JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 54/97

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE PATTERSON, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

BETWEEN LEYMON STRACHAN PLAINTIFF/APPELLANT

AND THE GLEANER COMPANY LIMITED

AND DUDLEY STOKES DEFENDANTS/RESPONDENTS

Earl Witter, Barry Frankson and Maurice Frankson, instructed by Gaynair & Fraser, for appellant

Emile George, Q.C. and Richard Ashenheim, instructed by Dunn, Cox, Orrett & Ashenheim, for 1st respondent

R. N. A. Henriques, Q.C. and Samuel Harrison, instructed by Dunn, Cox, Orrett & Ashenheim, for 2nd respondent

October 9, 12, 13 and December 18, 1998

PATTERSON, J.A.:

On the 13th October, the court (by a majority) upheld a preliminary objection taken by the respondents to the hearing of this appeal. We

ordered that the appeal be struck out with costs to the respondents to be agreed or taxed. My reasons are contained herein.

On the 5th May, 1997, Leymon Strachan, the plaintiff in Suit No. C.L. 1992/S 025, ***Leymon Strachan v. The Gleaner Company Limited and Dudley Stokes***, moved the court below for an order to set aside an order made by Walker, J. on the 20th September, 1996, whereby it was ordered:

> "That the Default Judgment herein against the Defendants in the sum of $510,726.00 for special damages and $22,500,000.00 for general damages be set aside and the Defendants be granted leave to defend on the following terms:
>
> (1) The Defendants do file and deliver their Defence within 14 days hereof.
>
> (2) The costs thrown away and of these proceedings go to the Plaintiff in any event.
>
> (3) Such costs to be agreed/taxed and paid within 30 days of agreement/taxation."

The plaintiff sought alternative orders also, in the following form:

> "**2.** In the alternative, that, pursuant to section 41 of the Judicature (Supreme Court) Act, this Honourable Court reserves for the consideration of the Court of Appeal, the question of the jurisdiction of a Judge of the Supreme Court to set aside a Final Judgment based on the verdict of a jury in circumstances where the Defendants participated in the trial of the matter; an appeal was pending before the Court of Appeal; and where the Court of Appeal was already seized of the matter.
>
> **3.** In the further alternative that leave be granted to the Plaintiff to appeal to the Court of Appeal against the said Order of Mr. Justice

> Walker made on the 20th day of September, 1996.
>
> **4.** The time for making this Application be extended to the date of hearing of this Notice of Motion; and
>
> **5.** The costs of this Notice of Motion be provided for."

Smith, J. dismissed the motion with costs to the defendants, and refused leave to appeal. Nevertheless, the plaintiff filed a notice of appeal from the order of Smith, J. on the 28th May, 1997, without making a similar application to this court for leave to appeal. Section 22(3) of the Court of Appeal Rules, 1962, provides:

> "Where an exparte application has been refused by the Court below, an application for a similar purpose may be made to the Court exparte within seven days from the date of the refusal."

On the 9th July, 1997, when the parties attended on the Registrar for the purpose of settling the Record of Appeal, Mr. Samuel Harrison, who appeared on behalf of the respondents, objected to the settlement and asked the Registrar to make the following notation:

> "Leave to appeal having been refused by His Lordship the Honourable Mr. Justice Smith, that such leave should be sought at the Court of Appeal before the Record for such substantive appeal is settled."

The Record was nevertheless settled and filed on the 5th December, 1997. On the appeal coming on for hearing, a preliminary objection was

taken in terms of a written notice which had been served on the appellant by the respondents. The grounds of the objection were these:

> 1. "The said Order of the Honourable Mr. Justice Smith refused the Appellant leave to appeal;
>
> 2. No application has been made subsequent thereto by the Appellant to obtain such leave pursuant to Section 11(1) of the Judicature (Appellate Jurisdiction) Act before bringing this Appeal."

The real issue rested on the question of whether the court had jurisdiction to hear this appeal. It was conceded that if the order of Smith, J. is a final order, then the appellant's appeal is of right and no leave to appeal is required. The court's jurisdiction could not then be questioned. Mr. Henriques, Q.C. submitted on behalf of the respondents that the order is interlocutory, and consequently the jurisdiction of this court cannot be invoked without the leave of the judge below or this court, and no such leave was obtained by the appellant. He relied on the provisions of section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act which read as follows:

> "11.--(1) No appeal shall lie--
>
> ...
>
> (f) without the leave of the Judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a Judge except..."

