
[2013–14 Gib LR 423]

**VIZCAYA PARTNERS LIMITED v. PICARD, BERNARD L.
MADOFF INVESTMENT SECURITIES LLC (in
Liquidation) and BANK J SAFRA (GIBRALTAR) LIMITED**

COURT OF APPEAL (Kennedy, P., Parker and Waller, JJ.A.): March
11th, 2014

Courts—Judicial Committee of Privy Council—appeal as of right—Gibraltar (Appeals to Privy Council) Order 1985, s.5 requires appellant “as of right” nevertheless to apply to Court of Appeal for conditional leave—Court of Appeal must first determine if appeal in fact “as of right”—if so, cannot refuse leave on merits (though may impose conditions/order stay of execution)—appellants intending to proceed will then obtain final leave

Courts—Judicial Committee of Privy Council—leave to appeal—Court of Appeal has no power to grant leave or conditional leave to appeal against interlocutory decisions—2006 Constitution, s.66 clear that can only grant leave to appeal to Privy Council against certain “final” decisions

The first respondent sought the enforcement in Gibraltar of New York Bankruptcy Court judgments against the defendants.

The applicant (“Vizcaya”) received a sum of \$150m. from the US company Bernard L. Madoff Investments Securities LLC (“BLMIS”) less than three months before BLMIS went into voluntary liquidation when it emerged that it was operating as a large Ponzi scheme. BLMIS went into

liquidation in New York and the first respondent (“the trustee”) was appointed as trustee to administer BLMIS’s affairs. The moneys were received by the applicant into its account with the second respondent bank (“Safra Gibraltar”), whence sums were transferred to various other parties.

The trustee sought recovery of the sums transferred from BLMIS to Vizcaya on the basis that, under New York law, it was “customer property” to be applied to the debts owed by BLMIS. In August 2010, the trustee obtained default judgments against Vizcaya and Safra Gibraltar in the New York Bankruptcy Court. Vizcaya applied for strike-out and/or summary judgment of the trustee’s claims against it on the basis that the US judgments were not enforceable in Gibraltar.

The Supreme Court (Dudley, C.J.) dismissed that application. Vizcaya appealed, and the Court of Appeal allowed that appeal in part, holding that the US judgment was not enforceable against Vizcaya in Gibraltar on one of the grounds put forward (that Vizcaya had submitted to the jurisdiction of the New York courts by reason of its presence there) but that it was enforceable on the other ground (that Vizcaya has submitted to that jurisdiction by agreement). Vizcaya then applied to the Supreme Court for “leave or conditional leave” to appeal to the Privy Council, submitting that where the decision to be appealed was an interlocutory decision, there was a degree of uncertainty as to whether leave of some kind was required from the Court of Appeal before applying to the Privy Council for special leave to appeal.

The first respondent submitted in reply that the position was clear, that the Court of Appeal had no power to grant leave to appeal against an interlocutory decision and therefore there was no scope for any application for leave or conditional leave to appeal in the present case.

Held, dismissing the application:

(1) There was no basis for the appellant’s application for “leave or conditional leave.” The court had no power to grant leave to appeal against an interlocutory decision, and therefore there was no scope for any application for leave or conditional leave to appeal in the present case. The 2006 Gibraltar Constitution, s.66 was clear that the Court of Appeal could only grant leave for certain “final” decisions to be appealed to the Privy Council, and the express power to grant leave to appeal against interlocutory decisions which had once existed was no longer in force (para. 14).

(2) The purpose of the Gibraltar (Appeals to Privy Council) Order 1985, s.5, which gave the Court of Appeal the power to hear an application for leave to appeal to the Privy Council where such an appeal lay of right, was that the Court of Appeal was first required to determine whether such an appeal was indeed an appeal as of right, and, if it were, the court had no discretion to refuse leave on the merits but was empowered to impose conditions or order stays of execution in cases where the decision appealed required the appellant to pay money or do any act. Where an appellant sought leave to appeal on the merits of as of right, he was

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required to apply to the Court of Appeal for conditional leave, and if he wished to proceed he would then obtain final leave (paras. 19–20).

Cases cited:

- (1) *Electrotec Servs. Ltd. v. Issa Nicholas (Grenada) Ltd.*, [1998] 1 W.L.R. 202, considered.
- (2) *Ross v. Bank of Comm. (St. Kitts & Nevis) Trust & Savings Assn. Ltd.*, [2011] 1 W.L.R. 125; [2010] UKPC 28, considered.
- (3) *Schiller v. Att.-Gen.*, 1999–00 Gib LR 199, considered.
- (4) *Schiller v. Captain of Port*, 1995–96 Gib LR 303, considered.

