NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 58/98

MOTIONS

BEFORE: **THE HON. MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE SMITH, J.A.(Ag.)

BETWEEN: **DALTON YAP** **APPLICANT**

A N D: **RBTT BANK OF JAMAICA LIMITED** **RESPONDENT**

(FORMERLY UNION BANK OF JAMAICA LIMITED)

Hilary Phillips, Q.C. and Christopher Dunkley instructed by Cowan Dunkley and Cowan for the applicant

Dennis Goffe, Q.C., and Hilary Reid instructed by Myers Fletcher and Gordon for the respondent

October 10, 2001 and January 31, 2002

DOWNER, J.A.

On October 10, 2001 there were two motions before this Court. Mr. Goffe, QC., for the Bank raised a preliminary point which stated that this Court had no competence to hear the listed appeal by Yap. Ms. Phillips QC., for Yap, sought to enlarge time, and also sought leave to appeal, to confirm the status of the listed appeal. At the conclusion of the hearing the following order was made.

(1) Preliminary objection dismissed

(2) Leave to enlarge time granted

(3) Leave to appeal granted

(4) Registrar directed to treat 'Notice and grounds of Appeal' filed on 8th June 1998 as filed 10th October, 2001

(5) Costs of the day to be taxed or agreed are to go to the Bank

(6) Reasons to be put in writing

The submissions and the order of this Court assumed we were dealing with an interlocutory appeal. The issue was never raised as to whether we were dealing with a final order on appeal.

Why all concerned assumed the proceeding before Karl Harrison J was interlocutory for the purpose of an appeal

The applicant Yap invoked the jurisdiction of the Supreme Court to enforce the undertaking for damages pursuant to a summons of which the material part reads:

> "1. There be an inquiry whether the Plaintiff has sustained damages by reason of the Mareva Injunction dated October 8, 1993 which the Defendant ought to pay according to their undertaking as to damages contained in the said order."

It is pertinent to refer to the relevant order of the Supreme Court. It reads at page 50 of the Supplementary Record:

> "In Chambers
> Before the Honourable Mr. Justice Harrison
> February 23rd, & 27th April 1998
>
> **UPON THE SUMMONS TO PROCEED TO INQUIRY AND ASSESSMENT OF DAMAGES** coming on this day and upon hearing Mr. Christopher H. Dunkley, Attorney-at-Law instructed by Messrs, Wright Dunkley & Co, Attorneys-at-Law for and on behalf of the Defendant and Mr. Patrick McDonald, Attorney-at-Law instructed by Myers, Fletcher & Gordon, Attorneys-at-Law for the Plaintiff IT IS HEREBY ORDERED THAT:-
>
> 1. The Summons be dismissed with costs to the Plaintiff to be taxed if not agreed.

2. Application for leave to appeal refused." (Emphasis supplied)

It will be demonstrated that the learned Judge below and the Registrar who is presumed to have acted on his instructions, had no jurisdiction to incorporate paragraph 2 in the order as it was final and no leave to appeal was required. To preclude a prolonged debate in the Court below an order which reads "Leave to appeal granted if necessary" is an appropriate judicial stance, and Lord Merriman P. adverted to it in **The Pacific Concord** [1961] 1 All E.R. 106 at 115. For ease of reference it should be noted that the appeal from the above order of Harrison J. was disposed of when the reasons for judgment and the directions for conducting the assessment were delivered on November 22, 2001. Moreover, this decision to direct an enquiry and give directions thereto entailed a decision to enforce the undertaking. See paragraph 25 of **Mayor & Burgesses of London Borough of Southwark v. Neil Antony Storrie** [1996] Court of Appeal Transcript of 3rd December 1996. Also worthy of note is that in the Council's points of defence in paragraph 8 of this judgment is a denial of liability stated thus:

> "The Plaintiffs deny that this is a case where the Plaintiffs will be liable for the payment of any damages whether general ... exemplary or aggravated damages."