Certain exceptions follow, but they are not relevant to the issue in this case. Mr. Henriques, Q.C. argued that the terms of the motion itself show that it is not an originating motion, one that commenced an action and which must be

used in particular circumstances. The order of dismissal was not a final order as it did not end the proceedings between the parties. He supported his arguments by referring to the case of ***White v. Brunton*** [1984] 2 All E.R. 606 and urged this court to apply the "application approach" which that case advocated as the test to be applied in determining whether an order is interlocutory or final for the purpose of the grant of leave to appeal. He finally submitted as follows:

> "The motion in this case is not an originating motion but a motion seeking relief in the suit, and is for interlocutory orders as is evident from the alternative reliefs sought, that is, leave to appeal and extension of time."

He referred to the affidavit filed in support of the motion and continued:

> "Therefore, the order of Smith J. is an interlocutory order in respect of all reliefs sought. The appellant appreciated that leave to appeal was necessary and made application to the Judge below which was refused. No application was made to this Court. Consequently, this Court has no jurisdiction to entertain the appeal."

He asked for an order striking out the Notice of Appeal.

Mr. Witter for the appellant bemoaned the fact that Smith, J. did not give written reasons for dismissing the motion. His instructions were that the motion was dismissed on a preliminary objection as to the judge's jurisdiction to hear the motion. He submitted that the order of Smith, J. was a final order in the sense only that it purported to determine the rights of the parties in respect of the particular application before him. It was final in that it

determined that he had no jurisdiction to interfere with the order of Walker, J. He argued that "procedural niceties ought not to unduly detain the grant of the application" before the court. It is of the essence of the matter that the order complained of before Smith, J. was a nullity. Where an order is a nullity, no appeal is necessary to have it set aside. It does not matter in such a case whether it is the "order approach" or the "application approach" that is relevant. But he submitted that if the "application approach" was adopted, having regard to the order sought and the decision made, the order of Smith, J. was final, hence no leave to appeal from that order is required. There being no question that the judgment entered following upon the verdict of a jury at the assessment trial was a final judgment, there was no scope for interlocutory applications thereafter. If the application to Walker, J. to set aside could be characterized, its purport was interlocutory.

Mr. Witter seemed to have preferred the "order approach" advocated for in the two cases he referred to, namely: ***Haron bin Mohd Zaid v. Central Securities (Holdings) Bhd*** [1982] 2 All E.R. 481 and ***Bozson v. Altrincham Urban District Council*** [1903] 1 K.B. 547. This is his ultimate submission:

> "To determine whether the application before Smith, J. was interlocutory or final, this court must examine the nature of the order made by Walker, J. and in so doing, it would be clear that the issue between the parties had been already finally determined and there was no enforceable order that could alter that status quo. Walker J's judgment could in no way be interlocutory."

In my judgment, the cases that were referred to in argument all pointed to the difficult task of the court in deciding whether an order is final or interlocutory. In the ***White*** case (supra) the court examined a number of earlier cases and came down on the side that preferred the "application approach" to the "order approach". Sir John Donaldson, in his judgment said (p. 108):

> "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."

The headnote sets out the decision of the court. It reads as follows:

> "In determining whether an order or judgment is interlocutory or final for the purposes of leave to appeal under s 18(1) of the Supreme Court Act 1981, 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. Since a preliminary issue, on a true analysis, is the first part of a final hearing, and not an issue preliminary to a final hearing, it follows that any party may appeal without leave against an order or judgment made on the preliminary issue if he could have appealed without leave against the order or judgment if that issue had been heard as part of the final hearing and the order or judgment on the preliminary issue had been made at the end of the complete hearing. To hold otherwise would, by depriving parties on a preliminary issue of an unfettered right of appeal, indirectly fetter the ability of the court to order such split hearings in cases where it was plainly in the interests of the more efficient administration of justice to do so (see p 607 *f g*

> and p 608 *b* to *g*, post); ***Salaman v Warner***]1891] 1 QB 734 and ***Salter Rex & Co v Ghosh*** [1971] 2 All ER 865 followed; ***Bozson v Altrincham UDC*** [1903] 1 KB 547 disapproved.
>
> Although the parties may take the view that they can by agreement waive the requirements as to leave, it is for the court to decide whether leave is required since that goes to jurisdiction (see p 608 *h j*, post)."

The decision in the ***Haron*** case (supra) which favoured the "order approach" was based on the practice that existed in Malaysia. Their Lordships' Board clearly stated that the authorities as well as the Federal Court in Malaysia (at p. 486):

> "...has established over the years a settled practice of applying Lord Alverstone CJ's test in the ***Bozson*** case in order to determine whether an order is final or interlocutory."

