# CONCERNING THE CLASSIFICATION OF JUDGMENTS AS "FINAL" OR "INTERLOCUTORY": A FRAGMENT ON JUDICIAL LAWMAKING IN PAPUA NEW GUINEA

BY

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## I. INTRODUCTION

In the course of preparing to prosecute an appeal on behalf of the Milne Bay Provincial Government in a suit against the National Government and one of its Ministers, we were confronted with a number of what seemed to us important and novel points of constitutional and procedural law, as well as of judicial practice in the highest courts of the land. As with many such appeals, however, these matters did not get to be settled by the Supreme Court. This was because the National Government undertook to meet the demands of the Provincial Government, thereby rendering the action essentially moot.

Our interest had by then become sufficiently excited for us to go beyond the written brief we had prepared for the appeal, and to follow up some of the questions thrown up by the litigation, matters on which the law of Papua New Guinea seemed to us seriously undeveloped. Among these were the following:

(a) when is an "interlocutory" judgment final?

(b) how far can legislation retroactively abrogate accrued rights to constitutional redress?

(c) to what extent can the "National Judicial System" be divested of judicial power under the Constitution of Papua New Guinea?

We must emphasise that our intention in carrying out these studies is not only to help clarify the law on the specific issues, but also to highlight the deficiencies in judicial lawmaking which in part account for the undeveloped nature of Papua New Guinean law in these and some other areas. This last matter is of considerable importance because of the duty laid on

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our young court system by the Constitution actively to develop the "underlying law" of the country, and not draw slavishly on foreign precedents.(1)

In this paper we take up the first question mentioned above, namely the distinction to be drawn between interlocutory and final orders and judgments. Though the expressions are used in the legislation they are not authoritatively defined in any statute. We are therefore left with such definitions as can be found in the cases and legal writing.

> "A proceeding in an action is said to be interlocutory when it is incidental to the principal object of the action, namely, the judgment. Thus, interlocutory applications in an action include all steps taken for the purpose of assisting either party in the prosecution of his case, whether before or after final judgment; or of protecting or otherwise dealing with the subject-matter of the action before the rights of the parties are finally determined, or of executing judgment when obtained".(2)

This makes it clear that an interlocutory application is not directed to the final disposition of the rights of the parties, but is preliminary, or subsequent, to it. Where it is preliminary its effect is to settle some preliminary, incidental, point, after which the case will move to the final determination of the rights of the parties. In such cases the interlocutory application will have led to an interlocutory order or judgment, i.e.

> "A decision which is not final or which deals with only part and not the whole of the matter in controversy."(3)

or one

> "...Which does not deal with the final rights of the parties but... is made before judgment and gives no final decision on the matters in dispute, but is merely on a matter of procedure..."(4)

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1. Constitution of the Independent State of Papua New Guinea (hereinafter, Constitution)

2. **Earl Jowitt, The Dictionary of English Law** (ed. C. Walsh) (London: Sweet & Maxwell 1959) 995.

3. D.M. Walker, **The Oxford Companion to Law** (Oxford: O.U.P. 1980) 630.

4. **Halsbury** 3rd Edition, Vol.22, 744.

But not all situations lend themselves to the tidiness of an interlocutory application leading to an interlocutory order. In some cases an application may be regarded as interlocutory in that it does not directly seek a final settlement of the substantive rights in issue, for instance where it raises a jurisdictional objection, queries the justiciability of the claim or seeks the striking out of a vexatious writ or defence. If the application is rejected by the Court, the relevant order will be interlocutory, and the action can proceed to its final determination. But where the application is upheld, the order will dispose of the rights of the parties, in that the case comes to an end, the plaintiff winning or the defendant winning. In such a situation, is the order upholding the application to be regarded as a "final" order because it finally settles the rights of the parties in particular litigation, or is it to be regarded as "interlocutory" because had it gone the other way the rights of the parties would have had to wait further action and a further determination?

The question is particularly acute where, as we shall see in the **Milne Bay Case(5)** the challenge is to the justiciability of the claim. For here, a ruling that the claim is justiciable means that the court must then go on to hear and determine the claim on the merits, which indicates clearly that the ruling or order is **not** final. But on the same application, should the ruling go against justiciability, the proceedings would come to a complete stop, the plaintiff being adjudged to have no legally enforceable claim. Is this not a final determination of

> "...whether there was a pre-existing right of the plaintiff against the defendant..."? **(6)**

If so, can one application in an action lead to **either** an interlocutory order **or** a final order, depending upon whether it is granted or rejected?

This is the question that arose in sharp form in the **Milne Bay Case** and is the subject-matter of this paper.

In what follows we first summarise the relevant features of the **Milne Bay Case** to indicate the specific context in which the issue arose. This is followed by a discussion of the judicial authorities - Papua New Guinean, English and Australian -- on the subject. In the process we shall highlight the unsatisfactory manner in which the relevant judicial precedents were handled by Che Supreme Court in that case, and suggest a more principled approach.

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5. See II below

6. **Halsbury,** 3rd Edition, Vol.22, 743.

