

IN THE COURT OF APPEAL  
CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0062 OF 1998S  
(High Court Civil Action No. HBC0564 of 1997S)

BETWEEN:            THE NEW INDIA ASSURANCE COMPANY LIMITED

Applicant/Appellant  
(Original Defendant)

AND:                FOOTWEAR MANUFACTURERS LIMITED

Respondent  
(Original Plaintiff)

In Chambers:      The Hon. Justice Devendra Pathik,  
Justice of Appeal

Counsel:            Mr. H. Nagin for the Appellant  
                          Mr. Subhas Parshotam for the Respondent

Date of Hearing:     19 April 1999

Date of Decision:   4 June 1999

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DECISION

(Chamber applications for:

- (i) dismissal of intended appeal against an interlocutory order,
  - (ii) leave to appeal and for leave to appeal out of time if required)
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The nature of applications

There are two applications before the Court:

By **summons** filed herein on 26 March 1999 the **respondent** is seeking an Order that the 'intended appeal be dismissed' upon the grounds that:

- (A) *The judgment appealed from is an interlocutory judgment entered for part of the claim; and*
- (B) *Leave to appeal is necessary pursuant to Section 12(2) (f) of the Court of Appeal Act (Cap.12);*
- (C) *No such leave has been obtained.*

The respondent says that its counsel had by letter dated 6 November 1998 informed counsel for the appellant that "we are of the view that the appeal is a nullity because no leave has been taken and as it is an interlocutory judgment, leave is necessary. We intend to raise this point at an appropriate time and seek dismissal of the appeal."

The **appellant**, on the other hand, by **Notice of Motion** dated 6 April 1999 seeks orders as follows:

- "A. *That leave is not required to appeal against a decision refusing unconditional leave to defend (copy of the decision attached herewith), or ALTERNATIVELY*
- B. *If leave is required, then such leave be granted by this Honourable Court under the circumstances."*

#### **Background facts**

The appellant had insured the respondent's property. This property caught fire and the parties were attempting to resolve the 'quantum'. The appellant had on 23 January

1998 applied to have the action which had already been commenced by the respondent on 24 December 1997 stayed and the matter referred to arbitration. Before the matter was finalised, on 12 August 1998 the respondent filed an application for Summary Judgment against the appellant for the sum of \$243,059.00 plus interest.

Both the applications came before **Scott J** on 25 August 1998 who after hearing on 4 September 1998 gave his decision in favour of the respondent in the sum of \$194,643.21 (part of the total claim of \$394,667.50 as prayed for in the Statement of Claim) plus interest at the rate of \$11.00% per annum and \$1,000.00 costs and his Lordship stated that he was "*satisfied that there was no bona fide dispute that at least \$194,643.21 was in fact owed by the Defendant to the Plaintiff. To that extent therefore I refused the Defendant's application for a stay but granted the stay in respect of the balance*".

The decision which reads as follows (p85 of Record) was sealed on 7 September 1998:

IT IS ORDERED:

- A. That stay is refused to the extent of \$194,643.21 and the Defendant do pay the Plaintiff the said sum of \$194,643.21.
- B. That the balance of the claim is stayed in terms of the Notice of Motion dated 23 January 1998.
- C. That the Defendant do pay the Plaintiff interest on the said sum of \$194,643.21 at the rate of \$11.00 per centum per annum calculated from 16 July 1997 till the date of this judgment.
- D. That the Defendant do pay the Plaintiff costs of the applications fixed at \$1,000.00.

On 30 September 1998 a Notice of Appeal, stating the Grounds of Appeal, was filed.

'Without prejudice' to its appeal, the appellant paid the judgment sum plus interest and costs to the respondent. It was after this that Mr. B.C. Patel wrote the said letter of 6 November 1998 to the appellant. The respondent appeared on Security for Costs application. The appellant says that the respondent is estopped from raising the issue it raises now at this stage after having 'appeared throughout' upto the fixing of security for costs and when the appeal is ready and call-over had been fixed for 20 April 1999 to fix a date of hearing.

