Ak Abd Rahman Rahimin Bin Pg Mahali **… Appellants**
Hjh Yashimah Bte Haji Yahya

AND

Rizan Bin Hj Awg Hamid **.. Respondents**
Mohd Romzi Bin Pozan
Hj Hamid Bin Abdullah

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No.3 of 2008)

Power, P.; Mortimer and Chong, JJ.A.
17th May, 2008.

Mrs Susannah Lim (M/S Sussanah Lim Partnership) for the Appellants.
Mr Vincent Joseph (M/S Sandhu & Co.) for the Respondents.

Case cited in the Ruling:
Birkett v James [1978] AC 297 at 317D-G

R U L I N G

Mortimer, J.A.:

1. This action concerns a road accident which happened as long ago as 4 June 2003. It was commenced on 8 February 2005 and in March 2005, there was judgment by consent on liability with damages to be assessed by the Registrar.

2. The brief background of the proceedings thereafter is that the assessment came before the Registrar and on 9 and 10 November 2005 she heard the plaintiff's case. The defendant's case was opened on 3 January 2005 and for the first time, video recordings of the plaintiff were disclosed. These were taken when he was being watched and videoed on behalf of the defendant. It is alleged that videos demonstrate the plaintiff to be a malingerer and that part of his case is dishonest.

3. Neither the plaintiff nor any of his witnesses were cross-examined on the contents of the recordings so he and his advisors were taken completely by surprise. There was no adjournment for the plaintiff to consider the recordings, he and his

witnesses were not recalled for cross-examination. The defence case continued, and was concluded on 13 April 2006.

4. In an attempt to right that which had gone wrong and to answer the new allegations, the plaintiff applied for disclosure of all documents connected with the surveillance, for leave to call a further medical witness and other consequential Orders. The clear aim was to call evidence on behalf of the plaintiff in rebuttal upon the meaning and effect of the video evidence. The Registrar refused these Orders and the hearing was adjourned.

5. Although the assessment is part heard, the plaintiff appealed against the Registrar's decision and the Judge, in her discretion, made the Orders adding some stringent comments about the manner in which the defendant's case had been conducted.

6. It is important to note in passing that the issue whether the plaintiff is exaggerating his disabilities dishonestly, has yet to be decided. The Registrar will hear the plaintiff's evidence on this matter. It remains her task, difficult though it may be in the circumstances, to ensure that both parties have a fair hearing on all the issues.

7. The defendant wished to appeal against the Judge's Interlocutory Orders. Miss Lim, for the defendant, went through the motions of pursuing an appeal but she failed to obtain leave either from the Judge or this Court. Interlocutory appeals can only be brought from a Judge if leave is obtained from either the Judge or this court under section 20(2)(f) of the Supreme Court Act (Cap 5).

8. The Registry ought not to have accepted the documents but it did. The plaintiff ought to have taken the point early but he failed to do so and the matter proceeded. A few days ago the plaintiff raised the matter for the first time saying rightly that no appeal could be heard in the absence of leave. By then all the preparations had been made for the hearing.

9. Miss Lim therefore applied to this Court first for an extension of time to make the application for leave and for leave to appeal against the Interlocutory Orders.

10. Miss Lim readily accepts that it was her error that leave had not been applied for. This alone we would readily overlook, let anyone who has not been guilty of an oversight or an error in the past throw the first stone.

11. Our concerns are twofold. First the effect of the failure to apply for leave and secondly whether leave ought to be granted. The question whether leave should be granted in all the circumstances, may well be the same now as it would have been had the application been made in a timely way but not necessarily so.

12. If leave ought to have been granted before the process began, the only adverse consequence is the necessity to make this application. On the other hand, if leave would not and ought not to have been granted, a substantial part of the delay in the part hard damages assessment has been the pursuit of a flawed appeal. This puts into perspective the reasons why leave has to be obtained to pursue an interlocutory appeal to this Court.

13. Interlocutory applications and appeals are rightly described as "satellite" litigation. In other words, they are hearings not designed to decide the real issues between the parties, only subsidiary ones. Whether justified or not, they cause delay in the final resolution of the dispute. Judges are recognized as being better, more experienced and more practical tribunals for dealing with appeals on ordinary interlocutory applications. Additional delay in an appeal to this Court on such matters ought not to be entertained save where there is a serious point of principle involved or where a decision on the point would be of general advantage, not usually otherwise. There must always be some good reasons.

14. Note the oft cited observations of Lord Diplock in *Birkett v James* [1978] AC 297 at 317D-G:

> "These (Interlocutory Orders) are matters best left to the decision of the Masters and, on appeal, the Judges of the High Court whose daily experience and concern is with the trial of civil actions. They are decisions which involve balancing against one another a variety of relevant considerations upon which opinion of individual Judges may reasonably differ as to their relative weight in a particular case. That is why they are said to involve the exercise by the judge of his "discretion". That, an the consequent delay and expense which an appeal in interlocutory matters would involve, is also why no appeal to the Court of Appeal from his decision is available except with the Judge's leave or that of the Court of Appeal. Where leave is granted, an Appellate Court ought not to substitute his own "discretion" for that of the judge merely because its members would themselves have regarded the balance as tipped against the way in which he had decided the matter."

15. The particular point of importance which Ms Lim advances, is usefully set out in her skeleton:

> "We submit….in particular the issue of abuse of legal process by claimants of personal injury claim, could not be of greater importance not only to the judiciary, to the bar, but to the whole community at large. Insurance premiums for example, had sky rocketed due to inflated claims. It is the public at large who had to hear the higher premiums. The community must be protected. Further, claimants must know that they are not allowed to use the legal system, which is the machinery for keeping order and doing justice, for achieving an improper end. A decision by this….Court would therefore be of great importance."

16. On this, she faces two insuperable difficulties. First, there could be nothing so trite as the proposition that it is an abuse of process for a plaintiff in a personal injury claim to advance an inflated and dishonest claim. A decision of this Court is not needed to emphasise such an obvious proposition.

17. Secondly, and equally important, this issue does not arise on this appeal. It is an issue which has arisen in front of the Registrar. The hearing is part heard. She will now hear such evidence as the plaintiff wishes to advance on this issue and she will then decide the issue along with others.

18. There are no grounds advanced upon which we could properly give leave to appeal in these interlocutory matters. Nor, had the application been made at the proper time, were there any grounds of which we are aware which could have justified the giving of leave at that time. The resulting unnecessary delay cannot now be avoided but the fact that the damage has been done is not a good reason for granting leave.

19. For these reasons, having allowed the application to be made out of time, the application for leave to appeal is refused.

20. Having heard counsel on costs we now order that the appeal be struck out with costs to the Respondent to be taxed if not agreed.

21. We also order that the appellant shall pay the costs of the application for leave to appeal out of time to be taxed if not agreed.