## II. THE MILNE BAY CASE

The Milne Bay Provincial Government issued a writ against the Minister for Primary Industry and the National Government for certain declarations and injunctions in respect of fishing licences issued by the defendants authorising a private fishing company to fish in Milne Bay waters without the constitutionally mandated consultations. The defendants took a preliminary objection to the jurisdiction of the National Court to proceed with the suit on the grounds that days after the institution of the proceedings, a statute had come into force excluding the jurisdiction of the courts in suits between the National and Provincial Governments.(7) This objection was upheld by the National Court, which therefore dismissed the case.(8)

An appeal was filed against this decision on a number of constitutional and other grounds.(9) Again, the respondents raised the technical objection that the appeal was incompetent since, the order appealed from being interlocutory, leave of the Supreme Court had not been first obtained as is required by S.14 (2)(b) of the Supreme Court Act. In support of this position they argued that had the National Court ruled against their objection the case would have had to be fought on its merits, i.e. would not then have been settled as to the issue in controversy. To this the appellants responded, among other things, that the order was final and not interlocutory, in that, as it stood, it had firmly and finally disposed of their right to the claimed constitutional remedies. Thus was posed in very sharp form the question whether the categorisation of an order as "final" or as "interlocutory" should turn on the nature of the application from which it resulted, or on the effect of the order itself on the rights of the parties to the suit.(10)

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7. **Provincial Government (Mediation and Arbitration Procedures) Act, 1981, S.4**

8. **Milne Bay Provincial Government** v. **The Honourable Roy Evara M.P. and The Independent State of Papua New Guinea** [1981] PNGLR 63,67

9. S.C. Appal No. 7 of 1981

10. The Supreme Court did not have to rule on this point because at the first hearing of the Respondent's objection to the appeal, their Counsel undertook on behalf of the National Government that the fishing licences, the issuing of which was challenged by the Appellant Provincial Government, would be cancelled by the Minister. When this cancellation did occur weeks later the appeal was not proceeded with.

In support of the "nature of the application" test, the respondents relied on the only local case directly on the question, **Shelley v. PNG Aviation Services(11)** in which it had been considered that for the purposes of s.14(3) of the Supreme Court Act an order may be interlocutory because of the nature of the application, even if the effect of that order is finally to determine the rights of the parties.

Thus any examination of this area must begin with an analysis of **Shelley's Case.**

## III. SHELLEY V. PNG AVIATION SERVICES PTY. LTD.

In this case the Supreme Court had to deal with an appeal against a decision of the National Court ordering that the appellant's defence and counterclaim be struck out and the respondent given leave to enter judgment. This appeal was opposed by the respondents on the ground that leave had not been obtained, as required by s.14(3)(b) of the Supreme Court Act. It would appear from the report that the main thrust of the appellant's case was that the National Court's order "amounted inferentially to a refusal of unconditional leave to defend an action, and that therefore leave was not required", since such an order was specifically deemed not to be interlocutory by s.14(4) of that Act.**(12)**

On this question of the applicability of s.14(4) the Court was unanimous that the order of the National Court was not an order refusing unconditional leave to defend, though there was some confusion about the precise basis of that conclusion.**(13)**

What does concern us is another issue dealt with by the Court, namely, whether the order striking out the defence and counterclaim was interlocutory or final. On this, the report discloses no argument by the appellants, and, not surprisingly, the Court ruled, in favour of the respondents, that the order was interlocutory and therefore the appeal could not be heard without leave.

As Prentice, C.J. put it,

> "...it seems clear that an order of the kind made by the National Court in this case, **though it may be final in its effect,** is an interlocutory judgment within the meaning of s.14(3)." (emphasis supplied)**(14)**

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11. (1979) Unreported Judgment SC149, referred to throughout this article. Shelley's case is now reported at [1979] PNGLR 119.

12. **Id.,** p.3

13. **Id.,** p.4 (per Raine D.C.J.)

14. **Id.,** p.1

In support of this proposition the learned Chief Justice calls in aid three cases, two English and one Australian. As we shall show below this citation of authority is distinctly one-sided, since it ignores all cases, English or Australian -- and there were many -- which take a contrary position. Further, having cited those cases, no attempt is made by the court to determine the appropriateness or otherwise of the rule they suggest.

In what follows we attempt to show that, whatever the merits of the decision in **Shelley's case** on its specific facts, to the extent that it purports to set out a general test for determining when an order is interlocutory, the case is defective on the grounds that:

(a) it reviews the relevant case law in a one-sided manner, and comes down on what we believe is the wrong side, and

(b) it lays down a test that is too general and that does not in terms address the specific conditions of the PNG legal system.