#### **Issues for determination**

- (a) Whether leave is necessary to enable the appellant to proceed with the Appeal.
- (b) Whether the Appeal should be dismissed as, according to the respondent, no leave was obtained to appeal as the judgment was interlocutory.

#### **Appellant's submission**

##### **(i) Leave not required**

Mr. Nagin for the appellant submits that the said decision under Or.14 of The High Court Rules meant that "unconditional leave to defend was refused to the appellant"; and under Or.14 r3-4/35 of the Supreme Court Practice it may be appealed against without leave since it is deemed not to be an interlocutory order. He argues that "an order giving conditional leave to defend is the equivalent of an order refusing unconditional leave to defend so that both the plaintiff and the defendant may appeal against such order without leave". He referred the Court to s12(2)(b) of the Court of Appeal Act (the "Act") which provides that no appeal shall lie 'from an order of a

judge giving unconditional leave to defend an action', but the "summary judgment was entered and unconditional leave to defend was refused, it is deemed not to be interlocutory order and therefore an appeal lies as of right". He also refers to s12(3) of the Act which provides that 'an order refusing unconditional leave to defend an action shall not be deemed to be an interlocutory order within the meaning of' section 12.

**(ii) If leave required**

Mr. Nagin submits in the alternative that if leave is required then this is a proper case in which it should be granted for the reasons he has stated in his written submissions. He argues that "a serious error has been made by the High Court in making the summary judgment Order of over \$200,000.00 when the Fire Policy contained a Scott v Avery arbitration clause". He says that "if the question is one of general principle, decided for the first time leave is also granted by the Court of Appeal". He submits that in the case of **PETER SUJENDRA SUNDAR & ANOR v CHANDRIKA PRASAD** FCA Civ. App. No. ABU0022 of 1997 the Court granted leave to appeal against an interlocutory order at the hearing of the appeal itself.

Mr. Nagin says that the Court can now grant that leave rather than 'shut out' the appellant.

**Respondent's submission**

Mr. Parshotam submits that the judgment "did not dispose of the proceedings nor determine all the issues between the parties; instead, judgment for part of the claim was given, and as such is an interlocutory judgment".

Hence he submits that leave to appeal is necessary in terms of s12(2)(f) of the Act which provides that "no

appeal shall lie without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge of the Supreme Court except ...."

Mr. Parshotam further says that leave to appeal against interlocutory judgment or order must be made within 21 days under r.16 of the Court of Appeal Rules. He said that the time to appeal had expired on 28 September 1998.

Counsel submits that the appeal as filed "must be considered a nullity because no leave was obtained from it in the first place; as such, there is no appeal before this Court - only an application for leave to appeal and there is not even an application for extension of time to apply for leave to appeal".

After referring to a number of authorities, counsel submitted that neither leave should be granted nor an extension of time be allowed to file for leave.

#### **Determination of the issues**

The decision on the issues before the Court will depend on the finding whether the said decision under Or 14 is 'final' or 'interlocutory'.

In considering the issues I have given due consideration to counsels' submissions.

The decision herein is in respect of part of the claim on the application for Summary Judgment under Or.14. The appellant has appealed against the judgment and has stated the grounds of appeal. Mr. Parshotam when asked told the Court during the hearing that in his submission because leave is required and if it is refused by the Court the door will be shut on the appellant. It will not be able to

dispute the decision on the hearing of the balance of the claim.

For the reasons he has given Mr. Nagin has vigorously argued that the decision is final and hence there is no need for leave and alternatively if one is required then he applies for it.

The question for Court's determination first of all is whether the decision is "final" or "interlocutory". The difficulty in deciding this has been stated by Lord Denning M.R. in *Salter Rex & Co. v Ghosh* [1971] 2 Q.B. 597, 601 thus:

*"This question of 'final' or 'interlocutory' is so uncertain that the only thing for practitioners to do is to look up the practice books and see what has been decided on the point. Most orders have now been the subject of decision. If a new case should arise, we must do the best we can with it. There is no other way."*

It is in the light of the above observation that I propose to consider the issues before me.

