SAINT VINCENT & THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO.10 OF 1992

BETWEEN:

OTHNIEL R SYLVESTER

Appellant

and

SATROHAN SINGH

Respondent

Before:

The Hon. Mr. C.M. Dennis Byron	Justice of Appeal
The Hon. Mr. Albert Redhead	Justice of Appeal [Ag.]
The Hon. Mr. Odel Adams	Justice of Appeal [Ag.]

Appearances:

Mr. Norman Hill, Q.C. and Dr. Ralph Gonsalves
for the Appellant

Mr. Karl Hudson-Phillips, Q.C. and Mr. Hans Matadial
instructed by the Solicitor-General of St. Vincent
for the Respondent

1995: July 17;
September 18.

JUDGMENT

BYRON, J.A.

By a generally indorsed writ filed on the 16th day of April, 1991the appellant, one of Her Majesty's Counsel, claimed damages for slander against the respondent, a member of the East Caribbean Supreme Court, and also an injunction to restrain the respondent from repeating the defamation.

By separate summonses filed on the 14th day of April, 1992 the appellant applied for an order extending the validity of the said writ pursuant to Order 6 rule 7 of the Rules of the Supreme Court 1970 and for an order for substituted service pursuant to Order 50 rule 9 of the aforesaid Rules. These summonses were supported by an affidavit of Ms. Nicole Sylvester, Barrister at Law and Solicitor, sworn and filed on the 14th day of April, 1992. A summary of the persons to resolve the matter the Appellant had not attempted to serve the writ until the period 9th to 14th April, 1992 when the deponent went to St.kitts-Nevis, where at that time the Respondent was the resident puisne judge, and all her efforts to effect service of the writ were frustrated. She returned to St. Vincent where this application was made.

On 15th April, 1992 Joseph J. granted the following orders:

1. That the validity of the Writ of Summons in the above-captioned Suit be extended to July 31st, 1992;
2. That the application for substituted service of the said Writ of Summons as extended as aforesaid be granted;
3. That substituted service as aforesaid be done by registered post to the Defendant at his address at the Registry, Supreme Court, Bassetere, St.Kitts-Nevis;
4. That all other pleadings in this matter follow the Rules of the Supreme Court.

Service of the writ having been effected on him, the Respondent, by summons filed on 12th May, 1992 applied for leave to enter a conditional appearance, on the ground that it was his intention to challenge the above mentioned orders because:

(i) No time was specified for entry of appearance in the order for substituted service;

(ii) The order purported to permit service of the writ at a Court House which was contrary to Order 50 Rule 9 of the Rules of the Supreme Court;

(iii) There was no endorsement on the writ sent by registered mail to the defendant that the same had been extended.

Leave was granted and on 20th May, 1992 the Respondent applied by way of summons to have the orders extending the validity of the writ of summons and granting leave for substituted service thereof set aside. On the 10th day of July, 1992 Georges J. set aside the writ and the orders extending its validity and granting substituted service of it and ordered that service of the said writ be discharged. On 21st October, 1992 the Appellant lodged a notice of appeal against that order, without first having obtained the leave of the judge or of the Court of Appeal.

On 1st December 1992 the Respondent gave notice that he intended to rely on a preliminary objection to the hearing of the appeal on the ground that the same was filed without leave to appeal having been obtained.

There is an automatic right of appeal against a final judgment or order. However, the Privy Council case of Owens Bank v Cauche [1988] 36 W.I.R. confirmed that leave is required for an appeal to lie from an interlocutory judgment or order by virtue of the Eastern Caribbean Supreme Court [Saint Vincent and the Grenadines] Act, 1970 section 32[2][g] which provides:

> Section 32 provides:
> [2] " No appeal shall lie under this section -
> [g] without the leave of the judge or the of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a judge except….. "

[None of the exceptions are relevant to this case].

This provision means that any notice of appeal filed against any interlocutory order or judgment, without leave having been first obtained is of no effect and is completely valueless and void. See Patrick v Walker [1966] 10 W.I.R. 110 and Henderson v Archila [1983] 37 W.I.R. 90.

The preliminary objection, therefore, raises only one question, is the order appealed against interlocutory?

In arguing this point counsel renewed a debate that had been joined in the English Court of Appeal well over a century ago, should the court answer that question by employing the application test or the order test?

Under the application test, an order would be final if it was Made on an application which would have determined the matter in litigation for whichever side the decision was given. It is conceded that if the application test was applied the order made by Georges J. would be interlocutory , because if he had not set aside the writ and discharged its service, the proceedings would have continued.

Under the order test an order is final if it finally determined the issue in litigation, or disposed of the rights of the parties. It seems to me that although the order, having adjudged the writ and its service to be invalid, effectively determined the proceedings, it did not determine any issue in litigation between the parties nor dispose of their rights, and therefore was not a final judgment or order.

