COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW & EQUITY DIVISION

2019/CLE/gen/00555

BETWEEN

IN THE MATTER OF ALL THAT piece parcel or lot of land totaling approximately 3,978 square feet being situate on the Northern side of West Bay street in the Western District of the Island of New Providence and bounded on the NORTH by the sea and running thereon forty-four (44) feet on the EAST by land now or formerly the land of Esso Standard Oil S.A. Ltd and running thereon one hundred and sixty two and two hundredths (162.02') feet on the SOUTH partly by west bay street and running thereon fourteen (14') feet and partly by the land of the Harbour side West Ltd. And running thereon thirty (30') feet and the WEST by property of Harbour side West Ltd. And running thereon One Hundred and Sixty two and two hundredths (162.02') feet.

KOZY HARBOUR LIMITED

Plaintiff

AND

CYRIL EZEKIEL MINNIS

Defendant

Before: The Honourable Madam Justice Tara Cooper Burnside (Ag)

Appearances: K. Miles Parker for the Plaintiff

Wayne R. Munroe QC for the Defendant

Hearing Date: 27 January 2021

RULING

Practice - Appeal – Whether Order Interlocutory or Final.

[1] This is an application by the Defendant for leave to appeal and a stay of execution pending appeal of a Ruling delivered by Mr Justice Keith Thompson on 14 December 2020.

[2] By his Ruling, Keith Thompson J granted judgment in favour of the Plaintiff against the Defendant, with damages to be assessed. He stated:

> **"[102] ...I accede to the Plaintiff's claim and award damages for any loss incurred by it during the period it was dispossessed by the Defendant and if none, a reasonable remuneration for the use of the land by the Defendant. The quantum of those damages is to be assessed by this Court.**
>
> **[103] In the circumstances therefore and after detailed consideration of the evidence and the authorities, I dismiss the Defendant's counterclaim and grant the following relief to the Plaintiff:**
>
> **(1) An Order that the Defendant do forthwith deliver up vacant possession of the subject land;**
>
> **(2) An injunction restraining the Defendant whether by himself his servants, agents or otherwise howsoever from entering or remaining upon the subject land or disturbing the Plaintiff in his quiet possession enjoyment and ownership of the land the subject hereof.**
>
> **(3) An Order that the Defendant within Thirty (30) days and at his own expense demolish and remove any and all structures unlawfully erected upon the Plaintiff's land the subject hereof without the Plaintiff's permission;**
>
> **(4) An Order that failure to demolish the unlawful structure(s) by the Defendant, the Plaintiff is at liberty to demolish ad remove the said structure(s) at the expense of the Defendant without liability for waste;**
>
> **(5) Damages for Trespass to be assessed by the Court;**
>
> **(6) Damages for waste to be assessed by the Court;**
>
> **(7) Damages until vacant possession is delivered up to the Plaintiff;**
>
> **(8) Mesne Profits;**

(9) General Damages to be assessed by the Court;

(10) Costs to the Plaintiff to be taxed if not agreed."

[3] The Defendant's application to this Court was not opposed by the Plaintiff albeit Counsel for the Plaintiff queried whether the Ruling sought to be appealed was interlocutory whereby leave to appeal was required.

[4] In my view, the Defendant was not required to obtain leave of this Court to appeal the Ruling. Notwithstanding this, I granted the Defendant leave to appeal *ex abundanti cautela* and a stay of execution pending determination of that appeal. In doing so, I indicated I would provide written reasons for my conclusion that leave was not required in this case; those reasons are below.

[5] It has long been established that in determining whether an order or judgment is interlocutory or final for the purposes of leave to appeal, regard must be had to the nature of the application or proceedings giving rise to the order or judgment and not the nature of the order or the judgment itself. This has been referred to as the "application approach" or "application test" and it has been consistently applied in the courts of The Bahamas: ***Lockhart and others v Mitsui Sumitomo Insurance (London Management) Limited and others*** [2012] 2 BHS J. No. 57, ***Farmer and others v Security and General Insurance Company Limted The Court Appointed representative of the estate of the late Gemason Smith*** [2013] 1 BHS J. No. 13, ***Peace Holdings Limited v First Caribbean International Bank (Bahamas) Ltd.***[2014] 2 BHS J. No. 73.