Their Lordships found no error in the reasoning, and continued:

> "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."

We were not referred to any judgment or practice of this court in this regard. It seems to me that it is for us to decide the approach that we will follow. In my view, the "application approach" is the better principle and I will be guided accordingly. Lord Esher, M.R. succinctly expressed the rule to be

applied when he said in ***Salaman v. Warner and others*** [1891] 1 Q.B. 734 at 735:

> "The question must depend on what would be the result 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 is given 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." [Emphasis supplied]

Fry, L.J. and Lopes, L.J. were of the same opinion as Lord Esher, M.R.

In ***Salter Rex & Co. v. Ghosh*** [1971] 2 All E.R. 865, the court (Lord Denning, M.R., Edmund-Davies and Stamp LLJ) were of a similar opinion, and ***Salaman v. Warner*** (supra) was expressly approved while ***Bozson v. Altrincham Urban District Council*** (supra) was disapproved. Lord Denning, M.R. in his judgment said (p. 866):

> "Lord Esher, MR's test has always been applied in practice... so 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." [Emphasis supplied]

Lord Denning, M.R., realising the different approaches to this question, continued:

> "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."

That may no longer be necessary in England, since provisions have now been made defining which orders are final and which are interlocutory, for all purposes connected with appeals to the Court of Appeal (see Rule 59/1A of The Supreme Court Practice which came into effect on October 1, 1988). The rule sets out lists of specific types of orders which are to be treated as final and those that are interlocutory. But there are cases which are not specified in the lists, and so provision is made in Rule 59 1A(3) for such cases. The test is that laid down in ***White v. Brunton*** (supra) viz., that an order was not final unless it would have finally determined the whole case whichever way the application in the court below had been decided. It is interesting to note that Rule 59/1A/18 provides that:

> "Any order granting or refusing an application for a new trial, or for a re-hearing, or an application to set aside an earlier order (whether final or interlocutory) is interlocutory."

The English Rules of Practice, though not binding on this court, are persuasive and are usually followed in appropriate cases.

The jurisdiction of this court to hear and determine appeals is conferred by the Judicature (Appellate Jurisdiction) Act. The court cannot entertain an appeal, where leave is required, unless such leave has been obtained. Even if the respondents had not taken the preliminary objection, it seems clear to me that the court would be obliged to consider, on its own

motion, the question whether leave to appeal was necessary in this case. It goes to the jurisdiction of the court.

Applying the "application approach" to the instant case, it seems plain that the order of Smith, J. was interlocutory. This is so because the motion before him could not, for whichever side the decision was given, finally determine the matter in litigation. The decision, if given for the plaintiff, would finally dispose of the matter between the parties, but if given for the defendants, the action would proceed to trial. In such a case, where the application could result in either a final decision or a continuation of the action, in my judgment, the order of dismissal is interlocutory. It follows, therefore, that leave to appeal must first be obtained in accordance with the provisions of section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act, before notice of appeal can be validly filed. I held that there was merit in the preliminary objection. The appeal was not properly before the court for the reason that the order of Smith, J. is interlocutory and no appeal will lie without leave of a judge below or of this court. No such leave had been granted.

I agreed to the order that the appeal be struck out with costs to the respondents.

RATTRAY, P.:

I agreed for the reasons given by Patterson, J.A. that the appeal be struck out with costs to the respondents.

HARRISON, J.A. (Dissenting)

I regret that I must disagree with my brethren in this matter.

By a motion before this court the appellant Leymon Strachan appeals from the order of Smith, J. made on 15th May, 1997, dismissing a motion to set aside an order of Walker, J. The respondent Gleaner Company Limited has taken a preliminary point before us that this court has no jurisdiction to hear the motion because no application for leave to appeal was made to this court, in these proceedings which are interlocutory.

The facts to this issue are here stated: Suit No. C.L. 1992/S25 **Leymon Strachan vs. The Gleaner Co. Ltd. et al.** was on 16th May, 1995, heard by Bingham, J. (as he then was) and a jury, as to damages which were assessed, and final judgment was entered in the sum of $510,726.00, special damages and $22,500,000.00 general damages; an interlocutory judgment in default of defence had been previously entered. The respondent appealed.

On 20th September, 1996, on the application of the respondent, the said final judgment was set aside by Walker, J. and leave to defend granted on the ground that the respondent had a good defence to the action, based on certain fresh evidence which was available, tendered and considered by the said judge.

