[2010–12 Gib LR 234]

WHATLEY v. PHILLIPS & COMPANY and PHILLIPS

COURT OF APPEAL (Kennedy, P., Parker and Tuckey, JJ.A.):
September 13th, 2011

Courts—Court of Appeal—single judge—single judge not to determine costs of preliminary hearing and appeal—not "interlocutory matter" which, by Court of Appeal Act 1969, s.24, may be determined by single judge—"final determination" by 1969 Constitution, s.57(4)(a) (now 2006 Constitution, s.60) requires three judges, if decision after part of hearing that would have been final if made at conclusion of hearing

The claimant brought an action in the Supreme Court against the defendants, his solicitors, for failing to lodge his claims in respect of personal injuries before the expiry of the limitation periods.

The claimant was involved in two accidents and instructed the defendant solicitors to act on his behalf. They failed to issue proceedings before the limitation periods expired and the claimant brought professional negligence proceedings against them. A directions hearing took place before the then Chief Justice (Schofield, C.J.), following which an application was made to the Supreme Court for a split trial. As the claims concerned loss of a chance, the court did not split the trial but ordered a preliminary hearing to determine whether (a) the accidents had caused the claimant to lose something of value; and (b) the percentage loss of a chance. At the preliminary hearing, the Supreme Court (Dudley, J.) determined loss of chance for both accidents, but there was no record of his making any costs order or of costs being reserved. That decision was subject to an appeal and cross-appeal in respect of both accidents. The Court of Appeal made no reference to costs and no complaint was made about the absence of a costs order at either stage. The defendants appealed to the Privy Council about the assessment of loss for one of the accidents, which the Board reduced.

The former Chief Justice, sitting alone, made an order that the defendants pay 85% of the costs of the preliminary hearing in the Supreme Court and in the Court of Appeal. There was no evidence that the order was made by consent. The Privy Council ordered that the claimant pay the defendants' costs in the final appeal, but did not interfere with the order of the ruling of the former Chief Justice in respect of costs below. The Privy Council assumed that the trial judge had reserved the issue of costs and that the former Chief Justice's costs order had been valid. The defendants

applied to the Court of Appeal to set aside the costs order of the former Chief Justice.

The applicants/defendants argued that the costs order should be set aside, submitting that (a) the former Chief Justice had exceeded his jurisdiction, as the costs order was a "final determination" for the purposes of the 1969 Constitution, s.57 and he had been sitting alone; (b) the Privy Council's determination of costs did not preclude the court from setting aside the former Chief Justice's costs order, as it had not confirmed the validity of that order; and (c) delay could not validate an order than was null and void.

The respondent/claimant submitted in reply that (a) the costs order had not been a "final determination" for the purposes of s.57, as it did not include decisions made at the end of a part of a hearing unless the trial were split; (b) the Privy Council's decision on costs precluded the court from setting aside the order; and (c) delay made the application an abuse of process.

Held, setting aside the costs order:

(1) The former Chief Justice had no jurisdiction to make the costs order. In making it, he had acted as an *ex officio* member of the Court of Appeal, as permitted by the 1969 Constitution, s.57 (now the 2006 Constitution, s.61), but had exceeded his jurisdiction by sitting alone. Final determinations were, by s.57(4)(a), to be made by at least three Judges of Appeal. "Final determination" was synonymous with "final decision" in the CPR, r.52, meaning, *inter alia*, a decision made at the conclusion of part of a hearing (whether or not the trial was split) which would, if made at the conclusion of that hearing or trial, have been a final decision. The determination of costs for the preliminary hearing and appeal/cross-appeal had been a "final determination." It had not been an "interlocutory matter," which, by the Court of Appeal Act 1969, s.24, a single judge could have determined. There was no evidence that the order had been made by consent, and it would be set aside (para. 9–16; para. 24).

(2) The Privy Council's determination of costs did not preclude the court from setting aside the former Chief Justice's costs order. The Privy Council did not alter that costs order on the basis that the trial judge had reserved the issue of costs, as, in fact, there was no evidence that he had made any order as to costs, and had assumed that the order for costs in the Court of Appeal had been valid, which it had not been. The Board had not purported to determine the jurisdictional validity of the order, but had merely decided that a presumably valid order had been correct. The present court would, therefore, exercise its discretion to order that the costs incidental to the preliminary hearing be reserved, as the claimant's damages at trial were likely to have a substantial impact upon costs and it was appropriate to decide the cost of the preliminary hearing after the whole case was heard. It would further order that the costs of the appeal and cross-appeal be awarded on the same terms as the nullified order (paras. 17–25).

(3) The order, being made without jurisdiction, was null and void and delay on the part of the defendants could not give it validity or make the application an abuse of process (para. 19).

