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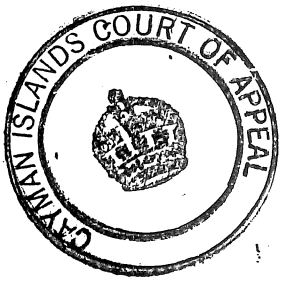
IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

GRAND COURT CAUSE NO. 200 OF 1994



In the Matter of
The Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978

and

In the Matter of
Order 70 of the Rules of the Supreme Court

and

In the Matter of
A Proceeding commenced by the Democratic Constituent Congress Committee investigating the Contracts for the Electric Train and Mass Transport Projects in Lima and Callao ("CITEL")

For the applicant: Mr. Charles Quin and Mrs. Angelyn Hernandez of Messrs Paget-Brown Quin & Hampson

For the respondent: Ramon Alberga Q.C. instructed by Mr. Sean McCann of Bruce Campbell & Co.

HARRE C.J. RULING

In this matter I sat as a Grand Court judge exercising the powers of a single judge of the Court of Appeal. As was pointed out by Sir John Summerfield C.J. in W. W. Becker & anor v Bank of Nova Scotia & anor (1987) C.I.L.R. 389 the single judge has jurisdiction,

concurrent with that of the Grand Court to grant a stay of execution pending the determination of an appeal. I had to deal with a preliminary point before addressing that issue.

The facts which have brought this matter before me are these -

In accordance with the procedure under the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 ("the Cayman Order") and Order 70 of the Rules of the Supreme Court ("RSC") the Democratic Constituent Congress Committee investigating the contracts for the Electric Train and Mass Transport Projects in Lima and Callao, Peru which I shall call "CITEL", sought and obtained, ex parte, an order for the taking of depositions before an examiner and the production of documents. At the subsequent inter partes hearing the Grand Court Judge refused to set aside the order except in one respect in which he concluded that it was too wide. The order is subject to an application being made under section 3A of the Confidential Relationships (Preservation) Law. At the inter partes hearing leave to appeal was sought and refused. I am now told that leave was sought out of abundant caution without a concession that such leave was needed. The prospective appellant ("Worldwide") now says that it is not, and has lodged a notice of appeal on that basis. The preliminary question which I was asked to determine is whether such leave is or is not required, and the answer to that question depends on whether the order appealed against is an interlocutory or a final order.

In England, until October 1982, the question whether an order was final or interlocutory was governed by case law. The

difficulties inherent in that were referred to as follows by Denning MR in Salter Rex & Co v Ghosh (1971) 2 QB 597 at 601 -

> "The 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."

I have to acknowledge that there is an element of self-extenuation in my reference to that passage since having come to and expressed one conclusion extempore last week and heard further arguments on the issue of the stay based on that conclusion I was constrained to notify the parties on Friday morning that I had changed my mind.

An order pronounced by a judge can always be withdrawn, altered or modified by him until it is drawn up, passed and entered. In the meantime, it is provisionally effective and can be treated as a subsisting order in cases where the justice of the case requires it and the right of withdrawal would not be prejudiced thereby. Re Harrisons Shares etc (1955) Ch D 260. In the present case the parties undertook last week to preserve the status quo until I had delivered reasons and the ruling which was then contemplated on the matter of a stay. What has been lost is Court time dealing with arguments about a stay and there has been a delay in the Section 3A application. Otherwise, as far as I can see, the parties are in the same position as they would have been if I had reached my present conclusion last week.

The question is now governed in England by RSC Order 59 rule 1A which came into force on 1st October 1988. The broad principle which is contained in subrule (3) of that rule is that a judgment or order shall be treated as final if the entire cause or matter would (subject only to any possible appeal) have been finally determined whichever way the court below had decided the issue before it. However, in subrule (6), a number of particular kinds of judgments and orders are to be treated as interlocutory, notwithstanding subrule (3). One of these is "an order setting aside or refusing to set aside another judgment or order (whether such other judgment or order is final or interlocutory)". That is exactly what the Grand Court order made on 19th August, following the inter partes hearing, was.

The broad principle enunciated in subrule (3) of RSC is an expression of what had become known as "the application approach" which was described as follows by Sir John Donaldson MR in White v Brunton (1984) 1 QB 570 at 572 -

> "In Salaman v Warner (1891) 1 QB 734 ... a Court of Appeal consisting of Lord Esher MR, Fry LJ and Lopes LJ 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 upon the nature of the application or proceedings giving rise to the order and not upon the order itself. I refer to this as the "application approach".

In White v Brunton Sir John Donaldson MR confirmed that the Court was now clearly committed to the application approach as a general rule and it is this general rule which is expressed in RSC Order 59 rule 1A (3).

In determining this preliminary point I shall need to look carefully at the nature of the application. It is originally made ex parte in accordance with the Practice and Procedure set out in RSC Order 70. That procedure is appropriate since the effect of the Cayman order is the same as that of the corresponding provisions of the Evidence (Proceedings in Other Jurisdictions) Act 1975.

Mr. Alberga based his argument that the order of the 19th August was interlocutory on the following broad grounds. They are these -

1. The order was made subject to applications being made under the Confidential Relationships (Preservation) Law

2. It was still open to the targets of the investigation in Peru to apply to set the order aside.

3. In applying for leave to appeal at the inter partes hearing the appellant had acknowledged that the order was interlocutory, and the affidavit of Mr. David Roberts dated 22nd August gave no indication that this position was not being maintained.

4. It falls squarely within RSC O. 59 r 1A (6) (bb).

With regard to the first point, I do not think that any general conclusion can be drawn from the requirement in this case of an application under S 3A of the Confidential Relationships (Preservation) Law. That only arises because the information sought is "confidential information" as defined in that law. There could be

cases where the information sought is not of that character at all. However, it should also be noted that in all cases there are circumstances, as set out in sections 3 and 5 of the Cayman Order, in which a person cannot be compelled to give the evidence sought. To that extent the order does not finally determine the rights of the parties.