Legislation construed:

Gibraltar Constitution Order 2006 (Unnumbered S.I. 2006, p. 11503), Annex 1, s.66(1): The relevant terms of this sub-section are set out at para. 15.

Gibraltar (Appeals to Privy Council) Order 1985 (S.I. 1985/1199), s.5: The relevant terms of this section are set out at para. 18.

R.M. Vasquez, Q.C. for the appellant;
K. Azopardi, Q.C. for the first respondent;
L. Baglietto for the second respondent.

1 **PARKER, J.A.:** On February 7th, 2014, this court handed down judgment in this appeal. It adjourned the consideration of consequential orders until Thursday, March 6th, 2014. In the meantime, the parties agreed a form of order, subject only to the determination of an application by the first-named of the two appellants on the appeal, Vizcaya Partners Ltd.

2 Vizcaya succeeded in part on its appeal to this court, but wishes to appeal to the Privy Council against that part of its appeal on which it was unsuccessful. By its notice of motion, dated February 26th, 2014, it seeks from this court an order (and I quote from the notice of motion)—

“that leave or conditional leave be granted to the appellant pursuant to the Gibraltar (Appeals to Privy Council) Order 1985, s.3, to appeal or apply for leave to appeal to Her Majesty in Council in respect of the decision of the Court of Appeal for Gibraltar handed down on February 7th, 2014 insofar as . . . [it goes on to refer to the issue on which its appeal was unsuccessful].”

3 That is the application which came before us. Having heard Mr. Robert Vasquez, Q.C. for Vizcaya, Mr. Keith Azopardi, Q.C. for Mr. Irving Picard (the first respondent to the notice of motion), and Mr. Lewis Baglietto, for Bank J Safra (Gibraltar) Ltd. (the second respondent to the

notice of motion), we dismissed Vizcaya’s application with costs, indicating that we would give our reasons later. This judgment contains my reasons for making that order.

4 I start by turning briefly to the background to the application.

5 Vizcaya is a company incorporated in the British Virgin Islands. It is recognized in the British Virgin Islands as a mutual fund. Mr. Picard is the trustee for the liquidation of the business of Bernard L. Madoff Investment Securities LLC (“BLMIS”), appointed by the US Bankruptcy Court, Southern District of New York. I shall refer to him as “the trustee.” Bank J Safra (Gibraltar) Ltd. is, as its name indicates, a Gibraltar bank. I shall refer to it as “the bank.”

6 In 2009, the trustee, in the course of the New York liquidation proceedings, made a number of claims against Vizcaya, the bank, and other parties, arising out of the fraudulent Ponzi scheme operated by Mr. Bernard Madoff through the medium of his company BLMIS. By his claim against Vizcaya, the trustee seeks repayment of moneys paid by BLMIS to the bank as “custodian” for Vizcaya, ostensibly as “redemptions” of Vizcaya’s supposed investment in the scheme. The trustee contends that the payments in question constituted fraudulent transfers and/or preferences by BLMIS.

7 In August 2010, the trustee obtained a default judgment against Vizcaya, which he now seeks to enforce against it in Gibraltar.

8 Vizcaya applied to the Supreme Court of Gibraltar to strike out the trustee’s claim, and/or for summary judgment dismissing it. The Chief Justice dismissed that application. Vizcaya appealed, and this court allowed its appeal in part. It held that the trustee could not contend that Vizcaya had submitted to the jurisdiction of the courts of New York by reason of its “presence” in the United States, and that the trustee had accordingly failed to establish that the default judgment was enforceable against Vizcaya in Gibraltar on that ground. However, it concluded that it was “reasonably arguable” that Vizcaya had agreed to submit to the jurisdiction of the New York courts, and that on that ground, the default judgment was enforceable against Vizcaya in Gibraltar. It also varied the Chief Justice’s order in relation to a co-appellant (we are not concerned with that aspect of the matter).

9 The agreed form of order provides that, save in those two respects, the appeals of both appellants are dismissed. It further directs that the matter be restored to the Chief Justice for further directions as to final trial of the remaining issues.