Case cited:

(1) *Kitchen* v. *Royal Air Force Assn.*, [1958] 1 W.L.R. 563; [1958] 2 All E.R. 241, referred to.

Legislation construed:

Court of Appeal Act 1969, s.24: The relevant terms of this section are set out at para. 10.

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), Annex 1, s.57: The relevant terms of this section are set out at para. 9.

Civil Procedure Rules (S.I. 1998/3132), Practice Direction 52, at para. 2A.3: The relevant terms of this paragraph are set out at para. 13.

O. Smith for the claimant;
C. Salter for the defendants.

1 **TUCKEY, J.A.:** The first and second defendants in these proceedings, who are solicitors ("the solicitors"), apply to this court by notice of motion to set aside a costs order made on January 26th, 2006 by Schofield, C.J., as he then was. The application also asks for any necessary extension of time to enable it to be made and for appropriate costs orders to be made in place of the impugned order. The application is opposed by the claimant, Mr. Whatley, on a number of grounds, which I will explain later in this judgment.

2 The background to the application is as follows. The claimant instructed the solicitors to take proceedings on his behalf to recover damages for injuries he had received in two accidents. In the first accident, which occurred in 1994, he was struck on the head by an Acrow prop whilst working for his own construction company. In the second accident, which occurred in 1996, a car collided with his motorcycle at a road junction. In each case the solicitors failed to issue proceedings within the limitation period so both claims became time-barred and formed the basis of a professional negligence claim against the solicitors. But there were difficulties about the claim arising out of the first accident because the claimant was suing his own company, which was insolvent and had notified its employers' liability insurers late so that it might not have had cover against the claimant's claim. No such difficulties arose in relation to the second accident, although contributory negligence was alleged against the claimant.

3 However, at a directions hearing on June 11th, 2004, Schofield, C.J. ordered that the action should proceed on the basis that the breach of the

solicitors' professional duty towards the claimant was not an issue. The matter then came before Dudley, J., as he then was, on October 19th, 2004, on an application for a split trial. It was put before him on the basis that damages in respect of each accident should be assessed for loss of a chance following the principles laid down in such well-known cases as *Kitchen* v. *Royal Air Force Assn.* (1). The order made by the judge was that—

"there will be a trial of the following preliminary issues:

(1) whether the claimant's claim in respect of each of the two actions in which he was represented by the defendants ('the original actions') would have succeeded or whether, on the contrary the prospect of success was negligible or whether the claimant has lost something of value in respect of the failure by the defendants to issue the writs within the limitation period;

(2) upon the finding that the claimant has lost something of value, the percentage loss of chance in respect of each of the original actions be determined."

4 This was a sensible way of proceeding since the solicitors contended that in respect of the first accident the chance had no value and because there were, and still are, substantial issues about the quantum of the original claims on a full liability basis.

5 The preliminary issues were tried by Dudley, J. In a judgment dated April 25th, 2005, he valued the loss of the chance of recovery for the first accident at 7% of the full value of the claim and for the second accident at 90%. There is no record of his having made any order for costs at the conclusion of that hearing. We have his written judgment in which there is no mention of costs. The parties' representation has changed several times but there is nothing in the papers inherited by the parties' present representatives to show what, if any, order he made. I shall return to this later in this judgment.

6 Dudley, J.'s decision was appealed and cross-appealed to this court which, by a majority, in judgments dated December 23rd, 2005, increased the percentage chance for the first accident from 7% to 80%, but upheld the judge's 90% valuation in respect of the second accident. There is no reference in the three judgments of this court (Staughton, P., Stuart-Smith and Aldous, JJ.A.) to costs and no other record showing that the court so constituted ever dealt with the costs of the appeal or the trial of preliminary issues in the Supreme Court before Dudley, J. We are told this morning that there was no complaint in the course of the hearing of the appeal about the fact that Dudley, J. had not made any order for costs of the hearing before him.

7 The solicitors appealed this court's decision about the first accident to the Privy Council, which reduced the percentage to 28% in a judgment dated May 2nd, 2007 (see 2007–09 Gib LR 82). They also made an order for costs on June 25th, 2007, which I will come back to. But, in the meantime, on the January 26th, 2006, Schofield, J. made the order which is the subject of this application. The relevant part of it reads:

> "Upon hearing ... counsel instructed [for both parties] ... IT IS ORDERED THAT:
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> 1. The [solicitors] to pay for 85% of the costs of the appeals, cross-appeal and the costs of and incidental to the trial of the preliminary issue before His Hon. Mr. Justice Dudley. The costs to be subject to detailed assessment if not agreed beforehand at the conclusion of the action."

8 Unfortunately, no transcript exists of the hearing which led to the making of this order and again there is no record beyond the order itself as to what led to its being made. What is clear, however, from the terms of the order itself is that the Chief Justice had purported to deal with both the costs of the trial of preliminary issues before Dudley, J. and the costs of the appeal from his decision to this court.