## CRITIQUE OF SHELLEY'S CASE

### On Authority

### The English Cases

A reading of **Shelley's Case** gives the impression that the English cases overwhelmingly, if not unanimously, take the position that an order final in its effect may nevertheless be interlocutory. An examination of only the relevant leading cases shows any such impression to be quite false. Some indication of this is given by this statement of Lord Denning, M.R., quoted in **Shelley's Case:**

> "different tests have been stated from time to time as to what is final and what is interlocutory. In **Standard Discount Co. v. La Grange(15)** and **Salaman v. Warner(16)** Lord Esher said that the test was the nature of the application to the court and not the nature of the order which the court eventually made. But in **Bozson v. Altrincham UDC(17)** the court said that the test was the nature of the order as made. Lord Alverstone, C.J. said that the test is: 'Does the judgment or order, as made, finally dispose of the rights of the parties?".**(18)**

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15. (1877-78) 3 CPD 67

16. (1891) 1 Q.B. 734

17. [1903] 1K.B. 547

18. **Salter Rex & Co. v. Ghosh** [1971] 2 All E.R. 865 - 866.

One can thus refer to two tests in English law -- that of Lord Esher laid down in **Standard Discount** and followed in Re **Herbert Reeves & Co.(19) Salter Rex & Co.,v. Ghosh,** and **Shelleys' Case:** and that of Lord Alverstone laid down in **Bozson,** following **Shubrook v. Tufnel(20)** and followed in **Isaacs and Sons v Salbstein(21)**

It will be useful to examine briefly these two tests and the lines of cases endorsing them.

Lord Esher's Test

We begin the story with the **Standard Discount Case (22).** The order in issue there was for the signing of judgment on a specially endorsed writ. The court held this order to have been interlocutory. Lord Esher (then Brett, L.J.), agreeing with Bramwell, L.J. said:

> "I have not had in this case so clear an opinion as Lord Justice Bramwell, but I agree that the order obtained by the plaintiffs is interlocutory. **My reason for holding is that the order is not the last step which must be taken in order to fix the status of the parties with respect to the matter in dispute:** it is in itself ineffectual, and until a further proceeding has been taken, the plaintiff cannot recover the debt sued for. Another step must be taken before the status of the parties can be fixed and that step is the entry of the judgment.
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> The order was not the final step in the action, and therefore it is interlocutory" (emphasis added)(23)

But he then went on:

> "I think that our decision may perhaps be founded upon another ground, namely that no order, judgment, or other proceeding can be final which does not at once affect the status of the parties for which ever side the decision may be given; so that if it is given for the plaintiff it is

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19. [1902] 1 Ch. 29

20. (1882) 9 Q.B. 621

21. [1916] 2 K.B. 139

22. (1877-78) 3 CPD 67

23. Id. 71

conclusive against the defendant, and if it is given for the defendant it is conclusive against the plaintiff; whereas if the application for leave to enter final judgment had failed, the matter in dispute would not have been determined. If leave to defend had been given, the action would have been carried on with the ordinary incidents of pleading and trial, and the matter would have been left in doubt until judgment. I cannot help thinking that no order in an action will be found to be final unless a decision upon the application out of which it arises, but given in favour of the other party to the action, would have determined the matter in dispute," (emphasis added) (24)

Cotton, L.J. the third judge, took a different, more limited, view. He said:

"Without using an exhaustive definition, it may be laid down that an order is interlocutory which directs how an action is to proceed; and the order before us is exactly of that kind." (emphasis added), (25).

We have quoted so much from the judgments in this case in order to make two points. First, that all the judges, including Lord Esher, were in agreement that the order in question was interlocutory because it was "not the last step which must be taken to fix the status of the parties with respect to the matter in dispute...." It may thus be argued that the broader test later laid down by Lord Esher was not necessary to the decision, an argument reinforced by the fact only he found it necessary to refer to any such test.

The second, related, point is the tentativeness with which the test was introduced. "I think that our decision may perhaps be founded upon another ground...."; "I cannot help thinking that no order...." These are hardly the phrases which preface the statement of an authoritative rule of the common law, especially where, as here, the supposed rule is unsupported by any authority. By the time of **Salaman v. Warner,**(26) fourteen years later, Lord Esher was stating the test more positively. Yet even there the tentative basis of the test was still evident as is shown by this passage from his judgment:

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24. Id., 71-72

25. Id., 72

26. (1891) 1 Q.B. 734

> "That is the (test) which I suggested in the case of **Standard Discount Co. v. La Grange,** and which **on the whole** I think to be the best (test) for determining these questions; the (test) which will be most easily understood and involves the fewest difficulties. As an example of the difficulties produced by the opposite view, take the case where an order is made staying or dismissing an action as frivolous and vexatious; **if that is a final order, the period during which an appeal may** be **brought is** a year." (emphasis added) **(27)**

In addition to indicating the tentativeness of the test, this passage reveals another interesting feature, namely, that the test was one of convenience aimed at enabling the courts to avoid some of the absurd results that could arise from the rule of nineteenth century English procedure which allowed appeals to be brought up to 12 months after a decision. It would clearly be absurd if a suit dismissed as frivolous and vexatious could be revived by an appeal 12 months later and without leave, because the order of dismissal was considered a final order. Equally clearly, however, where the period for appealing is only 40 days, as is the case in PNG, such an outcome would not be so absurd.**(28)**

A further point about **Salaman** is that there appears to have been neither discussion nor mention of **Shubrook v. Tufnell, (29)** decided by the Court of Appeal nine years earlier, which went the other way -- we discuss **Shubrook** later.