10 On the hearing of Vizcaya’s application before us, Mr. Vasquez does not seek to advance a positive case that leave from this court to appeal to

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the Privy Council is required in this case, whether conditional or otherwise. He accepts that this court's decision on the appeal is an interlocutory, rather than a final, decision; a proposition with which Mr. Azopardi agrees—indeed, he could hardly do otherwise, for the contrary would be unarguable. That being so, Mr. Vasquez also accepts that Vizcaya must apply to the Privy Council for special leave to appeal—a course which it is proposing to take. However, submits Mr. Vasquez, there is a degree of uncertainty as to whether, in addition to applying to the Privy Council for special leave to appeal, leave of some kind must first be obtained from this court, hence the reference in Vizcaya's notice of motion to "leave or conditional leave." On that basis, he invites us to decide the point.

11 In para. 4 of his affidavit in support of Vizcaya's notice of motion, Mr. Joseph Gomez, a member of the Gibraltar Bar, says this:

"It is believed that special leave is required for the purpose of making the proposed appeal to the Privy Council. It is further believed that such leave can only finally be given by the Privy Council itself, but before such leave is given, the Court of Appeal (which for this purpose can include a single judge of the Court of Appeal) must give its own leave or conditional leave pursuant to s.3 of the Gibraltar (Appeals to Privy Council) Order 1985 . . ."

Section 3 of the Gibraltar (Appeals to Privy Council) Order 1985 ("the 1985 Order") merely provides, so far as material, that applications to this court for leave to appeal must be made within 21 days of the date of the decision to be appealed from.

12 In his helpful written skeleton argument, Mr. Vasquez has drawn our attention to the relevant legislation. He has also referred us to a decision of Schofield, C.J. in *Schiller v. Captain of Port of Gibraltar* (4), and to a decision of Neill, P., Waite and Glidewell, J.J.A. in this court, *Schiller v. Att.-Gen.* (3).

13 Mr. Azopardi submits that the position is clear: this court has no power to grant leave to appeal against an interlocutory decision, and there is accordingly no scope for any application to this court for "leave or conditional leave" to appeal in this case.

14 In my judgment, Mr. Azopardi is right, the position is indeed clear. This court has no power to grant leave to appeal against an interlocutory decision, and Vizcaya's application for "leave or conditional leave" is accordingly misconceived.

15 Any doubt there may be on this point is laid to rest, in my judgment, by s.66 of the Gibraltar Constitution 2006. Section 66 of the 2006 Constitution provides (so far as material) as follows:

“(1) In the following cases, an appeal shall lie from decisions of the Supreme Court to the Court of Appeal and thence to Her Majesty in Council as of right, that is to say—

(a) final decisions, in any civil or criminal proceedings, on questions as to the interpretation of this Constitution;

(b) where the matter in dispute on the appeal is of the value prescribed by law or upwards or where the appeal involves, directly or indirectly, a claim to or a question respecting property or a right of the value prescribed by law or upwards, final decisions in any civil proceedings;

(c) final decisions in proceedings under section 16;

(d) final decisions in proceedings for dissolution or nullity of marriage; and

(e) in such other cases as may be prescribed by the Legislature.

(2) In the following cases, an appeal shall lie from decisions of the Supreme Court to the Court of Appeal with the leave of the Supreme Court or of the Court of Appeal and thence to Her Majesty in Council with the leave of the Court of Appeal, that is to say—

(a) where the decision appealed against is a final decision in civil proceedings and, in the opinion of the court giving leave, the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to the Court of Appeal or to Her Majesty in Council, as the case may be; and

(b) in such other cases as may be prescribed by the Legislature.

...

(4) In this section references to final decisions of a court do not include any determination thereof that any application made thereto is frivolous or vexatious.

(5) Nothing in this section shall affect any right of Her Majesty to grant special leave to appeal to Her Majesty in Council from the decision of any court in any civil or criminal matter.”

16 Thus, by virtue of s.66 of the 2006 Constitution, this court has power to grant leave to appeal to the Privy Council against certain “final decisions” only, save to the extent that the legislature may decide to extend that power (which it has not done to date). Under the Appeals Order in Council, Gibraltar, 1909, there was express power to grant leave to appeal to the Privy Council against interlocutory decisions, but that provision was not replicated in the 1969 Constitution. In its place, the

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1969 Constitution contained a provision for extension by the legislature in similar terms to s.66(5) above.

17 Section 4 of the 1985 Order provides that leave to appeal to the Privy Council shall only be granted by this court on condition that the proposed appellant provide security for the costs of the appeal and on such other conditions relating to the prosecution of the proposed appeal as this court shall think it reasonable to impose.

