JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 103 OF 1994

MOTION NO. 10/95

BEFORE: **THE HON. MR. JUSTICE RATTRAY - PRESIDENT**
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

BETWEEN **EMANUEL OLASEMO** **APPLICANT**

A N D **BARNETT LIMITED** **RESPONDENT**

John Vassell instructed by Dunn, Cox, Orrett & Ashenheim for applicant

Maurice Frankson instructed by Gaynair & Fraser for Respondent

November 27, 28, and December 20, 1995

RATTRAY P.:

On the 14th June 1995 the Court of Appeal allowed the appeal of Barnett Limited and set aside the Order of Langrin J. in the Supreme Court granting an interlocutory injunction in favour of Emanuel Olasemo forbidding the Registrar of Titles from registering the transfer in all those parcels of land part of Fairfield in the parish of St. James being lots numbered 1 - 32 on the plan of part of Fairfield aforesaid and being the lands registered at Vol. 1126 Folio 711 - 748 of the Register Book of Titles until the trial of the action.

The Court of Appeal further ordered that Caveat No. 738671 lodged by the respondent (Mr. Olasemo) be removed and that an Enquiry be made by a Judge of the Supreme Court as to damages consequent on the grant of the

interlocutory injunction and in respect of an undertaking as to damages given by the respondent (Mr. Olasemo) on the grant of the interlocutory injunction now being set aside. Costs were awarded here and in the Court below to the appellant to be taxed if not agreed.

The details of the prior proceedings are to be found in the written judgments of the Court of Appeal in S.C.C.A. 103 of 1994 delivered on the 17th of July 1995.

Briefly the proceedings had their genesis in a Writ of Summons issued by Emanuel Olasemo against Barnett Limited claiming specific performance of a contract reduced into writing whereby the plaintiff alleged that the defendant offered to sell thirty-two lots of land the subject-matter of the action to the plaintiff for $1.2m. The plaintiff maintained that the defendant had refused to complete the agreement.

The plaintiff made application on a summons for an interlocutory injunction seeking an order that:

> 1. The Registrar of Titles be restrained from registering any transfer of thirty-two lots of land situated on the plan part of Fairfield in the parish of St. James being lands comprised of Certificate of Titles at Folio 717- 718 of the Register Book of Titles.
>
> 2. That the matter be allowed to go to trial for the determination of the existence of a contract.

In his judgment Langrin J. before whom the application was heard found that:

> "In the light of the foregoing reasons it is the judgment of the Court that the interlocutory injunction should be granted and the matter be allowed to go to trial for a final determination of the issues. There will be costs in the cause."

It is this judgment which was overturned an appeal. The Court of Appeal determined and so stated that no binding contract had come into being with respect to the sale of the lots.

In the words of Downer J.A.:

> "This is one of those cases where it could be said that the interlocutory judgment disposes of the single point of law to resolve the issue namely, that there was no contact which could be specifically performed."

Wolfe J.A. stated:

> "I entertain no doubt that had Langrin, J. not misdirected himself as to the nature of the issues, he would have embarked upon resolving the issues and, on the documentary evidence before him, he would have been constrained to find that no binding contract existed between the parties, and the matter would have been disposed of then and there."

I was content to state:

> "Langrin J. had before him the four documents which called for interpretation. He should have proceeded upon this exercise which would have resulted in a finding that no contract had come into being with respect to the sale of the lots."

The appeal therefore determined the sole issue in the case and although the proceeding in which the determination was made was launched by virtue of an interlocutory process the effect was indeed a final judgment.

Mr. Vassell on behalf of Barnett Limited has resisted the application for leave to appeal to the Privy Council on the basis that the judgment is not final until either:

(a) struck out by the Supreme Court on the application of the defendant (Barnett Limited), or

(b) proceeded with by the plaintiff (Olasemo) in the Supreme Court and a trial embarked upon resulting in a judgment against him.

In respect of (a) the power to determine whether there ever would be a final judgment would be in the hands of the defendant, who in view of the decision of the Court of Appeal would have no incentive to proceed any further.

With respect to (b) this would be a purely time-wasting exercise since the result would be inevitable by virtue of the judgment of the Court of Appeal.

An appeal from decisions of the Court of Appeal to Her Majesty in Council is governed by Section 110 of the Constitution of Jamaica, and is as of right where:

> "... the matter in dispute on the appeal to Her Majesty in Council is of the value of one thousand dollars or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of one thousand dollars or upwards, final decisions in any civil proceedings;"
> ***[Section 110 (1)(a) of the Constitution of Jamaica]***

The leave of the Court of Appeal is required in cases where:

> "... in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings ..."
> ***[Section 110 (2)(a) of the Constitution of Jamaica]***

The property involved is above the value of one thousand dollars. The question as to whether the appellant has a right of appeal to Her Majesty in Council depends upon whether or not the decision of the Court of Appeal is final.

