Privy Council Appeal No. 55 of 1980

Haron Bin Mohd. Zaid – – – – – – *Appellant*

v.

Central Securities (Holdings) Berhad – – – – *Respondents*

FROM

THE FEDERAL COURT OF MALAYSIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH APRIL 1982

Present at the Hearing:

LORD WILBERFORCE

LORD SIMON OF GLAISDALE

LORD KEITH OF KINKEL

LORD BRIDGE OF HARWICH

SIR WILLIAM DOUGLAS

[*Delivered by* SIR WILLIAM DOUGLAS]

This is an appeal by the appellant from two orders made in the Federal Court of Malaysia (Suffian L.P., Raja Azlan Shah Ag.C.J. Malaya, Wan Suleiman F.J.):

(i) an order dated 27th February, 1979 wherein the Federal Court dismissed the appellant's notice of motion dated 13th October, 1978, in which the appellant had moved to dismiss the respondents' appeal from two orders of Harun J. both dated 28th June, 1978 on the ground that the respondents had not obtained leave from a judge of the High Court or from the Federal Court in compliance with section 68(2) of the Courts of Judicature Act, 1964;

(ii) an order dated 16th May, 1979, which

(*a*) allowed the respondents' appeal from the order of Harun J. dated 28th June 1978 giving the appellant judgment against the respondents in the sum of $4,186,224/- together with interest thereon and costs;

(*b*) gave directions in the third party proceedings brought by the appellant against the respondents;

(*c*) gave the respondents unconditional leave to defend in the said third party proceedings; and

(*d*) ordered the consolidation of the said third party proceedings with proceedings brought by the appellant against the respondents in the Kuala Lumpur High Court in Suit No. 2323 of 1976.

By an agreement in writing dated 7th December 1974 the respondents, a public limited company incorporated in Malaysia, agreed to sell to the appellant, a businessman and a company director, 1,400,000 fully paid up $1 shares in a public company known as United Holdings Berhad (hereinafter referred to as "U.H.") at $8 per share and at a total purchase price of $11,200,000. The purchase price was paid on or about 22nd January 1975 and the respondents delivered to the appellant share certificates for the 1,400,000 shares in U.H. including a share certificate numbered 0227 for 523,278 shares, in relation to which the appellant received from the respondents a memorandum of transfer signed by a certain Dr. Chong Kim Choy.

On 12th March 1975 the appellant sold on to a company called Syarikat Seri Padu Sdn. Bhd. (hereinafter referred to as "S.S.P.") 560,000 of the shares in U.H. which he had acquired from the respondents for the sum of $4,480,000. The appellant delivered the share certificates for these shares to S.S.P. and included among them the share certificate numbered 0227 and the memorandum of transfer relating to it. The transfer of shares was registered by U.H. in favour of S.S.P. but, that notwithstanding, on 18th March 1975 the Secretary of U.H. Mr. Yap Ping Kon, wrote to Dr. Chong Kim Choy in these terms:—

> "I refer to the transfer form signed by you to cover certificate no. 0227 for 523,278 shares of United Holdings Bhd. and return herewith the said form for your cancellation.
>
> As you are aware these shares were sold to Central Securities and subsequently to Mr. Koh Kim Chai. The transfer form executed by you is invalid as the transferee, International Holdings Pte. Ltd. has been inserted in the transfer form. As such I enclose herewith a new transfer form for your execution. Kindly sign on both sides of the transfer form marked by a pencil cross. On completion I shall be glad if you will return this to me immediately.
>
> Your kind attention to this matter is greatly appreciated."

On 22nd April, 1975, Mr. Yap addressed another letter to Dr. Chong enclosing a copy of a transfer form for Dr. Chong's signature. Dr. Chong's reply is dated 25th April, 1975, and is as follows:—

> "I acknowledge with thanks your registered letter dated 22nd instant. This share certificate was held by us in trust for International Holdings (Pte.) Ltd., and I had already transferred the same shares back to them without any monetary consideration. I am therefore returning the original transfer form signed by me (transferee being I.H.P.L.) to you. It is only proper that you transfer the shares to I.H.P.L. and get them to transfer the shares to whoever are the present legal owners. I regret that I cannot in good faith declare that I have received a sum of $1,486,109·52 from Sharikat Seri Padu Sdn. Bhd. when this is not true, as it will give rise to further problems for me."