18 Section 5 of the 1985 Order is in the following terms (so far as material)—

“A single judge of the Court [i.e. of this court] shall have power and jurisdiction—

- (a) to hear and determine any application to the Court for leave to appeal in any case where under any provision of law an appeal lies as of right from a decision of the Court . . .”

Section 6 of the 1985 Order empowers this court, “when granting leave to appeal,” to direct a stay of execution.

19 The reference in s.5 of the 1985 Order to an application to a single judge of this court for leave to appeal to the Privy Council in a case where such an appeal lies “as of right” may, on the face of it, appear somewhat perplexing (it certainly did to me, when I first read it), and it may be that that is what has led Vizcaya to make the present application. At all events, whether that be the case or not, the need for such an application was explained by Neill, P. in *Schiller v. Att.-Gen.* (3). He said (1999–00 Gib LR 199, at para. 7)—

“It is clear that although an unsuccessful party in the Court of Appeal can have an appeal as of right to the Privy Council, it is still necessary for him to apply to the Court of Appeal for leave. On hearing such an application the Court of Appeal must first decide whether or not the appeal lies within s.62(1) of the Constitution [the predecessor of s.66(1) of the 2006 Constitution] so that it is indeed an appeal as of right. Then, if it is, the court has no discretion to refuse him leave on the merits, but has at least two other functions to perform: (a) to exercise its powers under s.4 of the 1985 Order, which provides for the imposition of conditions; and (b) in an appropriate case, to exercise its powers under s.6 of the 1985 Order, which relates to stays of execution in cases where the decision appealed from requires the appellant to pay money or do any act.”

20 Further on in his judgment, Neill, P. said this (*ibid.*, at para. 12)

“It is therefore abundantly clear that an appellant, whether he has to seek leave [to appeal] on the merits or can appeal as of right, has to come to the court [*i.e.* the Court of Appeal] to obtain conditional

leave to appeal. At this first stage, conditional leave is granted under s.4 [of the 1985 Order]. If the appellant wishes to proceed he will then in due course obtain final leave to appeal from the Court of Appeal and the matter will be transferred to London. As is apparent from the decision of Schofield, C.J. in *Schiller v. Captain of Port*, the appeal remains under the supervision of the Court of Appeal in Gibraltar until the certified record of the appeal is lodged with the Privy Council.”

21 In *Electrotec Servs. Ltd. v. Issa Nicholas (Grenada) Ltd.* (1), a case of an appeal to the Privy Council brought as of right against a decision of the Court of Appeal of Grenada, Lord Hoffmann, giving the judgment of the Board, said ([1998] 1 W.L.R. at 204):

“Rule 2 of the [Judicial Committee (General Appellate Jurisdiction) Rules Order 1982, now replicated in r.10 of the Judicial Committee (Appellate Jurisdiction) Rules Order 2009, which are the current rules] provides that an appeal shall be either with the leave of the court appealed from or with special leave granted by Her Majesty in Council. It follows that notwithstanding that the case may be one in which an appeal lies as of right, the leave of the Court of Appeal must be obtained. Such leave is not, however, a matter of discretion for that court.”

22 Later in his judgment, Lord Hoffmann said (*ibid.*, at 205):

“It would therefore appear that the function of the Court of Appeal upon an application for leave is to satisfy itself that the case is one in which, under the Constitution of Grenada, a right of appeal exists and, if so satisfied, to consider the exercise of the power to impose conditions conferred by [the relevant local legislation]. Leave is granted “in the first instance” subject to compliance with those conditions and final leave is granted when the conditions have been complied with.”

23 See also *Ross v. Bank of Comm. (St. Kitts & Nevis) Trust & Savings Assn. Ltd.* (2), another case of an appeal as of right, where Lord Mance, citing *Electrotec* (1), said ([2011] 1 W.L.R. 125, at para. 5) that “[t]he purpose of seeking leave to appeal from the court appealed from was to confirm that the appeal was as of right, and to impose such limited conditions as might be permitted by the local Constitution and law.”

24 In my judgment, none of the above reasoning can apply in a case where the appeal is neither “as of right” under s.66(1) of the 2006 Constitution, nor one in which this court has power to grant leave to appeal under s.66(2), *e.g.* in a case such as the instant case, where the proposed appeal is from an interlocutory, as opposed to a final, decision. If this court has no power to grant permission to appeal in such a case, it

must follow that it has no power to grant such permission subject to conditions.

25 For those reasons, I conclude that there is no basis for the present application for “leave or conditional leave” to appeal to the Privy Council, and that the application should accordingly be dismissed with costs.

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

Application dismissed.