Mr. Vassell has helpfully referred the Court to ***White v. Brunton [1984] 2 All E.R. 606***, in which the question of whether a judgment is interlocutory or final was ventilated. I agree with the law as stated in the headnote that:

> "Where an order made or judgment given on an application would finally determine the matters in the litigation, the order or judgment is final, thereby giving rise to an unfettered right of appeal."

I do not find it necessary in my deliberations to enter as Sir John Donaldson MR did into a question of whether "the issue of final or interlocutory depended on the nature of the application or proceedings giving rise to the order and not the order itself", especially as he stated the Court's commitment "to the application approach as a general rule," [emphasis mine]. There are always exceptions as is admitted by Sir John Donaldson MR to a general rule.

Whatever nomenclature might have been given to the application before Langrin J., had he made a correct determination he would have been compelled to proceed to order final judgment for the defendant. On this appeal the decision of the Court of Appeal is a final judgment for the defendant.

In his judgment Downer J.A. in citing Section 110 (2)(a) of the Constitution emphasied the "or otherwise" in the section and stated that there may be a good ground to grant leave to appeal in some instances where the decision in an interlocutory appeal will be conclusive of the matters. He cited ***Garden Cottage Foods Ltd. v. Milk Marketing Board [1983] 2 All E.R. 770 at p. 773(g):***

I do not find it necessary to express a view as to whether the "or otherwise" in the section would cover a situation in some instances where the decision in an interlocutory appeal will be conclusive of the action. Such an exploration would require an analysis of the effect of the ejusdem generis rule and would not be required for the purposes of my decision.

The application for leave to appeal to Her Majesty in Privy Council is granted on condition that the appellant within a period of sixty days from the date hereof enter into good and sufficient security to the satisfaction of the Court in a sum of $1000.00 for the due prosecution of the appeal and the payment of all such costs as may become payable by the appellant and also within the said period to take the necessary steps for the purpose of procuring the preparation of the record and the despatch thereof to England.

DOWNER JA

Mr Maurice Frankson moves this court on behalf of the applicant Emanuel Olasemo who seeks leave to appeal to Her Majesty in Council. The gist of the dispute in this Court was whether on the true construction of the correspondence between Olasemo and Barnett Ltd, a contract was formed for the sale of thirty-two lots, comprising part of the Fairfield estate. If a contract was formed, Olasemo would have been entitled to specific performance or damages, without a recourse to any further hearing in the court below.

In the Supreme Court, Langrin J granted Olasemo an interlocutory injunction which restrained the Registrar of Titles from transferring the thirty-two lots in issue pending a decision whether there was an enforceable contract. Barnett Ltd appealed to this court (Rattray, P Downer & Wolfe JJA) and the decision was that, as a matter of construction of the correspondence between the parties, there was no contract. So Olasemo was not entitled to specific performance nor would he be entitled to any damages. Consequently, we set aside the order granting the interlocutory injunction and additionally made the necessary consequential orders. These orders effectively decided the single point of law which was in issue between the parties and concluded the matter. At the end of the hearing when judgment was handed down, there was an application for leave to appeal to the Privy Council but this Court (Rattray P, Downer & Patterson JJA) informed counsel it would be more appropriate to proceed with the motion after written reasons for judgment were delivered.

The issue to be decided is whether it is appropriate to grant Olasemo leave to pursue his appeal before their Lordships Board. That in turn depends on whether or not an appeal is permissible from this Court. Section 110(2) of the Constitution governs decisions in any civil

proceedings in interlocutory appeals to the Privy Council. As such it involves an interpretation of the Constitution. That section reads:

> " (2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases -
>
> (a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings;"... [Emphasis supplied]

Because this is a determination of Olasemo's constitutional rights, we ought not to use the restrictive approach embodied in such rules of construction as the ejusdem generis rule. In **Hinds v The Queen** [1975] 13 JLR 262. Lord Diplock in his opinion said at p. 268:

> "To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would, in their Lordships' view, be misleading - particularly those applicable to taxing statutes as to which it is a well established principle that express words are needed to impose a charge upon the subject."