9 The simple point taken on the application before us today by Mr. Salter, counsel for the solicitors, is that the Chief Justice had no jurisdiction to make this order sitting on his own. Chapter V of the Gibraltar Constitution Order 1969 (which was replaced, so far as is relevant, with identical provisions by the 2006 Order with effect from January 2nd, 2007) provided, by s.57, that the Chief Justice should be "an ex-officio member" of the Court of Appeal and, by sub-s. (4)(a), that—

> "for the purposes of any determination of the Court of Appeal—
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> (a) an uneven number of judges shall sit, which, in the case of any final determination by the court other than the summary dismissal of an appeal, shall not be less than three ..."

10 Section 24 of Gibraltar's Court of Appeal Act 1969 makes an exception to this requirement by allowing a single Judge of the Court of Appeal to hear and determine any "interlocutory matter," but otherwise any final determination of this court must be made by no less than three of its judges.

11 The solicitors submit that the determination made by the Chief Justice's order of January 26th, 2006 was not a determination of an interlocutory matter but a final determination as to costs of the preliminary issues before the Supreme Court and costs of the appeal to this court from that decision. It follows, they say, that the Chief Justice, acting as a single

Judge of the Court of Appeal, had no jurisdiction to make the order he did. His order was a nullity and must therefore be set aside.

12 Not so, says Mr. Owen Smith, counsel for the claimant. The Chief Justice had jurisdiction to make the order because it was not a final determination. Alternatively, he submits that the question of costs in the courts of Gibraltar was before the Privy Council and so has been determined by that court and this court cannot interfere. Furthermore, the application is hopelessly out of time and an abuse of process.

13 What is a "final determination" is not defined in Gibraltar's Constitution, its Court of Appeal Act 1969, or Court of Appeal Rules 2004, but the Act does allow a single Judge of this court to hear and determine an "interlocutory matter" and so obviously the legislation distinguishes between such matters and final determinations. Mr. Smith conceded, correctly in my judgment, that the orders for costs made by the Chief Justice were not interlocutory orders. He referred us to the CPR, Practice Direction 52, which, at para. 2A.3 says that—

> "a decision of a court is to be treated as a final decision for routes of appeal purposes where it:
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> (1) is made at the conclusion of part of a hearing or trial which has been split into parts; and
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> (2) would, if it had been made at the conclusion of that hearing or trial, have been a final decision . . ."

14 Mr. Smith conceded that the words "final decision" which appear in the English rule have the same meaning as "final determination" in the Gibraltar legislation. It seems to me that the final decision on the preliminary issues decided by Dudley, J. falls fairly and squarely within this definition in the CPR, as does any order for costs made in relation to the trial of those issues by him or this court.

15 Mr. Smith sought to argue that the practice direction only applied to split trials properly so called, that the issue of liability in this case was decided by the Chief Justice's earlier order of June 11th, 2004 and that the issue of quantum is yet to be decided. He also submits that there are further issues which go to liability which will have to be determined in the trial on quantum.

16 I do not accept these submissions. The preliminary issues decided by Dudley, J. were crucial to both liability and quantum and any order for costs made in relation to the trial of these issues was, in my judgment, a final determination. The same reasoning applies equally to the Court of Appeal's decision on appeal from the trial of those issues and any order for the costs of the appeal. The fact that further issues may have to be decided in the course of the trial on quantum is neither here nor there.

17 As to the submission based upon the Privy Council's decision, there is no doubt that the appeal did raise an issue as to the costs of the appeal to this court. In its decision on costs the Privy Council said:

> "3. The costs before the trial judge have been reserved. The Court of Appeal ordered that Mr. Whatley receive 85% of his costs in the Court of Appeal (effectively 100% since the other 15% related to the other claim against the appellant not pursued to the Privy Council). The questions now are (a) what order should be made as to costs before the Board; and (b) whether the Board should alter the Court of Appeal's order for costs.
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> 4. Bearing in mind that the appellants succeeded very substantially before the Board, and bearing in mind that they also substantially beat their own offer of 40% made on September 7th, 2006, the Board has concluded that Phillips should (under the CPR, rr. 44.3(6) and 36.14) have all their costs of the appeal to the Privy Council from September 28th, 2006, the expiry date of the 21 days for the acceptance of the offer) . . .
>
> 5. As to costs in the Court of Appeal, Mr. Whatley's appeal to that court was justified, but should only have yielded an increase to 28%. However, the Board considers that, as the appellants are to receive all the costs of the appeal in the Privy Council, it is not unfair to leave the 85% costs order made in Mr. Whatley's favour in the Court of Appeal undisturbed."