On 8th October, 1976, the appellant commenced proceedings in the High Court at Kuala Lumpur in Suit No. 2323 claiming against the respondents rescission of the agreement for the sale of 1,400,000 shares in U.H., the return of the purchase price and damages for fraudulent misrepresentation on the part of the respondents. The appellant pleaded, inter alia, that verbally and by letter of 23rd December, 1974, he had given the respondents notice of rescission of the agreement for the sale of the shares and had demanded the return of the purchase price. The respondents, in their defence, admitted the agreement to sell the shares but denied the representations alleged by the appellant. They stated that they had no knowledge of the letter dated 23rd December, 1974, giving notice of rescission and went on to plead that the agreement for the sale of the

shares was affirmed by a supplemental agreement made between the parties on 22nd January 1975. The respondents further pleaded that the appellant and his nominees had taken over control of U.H. and in consequence the appellant was not entitled to rescission.

According to the appellant's case it was only in December, 1976, that Mr. Koh Kim Chai, an associate of the appellant and a director of U.H., discovered that the memorandum of transfer in respect of the shares comprised in Certificate No. 0227 did not support the transfer of the shares to anybody other than International Holdings (Pte.) Ltd. However this may be, on a date prior to 15th December, 1977, S.S.P. was de-registered in respect of the shares comprised in Certificate No. 0227 and Dr. Chong re-registered as the holder of those shares.

On 21st May 1977 S.S.P. commenced proceedings against the appellant claiming the sum of $4,186,224, the purchase price of 523,278 shares alleged not to have been delivered. On 16th August, 1977, the appellant issued a third party notice against the respondents. The respondents entered a conditional appearance and on 30th September, 1977 took out a summons to set aside the third party notice on the grounds, inter alia:

(*a*) that there was no proper question to be tried between the appellant and the respondents, and

(*b*) that the issue between the appellant and the respondents formed the subject of a separate action already pending before the Court, namely Civil Suit No. 2323 of 1976.

On 3rd October, 1977, the appellant applied by summons for leave to enter final judgment against the respondents or alternatively for third party directions. On 28th October, 1977 S.S.P. applied for leave to enter final judgment against the appellant.

All three of these applications came on for hearing on 28th June, 1978 before Harun J. in chambers whence they were adjourned by consent into court. The learned Judge dismissed the summons to set aside the third party notice. He gave leave to S.S.P. to enter final judgment against the appellant and after argument gave the appellant leave to enter judgment against the respondents. Those judgments were entered in due course.

On 29th June, 1978 the respondents applied in writing that the summonses be adjourned into open court for further argument in accordance with Order 54, rule 22A of the Rules of the Supreme Court. Harun J. certified that he required no further argument and the respondents appealed to the Federal Court.

Before the appeal came on for hearing before the Federal Court, the appellant applied by notice of motion for an order that the appeal be dismissed on the ground that no leave had been obtained from a judge of the High Court or from the Federal Court in accordance with the provisions of section 68(2) of the Courts of Judicature Act, 1964. That motion was dismissed on 27th February 1979.

On 16th May 1979 the Federal Court allowed the respondents' appeal and made orders in the terms set out above. Thereafter, on 22nd August 1979 the appellant applied to the Federal Court for leave to appeal to His Majesty the Yang di-Pertuan Agong against the orders of the Federal Court but leave was refused. On 8th May 1980 the appellant, on petition to their Lordships, obtained special leave to appeal to His Majesty the Yang di-Pertuan Agong from the orders of the Federal Court dated 27th February and 16th May 1979.

The first issue which arises in this appeal is whether the orders made in these proceedings by Harun J. are final or interlocutory. It is contended

on behalf of the appellant that they are interlocutory and thus fall within the scope of section 68(2) of the Courts of Judicature Act, 1964, which provides—

> " No appeal shall lie from an interlocutory order made by a Judge of the High Court in Chambers unless the Judge has certified, after application, within four days after the making of the order by any party for further argument in court, that he requires no further argument, or unless leave is obtained from the Federal Court or from a Judge of the High Court."

It is further argued that, as the orders were made in open court and not in chambers, the question of obtaining a certificate that no further argument was required did not arise, and, as no leave had been obtained, the appeal was not properly before the Federal Court.