So the ample phrase "or otherwise" must be given a generous construction as to accord the court discretion to grant leave to appeal in interlocutory matters not covered by the specific phrase "by reason of its great general or public importance." "Or otherwise" therefore enlarges the category of appeals. To my mind one such category is where an interlocutory order is conclusive of the action.

It is useful to find a comparable situation where such a condition is recognised as a basis for granting leave to appeal to the House of Lords. It seems that the Appeal Committee of the House of Lords in the exceptional cases, where it grants leave to appeal in interlocutory matters, follows this course. That is the implication from a passage in **Garden**

Cottage Foods Ltd v Milk Marketing Board [1983] 2 All ER 770 at 773 where Lord Diplock said:

> " My Lords, it was this procedural history that induced an Appeal Committee of this House to depart from its usual practice and to grant leave to appeal in an interlocutory matter the decision on which will not be conclusive of the action."

There is an alternative approach in the case cited by Mr. Vassel, **White v Brunton** [1984] 2 All ER 606, which when properly interpreted really assists the applicant Olasemo. Sir John Donaldson MR considered that there were three approaches in deciding which matters were interlocutory. Firstly, there is "the order approach" and he uses **Shubrook v Tufnell** [1882] 9 QBD 621 as an illustration. Secondly, there is the application approach and the example he gives is **Salaman v Warner** [1891] 1 QB 734. Thirdly, there is the exception which is in reality two final hearings. For this special category he relies on the decision in **Bozson v Altrincham** [1903] 1 KB 547. Sir John Donaldson MR rightly regards the division of a case where there is a trial on a preliminary point of law as a final hearing split in two parts. Here is how he put it at p. 608:

> "... 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 on 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."

As this appeal decided that in substance the hearing below ought to have been on a preliminary point of law, this approach supports the applicant. Olasemo ought to be granted leave to appeal on the basis that

the decision in that case was a final decision in civil proceedings. This is the basis of Mr. Frankson's application.

In addition to his right of appeal pursuant to section 110 (2)(a) of the Constitution Olasemo also satisfies the further conditions for final decisions where there is an appeal as of right. These provisions are stipulated in section 110(1) of the Constitution and they read:

> ""**110.**-(1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases -
>
> (a) where the matter in dispute on the appeal to Her Majesty in Council is of the value of one thousand dollars or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of one thousand dollars or upwards, final decisions in any civil proceedings;"

In this case, the value of the property was $1.2 million and the damages which must now be the alternative to specific performance if a further appeal is successful, is bound to be in excess of one thousand dollars having regard to the rising price of land due to the inflationary tendencies in the economy. It is against this background that leave to appeal ought to be granted either under s. 110(1) or 110(2)(a) of the Constitution. I agree with the order proposed by Rattray P.

WOLFE J.A.

Emanuel Olasemo commenced proceedings in the Supreme Court seeking an order for specific performance of a contract made between himself and Barnett Ltd. for the sale of thirty-two lots of land comprising part of the Fairfield Estate. In the interim he sought an interlocutory injunction to maintain the status quo pending the determination of the action. Langrin J. before whom the application was set down, granted the application as prayed.

Barnett Ltd. appealed to this Court to set aside the order of Langrin J. This Court (Rattray P, Downer & Wolfe JJA) allowed the appeal and ordered as follows:

> "Appeal allowed. Order of Langrin J. set aside. Further ordered that Caveat No. 738671 lodged by the respondent be removed by the Registrar of Titles and that an Enquiry be made by a Judge of the Supreme Court as to damages if any, arising out of the undertaking given by the respondent on the grant of Interlocutory Injunction. Costs of the appeal and the proceedings below to the appellant." (emphasis supplied)

Arising from the above Order Mr. Olasemo now seeks the leave of the Court to appeal to Her Majesty in Council.

Appeals to Her Majesty in Council are governed by Section 110 of the Constitution of Jamaica. I set out below the provisions of Section 110.

> (1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases -
>
> **(a)** where the matter in dispute on appeal to Her Majesty in Council is of the value of one thousand dollars or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of one thousand dollars or upwards, final decisions in any Civil proceedings.
>
> (b) final decisions in proceedings for dissolution or nullity of marriage.
>
> (c)) final decisions in any civil, criminal or other proceedings on

> questions as to the interpretation of this Constitution; and
>
> (d) such other cases as may be prescribed by Parliament.

For purposes of this judgment only (1) (a) is relevant.

Subsections (2) and (3) state:

> (2) An appeal shall lie from the decisions of the Court of Appeal to her Majesty in Council with the leave of the Court of Appeal in the following cases
>
> > (a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; and
> >
> > (b) such other cases as may be prescribed by Parliament
>
> (3) Nothing in this section shall affect any right of Her Majesty to grant special leave to appeal from decisions of the Court of Appeal to Her Majesty in Council in any civil or criminal matter.