Interlocutory or final order – historical debate

[6] Historically, the distinction between an interlocutory and final order garnered considerable debate. Two tests emerged: (i) the order test and (ii) the application test. In ***White v Brunton*** [1984] 2 All ER 606, the English Court of Appeal authoritatively decided that the application test was to be generally preferred.

[7] Sir John Donaldson MR, who delivered the judgment in ***White v Brunton***, provided a helpful recount of the history of the debate as follows (at pages 607- 608):

> **"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 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 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.

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's test has always 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 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.'**

More recently in *Steinway & Sons v Broadhurst-Clegg* (1983) Times, 25 February, this court followed Salter Rex & Co v Ghosh and, applying the application approach to a judgment in default of defence, held that it was an interlocutory judgment."

[8] After considering the various conflicting authorities, Sir John Donaldson MR endorsed the application test. He stated (at page 608):

"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."

[9] Notably, in endorsing the application test, Sir John Donaldson MR stated that the decision in ***Bozson's case***, which upheld the order test, may be applied as an exception to the rule in certain circumstances. Moreover, he determined that it was appropriate to apply the decision in ***Bozson's case*** to ***White v Brunton***. In delivering his judgment, Sir John Donaldson MR stated (at page 608):

"...the decision in *Bozson's case*, as distinct from the reasoning, can be upheld on a different ground as an exception to the general rule. It was a case of a "split trial," all questions of liability and breach of contract being tried before and separately from any issue as to damages. If the two parts of the final hearing of the case had been tried together, there would have been an unfettered right of appeal, even if the judgment had been that there was no liability and that accordingly no question arose as to damages. It is plainly in the interests of the more efficient administration of justice that there should be split trials in appropriate cases, as even where the decision on the first part of a split trial is such that there will have to be a second part, it may be desirable that the decision shall be appealed before incurring the possibly unnecessary expense of the second part. If we were to hold that the division of a final hearing into parts deprived the parties of an unfettered right of appeal, we should be placing an indirect fetter upon the ability of the court to order split trials. I would therefore hold that 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."

[10] He then went on as follows:

"In effect that is the position in the present case for in directing a preliminary issue on a point of construction, the district registrar was seeking to divide the final hearing into two parts in the justified belief that it was possible that by adopting this course the expense of part of the hearing might be avoided. That the division may not have run exactly along the line dividing liability from quantum is, I think, immaterial. The decisive feature is that the "preliminary issue" was not, when analysed, an issue preliminary to a final hearing, but the first part of a final hearing."

[11] Accordingly, it was held in ***White v Brunton*** that the decision on the preliminary issue was not a decision preliminary to a final order but was to be treated as a final order for which

leave to appeal was not required. The division of the hearing of the action into two parts would not deprive the defendant of an unfettered right of appeal.

[12] **White v Brunton** is therefore clear authority that where the final hearing of an action is divided into two parts and a party wishes to appeal against an order made at the end of the hearing of one part, the order should not be treated as an interlocutory order for which leave to appeal is required, if the parties would not have required leave had all the matters raised in the action been heard together.

[13] For completeness, I set forth below the facts in both ***Bozson's case*** and ***White v Brunton***.

[14] ***Bozson's case*** involved a claim by the plaintiff to recover damages for breach of contract where a directions order was made in the following terms: "It is ordered that the action be transferred to the non-jury list. Questions of liability and breach of contract only to be tried. Rest of case (if any) to go to official referee." When the action came on for trial, the learned judge held that there was no binding contract between the parties and made an order dismissing the action, upon which order judgment was entered for the defendants. The plaintiff appealed the order and the defendants raised a preliminary objection on appeal, i.e., the order of the trial judge was an interlocutory order and the appeal was out of time. The defendants argued that the order put an end to the litigation but it would have been otherwise if the decision had been in favour of the plaintiff, because then the case would have had to go before the official referee for an assessment of damages.

