Strathmore Group Limited *Petitioner*

v.

(1) A.M. Fraser
(2) C.Y. Todd and
(3) Durafort Investments Limited *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 30TH APRIL 1992, UPON A PETITION FOR SPECIAL LEAVE TO APPEAL, DELIVERED THE 18TH MAY 1992

Present at the hearing:-

LORD TEMPLEMAN
LORD MUSTILL
LORD SLYNN OF HADLEY

*[Delivered by **Lord Templeman**]*

At the conclusion of the hearing of this petition for special leave to appeal their Lordships announced that they would humbly advise Her Majesty that the petitioner ought to be granted special leave to appeal and that they would give their reasons later. This they now do.

The question raised by the petition is whether an order made by the Court of Appeal of New Zealand on 4th October 1991 dismissing the petitioner's action was a final order which entitled the petitioner to appeal as of right to Her Majesty in Council or whether the order was an interlocutory order against which there was no appeal save with the leave of the Court of Appeal or the grant of special leave by the Judicial Committee of the Privy Council.

By rule 2 of the New Zealand (Appeals to the Privy Council) Order 1910, as amended, an appeal shall lie to Her Majesty in Council:-

"(a) as of right, from any final Judgment of the Court of Appeal where the matter in dispute on the Appeal amounts to or is of the value of five thousand New Zealand dollars or upwards, or where the Appeal involves, directly or

indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of five thousand New Zealand dollars or upwards; and

(b) at the discretion of the Court of Appeal from any other Judgment of that Court, whether final or interlocutory, if, in the opinion of that Court, the question involved in the Appeal is one which by reason of its great general or public importance, or otherwise, ought to be submitted to His Majesty in Council for decision; ..."

The power of the Board to grant special leave to appeal is expressly preserved by rule 28 which provided that:-

"Nothing in these Rules contained shall be deemed to interfere with the right of His Majesty, upon the humble Petition of any person aggrieved by any Judgment of the Court, to admit his Appeal therefrom upon such conditions as His Majesty in Council shall think fit to impose."

By the Judicial Committee (General Appellate Jurisdiction) Rules regulating the practice on appeal to the Judicial Committee, an appeal from the Court of Appeal of New Zealand can be entertained only if leave to appeal has been granted by that court or if special leave has been granted by Her Majesty in Council. In the present case the Court of Appeal on 4th November 1991 refused leave to the present petitioner, Strathmore Group Limited ("Strathmore"), to appeal from the judgment of the Court of Appeal dated 4th October 1991. If the judgment dated 4th October 1991 was "a final judgment" then the Court of Appeal had no discretion to refuse leave to appeal. In these circumstances Strathmore, claiming that the Court of Appeal had no discretion to refuse leave, petitioned Her Majesty in Council for special leave to appeal.

In 1986 and 1987 there were various commercial transactions between Strathmore and its associates including a company called Omnicorp on the one hand and the respondents and their associates on the other hand. These transactions led in 1988 to disputes, to legal proceedings and to threats of further litigation. One dispute concerned the acquisition by Strathmore from the respondents of the shares of a company called Clearwater Partners Ltd. ("Clearwater"); at the time of the acquisition the first two respondents were directors of Strathmore. According to the respondents all the disputes were resolved by an oral agreement which was concluded on 6th May 1988 whereby the first two respondents agreed to pay $100,000 to Strathmore and $50,000 to Omnicorp and it was agreed by all parties that the legal proceedings and threatened litigation with regard to all matters in dispute would be abandoned.

Nevertheless on 20th December 1988 Strathmore instituted these present proceedings against the respondents claiming damages and alleging breach of fiduciary duty in selling to Strathmore at an undervalue the shares in Clearwater. The respondents defended the proceedings denying all the allegations made against them by Strathmore. In addition the respondents pleaded that Strathmore was not entitled to pursue these allegations because of the compromise made on 6th May 1988 whereby it was agreed that "all litigation between Omnicorp, Strathmore, Fraser and Todd (including the present proceedings) would be discontinued". Strathmore pleaded in reply that no binding compromise had been reached and asserted, in the alternative that the compromise agreement had been cancelled by the failure on the part of the respondents to pay the sums due to be paid thereunder. So on the pleadings there were three separate issues, first the compromise issue namely whether Strathmore had agreed to abandon its claims in respect of the Clearwater transaction, secondly the cancellation issue, namely whether any compromise had been cancelled by breach on the part of the respondents, and thirdly the misconduct issue, namely whether Strathmore was entitled to damages in respect of the Clearwater transaction.

