IN THE COURT OF THE APPEAL OF THE SUPREME COURT OF JUDICATURE

APPELLATE JURISDICTION

G U Y A N A

CIVIL APPEAL NO. 8 OF 1996

In the matter of American Life Insurance And North American Life Insurance Company Limited.

- and –

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In the matter of the Insurance Act, Chapter 91:02.

BEFORE:

Hon. Madam Justice Desiree P. Bernard	-	**Chancellor**
Hon. Mr. Justice Nandram Kissoon	-	**Justice of Appeal**
Hon. Mr. Justice Ian Chang	-	**Justice of Appeal**

Mr. R. Stoby, SC & Mr. R. Poonai for Appellants
Mr. A. Chase, SC & Ms. P. Chase for Respondents

2002: April, 15, 16
May, 10, 22
July, 12
October, 11

RULING

BERNARD, C.: delivered the judgment of the bourt:

On 22nd October, 1990 two insurance companies – American Life Insurance and North American Life Insurance – filed a petition in the High Court seeking sanction of an agreement for the transfer of insurance policies of American Life Insurance Company to North American Life Insurance Co. Ltd. pursuant to **Section 43** of the **Insurance Act, Cap. 91:02**. Copies of the petition were served on the Commissioner of Insurance, and later on the Respondents who were employees of American Life Insurance Co.

On 14th January, 1992 after hearing all parties Small, J. sanctioned the agreement and ordered the transfer of the assets, rights and obligations of American Life to North American Life. He gave liberty to the parties to apply further to the Court.

The Respondents being dissatisfied with discussions with North American Life concerning their continued employment, on 30th March, 1992 filed a summons no doubt in pursuance of the liberty to apply granted by the learned trial judge, seeking a stay of the Court's order or alternatively cancellation of the said order approving the transfer to North American Life, and an order that North American Life be required to settle by mutual agreement their terms of engagement before the Court's approval of the said transfer is put into operation. In the meantime the Respondents entered an opposition to the passing of conveyance of immovable property of American Life to North American Life, and on 2nd April, 1992 the sum of $18,500,000 was lodged with the Registrar of Deeds. This cleared the way for the passing of the conveyance which was effected on 15th April, 1992.

After a protracted hearing the learned trial judge on 13th November, 1995 ordered American Life to pay their former employees in certain categories benefits which had been worked out by a Court appointed expert, Mr. Hans Barrow, out of their assets. This order is now the subject of this appeal.

The notice of appeal erroneously referred to the action in which the order was made as No. 4129 of 1990 when in fact it was 3948 of 1990.

At the commencement of the hearing of the appeal Counsel for the Respondents raised preliminary objections among these being that this Court has no jurisdiction as the matter having been heard and determined in Chambers the appeal should have been made to the Full Court; further North

American Life has no locus standi to pursue the appeal as the order appealed against was not made against that company but against American Life; further, there is no authority on record for Mr. R. Poonai to act as attorney on behalf of American Life in this appeal. These are the main objections of Counsel for the Respondents who cited authorities to support his contentions.

In reply Counsel for the Appellants contended that the petition for the transfer though heard in Chambers was by its nature a matter which ought to have been heard in open court as all petitions are. The order made was final and not interlocutory, as it finally determined the rights of the parties; hence under **Section 6** of the **Court of Appeal Act, Cap. 3:01** an appeal lies to this Court from an order that is final. The order made by the learned trial judge gave the Respondents a monetary judgment and determined their rights against American Life which was filed seeking the Court's sanction of an agreement to transfer the assets of American Life to North American Life. He conceded that the number of the action mentioned in the notice of appeal was wrong, but contended it is a mere irregularity which is not fatal.

Several issues fall to be determined at this stage of the appeal, and I shall consider first the question whether this Court has jurisdiction to hear the appeal, i.e. whether the matter was one which could have been heard in Chambers in which case the appeal should have been to the Full Court, or it was one which ought to have been heard in open court in which case an appeal would lie to this court. In effect, we have to determine the nature of the proceedings.

Section 43(1) of the **Insurance Act, Cap. 91:02** provides as follows:-

> "Where it is intended to amalgamate two or more insurance companies, or to transfer the insurance business of one company to another, the

> directors of anyone or more of such companies may apply to the court, **by petition**, to sanction the proposed arrangement." (Emphasis mine).

This Section was duly complied with by American Life when it filed a petition for the sanction of the Court of its agreement to transfer its assets to North American Life.

Proceedings in the High Court can be commenced by petition or by action as provided by **Order 2** of the Rules of the High Court, and **Order 58** regulates the procedure to be followed in the filing of petitions.