[15] ***White v Brunton*** involved a contractual dispute. By an agreement dated 19 March 1970 the defendant agreed to sell certain land to the plaintiff. The land was an island site about a mile from the road and access to it was over an old farm track. The agreement made provision for the track to be improved and for how the cost was to be shared between the parties. In particular, clause 3(1)(a) of the agreement provided that the portion of the track which had been re-laid was to be re-excavated at the expense of the plaintiff. The plaintiff made the track into a road and claimed half the costs from the defendant who refused to pay. Thereafter, the plaintiff commenced an action claiming damages for breach of contract and declaration that by virtue of the agreement the defendant was bound to contribute to the costs and expenses of the works effected by the plaintiff to the access road. On 2 December 1982 the district registrar ordered that there be a trial of the following preliminary issue, namely, (i) whether upon the proper construction of the contract dated 19 March 1970 the defendant was under any liability for construction costs of, or maintenance expenses for, the access road, having regard to the admitted fact that no re-excavation pursuant to clause 3(1)(a) had been done and (ii) whether the defendant was under any liability for maintenance expenses incurred by the plaintiff before the access road was laid. That preliminary issue was determined in favour of the defendant and the plaintiff sought leave to appeal. That gave rise to the question of whether leave to appeal was required.

[16] In the present case, Keith Thompson J made a ruling on liability and ordered damages to be assessed. By doing so, he divided the trial of the Plaintiff's claim into two parts. If the learned Judge had determined liability and damages at trial as he was entitled to do, the Defendant would undoubtedly have had an unfettered right of appeal. Applying the principle in ***White v Brunton***, the Defendant should not be deprived of his unfettered right of appeal merely because the learned Judge determined liability and ordered general damages to be assessed.

[17] I am fortified in my opinion by the sentiments expressed by Lord Templeman in his delivery of the Judgment of the Privy Council in ***Strathmore Group v Fraser*** [1992] 2 AC 172 on appeal from New Zealand. In that case, the petitioner sued its former directors for, *inter alia*, breach of fiduciary duty. In defence, the respondents contended that there had been a compromise between them whereby the petitioner had agreed to abandon those claims. In reply, the petitioner alleged that there was no compromise, or alternatively, that it had been cancelled. The compromise issue was tried as a preliminary issue. The first instance judge held that there was no binding compromise. The Court of Appeal of New Zealand reversed that decision and held that the compromise had not been cancelled and dismissed the petitioner's action. It also dismissed the petitioner's application for leave to appeal to the Privy Council, holding that the judgment was interlocutory and that the petitioner was not entitled as of right to appeal further. The petitioner then sought special leave to appeal from the Privy Council, which held that the decision of the New Zealand Court of Appeal was a final judgment.

[18] In is Judgment, Lord Templeman analysed why justice demanded that the petitioner should have a right of appeal. He stated (at page 178):

> **"If no preliminary issue had been ordered, the trial judge would have tried the whole action and decided the compromise issue, the cancellation issue and the misconduct issue. If the judge awarded damages to the petitioner on the grounds that there was no compromise or that the compromise had been cancelled and on the grounds that the respondents had been guilty of misconduct in the Clearwater transaction, then the respondents could have appealed to the Court of Appeal and either party, losing before the Court of Appeal, could have appealed to the Privy Council as of right and on that appeal all three issues, the compromise issue, the cancellation issue and the misconduct issue could have been argued. If the trial judge dismissed the petitioner's action either on the compromise issue or on the misconduct issue, then the petitioner could have appealed to the Court of Appeal and either party, losing before the Court of Appeal, could have appealed to the Privy Council as of right and on that appeal all three issues, the compromise issue, the cancellation issue and the misconduct issue could have been argued. The judgment of the Court of Appeal would have been final if the action by the petitioner were dismissed and final if the petitioner were awarded damages. All three issues, the compromise issue, the cancellation**

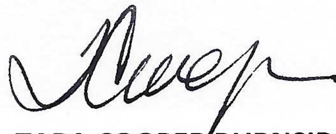
issue and the misconduct issue would be in play on the hearing of any appeal to the Privy Council.

If the judgment of the Court of Appeal on 4 October 1991, finally deciding the compromise issue and the cancellation issue, was not a final judgment..., then the petitioner has been deprived of an appeal to the Privy Council as of right, an unintended consequence of the decision of Wylie J that, in the interest of justice and for the possible saving of time and expense, the compromise issue should be tried as a preliminary issue.

... 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."

[19] I appreciate that in the present case, there was no directions order before the matter came up for trial that the trial be split into two parts. However, I think that is immaterial. The events which have occurred in this case have, in substance and effect, split the trial of this action into two parts: liability and damages. Accordingly, in my view, this is not an appropriate case for the application of the general rule. Rather, the principle enunciated in ***White v Brunton*** and ***Strathmore Group v Fraser*** should be applied.

DATED this 10th day of February, 2021



TARA COOPER BURNSIDE
JUSTICE (AG)