[2009] CA (Bda) 11 Civ

The Court Of Appeal for Bermuda

Civil Appeal
2009: No 7 - B

Before :

THE HONOURABLE JUSTICE ZACCA,
PRESIDENT
THE HONOURABLE JUSTICE WARD
and
THE HONOURABLE JUSTICE AULD

- -

IN THE MATTER OF THE JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT 1958

AND IN THE MATTER OF JUDGMENTS AGAINST CONSOLIDATED CONTRACTORS INTERNATIONAL COMPANY SAL AND CONSOLIDATED CONTRACTORS (OIL AND GAS) COMPANY SAL, OBTAINED IN THE HIGH COURT OF JUSTICE OF ENGLAND AND WALES DATED 15 JUNE 2007, 11 FEBRUARY 2008 AND 9 APRIL 2008

BETWEEN:

CONSOLIDATED CONTRACTORS INTERNATIONA COMPANY SAL

-and-

MUNIB MASRI

.....

Date of Hearing: 11th June 2009
Date of Judgments 19th June 2009

Mr. Delroy Duncan for the Appellant
Mr. Jeffrey Elkinson and Mr. Ben Adamson for the Respondent

JUDGMENTS

AULD JA:

1. This is the judgment of the Court. The first, and in the event, the only issue before the Court is whether the would-be Appellant, Consolidated Contractors International Company SAI ("Consolidated"), requires leave to appeal or may appeal as of right. Consolidated seeks to challenge an order by Kawaley J of 11th February 2009 dismissing its application to have set aside registration in Bermuda on 13th June 2008, under the Judgments (Reciprocal Enforcement) Act 1958, various large English money judgments in favour of the Respondent, Munib Masri ("Mr. Masri").

2. The point put more shortly is whether Kawaley J's Order is interlocutory, from which an appeal lies only with leave of the Court as provided by section 12(2) of the Court of Appeal Act 1964 ("the 1964 Act"), or final, where appeal is of right.

3. The Judge rejected Consolidated's entitlement to have the English judgments set aside on various grounds, only the first of which, fraud, is now material to the issue whether his decision was final or interlocutory.

4. The fraud ground was that the judgments were not properly registrable under the 1958 Act pursuant to section 3(1) of the Act because there had been no submission by Consolidated to the jurisdiction of the English Court, save one that had been vitiated by fraud on the part of Mr Masri, thereby requiring the Court, under section 4(1) of the Act to set aside the Registration Order. No such challenge had been raised before the English Court. The Judge rejected that argument, holding that: 1) he should consider as part of the application to set aside registration, whether, as a matter of Bermudian law, Consolidated had made out a *prima facie* case of fraud against Mr Masri on a matter material to its voluntary submission to the jurisdiction of the English Courts; 2) Consolidated had failed to establish before him a *prima facie* case of such fraud by Mr

Masri; and 3) even if he had found such a *prima facie* case of fraud, he would have held that Consolidated was either estopped from raising the allegation before him at that late stage or would have struck out the allegation as an abuse of process of the Court.

5. In the result, the Judge dismissed Consolidated's application to set aside the Registration Order on the ground of fraud and all other grounds relied on, and ordered Consolidated to pay Mr Masri's costs of the application. In so ordering, he observed:

> *"The present application is demonstrably part of a wider litigation strategy by ... [Consolidated] in various parts of the world to frustrate the Judgment Creditor's [Mr Masri's] legitimate efforts to obtain the fruits of his hard-earned judgments".*

6. The short question for this Court is whether that dismissal is a final order so that appeal to this Court lies as of right, or whether the Court's leave is required.

7. Mr. Delroy Duncan, on behalf of Consolidated, submitted that the Judge's ruling against him on all those grounds, in particular on the issue of fraud, amounts to a final order so appeal to this Court lies as of right. In so submitting, he relied on what the Courts in this jurisdiction and in England & Wales have, over the years, called *the application test,* which he sought, with some difficulty depending on the context, to distinguish from *the order test.* He is not to be blamed for his difficulty in articulating and applying that distinction. It is a difficulty that has caused much trouble for courts throughout the common law world over many decades. *The application test* is that if an application or claim before the court is of such a nature that, irrespective of which side succeeds, the order made in the proceeding will dispose of the case, subject only to the possibility of appeal, the order will be final. *The order test* is to look at the actual order, and if it is dispositive of the matter, subject only to the possibility of appeal, it is final whether or not any alternative order might not have been dispositive.