These two cases, **Standard Discount** and **Salaman,** are the foundation of Lord Esher's test.

## Lord Alverstone's Test

The story of this test goes back to **Shubrook v. Tufnell.** The issue there was whether an appeal against a decision of the High Court, upon a special case stated for its opinion, was to be set down in the interlocutory list or in the general list (as being a final decision). The Court of Appeal took the view that the decision was final. It said:

> "Here if we differ from the Court below, final judgment has to be entered for the defendant,and there is an end of the action. I am of opinion that this is to be treated as a final order, and the appeal must take its place in the general list."**(30)**

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27. Id., 735

28. This point is further developed at p.7

29. (1882) 9 Q.B. 621

30. Id., 623

The next stage in the story occurs in 1903 with the decision of the Court of Appeal in **Bozson v. Altrincham UDC.(31)** In that case an order was made for questions of liability and breach of contract to be tried, and other issues to go before an official referee. The questions were tried, and the learned trial judge found there was no binding contract. On appeal counsel for the defendants in support of his preliminary objection that the appeal was from an interlocutory order and therefore out of time, cited **Salman** and **In re Herbert Reeves.(32)** He also cited, quite properly, the earlier decision of **Shubrook v. Tufnell** which was against him.

In his judgment The Earl of Halsbury, L.C., after a review of the previous cases, said

> 'I prefer to follow the earlier decision i.e. **Shubrook v. Tufnell.** I think the order appealed from was a final order...'**(33)**

Lord Alverstone, C.J., in the Course of a judgment to similar effect, set out the following test:

> "Does the ... 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."**(34)**

The third judge, Jeune, P., concurred.**(35)**

It can be seen that in **Bozson,** the Court of Appeal, fully apprised of the previous cases on both sides of the argument, unanimously came down in favour of what has been called Lord Alverstone's test.

The subsequent history of the two tests shows a two-track approach -- cases like **Isaacs & Sons v. Salbstein (36)** following Lord Alverstone's test, whilst others, like **Egerton v. Shirley (37)** followed Lord Esher's, with no real attempt at reconciliation.

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31. (1903) 1 K.B. 547

32. (1902) 1 Ch. 29

33. (1903) 1 K.B. 548

34. Id., 548-549

35. Id., 549

This is the background against which to read the case of **Salter Rex & Co. v. Ghosh (38)**which played such a key role in **Shelley's** Case. To that case we now turn.

**Salter Rex & Co. v. Ghosh:** Seven months after he was adjudged liable to pay a sum of money owed to the plaintiffs, the defendant, Dr. Ghosh, applied to the county court for a new trial, arguing that the judge had failed to appreciate the significance of a particular receipt. This application was refused by the judge who explained that he had indeed considered the receipt, but had in any event based his decision on a later transaction. Lord Denning, M.R., reading the main judgment of the Court of Appeal, first recounted these facts, then went on:

> 'Then Dr. Ghosh sought to appeal from the refusal. Unfortunately, the lawyers advising Dr. Ghosh made a mistake. They thought it was a final appeal and that they had six weeks in which to appeal. They allowed four weeks to pass, and then on March 4, 1971, they gave notice of appeal. They sought to lodge it with the officer of the court; but the officer of the court refused to accept it. He said it was an interlocutory appeal and not a final appeal; and that it ought to be lodged and set down within 14 days and not six weeks.
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> There is a note in the Supreme Court Practice (1970) under R.S.C., ORD. 59, r. 4, from which it appears that different tests have been stated from time to time as to what is final and what is interlocutory. In **Standard Discount Co. v. La Grange** (1877) 3 C.P.D. 67 and **Salaman v. Warner** (1891) 1 Q.B. 734 Lord Esher M.R., said that the test was the nature of the application to the court: and not the nature of the order which the court eventually made. But in **Bozson v. Altrincham Urban District Council** (1903) 1 K.B. 547 the court said that the test was the nature of the order as made. Lord Alverstone C.J. said the "..... the test is whether the judgment or order as made finally disposed of the rights of the parties".

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36. (1916) 2 K.B. 139

37. (1945) K.B. 107

38. (1971) 2 All E.R. 865

Lord Alverstone was right in logic but Lord Esher was right in experience. For instance, an appeal from a judgment under Order 14 (even apart from the new rule) has always been regarded as interlocutory: and notice of appeal has to be lodged within 14 days. On an appeal from an order striking out an action as being frivolous or vexatious, or as disclosing no reasonable cause of action, or dismissing it for want of prosecution-every such order is regard as interlocutory: see **Hunt v. Allied Bakeries Ltd.** (1956) 1 W.L.R. 1326.

So I would apply Lord Esher'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. It was so held in **Anglo Auto Finance (Commercial Ltd. v. Dick** (December 4, 1967, C.A.; Bar Library Transcript No. 320A) and we should follow it today.

**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 decisions. If a new case should arise, we must do the best we can with it. There is no other way.**

So Dr. Ghosh is out of time. His counsel admitted that it was his, counsels' mistake and asked us to extend the time. **The difference between two weeks and four weeks is not much. If Dr. Ghosh had any merits which were worthy of consideration, we would certainly extend the time. We never like a litigant to suffer by the mistake of his lawyers. I can see no merits in Dr. Ghosh's case. If we extended his time it would only mean that he would be throwing good money after bad.** I would, therefore, refuse to extend the time. I would dismiss the application. (emphasis added).