On 27th April 1990 Wylie J. directed that the compromise issue be tried as a preliminary issue. On the hearing of the preliminary issue before Robertson J. evidence was called and arguments advanced dealing not only with the compromise issue but also with the cancellation issue. Robertson J. decided the preliminary issue in favour of Strathmore holding that no binding compromise had been reached; he did not therefore decide whether there had been any cancellation of compromise. The respondents appealed and on 4th October 1991 the Court of Appeal (Richardson, Hardie Boys and Gault JJ.) reversing Robertson J., held that a binding compromise had been concluded. Gault J. delivering the judgment of the Court also dealt expressly with the cancellation issue which had been argued in the course of the appeal. He said:-

> "It cannot be said that the contract was cancelled by Strathmore when payment was not made by Fraser and Todd on 23rd May 1988. At that time Strathmore was asserting that there was no contract and purported to withdraw an offer which had been made on terms different from those that had been agreed.
>
> We are satisfied the agreement is enforceable. ..."

The Court, in the words of Gault J., held that:-

> "Determination in favour of Fraser and Todd of their defence of settlement entitles them to judgment on Strathmore's claims ... The appeal is allowed. There will be judgment for all three appellants."

Both the compromise issue and the cancellation issue were therefore finally decided by the Court of Appeal. Both issues could of course be raised before the Board on the hearing of any appeal from the judgment of the Court of Appeal dated 4th October 1991. But on 4th November 1991, the Court of Appeal (Sir Robin Cooke P. and Richardson and Hardie Boys JJ.) held that Strathmore was not entitled to appeal as of right against the judgment of the Court of Appeal dated 4th October 1991 because that judgment was an interlocutory and not a final judgment and refused leave to Strathmore to appeal to the Board. Strathmore now petition for special leave to appeal on the ground that the Court of Appeal were in error on 4th November 1991 when they decided that Strathmore was not entitled to appeal as of right.

If no preliminary issue had been ordered, the trial judge would have tried the whole action and decided the compromise issue, the cancellation issue and the misconduct issue. If the judge awarded damages to Strathmore on the grounds that there was no compromise or that the compromise had been cancelled and on the grounds that the respondents had been guilty of misconduct in the Clearwater transaction, then the respondents could have appealed to the Court of Appeal and either party, losing before the Court of Appeal, could have appealed to the Privy Council as of right and on that appeal all three issues, the compromise issue, the cancellation issue and the misconduct issue could have been argued. If the trial judge dismissed Strathmore's action either on the compromise issue or on the misconduct issue, then Strathmore could have appealed to the Court of Appeal and either party, losing before the Court of Appeal, could have appealed to the Privy Council as of right and on that appeal all three issues, the compromise issue, the cancellation issue and the misconduct issue could have been argued. The judgment of the Court of Appeal would have been final if the action by Strathmore were dismissed and final if Strathmore were awarded damages. All three issues, the compromise issue, the cancellation issue and the misconduct issue would be in play on the hearing of any appeal to the Privy Council.

If the judgment of the Court of Appeal on 4th October 1991, finally deciding the compromise issue and the cancellation issue, was not a final judgment for the purposes of rule 2 of the Order of 1910, then Strathmore have been deprived of an appeal to the Privy Council as of right, an unintended consequence of the decision by Wylie J. that, in the interest of justice and for the possible saving of time and expense, the compromise issue should be tried as a preliminary issue. It is admitted that the object of the preliminary issue was to save time and money; the compromise issue and the cancellation issue required to

be decided in any event and if first decided and in favour of the respondents would render unnecessary any further expenditure of time and money. As Mr. Sher on behalf of Strathmore pithily observed "the purpose of the order by Wylie J. directing the preliminary issue was to save costs, not to deprive either party of an opportunity of appeal as of right".

It seems to their Lordships that Strathmore cannot be deprived of a right of appeal solely because the trial was divided into two parts, the first part dealing with the compromise issue and the cancellation issue and the second part, so far as necessary, dealing with the misconduct issue. In *White v. Brunton* [1984] Q.B. 570 an order deciding a preliminary issue of documentary construction was held to be a final order for the purposes of an appeal under the Supreme Court Act 1981 which does not allow an appeal to the Court of Appeal in England without leave from an interlocutory order. Sir John Donaldson M.R. said at page 573:-

> "It is plainly in the interests of the more efficient administration of justice that there should be split trials in appropriate cases, as even where the decision on the first part of a split trial is such that there will have to be a second part, it may be desirable that the decision shall be appealed before incurring the possibly unnecessary expense of the second part. 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 upon 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."

Their Lordships gratefully adopt the reasoning of the Master of the Rolls which applies equally to the Order of 1910 now under consideration.

A trial in two parts involves the danger of two appeals to the Court of Appeal and two appeals to the Privy Council. On the other hand the second part of the trial may be rendered wholly unnecessary by the decision on the first part. The litigants must take these factors into account when considering whether to apply for or consent to the division of the trial into two parts. The judge must decide whether, taking into account the issues involved and the nature of the evidence required for each issue, the disputes between the litigants can best be resolved by a single trial or by a trial in two parts. If the judge orders a trial in two parts there is an irremediable danger of two appeals to the Court of Appeal and justice requires that an appeal

to the Privy Council should not be denied on the first part but perforce accepted on the second part. In the present case, if the Court of Appeal had upheld the decision of Robertson J. on the first part, it would have been unfair to deny the respondents a right of appeal to the Privy Council on the compromise issue or the cancellation issue while accepting Strathmore could appeal to the Privy Council as of right if Strathmore failed on the misconduct issue. It is equally unfair to deny Strathmore a right of appeal against the decision of the Court of Appeal which reversed Robertson J. on the compromise and cancellation issue and therefore finally dismissed the claim by Strathmore for sums vastly in excess of NZ$5,000.