8. Mr Elkinson, in his submissions as to the appropriate test, also favoured the *application test,* noting its adoption by the English Courts and most Commowealth countries, including Bermuda.

9. *The application test,* though clearly enough expressed, has not always been straightforward in its application to the determination of the many issues that come before courts of first instance that engender appeals either as of right or with leave. The

widely accepted starting point for its application is the formulation adopted by Sir John Donaldson MR in *White v Brunton* [1984] 570, at 572 C-D, CA, from the approach of the Court of Appeal in the much earlier English case of *Salaman v Warner* [1891] 1 QB 734: namely:

> *"... 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."*

10. In England & Wales the time of the courts and the cost to litigants engendered in determining the issue on a case by case basis became such a burden that the Civil Court Rules Committee sought to simplify the path to appellate remedy. In an amendment in 1988 to the Supreme Court Rules by the introduction of RSC O 59, r 1A, it acknowledged and adopted in paragraph (3) the *application test*, but also introduced, notwithstanding it, paragraphs (5) and (6), which respectively set out lists of orders to be treated as final, and of judgments and orders to be treated as interlocutory.

11. It is noteworthy - but for reasons I shall explain, not helpful in the determination of this matter - that among the judgments and orders listed in paragraph (6) to be treated as interlocutory "[n]otwithstanding anything in paragraph (3)", was "an order setting aside or refusing to set aside another judgment or order (whether such other judgment or order is final or interlocutory). It is questionable, even when the RSC O59 r 1A regime came into force, whether it would have become applicable in Bermuda by virtue of the *Rules of the Court of Appeal for* Bermuda ("the Bermuda Rules"). Those Rules are silent as to the test of finality of an order for this purpose, but contain a "slip rule", rule 2/35, which provides:

> *"Matters not expressly provided for*
>
> *Where no other provision is made by these Rules the procedure and practice for the time being in force in the Court of Appeal in England shall apply in so far as it is not inconsistent with these Rules, and the forms in use therein may be used with such adaptations as are necessary."*

12. There was nothing in the Bermuda Rules expressly inconsistent with the highly prescriptive RSC O 59 r 1A regime, with its lists of judgments and orders in paragraphs (5) and (6) cutting across the divide of final and interlocutory orders as would otherwise have prevailed under the *application test* in paragraph (3). But the RSC O 59, r 1A regime would, we consider, have been difficult to import into Bermudian practice and procedure in the absence of any comparable provision here. And it would have potentially conflicted with its common law on the issue reproducing the earlier English practice and procedure that the new Order had replaced.

13. However, the question is now academic, because the RSC O 59 r 1A regime is no longer, in the words of the Bermudian Rule 2/35, "the procedure and practice for the time being in force in the Court of Appeal in England". It was all swept away, as part of the Woolf Reforms of Civil Procedure, by the introduction in 1998 of the Civil Procedure Rules ("CPR"). CPR 52.3 broke new ground in this context by simply requiring permission to appeal every decision at first instance, whether final or interlocutory, except in few respects prescribed the Rules themselves or as provided by practice directions; see CPR 52.3. It thus removed at a stroke all need to consider distinctions between final and interlocutory orders, a luxury or imposition, depending on how you look at it, not part of Bermudian law Just as in the case of the previous RSC regime, I do not consider that this even more radical break from the tyranny of finality or otherwise could be transplantable to Bermuda under the "slip rule"; given the continuance of section 12(2) of 1964 Act, requiring leave to appeal interlocutory orders, but leaving finals orders appealable as of right. In short, the distinction between a final and an interlocutory order, no longer relevant in England and Wales as a result of CPR 52, r 3, has no equivalent or near equivalent in Bermuda to which the slip rule could apply.

14. So, as became common ground for Mr Duncan and Mr Elkington by the end of their respective submissions, we are driven back in Bermuda to the common law *application test*, derived from English jurisprudence prior to the introduction in 1988 of the RSC O 59, r1A regime, and as adopted by this Court, in among other cases, *Remington v Remington,* Civil Appeal No 2 of 1977 and *Phillips v Phillips,* Civil Appeal No 2 of 1999. It is also common ground, as I have said, that, of the various issues ruled on by the Judge and on each of which he dismissed Consolidated's application to set aside

registration, the only possible candidate for an interlocutory judgement or order is his dismissal of the ground of fraud on the basis that Consolidated had not shown a *prima facie* case.