EDMUND DAVIES L.J. I agree and have nothing to add.
STAMP, L.J. I agree and have nothing to add.

Among the issues which emerge from this judgment the following may be noted:

(1) The decision of the Court of Appeal in **Salter Rex** is not as clear and unambiguous in authority on the test of finality as would appear from the judgments in **Shelley's Case.** This is apparent from Lord Denning's recitation of the two contrasting lines of cases and the obvious contradiction in his statement, on the one hand claiming that "Lord Esher's test has always been applied in practice"; on the other hand denying the existence of any general test by conceding that the question was so uncertain that practitioners had to do the best they could if a new case should arise.

(2) Lord Denning does not purport to endorse Lord Esher's test as a matter of logic or as a rule of law, but merely as a rule of practice developed, at least in part, to mitigate absurdities of the old 12-months appeal period.

(3) It would appear that Dr. Ghosh had a thoroughly unmeritorious case. As Lord Denning put it, to have allowed the lase to go forward would only have amounted to "throwing good money after bad".

Further, he said, "if Dr. Ghosh had any merits.....worthy of consideration, the Court would certainly extend the time". One does not have to be a total cynic to see a relationship between the lack of merit in an appeal and the preparedness of the court to rule the order appealed from interlocutory and so not appealable without leave. **Shelley's Case** itself provides an excellent example.

At the very minimum this review of the English cases shows that by the date of **Shelley's Case** in 1979, an English court looking for guidance on the issue of "interlocutory or final" would be confronted by two conflicting sets of Court of Appeal decisions. Thus, following the rules laid down in **Young v. Bristol Aeroplane Co. Ltd.**, (39) in the absence of an authoritative resolution of the conflict by either legislation or a decision of the House of Lords, the Court of Appeal was not bound to follow any particular decision.(40)

If the English court would not be bound by any particular line of cases, it must follow that neither was the Supreme Court of Papua New Guinea. So that, had the Supreme Court been fully addressed on the whole range of English case law, it would not have unquestioningly accepted Lord Esher's test.

In fairness to the Supreme Court it must be emphasised that, as earlier indicated, in the main thrust of the appellant's case, and therefore, presumably, in the Court's mind, concentration was not on the applicability of Lord Esher's test. Rather, it was on whether the National Court order appealed from was to be deemed not to have been interlocutory by reason (s.14(4) of the Supreme Court Act, on the ground that it "amounted inferentially to a

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39. [1944] 2 All E.R. 93 affirmed in **Davis v. Johnson** [1979] A.C. 264, 317

40. It is worth noting that in spite of the confusion in case law, and contrary to Lord Denning's statement, Master Jacob and seven other Masters and senior practitioners at the English Bar asserted that Lord Alverstone's test is the "generally preferred" one: The Supreme Court Practice, 1979, Vol.1 para. 59.4.2. (p.883).

refusal of 'unconditional leave to defend an action'". On this question the Court was emphatic in its ruling against the appellant.(41)

If as we have argued the Court in **Shelley's Case** could find no authoritative guidance from the English cases, how about Australian cases?

To the quite different situation in Australian case law we now turn.

## The Australian Cases

It is interesting that the only Australian case referred to by the Court in **Shelley's case**, presumably the only one cited to the court, was **Dudgeon v. Chie,** (42) which favoured Lord Esher's test. This is interesting because, as we show hereafter, the overwhelming majority of Australian cases have explicitly and decisively rejected this test in favour of Lord Alverstone's contrary test.

Let us review a few of the cases briefly.

**Dudgeon v. Chie:** A judge in Chambers in the Supreme Court of New South Wales ordered the appearance of the defendant and particulars of his defence to be struck out, and the plaintiff to be given leave to enter judgment for the recovery of premises in ejectment proceedings. This order having been affirmed by the Full Court, appeal was taken as of right to the High Court of Australia. The latter Court ruled that appeal as of right did not lie, because the order appealed from was interlocutory, citing **Cox Bros. (Australia) Ltd. v. Cox** (43) in support.

On an application for special leave to appeal, defendant was allowed to argue his case, after which the High Court decided on the merits against him and refused to grant leave.

**Cox Bros. (Australia) Ltd. v. Cox:** The defendant in this case appealed as of right to the High Court of Australia against an order giving plaintiff leave to sign final judgment in an action commenced by specially endorsed writ. When plaintiff raised the objection that leave was required, defendant applied for leave to appeal. This was "refused on the merits, the Court expressing no opinion at that stage whether he had a right of appeal or not". (44) Plaintiff /respondent's objection to the appeal then came on for hearing before a bench of five judges. Respondent relied on

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41. Shelley v. PNG Aviation Services Pty.Ltd. [1979] PNGLR 122

42. (1954-55) 92 C.L.R. 342

43. (1933-34) 50 C.L.R. 314

44. Id., 315

**Standard Discount** v. **La Grange** to argue that an order giving leave to enter final judgment was not effective until judgment was entered in pursuance of it, and was thus interlocutory. Appellant, relying on **Bozson's case and Isaacs & Sons**, argued that the order was final insofar as it settled respondent's rights and precluded appellant from further contesting respondent's claim.