In England by virtue of the Supreme Court of Judicature (Consolidation) Act 1925, section 68(2), what orders or judgments are final, and what are interlocutory , are to be determined by the Court of Appeal, which, in 1984 declared itself to be firmly committed to the application test. In the leading case of White v Brunton [1984] 2 All ER 606 Sir John Donaldson MA considered the history of the debate and said at p.607:

> "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 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 Esher 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 to 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 ……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] 2 QB 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 test has ways been applied in practice……..I would apply Lord Esher MR's test to an order refusing a new trial. I look to the application for a new trial and 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…….. "
>
> The court is now clearly committed to the application approach as a general rule and Bozson's case can no longer be regarded as any authority for applying the order approach."

Shortly after this case, the matter received statutory attention in England, and rules made under s.60 of the Supreme Court Act 1981came into force with effect from October 1, 1988. These new rules specifically incorporated the application test. The matters under consideration in this

appeal are covered by the new Order 59 rule 1 A[6][c] which provides that "an order for or relating to the validity, service [including service out of the jurisdiction] or renewal of a writ or other originating process"; shall be treated as interlocutory for all purposes connected with appeals to the Court of Appeal.

In England the matter is now clearly settled and both at common law and under the rules of the Supreme Court the matters on appeal would be regarded as interlocutory.

It is interesting to note that, in White v Bruton, Sir John Donaldson pointed out that the decision reached in Bozson's case, as distinct from its reasoning could be upheld. He concluded his rationale by saying:

> "...where there is a split trial or more accurately, in relation to a non-jury case, a split hearing, any party may appeal without leave against an order made at the end of one part if he could have appealed against such an order without leave if both parts had been heard together and the order had been made at the end of the complete hearing."

Over the years the Privy Council had been clearly reluctant to lay down any universal formula or definition of "final" and "interlocutory". In the Australian case Becker v Marion City Corp [1977] A.C. 271 Lord Edmund-Davies said at 282:

> "there remains the difficulty, referred to by Lord Kilbrandon, arising:
> "out of attempts to frame a definition of final (or of 'interlocutory') which will enable a judgment to be recognised for what it is by appealing to some formula universally applicable in any contingency in which the classification falls to be made": see Tampion v Anderson (1973) 48 A.L.J.R.11, 12.:
>
> > Lacking any such definition, was the judgment of August 29, 1974, a "final judgment?" Their Lordships hold that it was. Even though, for administrative reasons, further questions were put in the originating summons, the negative answer to the

> question raised by the prayer for the first declaration produced a state of finality ."

In this judgment it is interesting to note that despite their Lordship's unwillingness to identify any universal formula or definition the ratio decidendi, seemed to have anticipated the opinion expressed by Sir John Donaldson on split trials in White v Brunton
[supra]. I would therefore venture to opine that the decision would have been the same if the case had been decided in the Court of Appeal in England.

In the Malaysian case of Haron Bin Mohammed laid v Central Securities (Holdings) BDH [1983] 1 AC 16, (which preceded White v Brunton) Sir William Douglas gave the decision on behalf of the Privy Council. At page 27 he said:

> "It appears to their Lordships that the Federal Court has established over the years a settled practice of applying Lord Alverstone C.J.'s test in Bozson v Altrincham Urban District Council [1903]1 K.B. 547 in order to determine whether an order is final or interlocutory .Their Lordships are unable to find any error in this reasoning: on the contrary their Lordships feel entitled to say that the test is both sound and convenient. In three of the five cases cited above the appeal was against leave to sign judgment in summary proceedings. Thus the effect of the practice adopted by the Federal Court in such cases is in line with the English practice as established by statute since 1925. In any event, this being a matter of practice and procedure, their Lordships, in accordance with their practice, will uphold the decision of the Federal Court."

Although this judgment affirmed the settled practice of the Federal Court of Maraysia, which appriecf the order test, it seems that the Privy Council was again reluctant to identify it as a universal formula or test. Sir William Douglas expressed approval for the order test but he nonetheless also supported the decision of the Board by showing that it accorded with the

English practice. Perhaps he was influenced by an observation of Lord Parker C.J. in Smith v Leech Brain & Co. Ltd. [1962] 2 Q.B. 405 at 415:

> "It is important that the Common Law, and the development of the Common Law, should be homogenous in the various sections of the Commonwealth ."

In Strathmore Group Ltd. v. Fraser [1992] A.C. 172 an appeal from New Zealand, the Privy Council applied White v Brunton. Lord Templeman who delivered the decision of the Board said at 178:

> "It seems to their Lordships that the petitioner cannot be deprived of a right of appeal solely because the trial was divided into two parts, the first part dealing with the compromise issue and the cancellation issue and the second part, so far as necessary, dealing with the misconduct issue. In White v Brunton [1984] Q.B. 570 an order deciding a preliminary issue of documentary construction was held to be a final order for the purposes of an appeal under the Supreme Court Act 1981 which does not allow an appeal to the Court of Appeal in England without leave from an interlocutory order. Their Lordships gratefully adopt the reasoning of Sir
> John Donaldson M.R. which applies equally to the Order of 1910 now under consideration."