Exemplary or aggravated damages will always be a live issue in equity in circumstances where an undertaking is in issue as so much depends on conduct. See **Smith v Day** (1882) 21 Ch.D 421 per Esher, L.J. 427-428. The pertinent evidence in the context of the motions is the affidavit of Mr. Christopher Dunkley, the junior counsel. Here are the relevant paragraphs of his affidavit:

> "2. That this matter commenced in 1993 with the Plaintiff's obtaining a Mareva Injunction against the Defendant. Thereafter there have been several

Interlocutory Applications, a substantive trial and five (5) other Appeals, to include that to Her Majesty in Council

3. That in preparation of this Appeal I was guided by the Judgment of his Lordship Mr. Justice Harrison given on April 27th 1998 which did not reflect any application or refusal by His Lordships of Leave to Appeal.

4. That the order of Mr. Justice Harrison as filed on the 17th day of November 2000 did not contain the refusal of Leave to Appeal. The amendment was inserted by the Registrar thereafter and prior to our collection of the Perfected Order." (Emphasis supplied)

The trial on the merits of the case was before Panton J. (as he then was).

Mr. Christopher Dunkley continued thus:

"5. That this matter proceeded to settling of the Record, the fixing of a date and consented inclusion of further documents between the parties in preparation for the hearing of the Appeal before this Honourable Court of Appeal

6. That owing to the multiplicity of applications and hearings between the parties to this Appeal, the application for Leave to Appeal was inadvertently over-looked and was not in fact sought nor applied for prior to its absence being brought to this Counsel's attention on Monday October 8th, 2001.

7. That this omission appears to have been over-looked by all the parties concerned being the Appellant's and the Respondent's Attorneys-at-Law and the Registry of this Honourable Court of Appeal

8. That in all the circumstances, the parties to this Appeal being ready and prepared to proceed with this Appeal and there being no prejudice to the Respondent by virtue of this application, I humbly pray that this Honourable Court of Appeal will grant its Orders to enlarge time and Leave to Appeal to the Appellant." (Emphasis supplied)

It is now appropriate to refer to the two motions which were heard together before this Court on 10th October, 2001. That for the Bank reads as follows:

> "**TAKE NOTICE** that the Respondent herein named intends, at the hearing of this appeal, to rely upon the following preliminary objection, notice whereof is hereby given to you viz:-
>
> That there is no appeal properly before the Court of Appeal
>
> **AND TAKE NOTICE** that the ground of the said objection is as follows:
>
> That leave to appeal was required and was not obtained, hence the Notice of Appeal herein is void, valueless and of no effect, and incapable of being saved, and should be struck out with costs to the Respondent."

On the other hand the Amended Notice of Motion at page 1 of the Record for the applicant Yap reads:

> "**TAKE NOTICE** that the Court of Appeal will be moved on Wed. the 10th day of Oct, 2001 or as soon thereafter as Counsel may be heard for the hearing of an application on the part of the Defendant/Appellant for an Order that:
>
> 1. The time within which to seek Leave to Appeal be enlarged to the date hereof;
>
> 2. Leave to appeal be granted;
>
> 3. Leave to lodge Notice and Grounds of Appeal out of time;
>
> **AND FURTHER TAKE NOTICE** that at the hearing of this Application the Defendant/Appellant will rely on the Affidavit of CHRISTOPHER DUNKLEY."

Why this Court had no jurisdiction to hear and determine the above motions

The clue to understanding why there was a lack of jurisdiction may be observed by referring once again to the summons to enforce the undertaking before Karl Harrison J. in the Court below. It reads in part:

> "1. There be an inquiry whether the Plaintiff has sustained damages by reason of the Mareva Injunction dated October 8, 1993 which the Defendant ought to pay according to their undertaking as to damages contained in the said order."

Karl Harrison J, as a matter of law in exercising his discretion decided that there was to be no assessment in favour of Yap. The issue between the parties namely the enforcement of the undertaking for damages was at that time finally determined. Consequently, it was a final order and the redress available was to appeal. The appeal was therefore governed by sec. 10 of the Judicature (Appellate Jurisdiction) Act, which reads:

> "10. Subject to the provisions of this Act and to rules of court, the Court shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court in all civil proceedings, and for all purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court shall subject as aforesaid have all the power, authority and jurisdiction of the former Supreme Court prior to the commencement of the Federal Supreme Court Regulations, 1958."

On the other hand section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act governs interlocutory appeals. It reads:

> "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-
>
> (i)..."

