[2003–04 Gib LR 336]

BENAIM v. FINANCE AND GUARANTEE LIMITED

SUPREME COURT (Pizzarello, Ag. C.J.): January 5th, 2004

Bankruptcy—appeals—jurisdiction of Court of Appeal—Court of Appeal has jurisdiction under Court of Appeal Ordinance, s.22 to hear bankruptcy appeal from Supreme Court

The appellant applied for leave to appeal to the Court of Appeal against a decision of the Registrar, sitting as a Judge of the Supreme Court, in a matter relating to bankruptcy.

The parties applied as a preliminary issue for a ruling whether the Court of Appeal had jurisdiction to hear such an appeal.

The appellant submitted that (a) the Court of Appeal had jurisdiction to hear his appeal by virtue of the general right of appeal conferred by the Court of Appeal Ordinance, s.22, which applied to bankruptcy appeals from the Supreme Court as it did to other appeals; (b) the repeal of the Bankruptcy Ordinance, s.86(2) in 1983 merely took away any direct right of appeal from the Supreme Court to the Privy Council in bankruptcy matters and the implication was that it was replaced by a right of appeal to the Court of Appeal (which had been created since the original enactment of the Bankruptcy Ordinance in 1934); and (c) no leave to appeal was necessary as the Registrar's decision was not interlocutory (and so did not fall within s.22(vii) of the Court of Appeal Ordinance) but stood alone and was final and appeal lay as of right.

The respondent submitted that (a) there was no right to appeal in bankruptcy proceedings, as this right had been abrogated when s.86(2) of the Bankruptcy Ordinance had been repealed; and (b) even if there were a right to appeal, the Registrar's ruling was interlocutory and leave to appeal was therefore required pursuant to s.22(vii) of the Court of Appeal Ordinance, and the circumstances were such that leave should be refused.

Held, ruling accordingly:

(1) The Court of Appeal had jurisdiction to hear the appellant's appeal by virtue of s.22 of the Court of Appeal Ordinance. The repeal of s.86(2) of the Bankruptcy Ordinance in 1983 had merely taken away the right to appeal from the Supreme Court to the Privy Council. It was true that *generalia specialibus non derogant*, *i.e.* where the legislature had already specifically dealt with a subject-matter it was not to be inferred that general words used in subsequent legislation which did not deal expressly with that subject-matter were to be construed as affecting the specific

legislation, but as it was inconceivable that the legislature would have intended to take away all right of appeal in bankruptcy matters, the right of appeal conferred by the Court of Appeal Ordinance must apply (para. 11).

(2) The Registrar's ruling was not interlocutory but was final and stood alone, and therefore did not fall within s.22(vii) of the Court of Appeal Ordinance, with the consequence that the appellant had a right to appeal, without requiring leave (para. 7; para. 12).

Case cited:

(1) *Pillai* v. *Comptroller of Income Tax*, [1970] A.C. 1124; [1970] T.R. 51, considered.

Legislation construed:

Bankruptcy Ordinance (1984 Edition), s.84: The relevant terms of this section are set out at para. 9.

s.86(1): "The court may review, rescind or vary any order made by it under its bankruptcy jurisdiction."

Court of Appeal Ordinance (1984 Edition), s.22: The relevant terms of this section are set out at para. 5.

Court of Appeal Rules (1984 Edition), r.16:

"Whenever application may be made to the Court of Appeal or to the Supreme Court it shall be made in the first instance to the Supreme Court."

J. Jacobs and *Ms. F. Young* for the appellant;
P.J. Isola for the respondent.

1 **PIZZARELLO, Ag. C.J.:** There were two applications before me, both headed "Intended Appeal from a Judgment of the Supreme Court of Gibraltar at 277 Main Street, Gibraltar (Katherine M. Dawson sitting as a Judge of the Supreme Court), dated the 22nd day of September, 2003" in Bankruptcy Claim No. 1 of 2003.

2 As the application progressed, there appeared to be some confusion as to the procedures which had been adopted. As the heading to which I refer appeared to make plain, what was before me was leave to appeal to the Court of Appeal and this follows r.16 of the Court of Appeal Rules. Nevertheless, it was said that, this being an appeal against the decision of the Registrar sitting as a judge, the matter should be dealt with before a Judge of Appeal and the number assigned to the application is as of a Court of Appeal matter. Happily, by virtue of my appointment as Acting Chief Justice, I am able to discharge *ex officio* some of the functions of the Court of Appeal, which includes the granting of leave and so there is no obstacle to my dealing with the application for leave.

3 It seemed to me that subject to s.86(1) of the Bankruptcy Ordinance an appeal from a Judge of the Supreme Court must be heard in the Court of Appeal. A judgment of a Judge of the Supreme Court cannot be appealed to another judge of the same court. I was persuaded that by virtue of the Bankruptcy Rules the Registrar, in exercising her jurisdiction under the Bankruptcy Ordinance, is sitting as a judge and I proceed on that basis, hence the substantive matter cannot come to me as a Judge of the Supreme Court on appeal: that is a matter for the full court.

