Ian Kenneth Tampion – – – – – – *Petitioner*

v.

Kevin Victor Anderson and Another – – – – *Respondents*

and

Ian Kenneth Tampion – – – – – – *Petitioner*

v.

Kevin Victor Anderson – – – – – – *Respondent*

FROM

THE FULL COURT OF THE SUPREME COURT OF VICTORIA

REASONS FOR THE REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL UPON PETITIONS FOR SPECIAL LEAVE TO APPEAL, DELIVERED THE 5TH DECEMBER, 1973

Present at the Hearing:
LORD WILBERFORCE
LORD DIPLOCK
LORD SIMON OF GLAISDALE
LORD CROSS OF CHELSEA
LORD KILBRANDON

[*Delivered by* LORD KILBRANDON]

On 21st May 1971 the petitioner issued a writ in the Supreme Court of Victoria against the respondent Kevin Victor Anderson (now Anderson J.); on 23rd June 1971 he issued another writ against the same party and also against Gordon Just, a barrister. The actions arose out of the conduct and the report of a Board of Inquiry on which the first respondent was appointed to be the Board and before which the second respondent held a brief. In the first action the petitioner claimed damages for defamation, in the second he claimed damages for misfeasance in a public office. In each case McInerney J. ordered that the action be for ever stayed on the grounds that each was frivolous, vexatious and an abuse of the process of the Court. From these orders the petitioner appealed to the Full Court. On 30th March 1973 the Full Court dismissed both appeals. The petitioner seeks special leave to appeal from that judgment.

On 1st June 1973, an application having been made in both actions by the petitioner to the Full Court for leave to appeal to Her Majesty in Council, the Full Court refused the applications. Against those refusals the petitioner now also seeks special leave to appeal. It is the latter branch of the petitions that their Lordships propose now to consider. The first

question is, whether in the circumstances of these cases an appeal lay as of right from the Full Court to the Privy Council. The Full Court held that it did not.

The provisions as to appeals from the Victorian Court to the Privy Council are to be found in a Victorian Statute, the Supreme Court Act 1958, and the Order in Council of 23rd January 1911. The first part of section 218 of the Supreme Court Act 1958 provides that

> " If any person feels aggrieved by any decision of the Court in any civil proceeding of any nature depending in the Court in which the matter in issue amounts to one thousand pounds sterling in value by which decision the merits of the case may be concluded it shall be lawful for such person within thirty days after such decision has been pronounced to apply to the Court for leave to appeal therefrom to Her Majesty in Her Privy Council."

Section 220 of the Act provides as follows:

> " Nothing in this Part contained shall be construed to affect the Royal Prerogative of Her Majesty, or to abridge the power of Her Majesty to allow any person aggrieved by any decision of the said Court to appeal to Her Majesty at any time in such manner as Her Majesty is graciously pleased to allow."

It will be seen that the Act does not give an appeal as of right, but makes provision for appeals to proceed upon leave obtained on application.

Rule 2 set out in the Order in Council is in the following terms:

> " 2. Subject to the provisions of these Rules, an appeal shall lie—
>
> (*a*) as of right, from any final judgment of the Court, where the matter in dispute on the Appeal amounts to or is of the value of £500 sterling 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 £500 sterling or upwards; and
>
> (*b*) at the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if, in the opinion of the 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."

Thus an appeal as of right from a Full Court Order can be prosecuted only in terms of and under the conditions laid down in Rule 2(*a*) of the Order in Council. Whether these terms and conditions have been satisfied in the present cases is the first question for the Board to consider. Their Lordships propose to do so on the hypothesis, which the Full Court did not accept, and their Lordships do not examine, that the pecuniary condition has been satisfied. The matter remaining in controversy under the Order is, accordingly, whether the orders staying the actions were final judgments within the meaning of Rule 2(*a*), or whether they were interlocutory, a contrast which is recognised by the terms of Rule 2(*b*).

At the hearing on the petitions, their Lordships had the advantage of a very full citation of authority, both Australian and English, on the question whether a given judgment is of a final or an interlocutory character. It is clear that, in general, and certainly in the present cases, the Australian courts have accepted as authoritative the English decisions on this topic.

It was submitted, and their Lordships would be inclined to agree, that the authorities are not in an altogether satisfactory state. There is a continuing controversy whether the broad test of finality in a judgment depends on the effect of the order made, as decided in *Bozson v. Altrincham U.D.C.* [1903] 1 K.B. 547, *per* Lord Alverstone C.J. at p. 548. or on the application being of such a character that whatever order had been made thereon must finally have disposed of the matter in dispute—*Salaman v. Warner* [1891] 1 Q.B. 734. But the difficulty seems to arise out of attempts to frame a definition of " final " (or of " interlocutory ") which will enable a judgment to be recognised for what it is by appealing to some formula universally applicable in any contingency in which the classification falls to be made. It may be for that reason that in *In re Page. Hill v. Fladgate* [1910] 1 Ch. 489 Cozens-Hardy M.R. said, at p. 491,

> " I have no intention of attempting the task of defining exhaustively or accurately the meaning of an interlocutory order. I leave that to others."