The most recent authority on the issue of whether an order is interlocutory or final in relation to an appeal is **White v Brunton** [1984] 2 All ER 606. The dispute as to whether the "order approach" for the purpose of appeal or the 'application approach' was the better test was resolved in favour of the latter. Even so, as will be seen from the sage words of Lord Denning, the best guide is to look at the decisions of the Court. Also it will be seen from the prudent words of Sir John Donaldson MR. that in relation to appeals the "order approach" is not entirely discarded as it has been revived in cases of split hearing. So in this case it is a safe guide to examine firstly the "order" and the "application approach" and then, secondly, to examine the decisions of the Court in instances of the enforcement of the undertakings as to damages pursuant to a Mareva injunction. Then there must be an examination of **White v Brunton** which demonstrates the history of the matter and a third approach which demonstrates the position when there is a split hearing.

The "order approach" and the "application approach"

Sir John Donaldson MR in describing the 'order approach' said at page 607 of **White v. Brunton:**

> "In **Shubrook v Tufnell** (1882) 9 QBD 621, [1881-8] All ER Rep 180 Jessel MR and Lindley LJ held, in effect, that an order is final if it finally determines the matter in litigation. Thus the issue of final or interlocutory depended on the nature and effect of the order as made. I refer to this as the 'order approach'." (Emphasis supplied)

So natural is this initial definition that we find Lord Merriman saying during the course of argument, in **The Pacific Concord** at page 115:

> "I thought it was impossible to say that a final judgment for a specific sum was an interlocutory matter."

That this is also applicable to Jamaica, see section 366 of the Judicature (Civil Procedure) Code Law.

So useful is the definition of a final order in relation to appeals by Jessel MR. and Lindley LJ, that it is instructive to note that the issue of whether an order is final or interlocutory also arises in relation to affidavit evidence in interlocutory proceedings. Here is how that issue was treated by Cotton LJ. in **Gilbert v Endean** (1878) 9 CH D 259 at 268. It was cited with approval by Hodson L.J. in **Rossage v. Rossage** [1960] 1 WLR 249 at 251:

> "... for the purpose of this rule those applications only are considered interlocutory which do not decide the rights of parties, but are made for the purpose of keeping things in statu quo till the rights can be decided, or for the purpose of obtaining some directions of the court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the court ultimately to decide upon the rights of the parties. Now many of the cases which are brought before the court on motions and on petitions, and which are therefore interlocutory in form, are not interlocutory within the meaning of that rule as regards evidence. They are to decide the rights of the parties, and whatever the form may be in which such questions are brought before the court, in my opinion the evidence must be regulated by the ordinary rules, and must be such as would be admissible at the hearing of the cause."

The issue of final or interlocutory in relation to affidavit evidence was treated in detail by Purchas and Nicholls LJJ. in **Savings Bank v Gasco No.2.** 1988 Ch. 422. It will be referred to hereafter when considering the written submissions of Mr. Goffe, Q.C.

The essence of the "order approach" in relation to appeals is that when the order decides the rights between the parties as in the assessment of damages it is

final for the purpose of appeal. On this initial approach the order of Karl Harrison J. was a final one. The effect of his order is that the assessment of damages pursuant to the undertaking was concluded against Yap. Yap's only recourse was to appeal.

The definition adumbrated in **Shubrook v Tufnel** is the logical definition of an interlocutory order. Since the Judicature Act of 1875 there has been a Court of Appeal in England, and somewhat later, there was one in this jurisdiction, with different regimes for interlocutory and final appeals. Therefore the logical definition of interlocutory appeals required flexibility. This broader definition emerged nine years later and gave rise to the "application approach". During that nine years period there was much litigation on the issue, and the Court of Appeal sought to give authoritative guidance on the issue.

In continuing his judgment the learned Master of the Rolls in **White v Brunton** treated the matter thus:

> "In **Salaman v Warner** [1891] 1 QB 734, in which **Shubrook's** case does not appear to have been cited, a Court of Appeal consisting of Lord Esher MR, Fry and Lopes LJJ held that a final order is one made on such an application or proceeding that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation. Thus the issue of final or interlocutory depended on the nature of the application or proceedings giving rise to the order and not on the order itself. I refer to this as the 'application approach'." (Emphasis supplied)

It is important to refer to this case directly since it has had a powerful influence on the distinction between final and interlocutory judgments. Here is how Lord Esher M.R. states the distinction in **Salaman v Warner** at p. 735:

> "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, if given in 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."