When the Court of Appeal held that Strathmore was not entitled to appeal as of right, the court was unfortunately and inadvertently and erroneously informed that the cancellation issue had not been finally determined by the judgment of the Court of Appeal delivered on 4th October 1991. Sir Robin Cooke P. delivering the judgment of the Court of Appeal on 4th November 1991 said:-

> "... while this Court held that there was a settlement, there remains to be determined, if the plaintiffs persist with it, the claim or allegation by them that the settlement has been cancelled for breach. Counsel in support of the application this morning has not been able to say that that claim or allegation has been abandoned. Evidently it remains alive. Whether or not it has any prospect of success this Court is in no position to determine, but while it remains alive we do not consider that the judgment of this Court can be described as final within the meaning of Rule 2(a)."

Counsel then appearing for Strathmore does not seem to have appreciated that the cancellation issue had been heard in the course of the trial of the preliminary issue and finally decided by the Court of Appeal on 4th October 1991. Counsel for Strathmore and counsel for the respondents instructed in connection with the present petition submitted to the Court of Appeal and to the Board a Consent Memorandum dated 28th April 1992 which makes this position clear. If the President had been aware of the true position he could not have denied to Strathmore an appeal to the Board as of right on the ground that the cancellation issue remained alive. The result of the application to the Court of Appeal on 4th November 1991 might have been different if the true position had been known to that court. However that may be, the President also relied on an analogy which their Lordships are unable to accept. The President said that:-

> "... in this notoriously difficult area it is customary to look for analogies. One fairly obvious analogy is the type of case considered by this Court in *Re Chase (No. 2)* [1989] 1 N.Z.L.R. 345 where, following

> in particular the decision of the Privy Council in *Tampion v. Anderson* (1973) 3 A.L.R. 414, the view was taken that an order dismissing an action on the ground that there was no reasonable cause of action was an interlocutory judgment and that therefore no appeal lay as of right. An order or judgment determining that proceedings are at an end because of what is held to be a settlement is reasonably analogous and, adopting the pragmatic approach referred to for instance by Lord Denning M.R. in *Salter Rex & Co. v. Ghosh* [1971] 2 Q.B. 597, 601, we conclude that that in itself is a sufficient ground for holding that an appeal does not lie as of right in this case."

There are cases, including the authorities to which the President referred, in which an order apparently final has been treated as interlocutory so as to deprive a litigant of a right of appeal or so as to restrict such right. In *Hunt v. Allied Bakeries Limited* [1956] 1 W.L.R. 1326 Lord Evershed M.R. said at page 1328:-

> "... I am left in no doubt at all that, rightly or wrongly, orders dismissing actions - either because they are frivolous and vexatious, or on the ground of disclosure of no reasonable cause of action- have for a very long time been treated as interlocutory."

The cases to which the President referred are to the like effect. But their Lordships do not accept that any analogy can be drawn between those cases and the instant case. In each of the cited authorities the court had come to the conclusion that there was no issue proper to be determined. To allow a litigant to appeal would only encourage an unnecessary expenditure of time and money. If there was nothing to determine, there was nothing to appeal. In the instant case the decision of the Court of Appeal finally disposed of separate issues which had been pleaded, entertained, supported with evidence, argued and considered. There is every reason why such a decision should be included in the classification of decisions which are appealable as of right. It is of course open to the Government and Parliament of New Zealand at any time to abolish or restrict the classification of decisions which are appealable as of right. That is not a matter upon which the Board is competent or authorised to comment. But there can be no logic in depriving a litigant of a right of appeal where the final hearing is divided into parts by analogy with the decisions whereby a frivolous or vexatious litigant is deprived of a right to any hearing.

Although Strathmore was, for the reasons indicated, entitled to appeal as of right, the present petition by Strathmore is of necessity a petition for the grant of special leave to appeal and the grant of such leave remains discretionary; see *Lopes v. Valliappa Chettiar*

[1968] A.C. 887. In his careful, helpful, written and oral submissions Mr. Baragwanath, who appeared for the respondents before the Board, accepted that special leave to appeal would as a general rule be granted by the Board in the exercise of its discretion to a petitioner who had been erroneously refused leave to appeal as of right save in exceptional circumstances, for example, where the judgment of the courts below and the record available led the Board to conclude that the petitioner's chances of success or the amount involved did not justify the imposition on the respondents of the delay and expense which an appeal necessarily entails. Mr. Baragwanath made detailed submissions to the effect that an appeal to the Board in the instant case was unlikely to succeed. Their Lordships are not persuaded that this is a case in which Strathmore should be deprived of its right to argue that the trial judge was correct and that the Court of Appeal was wrong.