18 The Privy Council, therefore, proceeded on the basis that there was a valid order for costs of the appeal to this court in favour of the claimant and that it was subject to the appeal. The Privy Council did not in fact interfere with this order but clearly took it into account in making its order for the costs of the appeal to the Privy Council. Fortunately, further legal analysis of the consequences of all this is unnecessary because it is common ground that the order made by the Chief Justice was the right order (and indeed may have been made by consent) whether or not it was made without jurisdiction.

19 The same does not apply to the Chief Justice's order for the costs of the trial of the preliminary issues. The Privy Council proceeded on the basis that these costs had been reserved. That was not in fact the case. But the Chief Justice's order that the claimant should have the costs of that trial was not the subject of the appeal and formed no part of the Privy Council's reasons for making the order that it did. There is no question, therefore, of the claimant being able to argue that in some way the question of the costs of those preliminary issues has been resolved in such a way by the Privy Council as to preclude this application. Nor, if the order made by the Chief Justice was made without jurisdiction, can it stand because of delay in seeking to set it aside, or by characterizing the

application to do so as an abuse of process. A nullity is a nullity for all time. Delay cannot give validity to an order which could never have been made.

20 Mr. Smith submitted that the issue of the costs of the hearing before Dudley, J. was before the Privy Council and that its decision should be interpreted to mean that the order of Schofield, C.J. should stand despite the fact that the Privy Council was informed that the order which had been made was that costs should be reserved. I cannot interpret the Privy Council's decision in this way. At best it seems to me that it might support an argument that the Privy Council had approved an order that costs should be reserved. That does not help Mr. Smith in the submissions that he has made to us this morning on behalf of the claimant.

21 So for all these reasons, I conclude that the Chief Justice had no jurisdiction to make either of the orders for costs which he did and that those orders should be set aside. This does not matter so far as the costs of the appeal to this court are concerned, but, for the sake of clarity and good order, I think this court should make the same order for those costs as the Chief Justice purported to make, not least because the parties agree that this was the order which should have been made.

22 But what about the costs of the hearing of preliminary issues? There is nothing to suggest that Dudley, J. made any order for costs. This is not the same as "no order for costs," the consequence of which is that each party pays its own costs. The solicitors obviously believed that the judge had reserved costs because that is what they told the Privy Council and the Privy Council accepted. The claimant, on the other hand, through his counsel, informed the Privy Council that he had been awarded all of his costs by Dudley, J. That, again, was incorrect. The order made by the Chief Justice is in fact unclear as to whether 100% or only 85% of the costs of the trial of the preliminary issues was being ordered, but, as I have concluded, the Chief Justice had no jurisdiction to make any such order. There is no question, therefore, of this court being asked to interfere with the wide discretion which a judge has in making an order for costs. In deciding what order to make now, this court has an unfettered discretion.

23 Mr. Smith, in his skeleton argument, accepts that there can be no objection in principle to an order reserving costs in circumstances such as these, although he says, and I accept, that this is not necessarily the normal order to make. Here it seems to me that there were very good reasons for reserving costs and I suspect that this is what Dudley, J. had intended to do. Although the amount claimed has varied considerably (having at one stage exceeded £2m.) it now stands at about £1.3m. The solicitors say that the claim is worth next to nothing. The claimant's ultimate recovery is likely to have a substantial impact upon costs and in such a case it is sensible to decide all questions of costs at the end of the

trial. Reserving costs of a trial of liability or preliminary issues enables this to be done. It has the added advantage in this case of enabling the trial judge, rather than this court, to decide the costs of the earlier trial of preliminary issues after hearing the whole case.

24 Mr. Smith argued that it would be manifestly unfair to reserve costs because of the delay in making the application which has prejudiced the claimant's ability to discover more about how the Chief Justice came to make the impugned order and even (as suggested in the skeleton argument) whether it was made by consent. This court, he submits, should approach the matter on the basis that the solicitors were content with the order which had been made by the Chief Justice and it is too late now for them to say that a different order should be made. I accept that the solicitors should have acted sooner, but there is nothing to suggest that any order relating to the trial of preliminary issues was ever made by consent. Costs reserved is in my judgment the right order to make in this case. The solicitors' delay should not compel us to make some other order.

25 So for these reasons I think we should:

(a) Set aside the order of the Chief Justice made on January 26th, 2006.

(b) On the appeal and cross-appeal from the decision of Dudley, J. of April 25th, 2005, order that:

(i) the costs incidental to the trial of the preliminary issues be reserved; and

(ii) 85% of the costs of the appeal and cross-appeal be paid by the defendants to the claimant, such costs to be subject to detailed assessment if not agreed beforehand at the conclusion of the action.

26 **KENNEDY, P.** and **TUCKEY, J.A.** concurred.

Orders accordingly.