Fry, L.J. states the relevant rule thus at 736:

> "We must have regard to the object of the distinction drawn in the rules between interlocutory and final orders as to the time for appealing. The intention appears to be to give a longer time for appealing against decisions which in any event are final, a shorter time in the case of decisions where the litigation may proceed further. 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."

Then Lopes, L.J. said on the same page:

> "I think the definition suggested by the Master of the Rolls in the case that has been referred to is the right definition for this purpose. I think that a judgment or order would be final within the meaning of the rules, which, whichever way it went, it would finally determine the rights of the parties."

It must be stressed that in defining the "application approach" their Lordships were aware of the tension in the concept of interlocutory proceedings as explained by Cotton LJ. in **Gilbert v Endean** (supra), and were careful to emphasise that the "application approach" was related to appeals to the Court of Appeal, which was introduced by the 1875 legislation.

This broader definition is currently favoured and would include the final order made by Karl Harrison J. which is under appeal. In continuing his exposition in **White v Brunton** the learned Master of the Rolls Sir John Donaldson said:

> "The next occasion on which the problem was looked at on broad lines of principle was in **Salter Rex & Co v Ghosh** [1971] 2 All ER 865, [1971] 2 QB 597, where Lord Denning MR, with the agreement of Edmund Davies and

> Stamp LJJ, considered and contrasted the judgment of Lord Alverstone CJ in **Bozson's** case with that of Lord Esher MR in **Salaman v Warner.** Lord Denning MR said ([1971] 2 All ER 865 at 866, [1971] 2 QB 597 at 601):
>
> > 'Lord Alverstone CJ was right in logic but Lord Esher MR was right in experience. Lord Esher MR's test has always been applied in practice . . . 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 . . . 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'."

In England once the Court of Appeal has decided this issue it is final and there is no provision for a further appeal. See section 68(2) of the United Kingdom (1925) Judicature (Consolidation) Act.

To reiterate, by applying the "application approach" to the facts of the instant case, once Karl Harrison J. exercised his discretion to refuse to enforce the undertaking and order an enquiry and assessment of damages that was a final order. It would equally be a final order if he had enforced the undertaking and ordered an assessment and had given directions as to how to proceed with the assessment. It is the flexibility of the definition which has made this the favoured approach. The learned judge could have conducted the assessment himself or it could have been done by another judge. Be it noted that in either event there would have been one hearing with one final order.

Lord Denning's approach

It will be recalled that in **Salter Rex and Co. v. Ghosh,** Lord Denning said that the process of determining whether an order is interlocutory or final is so uncertain that a sound approach was to consult the decided cases. If resort be had to this method, then the case of **The Mayor and Burgesses of the London Borough of Southwark v Storrie** (supra) might prove useful. Paragraph 9 of the judgment gives the correct statement that when the Court gives the order for enquiry for damages it is a final order. It reads:

> "9. There was no application for leave to adduce further evidence under Ord 59 r. 10(2) before Millett LJ or before this Court on the opening of the appeal. The Court decided that it would attend to the evidence and decide later, and in the course of judgment, whether it was right for it to be admitted. In my judgment, the hearing of an application for enforcement of an undertaking on discharge of an interlocutory injunction is the hearing of the matter on the merits and, accordingly, the principles stated in **Ladd v Marshall** apply." (Emphasis supplied)

This case is cited at page 72 in **Mareva injunctions and Anton Piller Relief** 4th edition by Steven Gee Q.C. Since the application to enforce the undertaking, if successful, settles the liability of the plaintiff to pay damages it seems it is a final order for the purpose of appeal. This is what the above case suggests in the context of an interlocutory injunction. Here are the words of Sir Ralph Gibson delivering the judgment of the Court at paragraph 20 of the computer aided transcript:

> "An application for the enforcement of the undertaking is not in my judgment an interlocutory proceeding for this purpose because it determines the rights of the parties." **Rossage v Rossage** [1960] 1 WLR 249.