4 What then is the jurisdiction of the Court of Appeal to hear an appeal from Madame Registrar Dawson? Essentially, that is a matter for the Court of Appeal to decide but I have to form a preliminary view as I have before me an application for leave to appeal to the Court of Appeal made to the Supreme Court.

5 One of the matters to decide is what is the nature of the Registrar's judgment. Is it final or is it interlocutory? Mr. Jacobs submits that the judgment of the Registrar is not an interlocutory matter. It is a stand-alone judgment and the jurisdiction of the Court of Appeal stems from s.22 of the Court of Appeal Ordinance which gives the right of appeal from any decision of the Supreme Court other than those set out in sub-paras. (i)–(vii), none of which applies. Thus he shifts his ground from leave to appeal to argue that no leave is necessary. Section 22 reads:

> "Without prejudice to anything contained in the Constitution of Gibraltar an appeal shall lie to the Court of Appeal from any decision of the Supreme Court other than—
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> (i) an order allowing an extension of time for appealing from a judgment or order;
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> (ii) an order giving unconditional leave to defend an action;
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> (iii) a decision of the Supreme Court where it is provided by any Ordinance that the decision is to be final;
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> (iv) a decision, other than on grounds of law alone, on an appeal from the Court of First Instance;
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> (v) an order absolute for the dissolution or nullity of a marriage in favour of any party who, having had time and opportunity to appeal from the decree nisi on which the order was founded, has not appealed from that decree;
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> (vi) without the leave of the Supreme Court or of the Court of Appeal, an order made with the consent of the parties or as to costs only which by law are left to the discretion of the court;
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> (vii) without the leave of the Supreme Court or of the Court of

> Appeal, any interlocutory order or judgment made or given except in the following cases:—
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> (a) where the liberty of the subject or the custody of minors is concerned;
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> (b) where an injunction or the appointment of a receiver is granted or refused;
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> (c) in the case of a decree nisi in a matrimonial cause or a judgment or order in an Admiralty action determining liability; or
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> (d) in the case of an order on a special case stated under the Arbitration Ordinance."

6 Mr. Isola, for his part, says (a) there is no right of appeal; and (b) if there is, this is an interlocutory matter and so leave is required pursuant to s.22(vii) and the circumstances are such that leave should not be given. In so far as (a) is concerned, Mr. Isola traces the history of the Ordinance. It was enacted in 1934 and when it was passed the equivalent of s.86 contained three sub-sections. Sub-section (2) provided for an appeal to the Privy Council. In 1969, the Gibraltar Constitution was promulgated which made provision for a Court of Appeal. The Court of Appeal Ordinance was duly enacted and provided for appeals generally in what is at present s.22. It has to be borne in mind that the Bankruptcy Ordinance provided a complete code relating to bankruptcy matters and so when, in 1983, the legislature enacted the Law Revision (Miscellaneous Amendments) Ordinance 1983 and caused certain amendments to be made to the Bankruptcy Ordinance it can be taken that the legislature made a complete review of the Bankruptcy Ordinance. One of the amendments was the repeal of s.86(2), so there was no longer a right to appeal to the Privy Council. That did away not only with an appeal to the Privy Council but also had the effect that there was no appeal at all from a decision of the Supreme Court in bankruptcy and he submitted that it is clear that the legislature left any reconsideration of any order pursuant to s.86(1) to lie there to put an end to any proceedings of the Supreme Court and there was to be no appeal. He refers to *Pillai* v. *Comptroller of Income Tax* (1), where in relation to bankruptcy matters the Federal Court suggested ([1970] A.C. at 1131):

> "Bankruptcy is a special matter and it is dealt with by special law. Because generalia specialibus non derogant, I hold that the bankruptcy notice, to be valid, need only comply with section 3(2) of the Bankruptcy Ordinance, 1959."

7 Lord Diplock, who gave the judgment of the Privy Council, said of that (*ibid.*, at 1131–1132):

> "The rationale which underlies the Latin maxim is that where the legislature has already dealt with a special subject-matter by legislation directed to and confined to that subject-matter, it is not to be inferred that general words used in subsequent legislation which does not deal expressly with that subject-matter, although they are wide enough in their ordinary meaning to extend to it, are to be construed as repealing, altering or derogating from the previous legislation dealing with the special subject-matter unless there is a clear indication of the legislature's intention that the general words should have that effect. (*Seward* v. *Vera Cruz* (1884) 10 App. Cas. 59, 68; *Bishop of Gloucester* v. *Cunnington* [1943] K.B. 101.)"