15. On that critical issue, Mr Duncan submitted that the ultimate outcome before the Judge was always going to be determinative of the entire matter between the parties, subject to an appeal by one or other of them. On the issue of fraud, he submitted it was a matter for the Judge how he went about reaching a decision on it one way or another. He could have directed a full trial of the issue, the outcome of which would have resulted in a final order either way, or as he did, by first considering by reference to the parties' respective submissions and affidavit evidence, whether Consolidated had made out a *prima facie* case to warrant such a direction. Either way, his decision, right or wrong, would have been a final ruling on the application as to whether fraud had been established warranting the setting aside the Registration Order. Mr Duncan cited in support of his submission, the approach of Bingham LJ (as he then was) in *Holmes v Bangladesh Biman Corp* [1988] 2 Lloyd's Rep 120, at 124, in the context of trial of a preliminary issue:

> *"... a broad commonsense test should be applied, asking whether (if not tried separately) the issue would have formed a substantive part of the final trial. Judged by that test this judgment was plainly final, even though it did not give the plaintiff a money judgment and would not, even if in the airline's favour, have ended the action."*

16. In short, Mr Duncan submitted that, if the Judge had tried the issue of fraud as part of the hearing of the application to set aside, his decision, either way, would have been final, and is no less so because he disposed of the matter by finding that Consolidated had shown no *prima facie* case of fraud meriting such a trial. He added that, given the finality of the order actually made by the Judge, the outcome would be the same whether this Court applied the *application test* or the *order test.*

17. Mr Elkinson, on the other hand, maintained that the way in which Consolidated put its case on the issue of fraud before the Judge, and the Judge his consideration in his judgment as to how to deal with it, showed contemplation on both their parts that he could direct a trial of the issue before determining it. Such a course, submitted Mr Elkinson, would have been an interlocutory step leading to a final disposal of the matter

– not in itself a final order because it did not have the finality contemplated by recourse to the *application test.*

18. In our view, Mr Elkinson's submission is flawed for the reason submitted by Mr Duncan, namely that the matter before the Judge, Consolidated's application to set aside registration of the English judgments, was one proceeding, which was bound to end in finality, in whatever manner the Judge decided to conduct it. If he had decided to direct a full trial of this issue, whether as a preliminary or discrete issue, by himself or by another judge, the outcome of determination of that issue would necessarily amount to a final order in the application. This can be seen by way of example, in a passage in the Supreme Court Practice 1988, volume 1, at 59/1/25, to which Bingham LJ in *Holmes v Bangladesh Biman Corporation,* referred, at 124, before making the observation set out at paragraph 15 above:

> *"... where there has been a direction for the trial of a preliminary issue, the order made at the trial of that issue will be a final order if the circumstances are such that it is equivalent to a split trial (i.e. the issue is not an antecedent procedural point which falls to be determined in advance of the final trial, but is a preliminary issue which forms part of the final trial or hearing. ..."*

19. The fact that the Judge took the view that he could and should dispose of the issue by finding that Consolidated had not shown a *prima facie* case worthy of a full trial of the issue merely advanced the finality of the issue contemplated by the application to set aside; it did not produce finality where otherwise the outcome might have been interlocutory.

20. Accordingly, in our view, the Judge's dismissal of Consolidated's application to set aside the Registration of the English Judgments in Mr Masri's favour was a final order, and thus Consolidated does not require permission to appeal to this Court under section 12(2) of the 1964 Act.

21. In the light of the Court's ruling, which it communicated to the parties shortly after conclusion of the hearing before it on 11th June 2009, with reasons to follow, Mr Elkinson sought provision by Consolidated of security for costs of the appeal, purportedly pursuant to Rule 2/10 of the *Court of Appeal Rules*. The Court declined to

deal with the application, as it is a matter for the Registrar to determine on the setting down of the appeal.

22. Mr Elkinson rightly conceded that it was not open to him, in the light of the Court's ruling, to proceed with Mr Masri's indicated intention to seek the imposition of other conditions on Consolidated. However, he did apply for an order for taxation, if not agreed, and payment into Court of the costs of Mr Masri below, on an indemnity basis, ordered by the Judge, pursuant to Rule 2/11 of the *Bermuda Court of Appeal Rules*. The Court declined to make any such order, made no order for the costs of this hearing, and directed that the hearing of the appeal be listed at its November 2009 sittings.

Signed

Auld, JA

I agree,

Signed

Zacca, President

I agree

Signed

Ward, JA