In a short judgment, the High Court held:

> "In view of the authorities which have been cited we think the order giving the respondents leave to enter judgment is interlocutory."

Two points:

(a) By the time respondent's objection came up for final determination, appellant had had the merits of his application fully argued in the earlier proceedings for special leave to appeal (as was the case in **Dudgeon** v. **Chie** as well) -- he had had his day in court, and been found wanting.

(b) The High Court did not purport to lay down or endorse any general test, nor did it attempt any reconciliation or distinction of the conflicting authorities cited to it. An identically laconic approach had been adopted by the same bench two weeks previously in **Adams v. The Herald and Times Weekly. (45)** But that time it came down in favour of the other test, holding that an order refusing to set aside a judgment and grant a new trial was final, not interlocutory.

**Ex parte Bucknell: (46)** A bank was non-suited in the Supreme Court of New South Wales on a plea by Bucknell that its action was timebarred. It successfully appealed to the Full Court which set aside the non-suit and ordered a new trial. Bucknell then applied to the High Court for leave to appeal on the ground that an important point of law had been raised, and that the decision of the Full Court had effectively concluded the action in favour of the bank. Leave was granted on the basis of certain undertakings given by Bucknell's counsel.

In the main, the High Court was concerned with the principles governing the granting of leave to appeal against interlocutory orders under the Judiciary Act. In the course of the judgment, however, the question of determining when an order is interlocutory received attention. The Court said, for instance,

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45. (1933-34) 50 C.L.R. 1

46. (1936-37) 56 C.L.R. 221

> The first question ... is whether the interlocutory order from which leave to appeal is sought is an order from which if final an appeal would lie as of right; ..... It must not be forgotten that it is the interlocutory nature of the order, not the nature of the motion or other proceedings in which the court made the order, that determines whether leave is required (Adams v. Herald Tribunal and Weekly Times Ltd) emphasis added). (47)

Further on, the Court observes that

> "...an order giving leave to sign final judgment is in its form interlocutory (**Cox Bros. (Australia) Ltd.**). Yet in its effect it is final." (48)

This is instructive in that the Court not only did not consider the **Cox Bros. Case** and the **Adams Case** as being in conflict on this point -- after all, they were decided by the same bench(49) within one two-week period -- but considered them reconcilable through the application of Lord Alverstone's test.

In 1966 the High Court of Australia unequivocally affirmed the endorsement it had given in **Bucknell's Case** to Lord Alverstone's test. This was in:

**Hall v. Nominal Defendant: (50)** Here, appeal was taken to the High Court against an order of the Supreme Court of Tasmania, refusing to extend the time within which proceedings could be instituted against the Nominal Defendant. The question addressed by the Court was whether the order was final or interlocutory.

Taylor, J. (with whose reasons Owen, J. agreed) cited with approval Lord Alverstone's test.(51)

But the judgment of Windeyer, J. was the significant one on this point. He began by noting that

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47. Id., 225

48. Id., 226

49. Gavan Duffy C.J., and Starke, Dixon, Evatt and McTiernan JJ

50. (1967-68) 117 C.L.R. 423

51. Id., 447

"...the distinction between final and interlocutory orders has in England caused much difficulty. The question can... and has been approached in several ways".(52)

After referring to those various ways, he continued

"In most cases the test that seems to be the most satisfactory, and the one that accords most nearly with what has been said on the subject in this Court, is it seems to me to look at the consequences of the order itself and to ask does it finally determine the rights of the parties in a principal cause pending between them."(53)

Windeyer, J. then referred to the **Standard Discount** and **Salaman** Cases, in which Lord Esher's test was laid down and confirmed. Commenting on this test, His Honour said drily:

"But it is not a view that has had general acceptance: see **Isaacs and Sons v. Salbstein.** And it cannot be regarded as of general application because an order in favour of one party to an application may finally determine the dispute between them whereas an order to the opposite effect would not....The effect of such decisions as there are of this Court on this point seems to me to be that when an action has been commenced between parties, then whether an order in that action is interlocutory depends on whether or not it results in a final determination of that action,"(54)

After citing with approval the formulation in **Bucknell's** Case quoted above, he emphasised that

"...the cases show that the determining factor **is the effect of the order** in establishing finally or otherwise the rights of the disputant parties - **does it put an end** to an existing action?" (emphasis supplied) (55)

This emphatic affirmation of Lord Alverstone's test, and rejection of Lord Esher's, was in turn followed by the Full court of the Supreme Court of Victoria in **Niemann v. Electronic Industries Ltd.,** (56) a case more significant for its discussion of tests and criteria for determining whether or not leave to appeal should be granted on a particular application.