Having regard to Section 110 the applicant can only be granted leave to appeal to Her Majesty in Council if he can bring himself within the provisions of Section 110 (1) (a) or 110 (2) (a).

SECTION 110 (1) (a)

To bring himself within the provisions the applicant must establish that the decision from which he seeks to appeal is a final decision and that the value of the property involved is a thousand dollars or more. As to the value of the property it is clearly established that the agreed contract price is $1.2M. Were the matter to be tried and damages awarded in lieu of specific performance it is very likely that damages would far exceed a thousand dollars. The substantial question therefore is whether the decision of this Court is a final one.

Lord Alverstone C.J. in Bozson v. Altrincham UDC [1903] 1.K.B. 547 at p548 stated that the test as to whether or not an order is a final order is:

> "Does the... 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."

In **Salaman v Warner** [1891] 1 Q.B. 734 the test was stated in a different way to wit:

> "that an order is an interlocutory order unless it is made on an application of such a character that whatever order had been made thereon must finally have disposed of the matter in dispute"

In **White v Brunton** [1984] 2 All ER 606 the Court of Appeal held that

> "in determining whether an order or judgment is interlocutory or final regard must be had to the nature of the application or proceedings giving rise to the order or judgment and not to the nature of the order or judgment itself. Accordingly, where an order made or judgment given on an application would finally determine the matters in litigation, the order or judgment is final, thereby giving rise to an unfettered right of appeal."

Having said all this the question is, "was the order made by Langrin J. final or interlocutory? The application before him was interlocutory in nature and whichever way it was decided could not have had the effect of terminating the proceedings. In answering the question I use the approach of Lord Denning MR in **Salter Rex & Co v Ghosh** [1971] 2 All E.R 865 that is to look at the application which was made before Langrin J. and not to the order made". I conclude that the order made by Langrin J. was interlocutory. That he could effectively have disposed of the matter is, in my view, neither here nor there. The appellant Barnett Ltd, elected not to pursue the matter in the Court below on the preliminary point. The appeal from the order made by Langrin J. was therefore an interlocutory appeal.

Did the decision of this court amount to a final decision. The decision of this court in dismissing the appeal is not a final order in that it did not determine the matters in litigation. The appeal before us was concerned with setting aside the interlocutory injunction granted by Langrin J. The effect of the order made by the Court was to remove the injunctive order granted and to order the assessment of any damages which might have flowed from the grant of the injunction. The observations of this court as to whether or not a contract had been formed were by way of deciding if Langrin J. had properly exercised his discretion in granting the injunction. I certainly did not intend to adjudicate upon the merits of the substantive action. The action is still alive in the Court below.

I would therefore hold that the applicant has not brought himself within the provisions of Section 110 (1) (a).

SECTION 110 (2) (a)

Is the question involved in this appeal one of great general or public importance or otherwise? The matter of a contract between private citizens cannot be regarded as one of great general or public importance. If the applicant is to bring himself within the ambit of this subsection he must therefore do so under the rubric "or otherwise". Clearly the addition of the phrase "or otherwise" was included by the legislature to enlarge the discretion of the Court to include matters which are not necessarily of great general or public importance, but which in the opinion of the Court may require some definitive statement of the law from the highest Judicial Authority of the land. The phrase "or otherwise" does not per se refer to interlocutory matters. "Or otherwise" is a means whereby the Court of Appeal can in effect refer a matter to Their Lordships Board for guidance on the law. The matter requiring the guidance of Their Lordships Board may be of an interlocutory nature but it does not follow that every interlocutory matter will come within the rubric "or otherwise".

I am firmly of the view that the applicant has not brought himself within the provisions of Section 110(2)(a) of the Jamaica Constitution and that the application for leave to appeal to Her Majesty in Council ought to be refused.

This refusal has not left the applicant without remedy as he may seek special leave from Her Majesty in Council, to appeal from the decision of this Court, pursuant to Section 110(3).

RATTRAY, P.

By a majority decision (Wolfe, J.A. dissenting) the application for leave to appeal to Her Majesty in Privy Council is granted on condition that the appellant within a period of sixty days from the date hereof enter into good and sufficient security to the satisfaction of the Court in a sum of $1000.00 for the due prosecution of the appeal and the payment of all such costs as may become payable by the appellant and also within the said period to take the necessary steps for the purpose of procuring the preparation of the record and the dispatch thereof to England.