The above words were adapted from the judgment of Hodson LJ. in the case cited at page 251. It should again be pointed out however that the interlocutory as

against final judgment in **Rossage v Rossage** was adverted to in the context of interlocutory proceedings which determined rights of the parties. In contrast interlocutory proceedings are for the purpose of keeping things in statu quo until rights can be decided. Bear in mind that the order of Moreland J, on appeal from the **Mayor and Burgesses** reads:

> "There be an enquiry as to the damage sustained by Mr. Storrie by reason of the said order, such enquiry to be held by the Master."

This is the context in which paragraph 9 (supra) in the above case is to be understood.

The other example is Lord Merriman's emphatic statement that the assessment of damages is a final order in the **Pacific Concord** (supra).

The position where there is a split hearing

The learned Master of the Rolls gave valuable guidance on this issue. It could be argued that Karl Harrison J in his discretion could have ordered an enquiry on a preliminary point of law as to whether on the basis of the judgment of Panton J., it was obligatory to enforce the undertaking. Thereafter, if necessary he could order an assessment in this case. This is why this aspect of the matter warrants some attention. Then, according to the Master of the Rolls, the orders which would have resulted if there had been such a split hearing would have been final orders. Be it noted that the judgment of Panton J. (as he was then), delivered 22nd September, 1977 see Suit No. 1993 (J320), had concluded the matter on the substantive issues by deciding one issue in favour of the Bank. It is because there was a finding of facts by virtue of the judgment, coupled with the discharge of the Mareva injunction, that it was possible to have ordered a split hearing in this case.

This is what the learned Master of the Rolls said at page 608 on a split hearing:

> "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. However, the decision in **Bozson's** case, as distinct from the reasoning, can be upheld on a different ground as an exception to the general rule. It was a case of a 'split trial', all questions of liability and breach of contract being tried before and separately from any issue as to damages. If the two parts of the final hearing of the case had been tried together, there would have been an unfettered right of appeal, even if the judgment had been that there was no liability and that accordingly no question arose as to damages. 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 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." (Emphasis supplied)

So if there had been a split hearing ordered in this case, both orders would have been final orders for the purposes of appeal. In **White v Brunton** there was a split hearing so the above passage contains the ratio of the case. The ratio is that when there is a split hearing, there is a departure from the general rule and the logical definition of an interlocutory order defined in **Shurbrook's** case comes into play. The "order approach", the initial approach, has been revived in relation to split hearings. For a previous analysis of this aspect of **White v Brunton** see **Olasemo v Barnett Ltd.** (1995) 51 W.I.R. 191 at 197.

The jurisdictional point

In the instant case, by resort to the "application approach'" there was no need for any motion for Leave to Appeal. We were in the realm of a final order. This Court has no jurisdiction or power to treat a final order as if it were an interlocutory one. Accordingly, this Court is empowered by the exercise of its inherent jurisdiction to take the jurisdictional point on its own motion with respect to the two motions that were before it. See **Norwich Corporation v Norwich Electric Tramways Co. Ltd.** [1906] 2 K.B 129 approved in **Westminister Bank Ltd. v. Edwards** [1942] A.C. 529. To this end, the Registrar of this Court wrote twice to counsel forwarding relevant authorities and inviting written submissions and if necessary arguments in Court on the issue of whether the order of Karl Harrison J. was final or interlocutory for the purpose of appeal.

Perhaps, a diversion is appropriate here to show that as this is a Court of rehearing, it is not only in instances of jurisdiction that this Court is entitled to raise matters on its own motion. Here is how this issue was treated in **Cassel v Broome** [1972] 1 All ER 801 by Lord Hailsham and Lord Diplock. At page 822 Lord Hailsham said:

> "In passing, I may say that I do not attach so much importance as did the Court of Appeal [1971] 2 All ER 187, [1971] 2 WLR 853 to the circumstances that the two categories mentioned by Lord Devlin had never been discussed in argument by counsel. The cases and textbooks on exemplary damages had been exhaustively read, and when this House undertakes a careful review of the law it is not to be described as acting per incuriam or ultra vires if it identifies and expounds principles not previously apparent to the counsel who addressed it or to the judges and textbook writers whose divergent or confusing expressions led to the necessity for the investigation."

