IN THE COURT OF APPEAL OF BRUNEI DARUSSALAM

CIVIL APPEAL NO. 3 OF 1999

BETWEEN

YKH TRADING PTE LTD — Plaintiff

AND

SCHNEIDER SINGAPORE (SALES & ENGINEERING) PTE LTD — Defendant

Before : FUAD, P.: HUGGINS, J.A. AND SILKE, J.A..

Date of Hearing : 1 NOVEMBER, 1999.

Date of Reasons for Judgment : 3 NOVEMBER, 1999.

J U D G M E N T

FUAD, P.:

On 1 November 1999 we allowed an application by the defendants to strike out the Notice of Appeal filed by the plaintiffs on the ground that they had not obtained the leave to appeal required by section 20(2)(f) of the Supreme Court Act. We now give our reasons.

The matter arose in this way. On 9 February 1999 the defendants took out an application to set aside or stay proceedings in the action in Brunei on the ground that Singapore was the forum conveniens in which any proceedings against them should be taken. On 25 March 1999 The Chief Justice ordered all further proceedings in the action

to be stayed. On 21 April the plaintiffs filed a Notice of Appeal against the Chief Justice's order.

The principal issue arising on this application is whether the order of the Chief Justice staying proceedings in Brunei was an interlocutory or a final order. If the former, the position is governed by section 20(2)(f) of the Supreme Court Act:

> "No such appeal [to the Court of Appeal] shall lie –
>
> ……
>
> (f) without the leave of the High Court or Court of Appeal, from any interlocutory order or judgment."

In submitting that the Chief Justice's order was interlocutory, so that leave to appeal was required, the applicant invited this Court to apply the test formulated by Lord Alverstone CJ in Bozson v Altrincham UDC [1903] 1 KB 547:

> "Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order."

Mr Davidson, for the applicants, cited a number of authorities which clearly showed that the Courts of Malaysia and of Singapore consistently apply that test in deciding whether an order is final or interlocutory. This approach was approved by the Privy Council in Haron Bin Mohd. Zaid v Central Securities [1982] 2 All ER 481, a case from Malaysia. Sir William Douglas, giving the opinion of the Board said, at p. 486h "…..their Lordships feel entitled to say that the test is both sound and convenient".

Mr Siva Sankaran submits that leave to appeal was not necessary, for the order sought to be appealed against was not an interlocutory order. He invites this Court to apply the test formulated in Salaman v Warner [1891] 1 QB 734 where Lord Esher MR, at page 735, said:

> "The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."

Fry LJ, at p.736 put the test in this way:

> "I think that the true definition is this. I conceive that an order is "final" only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely I think that an order is "interlocutory" where it cannot be affirmed that in either event the action will be determined."

The same test was applied by the English Court of Appeal in White v Brunton [1984] 1 QB 570 where Sir John Donaldson MR (as he then was) observed, at p.573: "The Court is now clearly committed to the application approach as a general rule and Bozson's case [1903] 1 KB 547 can no longer be regarded as any authority for applying the order approach."

The position in England, before the new O.59, r.1A of the Rules of the Supreme Court came into operation in October 1988, is discussed and explained, e.g. in para. 59/1/25 of the 1988 Supreme Court Practice. The new rule sets out lists of specific types of order which are to be treated as final and specific types of order to be regarded as interlocutory. The residual general test enacts the White v. Brunton test.

We have been told from the Bar that there are no authorities in Brunei which indicate the approach adopted by the Brunei Courts in deciding whether an order or judgment is final or interlocutory. We have concluded that the test formulated in Bozson's case is convenient, logical and fair and should be applied in Brunei. It has received the approval of the Privy Council and is applied in two neighbouring

jurisdictions. Applying that test it seems to us that the Chief Justice's stay order did not finally dispose of the rights of the parties. While the order stands, the controversy which divides the parties can be litigated in Singapore, which the Chief Justice found to be the more appropriate forum for the trial of the action.

Even if, contrary to the views we have expressed, and as Mr Sankaran contends, the White v. Brunton test should be applied, it is plain that the same result would be reached. If the Chief Justice had declined to order the stay, the matter in litigation would, of course, not have been determined. We do not accept that in applying the appropriate test, "the matter in litigation" or "the matter in dispute" was merely the application for a stay.

Since leave to appeal was required and it was not obtained, the Notice of Appeal filed on 21 April 1999 was not a valid one (see the Supreme Court Practice 1999, Vol.1 para 59/14/17.) Thus no properly constituted appeal is before us. It was for these reasons that we granted the defendants' application and struck out the intended appeal.

DATO SERI PADUKA KUTLU TEKIN FUAD
President, Court of Appeal

SIR ALAN HUGGINS
Judge, Court of Appeal

WILLIAM JAMES SILKE
Judge, Court of Appeal

W.S.W.Davidson
Chan Choong Fatt — for the Defendant
And Amanda Pehin Hj Abas

Siva Sankaran and — for the Plaintiff
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