In support of his second point, Mr. Alberga relied upon Boeing Co v. PPG Industries Inc (1988) 3 All ER 839. But the question for determination in that case was whether a party to foreign proceedings had locus standi to apply to set aside an ex parte order obtained by the other party to the proceedings directing a third party to attend for examination or produce documents. That is not this case. The matter has already been the subject of full argument inter partes on an application to set aside and that application was partially successful. An amended order was made on 19th ~~22nd~~ August.

As to the third point I simply say this. It puts the courts in an intolerable position if, having applied for leave to appeal and been refused a party promptly puts in a notice of appeal, ignoring the refusal on the ground that the application for leave should not have been made. It is "heads I win, tails you lose" if a party may on the one hand go ahead confidently on the basis that he has obtained leave but on the other ignore a refusal of leave on the basis that he should not have asked for it. That is a matter for the judge. If he refuses leave, that determination should be respected until an application to the full Court of Appeal can be made. See Horvat Properties (Cayman) Ltd v Harold Brown (unreported

11th July 1994).

In dealing with this whole matter I am mindful of S. 22 of the Court of Appeal Law, which reads as follows -

> "The provisions of this Law conferring a right of appeal in civil causes and matters shall be construed liberally in favor of such right; and in case any provision of this Law shall have been inadvertently, or from ignorance or necessity omitted to be observed, the Court may, if the justice of the case so requires, with or without terms, admit the appellant to impeach the judgment or proceeding appealed from despite such omission.".

But the right of appeal is not here in issue, and there is no question of the appellant being driven from the judgment seat by some technical omission. I would not, in my judgment, be following either the letter or the spirit of S. 22 by straining to narrrow the definition of an interlocutory judgment against which leave to appeal is required.

The sole purpose of the Cayman Order is to establish a procedure for the obtaining of evidence in foreign proceedings. Once the order is made, it is argued on behalf of Worldwide, there is nowhere else for either party to go other than by way of appeal. I have already referred to questions which may remain to be argued in relation to specific evidence which in my view make that proposition not wholly accurate; and the foreign proceedings themselves on which the Cayman application depends are the process by which the rights of the principal adversaries (albeit not parties in Cayman) are determined. I find guidance in the old definitions of a final order which are referred to in paragraph 505 of Volume 26 of the 4th Edition of Halsbury's Laws of England, to which I was referred. They are

these -

> ".. a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established" Re Chinery, ex parte Chinery (1884) 12 QBD 342 at 345
> "a judgment obtained in an action by which the question whether there was a pre-existing right of the plaintiff against the defendant is finally determined in favour of either the plaintiff or of the defendant."

Both those definitions are far removed from a decision about whether or not certain evidence may be given in proceedings, whether those proceedings be domestic or foreign, and in my view, Order 59 r 1A (3) is their modern expression.

It was argued that if applications under RSC Order 70 were intended to be interlocutory that would have been made explicit in Order 59 rule 1A. I think not. The ex parte procedure under Order 70 leads inevitably to the result that in contested applications the matter will fall under rule 1A (6) (bb).

Next I refer to three authorities called in aid by Worldwide. It was submitted that the absence of any reference to the appeals to the court below in Rio Tinto Zinc v Westinghouse (1978) 1 All ER 434 being by leave indicated that no leave was sought or obtained and that the orders obtained were regarded as final orders. The history set out in the headnote preceding the speeches delivered in the House of Lords was referred to in support of this. In that regard I merely observe that that entire history is set out in the headnote under the heading "Interlocutory Appeals". Even without that I would have drawn no conclusion from the lack of reference to this aspect of the

earlier appeals. It was of no interest in the context of the proceedings in the House of Lords.

The next case referred to was Radio Corporation of America v Rouland Corporation and another (1956) 1 All ER 549. It was an appeal from an order of a judge under the different statutory provisions of the Foreign Tribunals Evidence Act 1856. That apart, a lack of reference to the process by which the case came to be before the appeal court - a matter which was not in issue at all - can, again, be no more than neutral.

Finally, there is the following passage from the judgment of Rowe JA in United States v. Carver and ors (1980-83) CILR 297 at 309 -

> "When an application is made to the Grand Court for international judicial assistance, that court acts in accordance with the procedure contained in the English Rules of the Supreme Court, O.70. O 70, r.2 prescribes that the application must be made ex parte and it is stated in The Supreme Court Practice 1982, para 70/1-6/23 that if an order is made, which must perforce be ex parte, an application may be made by summons supported by affidavit to discharge the order. The effect of these provisions is that an ex parte order made by the Grand Court on a request for judicial assistance is in the nature of a provisional order which can only become absolute if the person to whom it is directed does not seek to have it discharged or if his challenge to the order is rejected."

The reference to the order becoming absolute in that passage has, in my view, nothing to do with whether that order is final or interlocutory. It has to do with the difference between an ex parte order which is provisional in that it is subject to challenge inter partes and an order which is no longer so subject for one or other of

the reasons given by Rowe JA.

There is no local rule setting out what is a final order and what is interlocutory. RSC now does this with admirable clarity. It provides a practice and procedure which should be followed to the extent provided for in S. 20 of the Grand Court Law and Rule 62 of the Grand Court (Civil Procedure) Rules.

Accordingly I am of the opinion that my previous oral ruling cannot stand and that CITEL should succeed in its preliminary objection, leave to appeal against the order of Schofield J dated 19th August having been properly applied for and thereupon refused.

G. E. Harre
Chief Justice

30th August 1994.