Again, in *Salter Rex & Co. v. Ghosh* [1971] 2 Q.B. 597 at p. 601 Lord Denning M.R. said,

> " 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."

This advice, even if it be distressing to the scientific lawyer, may nevertheless be the most helpful in any actual case.

As far as the present problem is concerned, namely, whether an order staying an action on the ground that it is frivolous, vexatious, and an abuse of process, the cases, and accordingly the practice book, leave no room for doubt. There is a consistent line of authority to the effect that such an order is an interlocutory judgment. It is not necessary to go further back than *In re Page* (*supra*), in which Cozens-Hardy M.R. stated that at that date it was the established practice to treat an appeal against a " frivolous and vexatious " order as interlocutory, and cited, additionally, the decision of Chitty J. in *Price v. Phillips* (1894) 11 T.L.R. 86 as having been given to the same effect. The matter is really put beyond doubt by the case of *Hunt v. Allied Bakeries Limited* [1956] 1 W.L.R. 1326, in the Court of Appeal, which, by section 68 (2) of the Judicature Act 1925, is declared to be the final authority in England in this matter. In that case Lord Evershed M.R. said at p. 1328,

> " After consulting with the Chief Registrar and looking at the case(s), and also after consultation with my colleagues, 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."

In *Salter Rex & Co. v. Ghosh* (*supra*) Lord Denning M.R. at p. 601 said of such orders,

> " Every such order is regarded as interlocutory ",

and quoted *Hunt v. Allied Bakeries Ltd.* (*supra*).

Before leaving the English cases, their Lordships will notice an argument to the effect that the reason for the classification of such orders as interlocutory was primarily to cut down what used to be an inconveniently

long time during which a final judgment was appealable, and *cessante ratione legis, cessat lex ipsa.* The reason, however, may still have power in the case of appeals from overseas to the Privy Council, where geography itself may impose serious delay, the effects of which it is in the public interest to minimise.

None of the Australian cases to which their Lordships were referred dealt specifically with orders staying on the ground of frivolous, vexatious or abuse of process. It is also plain that the learned judges have had the same difficulty in finding a definition which will provide a reliable test in all the circumstances in which it may be required. In *Pye v. Renshaw* [1951] 84 C.L.R. 58 an order had been made that a suit should be dismissed failing amendment within a certain time. The amendment was not made, and the order was held to be an interlocutory order. The High Court, in so holding, relied principally on *In re Page* (*supra*) and *Stewart v. Royds* (1904) 118 L.T.Jo. 176 (C.A.), therein referred to with approval. In *Hall v. Nominal Defendant* [1966] 117 C.L.R. 423 there was some difference of judicial opinion. On the question whether the order appealed from, refusing an extension of time in which to sue, was final or interlocutory, it was held by Taylor, Windeyer and Owen JJ., Barwick C.J. dissenting, that the order was interlocutory. Taylor J. refers at p. 440 without comment to the English rule that an order striking out a claim on the ground that it discloses no ground of action is interlocutory. In the present case Smith J. observes,

> "The Court has not been referred to, and is not aware of, any case in which it has been specifically decided that orders of the kind now under discussion are 'final judgments' for present purposes".

Their Lordships, accordingly, being satisfied that the consistent English decisions in this class of case, going back at least to that of *Price v. Phillips* (*supra*) in 1894, have been accepted as correctly representing the law of Victoria, are not prepared to advise that leave to appeal on this point ought to be given.

If the petitioner has no right of appeal without leave, the question remains whether the Full Court properly exercised their discretion in refusing leave. Their Lordships can see no grounds upon which it could be maintained that the Court did not. The effect of section 21 A (1) of the Evidence Act 1958 upon the petitioner's claims is too plain for argument. It was not sought to challenge the exercise by the Full Court of their discretion under Rule 2(*b*) of the Order in Council.

It is for these reasons that their Lordships humbly advised Her Majesty that these petitions should be dismissed.

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In the Privy Council

IAN KENNETH TAMPION

v.

KEVIN VICTOR ANDERSON
AND ANOTHER

DELIVERED BY
LORD KILBRANDON

Printed by HER MAJESTY'S STATIONERY OFFICE
1974