Decision is interlocutory - Supreme Court Order 59  
(unallocated in Fiji)

In considering whether the decision is final or interlocutory two kinds of approaches have been adopted by the Courts, namely 'application approach' and 'order approach'.

As stated in the White Book (supra) at 608 "the court is now clearly committed to the application approach as a general rule". This Court in *Suresh Sushil Chandra Charan & Anor. v Syed M. Shah & Others* FCA Civil Appeal No. 29 of

1994 had adopted the "application approach" as was done in the case of *White v Brunton* [1984] 2 All E.R. (CA) 601.

In some cases the English Court of Appeal adopted the 'order approach' and in some 'application approach'. Quoting from the judgment of Sir John Donaldson in *White* (supra) at 607 these approaches have been explained thus:

"In *Shubrook v Tufnell* (1882) 9 QBD 621, [1881-8] All ER Rep 180 Jessel MR and Lindley LJ held, in effect, that an order is final if it finally determines the matter in litigation. Thus the issue of final or interlocutory depended on the nature and effect of the order as made. I refer to this as the 'order approach'.

In *Salaman v Warner* [1891] 1 QB 734, in which *Shubrook's* case does not appear to have been cited, a Court of Appeal consisting of Lord Esther MR, Fry and Lopes LJJ held that a final order is one made on such an application or proceeding that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation. Thus the issue of final or interlocutory depended on the nature of the application or proceedings giving rise to the order and not on the order itself. I refer to this as the 'application approach'.

In *Bozson v Altrincham UDC* [1903] 1 KB 547 a Court of Appeal consisting of the Earl of Halsbury LC, Lord Alverstone CJ and Jeune P reverted to the order approach.

In *Re Page, Hill v Fladgate* [1910] 1 Ch 489 a Court of Appeal consisting of Cozens-Hardy MR, Fletcher Moulton and Buckley LJJ refused to apply the order approach to a case of striking out the proceedings, but declined to propound any rule of general application."

Sir John Donaldson goes on to state at 607 (ibid):

"The next occasion on which the problem was looked at on broad lines of principle was in *Salter Rex & Co v Ghosh* [1971] 2 All ER 865, [1971] 2QB 597, where Lord Denning MR, with the agreement of Edmund Davies and Stamp LJJ, considered and contrasted the judgment of Lord Alverstone CJ in *Bozson's* case with that of Lord

*Esher MR in Salaman v Warner, Lord Denning MR said ([1971]) 2 All ER 865 at 866, [1971] 2 QB 597 at 601):*

*'Lord Alverstone CJ was right in logic but Lord Esher MR was right in experience. Lord Esher MR's test has always been applied in practice ... I would apply Lord MR's test to an order refusing a new trial. I look to the application for a new trial and not to the order made. If the application for a new trial were granted, it would clearly be interlocutory. So equally when it is refused, it is interlocutory... This question of "final" or - "interlocutory" is so uncertain, that the only thing for practitioners to do is to look up the practice books and see what has been decided on the point. Most orders have now been the subject of decision. If a new case should arise, we must do the best we can with it. There is no other way.'*

There is no definition of what is 'final' and what is "interlocutory" in our High Court Rules as Or.59 is unallocated. However order 59 r1A in the White Book (1997) at p.950 prescribes which orders shall be treated as 'final' and which orders are 'interlocutory'. And Order 59 r1A(6)(aa) at p952 states that "a judgment or order under Order 14, Order 14A or Order 86 or under Order 9 rule 14 of the County Court Rules 1981" is interlocutory. The scope of this new rule 1A is set out in the Notes (ibid) at p.953. The Notes under Or.59 1B/4 at p.961 state that "the question whether an order was final or interlocutory was governed by case law" but it is now governed by Or59 r1A which came into force on October 1 1988. In respect of order 14 (as in ours) the Notes at p.961 (ibid) state:

*"Order 14 - under O.59 r18(1)(f) (combined with the amended O.59 r.1A(6)(aa)) leave to appeal is required in respect of an appeal against any order made on an application for summary judgment whether the application is granted or refused, whether conditional or unconditional leave to*

***defend is granted and whether the appellant is the plaintiff or the defendant".*** (emphasis mine)

The arguments put forward by Mr. Nagin in support of his assertion that no leave is required is devoid of any merit in all the circumstances of this case. I therefore reject them and rely on what is stated in the White Book as outlined hereabove.