The Malaysian courts have considered the question of whether orders are final or interlocutory in a number of cases extending over a period of twenty years and commencing with *Ratnam v. Cumarasamy* (1962) 28 M.L.J. 330. In that case the Malayan Court of Appeal examined several English cases including *Salaman v. Warner and others* [1891] 1 Q.B. 734, 736 where Fry L.J. formulated the test in these terms: —

> " 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 court compared this with the test advanced by Lord Alverstone C.J. in *Bozson v. Altrincham Urban District Council* [1903] 1 K.B. 547, namely: —

> " 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."

The Malayan Court of Appeal unanimously adopted the test in the *Bozson* case in preference to that in the *Salaman* case. In delivering the judgment of the court, Good J.A. stated: —

> " In the present case our order refusing an extension of time for the applicant to file the record of appeal put an end to the proceedings and applying Lord Alverstone's test finally disposed of the rights of the parties by barring the unsuccessful plaintiff from appealing against the order of the High Court. Our order . . . . is therefore for the purposes of appeal a final order . . . . "

In his short concurring judgment Hill Ag. C.J. observed: —

> " Out of a number of conflicting opinions and decisions that of Lord Alverstone in *Bozson's* case stands out as the one judgment that provides a real and practical test for determining whether an order is final or interlocutory and I too would apply it here."

Ratnam v. Cumarasamy was followed by the Federal Court in *Peninsular Land Development Sdn. Bhd. v. K. Ahmad* [1970] 1 M.L.J. 253. Again there was a careful review of the leading English cases on the subject starting with *Standard Discount Co. v. Otard de la Grange* (1877) 3 C.P.D. 67 where it was held that an order empowering a plaintiff to sign judgment upon a specially indorsed writ is interlocutory. Again the court decided that the appropriate test for determining whether an order is final or interlocutory is that stated by Lord Alverstone in the *Bozson* case.

And thus the Malaysian courts treat an order of court giving leave to a plaintiff to sign final judgment as a final order, thus entitling a defendant to appeal to the Federal Court without the necessity of obtaining leave.

It must be recalled that in England and Wales section 68(2) of the Supreme Court of Judicature (Consolidation) Act 1925 (now repealed and substantially re-enacted by section 60(2) of the Supreme Court Act 1981), provided that:—

> " Any doubt which may arise as to what orders or judgments are final, and what are interlocutory, shall be determined by the Court of Appeal."

Thus, the Court of Appeal's decision whether the order is final or not is not subject to appeal and as Lord Edmund-Davies pointed out in *Becker v. City of Marion Corporation* [1977] A.C. 271, 282 some of its decisions on the point are difficult to reconcile.

In *Tampion v. Anderson* (1973) 48 A.L.J.R. 11 the question before the Board on a petition for special leave to appeal against an order made in the Supreme Court of Victoria staying an action on the ground that it was frivolous, vexatious and an abuse of the process of the court was whether that order was final or interlocutory. It appears from the judgment of Lord Kilbrandon that the Australian courts accept as authoritative the English decisions on this topic. Lord Kilbrandon continued at page 12—

> " It was submitted, and their Lordships would be inclined to agree, that the authorities are not in an altogether satisfactory state. There is a continuing controversy whether the broad test of finality in a judgment depends on the effect of the order made, as decided in *Bozson v. Altrincham U.D.C.* per Lord Alverstone C.J. at page 548, or on the application being of such a character that whatever order had been made thereon must finally have disposed of the matter in dispute—*Salaman v. Warner*. But the difficulty seems to arise out of attempts to frame a definition of ' final ' (or of ' interlocutory ') which will enable a judgment to be recognized for what it is by appealing to some formula universally applicable in any contingency in which the classification falls to be made."

Their Lordships are mindful of the great reliance placed by the Federal Court on English precedents and of the observation made by Lord Parker C.J. in *Smith v. Leech Brain & Co. Ltd.* [1962] 2 Q.B. 405, 415 that " it is important that the common law, and the development of the common law, should be homogeneous in the various sections of the Commonwealth ". But it must be remembered that in England the practice with respect to appeals from orders in summary proceedings refusing the defendant unconditional leave to defend an action has since 1925 been governed by statute. The Supreme Court of Judicature (Consolidation) Act, 1925 provided in section 31(2) (now repealed and substantially re-enacted in section 18(2)(*a*) of the Supreme Court Act 1981)—

> " An Order refusing unconditional leave to defend an action shall not be deemed to be an interlocutory order within the meaning of this section ".