8 Mr. Isola properly draws attention to the conclusion arrived at in the light of the facts of *Pillai*. Lord Diplock said (*ibid.*, at 1133–1134):

> "In their Lordships' view it is not possible in the context of the Courts of Judicature Act, 1964, to construe the general words of section 7 so as to exclude documents issued by a High Court in the exercise of any jurisdiction which is expressly conferred upon it by Chapter II of the same Act. Section 24(c), with its express reference to 'jurisdiction under any written law relating to bankruptcy,' is in their Lordships' view a clear indication that the legislature intended the subject-matter of the Courts of Judicature Act, 1964, to include, inter alia, the special jurisdiction of the High Court in bankruptcy. Prima facie, therefore, the rule of construction expressed in the maxim generalia specialibus non derogant is not applicable so as to enable one to construe general words in the Act which are apt in their ordinary meaning to relate to the process of a High Court in the exercise of its bankruptcy jurisdiction as intended to exclude such process. Furthermore, the content of section 7 itself supports the view that the general words describing the class of documents to which subsection (1) relates must have been intended to include documents issued in the exercise of bankruptcy jurisdiction. The same words are repeated in subsection (2), which deals with the force and effect of documents issued by a court, and must bear the same meaning as in subsection (1). If documents issued in the exercise of the bankruptcy jurisdiction of a High Court were excluded they would be deprived of force and effect in those parts of Malaysia which were outside the geographical limits of the jurisdiction conferred upon the particular High Court which issued them by section 23 of the Act."

In so far as there is no appeal, Mr. Isola submitted that the fact that there is no appeal is a sensible view for the legislature to take: it brings to a quick end the matters in issue, an important consideration in bankruptcy. The legislature took away the right of appeal in the knowledge that the

Court of Appeal Ordinance was in place at the time it took away, in 1983, the right of appeal to the Privy Council.

9 In reply, Mr. Jacobs reiterated that the plain words of the Court of Appeal are sufficiently wide to cover any appeal from the Supreme Court and that includes the Supreme Court in its bankruptcy jurisdiction. As to s.84, he says two things: (a) there is nothing to circumscribe the jurisdiction of the Court of Appeal on appeals; and (b) the effect of that section is necessary to ground the jurisdiction in bankruptcy in the Supreme Court as the court where the bankruptcy proceedings should begin. Section 84 reads: "The court having jurisdiction in bankruptcy shall be the Supreme Court."

10 It is recognized that the Bankruptcy Ordinance has its genesis in the Bankruptcy Act. One has only to look at that Act to note that there are different courts in England having jurisdiction in bankruptcy. The equivalent of s.86(2) of the Bankruptcy Ordinance is s.108 of the Act and deals (a) with appeals from the county court to a divisional court of the High Court, the decision of which is final unless the divisional court or the Court of Appeal gives leave to the Court of Appeal whose decision is final; and (b) with appeals from the High Court to the Court of Appeal and thereafter with the leave of the Court of Appeal, but not otherwise to the House of Lords. So, contrary to Mr. Isola's argument, one may also argue that the legislature, aware of the difference between s.86(2) (appeal to the Privy Council) and the provisions for appeal in s.108 of the Act and knowing that the Court of Appeal Ordinance made provision for appeal generally would have expected any appeal to be governed by the Court of Appeal Ordinance because it is inconceivable that the legislature would have intended to take away any right of appeal and replace it with none. In this day and age, and the position must have been the same in 1983, leaving a party bereft of a right to appeal is something which must be specifically attended to by the legislature.

11 I confess that I found it difficult to weigh up the arguments in such a manner that I could come to a conclusion one way or the other with any confidence. I was attracted at first by the provision of s.84 giving the Supreme Court jurisdiction in bankruptcy which seemed to me to place bankruptcy proceedings firmly under the umbrella of the Supreme Court and that by virtue of the right of appeal to the Privy Council embodied in the Bankruptcy Ordinance gave that court jurisdiction. But that has to be tempered with the submissions of Mr. Jacobs as to the difference between s.86 of the Ordinance and s.108 of the Act and the effect that might have, which I find persuasive. On the other hand, at the time the Bankruptcy Ordinance was enacted in 1934 there existed already a right of appeal to the Privy Council under an Order in Council of August 10th, 1909, which seems to suggest that the special nature of bankruptcy proceedings

required that the Bankruptcy Ordinance give the Privy Council jurisdiction. To help me resolve the difficulty, I have resorted to the House of Assembly debates at the time. The Law Revision (Miscellaneous Amendments) Ordinance was introduced to the House by the Attorney-General "to make minor amendments to various Ordinances as part of the revision and consolidation of the statute law" to anticipate the Revised Laws of 1984. There was absolutely no discussion on the merits of deleting sub-s.(2) either at the second reading or the committee stage. The Attorney-General said, in the course of his introduction, that "the relevance of this bill to that [*i.e.* the Revised Edition] is that these are matters which the Commissioner is seeking to have cleared in advance of putting the actual publication work in hand" and that was accepted by the House. I really cannot think that the legislature can be said to have contemplated the demise of an appeal. As a matter of construction, I find that the Court of Appeal has jurisdiction to hear an appeal pursuant to s.22 of the Court of Appeal Ordinance.

12 As to whether leave is necessary to appeal because the Registrar's ruling is interlocutory, I have no doubt that it is not, for the reasons advanced by Mr. Jacobs, *i.e.* (a) there are no further proceedings to take after its delivery, other than an appeal; (b) if the proceedings fail, that is the end of the matter; and (c) what follows on the Registrar's ruling is a new set of proceedings, namely the petition, so her judgment is final and stands alone. I do not therefore accept the submissions of Mr. Isola.

Ruling accordingly.