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52. Id., p. 442

53. Id., p. 443

54. Id., pp. 443-44

55. Id., p. 445

56. (1978) V.R. 431

In would seem plain from the foregoing that the overwhelming weight of Australian case law is firmly on the side of Lord Alverstone in the conclusion that the determination of whether an order is, or is not, interlocutory should turn on the nature of the order as made, not as it could potentially have been made, and its impact on the rights of the parties in relation to the issues in contention. The important point is that, in the leading cases we have considered, the rejection of Lord Esher's test was not the result of indirection, nor was it, as in our own **Shelley's case** the result of a one-sided citation of authority. It was mostly the result of careful consideration of the two tests and the cases supporting each, and a conscious acceptance of one and rejection of the other.

The decision in **Hall v Nominal Defendants** has since been affirmed by the High Court of Australia in four cases.

In **Licul and others v Corney** [1976] so ALJR 439, 444 the High Court of Australia rejected the path offerred by the English Court of Appeal in **Salter Rex & Co v Ghash**, in favour of its own decision in **Hall v Nominal Defendants**. This approach was affirmed in Port of **Melbourne Authority v A shun Proprietary Limited** No.1 [1980] 147 CLR 35, 38, **Carr v Finance Corporation of Australia Ltd** No.1 [1980-81] 147 CLR 246, 248, 253-4, and Sanofi v Parke Davis Proprietary Ltd and Another [1981] 149 CLR 147.

In light of this view of the leading English and Australian cases directly on the point, it is most unfortunate that the Supreme Court in **Shelley's Case** endorsed Lord Esher's test. It could be argued that in view of the unsettled condition of English case law on the subject, the Court should have held itself free from binding authority and therefore free to consider other sources of persuasive authority. It would then have been open to persuasion by Australian case law, which as we have sought to show, is more decided.

But a much sounder argument would direct the Court's attention to its obligations under the Constitution to formulate and apply appropriate rules of the "underlying law" in the absence of binding and appropriate authority. This would require of the Court a consideration of such matters as

- the specific social conditions of Papua New Guinea;
- its system of laws in general;
- its scheme of procedural rules; and
- the state of the relevant law not only in England, but also of "any country that in the opinion of the court has a legal system similar to that of PNG" **(57)**

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**57. Constitution** Sch.2.3(1), 2.4

In short it would invite the court to decide the issue of "interlocutory or final" in the particular case, as a matter of principle. We therefore next examine briefly the kinds of questions which such an effort would place before the Court.

## On Principle

Since our concern with the question, "interlocutory or final?", is limited to the issue of leave to appeal, we do not in what follows address directly the relevance of our observations to such other matters as, for instance, whether a particular judgment should be set down in the interlocutory or final lists. **(58)** We instead focus on the basis of the right of appeal in civil cases and of the requirement for leave of the court to file such appeals in specified circumstances. In addition, we look at some of the reasons for subjecting interlocutory judgments, as distinct from final judgments, to this requirement for leave.

## The Right of Civil Appeal

The rights of a party to a civil action to appeal to a higher court against a decision of a lower court, and the jurisdiction of the higher court to hear such appeals are generally creatures of special statutes. In this they differ from the right of an accused person to appeal against conviction or sentence, specifically provided for in the **Constitution,(59)** and the inherent power of superior courts of record to review the judicial acts of inferior tribunals and persons acting judicially, affirmed in the **Constitution.(60)**

We limit our discussion to civil appeals from the National to the Supreme Court. This is provided for and regulated by the Supreme Court Act 1975. It provides that a party to a civil action, aggrieved by the decision of the National Court, has the right, in accordance with the provisions of the Act, to appeal to the Supreme Court **(61)** This right is qualified elsewhere in the Act to the extent that specified types of appeal can only be taken up with the leave of the Supreme Court, others being appealable as of right, without such leave. This gives to the Supreme Court wide discretion in those cases to determine whether an appeal shall lie or not.

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58. See for example **Shubrook v. Tufnell**

59. **Constitution** s.37 (15)

60. Id., s.155(2), (3), (4).

61. Supreme Court Act, Ch. No. 37, s.14

Among the kinds of appeals requiring leave are appeals from interlocutory judgments of the National Court. We have already seen that the absence of a statutory definition of "interlocutory judgment" for this or any other purpose in the law of PNG leaves it to the courts to work out the correct interpretation and application of the requirement. In our review of the relevant English and Australian cases we came to the conclusion that a strong argument could be made for the proposition that the Supreme Court ought to decide this issue on principle rather than authority, such authority as there is being, on one view, less than conclusive. To form any such decision of principle, it is necessary to examine, as indicated above, the basis of the requirement for leave, and the reasons for bringing interlocutory judgments within it.

## Leave to Appeal

In general, leave is not required for a civil appeal from the National Court on a point of law or of mixed fact and law. Which is to say that in general such matters are considered sufficiently important to warrant appeals as of right, leaving it to the judgment (and, one might add, the pocket) of the aggrieved litigant whether an appeal shall be taken up or not.

This general proposition is qualified by the requirement that specified categories of appeal lie only with the permission of the Supreme Court. These categories are (62)

(a) appeals on questions of fact;
(b) appeals from an order allowing an extension of time for appealing or applying for leave to appeal;
(c) appeals from interlocutory judgments (with stated exceptions); and
(d) appeals from certain orders as to costs only.