For these reasons, bearing in mind the authorities and the said Notes to the English Order 59 the decision herein was interlocutory. Hence leave is required both in respect of wanting to appeal and leave to appeal out of time.

#### **Whether to grant leave**

In considering whether to grant leave or not I have carefully analysed the facts of this case and the bona fide belief of the appellant, although mistaken, that leave is not required. I have also taken into account certain difficulties in determining the distinction as to whether a decision is final or interlocutory as acknowledged by Sir John Donaldson M.R. when he said in *White v Brunton* (supra) at 608 that "*I do not under estimate the difficulties. Meanwhile the plaintiff needs to know whether he has to obtain leave to appeal.*"

Under s12(2)(f) of the Act leave to appeal is required from an interlocutory decision.

In the light of the facts of this case and the circumstances in which the decision was given in favour of the respondent and in view of my remarks hereabove regarding the difficulty in finding a clear demarcation line in the distinction between 'final' and 'interlocutory' the appellant cannot be punished for adopting and maintaining the view that it was a final judgment and hence

there was no need to obtain leave to appeal. For this reason it should not be precluded from pursuing its appeal.

The grant or refusal of leave is discretionary in each case "and may be reviewed if it is clear that it has been exercised on a wrong principle, or a conclusion has been reached which would work a manifest injustice - **G.L. Baker Ltd. v Medway Building Supplies Ltd** 1958 1 W.L.R 1216" [quoting from **Reddy Construction Company Limited v Pacific Gas Company Limited** (26 F.L.R. (1980) FCA p.121)]. In Reddy (supra) leave was granted to Mr. B.C. Patel during the hearing on an application to Court; so also in **Peter Sujendra Sundar** (supra) at the hearing of the appeal itself.

In the proposed Grounds of Appeal the appellant has raised a number of issues of far-reaching importance. It says that the amount claimed is in dispute and should have been referred to arbitration under the **Scott v Avery** clause in the insurance policy as the issues are significantly important in the insurance area. Mr. Nagin says that a *'serious error has been made by the High Court in making the summary judgment Order'* of that magnitude in the face of a **Scott v Avery** clause in the policy. It is one of the grounds that the appellant was not allowed *'further time to respond to the issue of Summary Judgment when it was patently clear that the Appellant had not responded to the same.'*

The following passage from the case of **The Fiji Public Service Commission v Manunivavalagi Dalituicama Korovulavula** FCA Civil Appeal No. 11 of 1989 at 5 is pertinent to the issues before me:

*"Whilst I am inclined to agree that Air Canada's case appears to be distinguishable, I must bear in mind that I am dealing with an application for leave to appeal and not with the merits of an appeal. It will therefore not be appropriate for*

me to delve into the merits of the case by looking into the correctness or otherwise of the Order intended to be appealed against. However if prima facie the intended appeal is patently unmeritorious or there are clearly no arguable points requiring decision then it would be proper for me to take these matters into consideration before deciding whether to grant leave or not.

However as matter stand I am clearly of the opinion that the Appellant has raised a number of arguable legal issues of some importance which call for further arguments from both sides leading to an authoritative decision of the Fiji Court of Appeal."

In all the circumstances of this case, bearing in mind the issues raised which are of general importance and question of law, the sum involved (judgment amount) having been paid to the respondent and that no prejudice will be caused to the respondent, in the exercise of the Court's judicial discretion this is a proper case for the grant of leave to appeal from the interlocutory order.

For these reasons leave to appeal is granted as well as leave to appeal out of time. As for costs, since the appellant is now found to be at fault in not complying with the relevant section of the Act in regard to leave to appeal I order costs against the appellant which I fix at \$350 to be paid within 14 days.

*D. Pathik*

D. Pathik

Judge of Appeal