

JERSEY / JUDGMENT

Planning and Environment v Lesquende

[2003] JRC 004 (10 January 2003)

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judgment

the Deputy Bailiff: 1. This is an application by the Planning and Environment Committee for leave to appeal against the decision of this court on 15 th October, 2002, refusing to order the Board of Arbitrators to state a case on what is known as Issue 2. 2. The application raises a number of interesting issues. The first is whether, assuming that there is a right of appeal, leave to appeal is required. Article 13 of the Court of Appeal (Jersey) Law 1961 provides that: "No appeal shall lie under this Part of this Law -.....

- (e) without the leave of the court whose decision is sought to be appealed from, or of the Court of Appeal, from any interlocutory order or interlocutory judgment..." There then follow some exceptions which are not relevant. 3. The question is whether the order in this case is an interlocutory order or

judgment.

This issue has arisen in relation to similar provisions in England. There appear to have been two different tests which we shall, for convenience, refer to as the Salaman test and the Bozson test. The Salaman test comes from the case of Salaman -v- Warner

(1891) 1 QB 734 CA, where Fry LJ, at page 736, formulated the test in these terms: "I think that the true definition is this: I conceive that an order is 'final', only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely, I think that an order is 'interlocutory' where it cannot be affirmed that in either event the action will be determined." 4. The Bozson test comes from the case of Bozson -v- Altrincham Urban District Council

[1903] 1 KB 547 CA, where Lord Alverstone CJ said this, at 548: "Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order." 5. So, under the Salaman approach the question of whether the matter is final or interlocutory depends on the nature of the application, whereas under the Boszon

approach the answer depends upon the nature of the order actually made upon the application. 6. So far as English law is concerned, the position was resolved by the case of *Salter Rex and Co. -v- Gosh*

[1971] 2 QB 597 CA, where the Court of Appeal referred to the two tests. It accepted that the *Bozson* test might be said to be right in logic but held that the *Salaman* test was that which had been applied in practice and should be followed. 7. Mr O'Connell pointed out that that approach had not necessarily been followed in other jurisdictions. Thus, he referred to *Haron Bin Mohamed Zaid -v- Central Securities (Holdings) BHD*

[1983] 1 AC 16, where the Judicial Committee of the Privy Council had upheld the courts of Malaysia, which had followed the *Bozson* approach. However it is clear that the Privy Council was saying that the question of procedure was really for the Malaysian courts to decide and the Privy Council should not intervene unless the approach was obviously wrong. Given the differences of opinion over what is final and what is interlocutory, the Malaysian approach could not be said to be obviously wrong. 8. Thus, the question is which approach Jersey should follow. There appears to be no decided case. It is, of course, ultimately a matter for the Court of Appeal, but we have to consider the position in order to decide the application before us today. In our judgment the *Salaman* approach should be applied in Jersey. We so conclude for the following

reasons:

- (i) Our rules are based upon the former English rules and appeal statutes and this Court has always looked to English decisions for guidance in relation to such matters. In our judgment it is preferable that we should follow the English approach so as to be consistent and that is the approach set out in *Salter Rex* which adopted the *Salaman* test. (ii) Although there is no decided case in Jersey it has certainly been my impression, both as an advocate and as a judge, that the *Salaman* approach has, in general, been followed. So, for example, leave to appeal has, in my experience, been sought in relation, for example, to applications to strike out as disclosing no reasonable cause of action. (iii) It seems to us that the *Salaman* test has the advantage of clarity. Based upon the nature of the application, everyone knows in good time whether leave to appeal will be required. One does not have to analyse the exact nature of the order in fact made before deciding whether leave is required or not. Indeed, the difficulty of categorising the order, rather than the application, is shown in the present case. The proceedings as a whole were not determined because the Court ordered that a case be stated on issue 1. Accordingly, the proceedings as a whole are continuing. They have not been finally determined. However, part of the proceedings, namely issue 2, has been finally determined. To quote the *Bozson* test: has the order finally disposed of the rights of the parties? It has in relation to issue 2 but not in relation to the underlying issue, which is the price to be paid for the land. In our judgment the *Salaman* approach would avoid such complexities and difficulties. (iv) It is consistent with the efficient management of the business of the Court of Appeal in that, as a result of the leave requirement, unmeritorious