Order 41 provides for summonses to be heard in chambers, and **Order 43** stipulates the applications which can be disposed of in chambers. **Rule 1(3)** empowers a Judge to dispose of such other matters in chambers as he/she may think fit. Petitions are not listed specifically as matters which can be disposed of in chambers, and since they are akin to actions which commence proceedings it seems that they are by nature to be heard in open court.

In keeping with **Order 43 Rule 1(3)** a judge may if he/she thinks fit dispose of a matter in chambers, that is, by adjourning from open court in to chambers. However, the matter does not lose its character of being one which ought to be heard in open court by being heard in chambers.

In the circumstances of this appeal the fact that the petition was heard by the learned trial judge in chambers does not make it a matter which could be heard in chambers. It remained at all times a petition which ought to have been heard in open court. The orders of court ought not to have reflected the fact that the petition was heard in chambers which was done no doubt for convenience. The order even though physically made in chambers was not pursuant to a chamber application. This satisfies **Section 6 (2) (a) (i)** of the **Court of Appeal Act, Cap. 3:01** which provides that an appeal

shall lie to the Court of Appeal from an order of a judge of the High Court where the order is final and is not an order from a judge of the High Court made in chambers. We now have to decide whether the order was final.

Over the years a large body of precedent has built up in the English courts, and is slowly building up in our jurisdiction over whether an order is final or interlocutory. The English courts have swung between the "application approach" laid down by **Lord Esher, MR** and **Fry, LJ** in **Salaman v. Warner & others (1891) 1 QB, 734** and the "order approach" preferred by **Lord Alverston, CJ** in **Bozson v. Altrincham Urban District Council (1903) 1 KB, 547.**

Lord Denning, MR in **Salter Rex & Co. v. Ghosh (1971) 2 QB, 597** applied the "application approach" of **Lord Esher, MR**, but conceded that the question of whether orders are final or interlocutory is so uncertain that in new cases one can only do the best one can. More recent cases include the Privy Council decision in **Haron bin Mohamed Zaid v. Central Securities (Holdings) BHD (1982) 3 WLR, 134**, and **White v. Brunton (1984) 1 QB, 570**. In the latter case the "application approach" was adopted, and in the former the "order approach". The Court of Appeal in England now seems committed to the "application approach", and **Bozson's case** is no longer regarded as any authority for applying the "order approach."

In 1999 **Persaud, JA** as a member of this Court in **Guyana Consumers Advisory Bureau v. The Public Utilities Commission & The Guyana Telephone & Telegraph Co. Ltd. (C.A. No. 7/1998)** reviewed all of the English decisions and adopted the advice of **Denning, MR** in **Salter Rex** by trying to do the best he could in the circumstances of the case. He seems to have adopted the "application approach".

In considering **Salaman v. Warner** (supra) I found the reasoning of **Fry, LJ** appropriate in determining this thorny issue of whether an order is final or interlocutory. He analysed it in this way:

> "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."

In the instant appeal the application by way of petition was made by both American Life and North American Life to obtain the sanction of the Court to the arrangement for the transfer of the insurance business from the former company to the latter. Whether this application was refused or granted by the Court the petition would have been determined, and such determination would have been final. Therefore, in my humble view the order made was final and not interlocutory. A perusal of the order of the learned trial judge dated 14th January, 1992 indicates that after hearing attorneys-at-law for the Petitioners and attorney-at-law for some of the employees of the first-named Petitioner, i.e. American Life, and after being satisfied that the requirements of **Section 43** of the **Insurance Act, Cap. 91:02** had been fulfilled, the learned trial judge sanctioned the agreement which was attached to the petition, and ordered the transfer of the insurance business and assets of American Life to North American Life from the effective date named and referred to in the agreement, which according to Clause 4 was the date when title for the property situate at 30/31 Regent & Hinck Streets, Georgetown, was passed to North American Life and the required purchase price paid which was subject to prior permission being obtained from the competent authority under the Exchange Control Act.

Under **Sections 43 (3) & (4)** of the **Insurance Act** (supra) the Court may sanction the arrangement if, after hearing the directors, the Commissioner and other persons whom it considers entitled to be heard, it is satisfied that no sufficient objection to the arrangement has been established, or **{Section 43 (4)}** shall not sanction it if it appears that the life policyholders representing one-tenth or more of the total amount assured in the transferring company dissent from the transfer.

The fact that the learned trial judge sanctioned the transfer suggests that he was satisfied that no sufficient objection, if any, had been established. What clearer indication can one require in deciding that this was a final order? It disposed finally of the matter that was before the Court. What has given rise to some difficulty is that at the end of the order the learned trial judge gave liberty to the parties to apply to the Court. One now has to determine the implications of this.