Then Lord Diplock said at page 871:

> "It has not been contended that those parts of Lord Devlin's speech which expounded the rationale of the award and the assessment of exemplary damages in those cases in which they could be recovered did not serve a useful purpose which lay well within the functions of this House in its judicial capacity. It brought some order out of chaos, some light and reason into what was previously a dark and emotive branch of the common law. What has been criticised is the decision of legal policy to restrict the categories of cases in which exemplary damages may be awarded."

Lord Diplock continues thus on the same page:

> "If the common law stood still while mankind moved on, your Lordships might still be awarding bot and wer to litigants whose kinsmen thought the feud to be outmoded – though you could not have done so to the plaintiff in the instant appeal, because defamation would never have become a cause of action. The common law would not have survived in any of those countries which adopted it, if it did not reflect the changing norms of the particular society of which it is the basic legal system. It has survived because the common law subsumes a power in judges to adapt its rules to the changing needs of contemporary society – to discard those which have outlived their usefulness, to develop new rules to meet new situations. As the supreme appellate tribunal of England, your Lordships have the duty, when occasion offers, to supervise the exercise of this power by English courts. Other supreme appellate tribunals exercise a similar function in other countries which have inherited the English common law at various times in the past. Despite the unifying effect of that inheritance on the concept of man's legal duty to his neighbour, it does not follow that the development of the social norms in each of the inheritor countries has been identical or will become so. I do not think that your Lordships should be deflected from your function of developing the common law of England and discarding judge-made rules which have outlived their purpose and are contrary to contemporary concepts of penal justice in England, by the consideration that other courts in other countries do not yet regard an identical development as appropriate to the particular society in which they perform a corresponding function. The fact that the courts of Australia, of New Zealand and of several

> of the common law provinces of Canada have failed to adopt the same policy decision on exemplary damages as this House did for England in **Rookes v Barnard** [1964] 1 All ER 367, [1964] AC 1129 affords a cogent reason for re-examining it; but not for rejecting it if, as I think to be the case, re-examination confirms that the decision was a step in the right direction- although it may not have gone as far as could be justified." [Emphasis supplied]

After submissions from leading counsel we have concluded that there was no jurisdiction to hear and determine the motion and make that order at the end of the initial hearing, as the appeal was from a final order which did not require leave to appeal. The Registrar of this Court had correctly listed the appeal as an appeal from a final order.

In so doing we have given careful attention to submissions and cases cited by Mr. Goffe Q.C. **Orwell Steel v. Asphalt and Tarmac** [1985] 3 All ER 747, was a case which decided that on the true construction of the relevant statutes and rules an interlocutory injunction may be granted between a final judgment and execution and that the Court has the power to grant a Mareva injunction in aid of execution.

Then there is a further citation of two cases from this Court. The first **Administrator-General v Sewell** (1969) 11 JLR 316 which relied on the "order approach" and **Salmon v. Hinds** S.C.C.A. 22/1982, delivered 19th November, 1982 (unreported) which resorted to "the application" test. Both cases preceded **White v. Brunton** (supra). Of more importance is **Savings and Investment Bank Ltd. v. Gasco Investments No. 2.** [1988] Ch. 422. Although this case deals in part with the nature of committal proceedings and decided that in the circumstances of R.S.C., Order 41. r. 5(2) they were interlocutory, there are useful passages which demonstrate the reasoning underlying a decision that the application for assessment

of damages or the assessment is a final order for the purpose of appeals. Nicholls, L.J. (as he then was) said at page 444:

> *"Interlocutory proceedings*
>
> I turn to the first appeal. Approaching the matter initially without the assistance of authority, I have to say that I am in no doubt that the committal applications brought in the present case are interlocutory proceedings within R.S.C., Ord. 41 .r. 5(2). It seems reasonably clear that in using the expression "interlocutory proceedings" without further definition or elaboration, the rule is drawing a contrast between interlocutory and final. Proceedings vary so widely, covering so many different situations, that comprehensive definitions of "interlocutory" and "final" are probably impossible. But the essence of the distinction seems to me to lie in the connotation, implicit in the phrase, that in general "interlocutory proceedings" are proceedings other than the trial of the action or the equivalent hearing in the case of an originating summons or other originating process. The trial of an action or the equivalent stage of other originating processes would, in general, be regarded as "final" but even here there may be exceptions, depending on the nature of the claims in the proceedings. For example, the trial of a **Norwich Pharmacal Co. v. Customs and Excise Commissioners** [1974] A.C. 133 type of action may be an exception, and there may well be others. Broadly that is how, as it seems to me, the terms "interlocutory" and "final" in this context would be understood by lawyers."