The effect of this is to give a defendant an appeal as of right against an order giving leave to a plaintiff to sign final judgment against him in summary proceedings. Moreover it would seem to their Lordships that it would be wrong to overrule the Federal Court on a matter of procedure as distinct from substantive law, unless it can be clearly shown that the Court has misconstrued the statute law of Malaysia. As Lord Westbury observed in *Boston v. Lelièvre* (1870) L.R. 3 P.C. 157, 163:—

> " Their Lordships would hesitate very much to interfere with the unanimous judgment of the Court below upon a matter of this kind

which is to be regarded as a matter of procedure only, unless they were clearly satisfied that the Court had made a great mistake in the construction put upon these Statutes."

It appears to their Lordships that the Federal Court in *Ratnam v. Cumarasamy* and *Peninsular Land Development Sdn. Bhd. v. K. Ahmad (supra)* and subsequently in *Hong Kim Sui v. Malayan Banking Bhd.* [1971] 1 M.L.J. 289, *Arumugam Pillai v. Government of Malaysia* [1980] 2 M.L.J. 283 and *Ng Cheng Yoon v. Mah Binti Mat Isa* [1981] 1 M.L.J. 218, all of which are unanimous, reserved judgments, has established over the years a settled practice of applying Lord Alverstone's test in the *Bozson* case in order to determine whether an order is final or interlocutory. Their Lordships are unable to find any error in this reasoning: on the contrary their Lordships feel entitled to say that the test is both sound and convenient. In three of the five cases cited above the appeal was against leave to sign judgment in summary proceedings. Thus the effect of the practice adopted by the Federal Court in such cases is in line with the English practice as established by Statute since 1925. In any event, this being a matter of practice and procedure, their Lordships, in accordance with their practice, will uphold the decision of the Federal Court.

Lord Rawlinson for the appellant drew attention to the cases of *Nagappa Rengasamy Pillai v. Lim Lee Chong* [1968] 2 M.L.J. 91, *Sri Jaya Transport Company Ltd. v. Fernandez* [1970] 1 M.L.J. 87 and *T. O. Thomas v. K. C. I. Reddy* [1974] 2 M.L.J. 87 as well as the unreported case of *Malayan Banking Berhad v. Yap Seng Hock* (1980) and invited the Board to express a view on what were said to be inconsistencies in the application of Order 54, Rules 22 and 22A of the Rules of the Supreme Court of Malaysia. Their Lordships consider that they must decline from so doing firstly because any views they express would be purely *obiter* in the light of the conclusion they have reached on the main issue in this appeal, and secondly because the points raised are purely procedural and ought to be resolved by the Federal Court.

The second main issue in this appeal is whether the Federal Court was wrong in granting to the respondents unconditional leave to defend the claim brought by the appellant against them. It is also contended that the respondents were allowed on appeal to the Federal Court to put forward new and different grounds from that relied on by them before Harun J. As to the putting forward of new and different grounds, this involves the discretion of the Court and since it has not been shown that the Court proceeded on some wrong principle the Board will not intervene. As to the granting of unconditional leave the Federal Court had before it material which, among other things, showed that a number of important issues of fact are in contention between the appellant and the respondents including the precise circumstances in which the appellant accepted Certificate No. 0227 and the memorandum of transfer signed by Dr. Chong. It would be inappropriate for their Lordships to say more, at this stage, than that these issues require to be tried. There was in addition material showing that it may be impossible to restore the parties to their original positions, some two-and-a-half years having elapsed before the matter came before the courts during which time the appellant and his associates had control of U.H. and made substantial changes in the company's affairs. These considerations commend themselves to their Lordships as justifying the conclusion reached by the Federal Court that the respondents should have unconditional leave to defend.

Their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal should be dismissed, with costs.

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In the Privy Council

HARON BIN MOHD. ZAID

v.

CENTRAL SECURITIES (HOLDINGS) BERHAD

DELIVERED BY

SIR WILLIAM DOUGLAS

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