Halsbury's Laws of England, 4th Edn., Vol. 26, para. 554 has been very helpful, and it indicates that where, in the case of a final judgment the necessity for subsequent application is foreseen, it is usual to insert in the judgment words expressly reserving liberty to any party to apply to the court; the judgment, however, is not thereby rendered any the less final. The only effect is to permit persons having an interest under the judgment to apply to the court touching their interest in a summary way without again setting the case down. The point was made that it does not enable the court to deal with matters which do not arise in the course of working out the judgment or to vary the terms of the order except possibly on proof of change of circumstances. Reference was made to the case of **Cristel v. Cristel (1951) 2 AER, 574** where it was held that prima facie the words "liberty to apply" in an order meant that when the order was drawn up its

working out might involve matters on which it might be necessary to obtain a decision of the court; they did not confer any right to ask the court to vary the order.

Another point raised by Counsel for the Respondents concerns the authority of Counsel for the Appellants to file the notice of appeal. The said notice was signed by Messrs. Stoby and Poonai on behalf of the Appellants/Applicants. The petition filed in the lower court was signed by Mr. M. Fitzpatrick and Mr. M.E. Clarke with Mr. Fitzpatrick acting on behalf of American Life and Mr. Clarke on behalf of North American Life. After the death of Mr. Clarke, Messrs. Stoby and Poonai were authorised to act on behalf of North American Life by Mr. R. Beharry, Director/Secretary of North American Life (vide para. 10 of Affidavit in Answer sworn to on 12th May, 1992).

The last order of the learned trial judge dated 13th November, 1995 was made against American Life, and not North American Life which was never mentioned in the order. The grounds of appeal in the notice of appeal filed on behalf of American Life enumerated several instances where the learned trial judge erred and misdirected himself in relation to the transfer of the Appellants/Applicants' business to North American Life, and held that he was not functus officio and was entitled to rule upon the request of certain former employees and agents of the Appellants/Applicants for compensation; further he sought to determine liability of the Appellants/Applicants for any alleged breach of contract to their former employees without hearing viva voce evidence or being given an opportunity to cross-examine the alleged former employees of the Appellants/Applicants.

It is clear from the grounds of appeal that the Appellants/Applicants were American Life and not North American Life. The notice of appeal incorporating the grounds of appeal was signed and filed by Messrs. Stoby and Poonai on behalf of the Appellants/Applicants which are American Life. This was done without any authority to the said attorneys-at-law from American Life.

Counsel for the Respondents referred us to a ruling of this Court decided by the present Chancellor as a Justice of Appeal where a similar point arose for consideration. It was **Kemelia Ramgobin v. Premnauth G.D. Persaud (C.A. No. 18/1996)** where a notice of appeal was signed by an attorney-at-law who was not authorised to act on behalf of the Appellant in the proceedings in the lower court. In the ruling reference was made to **Order 6 Rule 1** of the High Court Rules which I set out hereunder:

> "Every solicitor who shall be engaged in any action shall be bound to conduct the same if desired by the plaintiff or defendant, as the case may be, for whom he shall be engaged, unless allowed by the Court or a Judge to cease from acting therein, until the final determination of the action whether in the court of first instance or on appeal."

Order 62 (a) Rule 1 of the English Rules similarly provides that a solicitor once appointed shall be considered the solicitor of the party who appoints him/her until the final conclusion of the cause or matter whether in the High Court or the Court of Appeal.

As was decided in **Ramgobin v. Persaud** (supra) an attorney-at-law having been authorised to act by a party continues to do so until the final determination of the action either in the High Court or the Court of Appeal. Of course, a party is free to change his/her legal representative at any stage of the proceedings, but must do so by filing a notice of change. He/she can

equally authorise another attorney-at-law to act on his/her behalf, but such authority must be filed and served on the opposite party.

In the instant appeal Messrs. Stoby and Poonai were never authorised to act on behalf of American Life, and therefore had no authority to sign the notice of appeal. They were at all times the attorneys for North American Life who were not the Appellants in the appeal as no order had been made against them by the learned trial judge.

Messrs. Stoby and Poonai belatedly filed a ratification of an authority to attorney-at-law given by the directors of North American Life, but this was unnecessary as they remained unless removed the attorneys-at-law for North American Life until the final determination of the appeal. What was required was an authority from American Life, the Appellants, to act on their behalf when the notice of appeal was filed.

In the circumstances I find that the notice of appeal is a nullity as it was filed without authority. The appeal is therefore dismissed with costs to the Respondents to be taxed certified fit for Counsel.

Because of the protracted delay in determining these proceedings which were commenced in 1990, and having regard to a considerable amount of money which has been lodged with the Registrar of Deeds I urge strongly that the parties seek ways of resolving the outstanding issues and so bring this matter to a satisfactory conclusion.

Dated the 11th day of October, 2002.

D. P. Bernard

Desiree P. Bernard
Chancellor of the Judiciary.