Then Purchas L.J. at 426 cited the relevant order. R.S.C., Ord. 41 r. 5(2) thus:

> "An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the source and grounds thereof."

The substance of this provision is the same as section 408 of the Civil Procedure Code Law.

Then continuing on page 434-435, Purchas, L.J. said:

> "With respect to Scott J. he may have fallen into error in the first judgment in attempting to place committal proceedings as a genus into a single category, namely

> either interlocutory or final. In truth such applications may fall into one or other of these categories depending upon the circumstances in which the application is made, the order, if any, which the application is designed to enforce, but not the nature of the penalty which is sought. Thus, frequently in matrimonial proceedings orders are made to enforce the disclosure by the parties of their means or to protect the physical safety of the children by excluding one or other parties from the matrimonial home. These are clearly orders to further the resolution of the main issues or to preserve the status quo pending their final determination. Breaches of such orders may, and frequently do, involve contempts of court punishable in a way that may fairly be described as penal. This does not, as will be discussed in relation to the second judgment, make the proceedings themselves criminal proceedings. Other proceedings such as **Rossage v. Rossage** [1960] 1 W.L.R. 249, which take place after the final determination of the main suit, although sometimes loosely referred to as "interlocutory" are really separate "free standing" causes, the resolution of which are not infrequently "final."

These passages demonstrate that committal proceedings are not always comparable to proceedings for the assessment of damages which are governed by section 366 of the Civil Procedure Code Law which reads:

> "Certificate of amount of damages and entry of final judgments
>
> 366. Where in pursuance of this title or otherwise damages are assessed by Master and Registrar he shall certify the amounts of the damages, and upon the filing of the certificate the plaintiff may enter final judgment for the amount assessed."

The upshot of this is that although the cases cited by Mr. Goffe, Q.C. were helpful generally they were not very useful to solve the specific problem in issue as were **Mayor & Burgesses of London Borough of Southwalk v. Neil Antony Storrie, White v. Brunton,** and section 366 of the Code, supra. These cases and the statutory provision make it clear that the assessment of damages or the application to enforce the assessment is a final order for the purpose of an appeal.

Conclusion

The puzzle in applications to enforce the undertaking in damages as a consequence of the discharge of a Mareva injunction is twofold. Firstly, the parties are the Court itself on one hand and the plaintiff on the other. Secondly, the proceedings are wholly procedural, but result in the final entitlement to damages on the undertaking which is for the benefit of the defendant. Yet the "application approach" in the instant case is still pertinent. The clear answer is that the order of Karl Harrison J. was a final order. There will in due course be an order which finally determines the quantum of damages, on this aspect of the case. So the order of this Court which treated the order under appeal as interlocutory when it was a final order is recalled and struck out as null and void. For the Court's power to adjudicate on and recall its order by virtue of its inherent jurisdiction when its initial order is a nullity see **R. v. Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet** (No 3) [2000] 1 A.C. 147 or **Times Newspaper** 25 March 1999. The earlier case of **Australian Consolidated Press v Uren** [1967] 3 All ER 523 at 529 cites some of the relevant authorities on this issue. Once the offending order is struck out, the order to strike out has a retrospective effect. The substantive appeal therefore proceeded without any leave to appeal as none was required. There will be no order as to costs for this hearing.

WALKER, J.A..

I agree entirely with the reasoning and conclusion and have nothing further to add.

SMITH, J.A. (Ag.)

Having read in draft the judgment of Downer, J.A., I entirely agree and have nothing further to add.

DOWNER, J.A.

ORDER

Order of 10th October 2001 recalled and struck out as null and void.

No order as to Costs.