Although it would seem that prior to White v Brunton Judges in the Caribbean had a preference for the order test and I am unable to conclude, that this court has any settled practice in applying either the order or the application test.

In Allen v Wright [No.1] [1960] 2 W.I.R. 100 Hallinan C.J. said at 101 :

> "We are more disposed to follow the decision in Bozson's case [3] rather than that in Salaman's case [2] …….. But, in the present case, the judge set aside his previous order and ordered that the petition be removed from the file on the ground that the time was past for the petitioner to perform a condition precedent so that his right to proceed on the pefition was gone. He treated the statutory provision as to the time limited for service of the petition as a condition precedent and a matter of

> substantive law which disposed of the matter in dispute as effectively as, for example, a defence of the Statutes of Limitations would do if pleaded and established. Looking at the order made in this case and the grounds
> for that order, we think it has the character of an order finally disposing of the rights of the parties."

It is interesting to note however that this was an election petition, and Hallinan C.J.'s treatment of the time limited for service as a matter of substantive law meant that it was a part of the final trial, disposing of the rights of the parties to it. This reasoning is similar to the split trial of Sir John Donaldson M.R. in White v Brunton.

In Duporte v Freeman (1968) 11 W.I.R. 497 an appeal against an order dismissing an election petition under the Local Government Act 1967 in St.kitts-Nevis-Anguilla (as it then was) produced the same result as Allen v Wright. Although reliance was placed on a statutory barrier to the appeal preference for the order test was implicit in the reasoning of A.M. Lewis C.J. when he said at 498:

> "One might ask -interlocutory to what, since the effect of it was to rule that the appellant's petition was bad because it was out of time, and he could never come again, so that its effect would be to bring the proceedings to a final conclusion? However, even if it were an interlocutory decision, learned counsel has conceded that he is still out of court because in order to come to this court under the Federal Supreme Court Regulations, by which this court is governed, he would have had to obtain the leave either of the judge who gave the decision or of this court, and this has not been done."

In the more recent cases, however, there has been more reserve in declaring a preference for either test. and in my view it is, at least in part, due to the lack of any necessity to do so.

In Henderson v Archila [1983] 37 WIR 90 the appellants, in breach of the Court of Appeal Ordinance, Belize, failed to obtain leave before filing their notice of appeal against an order striking out their defence and entering final judgment against them. The court held that there was no appeal.

In considering the respondents contention that the order was interlocutory based on the English decision Sir John Summerfield explained that the statutory position did not require any analysis of whether the order was interlocutory or final and expressed the opinion that it was therefore unnecessary to make any such determination.

In Zuliani v Veira [1992] 44 W .1. R. 150, a case where there was an order to recover such sums as might be found due to a solicitor after taxation of costs, it proved unnecessary to rule on the respondent's objection that the judgment was interlocutory and not final because the matter was determined by a finding of the court that the value of the matter in dispute may not have been of the prescribed value for the purposes of the appeal.

In Owens Bank v Cauche (1989) 36 W.I.R. 221 (supra) the order which was treated as being interlocutory was an order setting aside an order for the service of a writ out of the jurisdiction and striking out proceedings as being an abuse of the process of the court. Their Lordships at the Privy Council did not find it necessary to disseminate any learning on the question whether the order was final or interlocutory because the issue was not contentious as the appeal had proceeded on the basis that it was interlocutory I which in any event accorded with the practice in England by virtue of Order 59 rule 1 A.

In conclusion the English Courts are now committed to the application test in determining whether an order or judgment is interlocutory .Applying that test, the order under appeal is interlocutory.

In addition, Order 59 rule 1 A[6][c] of the English Rules of the Supreme Court, [which Incidentally does not regulate our practice or procedure] prescribes that the order is interlocutory. I do not think that the order test would have produced a different result, because whereas the order effectively terminated the litigation, it did not determine any of the issues raised by the litigation. It dealt only with the question of whether the proceedings could continue. Although in some cases the rights of a party are determined by such procedural issues, in this case that was not so. The appellant's allegations of defamation were not disposed of by the order and could have been relitigated. If the effluxion of time of time has had any effect on his rights that could not be said to be a result of the order that the writ and its service were invalid. In my view, the only conclusion that can be drawn is that the order is interlocutory. The preliminary objection must be upheld, resulting in the declaration that the notice of appeal is void and there is no appeal.

I would therefore order accordingly.

……..
C.M. DENNIS BYRON
Justice of Appeal

I Concur.

…….
ALBERT REDHEAD
Justice of Appeal [Ag.]

I Concur.

…….....
ODEL ADAMS
Justice of Appeal [Ag.]