appeals can be sifted out. Indeed, it is of note that in England, following the introduction of the Woolf reforms, leave to appeal is now required in most cases. If the Bozson approach is adopted there will be a right to appeal without leave in many cases which have perhaps hitherto been regarded as interlocutory. In our judgment the Salaman approach is consistent with the more modern approach of ensuring that the Court of Appeal's time is only taken up with matters which merit its attention. (v) There is no real prejudice to the appellant because, even if leave is refused by the Royal Court, he can still renew his application to the Court of Appeal. He can, therefore, still get before the Court of Appeal, albeit on an application for leave rather than on a 'full blown' appeal. 9. An application for an order that a case be stated is clearly interlocutory if one applies the Salaman test as, if an order to state a case is made, this is but a step towards the final decision of the court on the case stated. The application will not, therefore, determine the action whichever way it is decided. Accordingly, we hold, applying the Salaman test, that the Committee does require leave to appeal because, in our judgment, the decision which we made was an interlocutory decision. 10. We turn next to the question of whether there is, in fact, a right of appeal at all. Article 12 of the Compulsory Purchase of Land (Procedure) (Jersey) Law 1961 provides: "(1) The decision of the Board on any question of fact shall be final and binding on the parties and the persons claiming under them respectively, but the Board may, and if the Inferior Number of the Royal Court so directs shall, state at any stage of the proceedings in the form of a special case for the opinion of the Court, any question of law arising in the course of the proceedings, and may state its award as to the whole or part thereof in the form of a special case for the opinion of the Court.

- (2) The decision of the Inferior Number of the Royal Court on any case so stated shall be final and conclusive, and shall not be subject to appeal to any other court." 11. Mr O'Connell argued that, although a decision of the Royal Court on a case stated was final, so that there could be no appeal, the wording of paragraph (2) does not expressly cover a decision on whether to order a case to be stated. There must, therefore, be presumed to be a right of appeal as clear and express words are required before any right of appeal can be excluded. 12. It seems to us very illogical that the decision of the Royal Court on a case stated should be final but that there should be a right of appeal in relation to the preliminary step of ordering a case to be stated. As the Court of Appeal made clear in its earlier judgments, the clear policy underlying the provision is that a quick and effective remedy at Royal Court level should be available. That is not consistent with a right of appeal against a refusal to order a case to be stated. Presumably, if there is an ability to appeal against a refusal to order a case to be stated, there must similarly be an ability to appeal against a decision to order a case to be stated. Thus, either party can get to the Court of Appeal to challenge the initial decision of the Royal Court, thereby incurring delay and expense. Indeed, on this argument, any other interim order made during the case stated procedure could also be appealed. All this despite the fact that the clear policy is that the decision of the Royal Court on the merits should be final. 13. We incline to the view that no appeal lies against a decision to order, or refuse to order that a case be stated. However, that is really a matter for the Court of Appeal

and, in case we are wrong, we think we should go on to consider whether to grant leave on the assumption that there is a right of appeal. 14. As to the question of whether we should grant leave, we have carefully considered the points made by Mr O'Connell with great clarity in his skeleton argument. However, in our judgment, the decision on issue 2 was clear cut. Indeed, we did not call upon Advocate Voisin on behalf of Lesquende to address us on this issue. Accordingly, we do not think that leave to appeal should be granted. 15. Furthermore, we think that the matters referred to earlier in connection with whether an appeal lies at all, are also relevant to our decision on whether to grant leave; and militate against granting leave. Thus, on the first occasion that the matter came before the Court of Appeal, Beloff JA, giving the judgment of the Court, said at the end of his judgment that the Court would be surprised to find any future challenge to a decision of the Board reaching the level of the Court of Appeal, (see

(1998) JLR 1 at 15). The point was amplified by Southwell JA in the subsequent hearing at

(1998) JLR 85 at page 99 when he said: "The second matter is this. The 1961 Law lays down in art. 12 a statutory procedure by way of case stated for the determination of relevant points of law by the Inferior Number of the Royal Court, which is to be the final determination of such points. Clearly this procedure was laid down so as to avoid the proliferation of arguments and the further appeals which have occurred so far in this case, and to enable the party whose property is acquired, and the States and the public of Jersey as the acquirers, to reach a speedy and relatively cheap determination of the compensation payable." He then went on to endorse the comments of Beloff JA to which we have referred. 16. In our judgment, if this matter is to trouble the Court of Appeal we think that that should be a decision for the Court of Appeal itself. We therefore refuse leave. Authorities. Compulsory Purchase of Land (Procedure) (Jersey) Law 1961 and amendments. p8-28. Court of Appeal (Jersey) Law 1961 and amendments. p29-59. Haron Bin Mohammed Zaid -v- Central Securities (Holdings) BHD [1983] 1. A. C.16. p79-88. Becker -v- City of Marion Corporation and Another

[1977] AC 271 . p89-100. Tampion -v- Anderson

(1973) 48 ALJR11. p101-102. Salaman -v- Warner

(1891) 1QB 734 CA. Salter Rex and Co -v- Ghosh

[1971] 2 Q. B. 597. p103-107. Bozson -v- Altrincham Urban District Council [1903] 1K. B. 547. p108-109. Planning -v- Lesquende 1998 JLR 1 . Planning -v- Lesquende 1998 JLR 85 . Page
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