By a motion filed on 4th March, 1997, the appellant applied to set aside the order of Walker, J. on the ground that:

> "... a judge of the Supreme Court has no jurisdiction to set aside a Final Judgment where the parties have participated in the trial of the matter ... the order is therefore a nullity."

Smith, J. dismissed the latter motion on the ground that he had no jurisdiction to hear such a motion to set aside an order of a judge of a co-ordinate jurisdiction. Leave to appeal was refused. As a consequence the matter came on appeal to this Court.

Mr. Henriques for the respondent raised a point in limine that this court has no jurisdiction to hear this appeal because the order of Smith, J. was interlocutory and no prior application was made to this court for leave and accordingly the matter is not properly before this Court.

Mr. Witter for the appellant maintained that leave to appeal is unnecessary because the said order was a final order attracting an unfettered right of appeal.

Section 11(1) of the Judicature (Appellate Jurisdiction) Act ("the Act") reads, inter alia:

> "11.-(1) No appeal shall lie -
> (a) ...
> ...
>
> (f) without the leave of the Judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a Judge..."

It seems to me that if the order of Smith, J. therefore, qualifies as a final order, there is an appeal as of right to the Court of Appeal, notwithstanding that the appellant had applied for and was refused leave by the said judge.

There is no statutory definition of the distinction between a final or interlocutory judgment or order. The resolution of this uncertain and admittedly difficult question lies in the test provided by decided cases.

In **Salaman vs Warner** [1891] 1 QB 734, the Court of Appeal (per Lord Esher) propounded a test to determine whether an order was final or interlocutory. It held that a final order is one, which, looking at the application or proceedings, for whichever side the decision is given it will finally determine the matter in litigation.

In **White vs Brunton** [1984] 2 All ER 606, Sir John Donaldson, MR., reviewing the authorities, referred to **Bozson vs Altrincham UDC** [1903] 1KB 547 in which Lord Alverstone maintained that it was the nature of the order which "finally determines the matter in litigation" and which determined the issue of final or interlocutory, and quoted Lord Denning's treatment of the issue in **Salter Rex and Co. v. Ghosh** [1971] 2 All ER 865. Lord Denning said, at page 866:

> "Lord Alverstone CJ was right in the logic but Lord Esher MR was right in experience. Lord Esher MR's test has always been applied in practice. For instance, an appeal from a judgment under RSC Ord 14 (even apart from the new rule) has always been regarded as interlocutory and notice of appeal had to be lodged within 14 days. An appeal from an order striking out an action as being frivolous or vexatious, or as disclosing no reasonable cause of action, or dismissing it for want of prosecution -every such order is regarded as interlocutory: see **Hunt v Allied Bakeries Ltd** [1956] 3 All ER 513, [1956] 1 WLR 1326. So 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. It was held in an unreported case, **Anglo-Auto Finance (Commercial) Ltd v Robert Dick (14th December 1967) unreported**, and we should follow it today.
>
> 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."

Continuing, Sir John Donaldson, then observed at page 608:

> "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."

and continued:

> "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."

The plaintiff in **White v Brunton**, had appealed against an order of McCollough, J. on a preliminary issue finding that on the true construction of a contract the defence was not liable for construction and maintenance costs of an access road.

The Court of Appeal held that the said order was the first part of a final hearing and:

> "Accordingly ... the plaintiff does not need leave to appeal."

In **Steinway and Sons v Broadhurst-Clegg** (supra) the defendant /appellant had appealed to a judge against an order refusing an application to set aside a judgment in default of defence against her. She then applied to the Court of Appeal for leave to appeal out of time. The Court held that the said order was interlocutory, the appellant had not obtained leave and therefore her application was refused. Sir John Donaldson, Master of the Rolls, said at page 135:

> "The question whether an order was final or interlocutory was fraught with difficulty..."

He referred to Lord Denning's dictum in **Salter Rex & Co. v Ghosh** (supra), as to the test to be applied, and continuing said:

> "Although the present case appeared to be a new case, the order by analogy with **Ghosh** appeared to be interlocutory and his Lordship would so hold.
>
> Accordingly, the defendant needed leave to appeal and had failed to obtain it..."

In **Bozson's** case, the order concerned the determination of "all questions of liability and breach of contract being tried before and separately from any issue as to damages." In **White v Brunton** the issue as to the construction of the contract was tried as a preliminary issue. In both cases the order was the first part of the final hearing. They were issues on the merits that would have been determined if there had been a single undivided hearing. The right of appeal would then have been unfettered. The rights of the parties in

those aspects of the litigation would have been finally determined on those points.

In the instant case, the application before Walker, J. to set aside the judgment of Bingham, J. and the jury, was, on the application test, an interlocutory order (**Salter Rex vs Ghosh** (supra)).

The notice of motion dated 4th March, 1997 listed before Smith, J., was in these terms:

> "... this Honourable Court will be moved... on behalf of the ...plaintiff Leymon Strachan... for AN ORDER THAT;
>
> 1. That the order made by Mr. Justice Walker.. on 20. 9. 96...
>
> ...
>
> be set aside on the ground that a Judge of the Supreme Court has no jurisdiction to set aside a Final Judgment where the parties have participated in the trial of the matter and that the order is therefore a nullity." (emphasis added)

Smith, J., dismissed the motion on the ground that he had no jurisdiction to make such an order. He declined jurisdiction.

Whereas the order of Walker, J., setting aside the judgment of Bingham, J. sitting with a jury, was an interlocutory order, simpliciter, the proceedings before Smith, J. was an application to set aside an order itself setting aside a judgment - both cannot arguably be seen as similar proceedings in nature or substance.

The matter before this court was the Notice of Appeal dated 28th May, 1997, appealing from the order of dismissal of Smith, J. sought an order that the

order of Walker, J. made on 20th September, 1996, be set aside being a nullity and continued:

> 1. "AND TAKE FURTHER NOTICE that the grounds of Appeal are as follows:
>
> The Learned Mr. Justice Smith erred in law when he upheld the preliminary objection made by the Defendants/Respondents that he had no power and/or Jurisdiction to entertain and hear the Motion" (emphasis added)

It is instructive therefore to observe that:

> (a) the proceedings by motion before Smith, J.
>
> (b) the preliminary point taken before Smith, J. and
>
> (c) the preliminary point taken before the Court of Appeal

were all on the issue of the jurisdiction of the court to hear relevant proceedings. They were not "on the merits" and so capable of satisfying the standard test.

An application setting aside a default judgment is an interlocutory order. Such an application is usually based on issues of (a) irregularity of process, where the judgment challenged is set aside ex debito justitiae or (b) a judgment regularly entered but a good defence is sought to be argued or (c) "fresh evidence" on the merits, as before Walker, J.

A jurisdictional challenge therefore has to be approached not merely as if one was using the general test to determine a final or interlocutory order by

deciding "... for whichever side the decision is given it will, if it stands, finally determine the matter in litigation." (**Salaman v Warner,)** supra). Such a challenge may be taken in any proceedings and even though not taken in the court below (**Westminister Bank vs. Edwards** [1942] A.C. 529; [1942] 1 All ER 470, **Benson vs. North Ireland** R.I.B. [1942] 1 All E.R. 465, 469.) Therefore, it seems to be quite illogical to argue, and a clear procedural irregularity to require, that leave to appeal is required to argue a jurisdictional ground in the Court of Appeal.

A challenge to jurisdiction is fundamental to the determination of the power of the court to embark on any hearing between the parties. It addresses that issue squarely. The substance or merits of the rights of the parties in the substantive action is not directly involved in the determination of a jurisdictional point of this nature. Instead the question involved and to be determined is whether the court has authority prior to embracing the matter before it, and prior to any consideration of the merits.

It is my view that the application leading to an order determining jurisdiction is in the nature of a final order.

The difficulty and uncertainty in categorising an order as final or interlocutory impelled Lord Denning in the **Salter Rex** case, supra, to send the practitioner "... to look up the practice books to see what has been decided on." Patterson, J.A. has observed, in his judgment that Rule 59/1A of the Supreme Court Practice defines what orders are final or interlocutory in relation to appeals to the Court of Appeal in England. Such a classification may well

now be necessary for the purpose of this Court, as contemplated in section 11 (1) (f) (vi) of the Act:

> "11.-(1) No appeal shall lie -
>
> (a) ...
> (b) ...
>
> (f) without the leave of the Judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a Judge except -
>
> (i) ...
> (ii) ...
> ...
> (vi) in such other cases, to be prescribed,as are in the opinion of the authority having power to make rules of court of the nature of final decisions."

For the above reasons, I am of the view that the preliminary point argued before us is untenable, that the appellant did not need leave to appeal the order of Smith, J. on the point of jurisdiction, and was properly before this Court to argue his appeal. Accordingly, I would have heard his appeal.