In these cases the Supreme Court is required to screen the appeals, letting in only those that it judges worthy of further judicial considerations.

We do not spend much time on categories (a), (b) and (d), noting only that matters of fact are considered best settled by the court which heard or saw the evidence, while those of costs and extensions of time are matters for the exercise of the discretion of the deciding court, an exercise which appellate courts rarely disturb.

More directly to our point is category (d), interlocutory judgments, and to that we now turn.

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62. Id., S.14(1)(c) and (3)(b)

## The Case of Interlocutory Orders

Leaving aside for the moment any attempt to specify the exact coverage of the expression "interlocutory order", there is little difficulty in identifying the kinds of considerations that go to explain the requirement that appeals from such orders be screened by the Supreme Court. There is little disagreement that interlocutory orders by and large are part of the process by which litigation is kept on track in its progress towards a resolution of the main dispute between the parties. Thus, in the course of a particular proceeding either party may make a number of applications for interlocutory orders of the kinds usually on a summons for directions. In most cases whichever way the court rules, the main case resumes and continues towards a resolution. When the case is finally decided any party aggrieved by the decision may take up the matter on appeal, with or without leave, depending upon the nature of the judgment, and on the hearing of the appeal can challenge the ruling of the lower court on the interlocutory matters that went against him.

Where this can be done and is done it provides a tidy and economical way of disposing of all matters in issue in one appeal. Occasionally, however, things do not work out so neatly. For instance, it may be found on appeal that an erroneous ruling on some point of evidence or pleading has so prejudiced the lower court proceeding that it is necessary to order a new trial. In such a case it would obviously have been cheaper and quicker for the aggrieved party to have taken an immediate appeal on the particular issue, so that the lower court could be pointed in the correct direction in the first place.

This last point is the basis for what may be described as the "individual issue" approach to the review of lower court decisions, in that it favours the timely challenge of individual rulings as they come up. But given the large number of rulings on points of law, evidence and procedure that are part of any but the most simple civil action, an unrestrained "individual issue" approach would tempt litigants to fight each separate question separately through the appeal process before getting to a final resolution of the rights of the parties, which is itself thereupon subject to appeal process. This is obviously a recipe for protracted and expensive litigation -- expensive to litigants, wasteful of court time.

The concern to mitigate such expense and protraction provides the basis, then, for the "entire case" approach, which eschews interlocutory review, insisting that an appeal should lie only after the lower court has given its final judgment. We have already mentioned the danger of this approach leading to greater expense and waste of time in those cases where the ordering of a new trial could have been avoided by timely interlocutory review. In recognition of this danger the Supreme Court Act permits interlocutory review, insisting, however, that, with a few exceptions, this be subject to leave of the Supreme Court.

We believe this brief review of policy considerations(63) puts us in a position to address correctly and on principle the question of the interpretation of the expression "interlocutory order" in s.14(3)(b) of the Supreme Court Act. For, the meaning to be

given to the expression "interlocutory" in this context cannot be separated entirely from the purpose of the requirement for leave to appeal, which is to ensure that, in general, rulings which do not stop a case from going ahead and do not, therefore, settle the rights of the parties, should not be separately appealable unless the Supreme Court is satisfied that there are special reasons for receiving such appeals. This reasoning points to the conclusion that the question whether or not leave is required for a particular appeal ought to be the nature of the order appealed from and its impact on the rights of the parties -- does that order finally settle those rights? If it does, an aggrieved party should be free to appeal or not as he seems fit. This is, of course, nothing more than Lord Alverstone's test.

Those who seek to avoid the logic of this test have, when they thought of the matter at all, advanced a variety of arguments based sometimes on logic and other times on history and convenience. The essence of the logical argument is that an order could be classed as final only if it would settle the rights of the parties, whichever way the decision went.

As Lord Denning put it in the **Salter Rex & Co. Case**,

> "if the application for a new trial were granted, it would clearly be interlocutory. So equally when it is refused, it is interlocutory." **(64)**

Clearly this enforced symmetry has little to do with logic. Our Supreme Court Act, s.14(3)(b) speaks of an "interlocutory **judgment**" (or order), not application. Does a judgment which concludes the rights of the parties because it refuses to grant a new trial cease to be final for this purpose because, had a **different** judgment been given, one granting a new trial, **that** judgment would have been interlocutory? No wonder Lord Denning says that Lord Alverstone, who rejected such a conclusion, was "right in logic."

If Lord Esher's test is not thus defensible in logic what does it have going for it? According to Lord Denning it was "right in experience". To the extent that this is intended to indicate

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63. For extensive examinations of these factors see "The finality rule for Supreme court review of State Court orders" (1978) 91 Harv L.R. 1004 and C.M. Crick, "The final judgment as a basis for appeal" (1931-32) 41 Yale L.R. 539,.

64. (1974) 2 All E.R.93

that that test has in practice prevailed, this statement is not borne out by our review of the English cases, nor was it an accurate description of English practice even at the time Lord Denning spoke and since.(65) What can be said is that in the specific history of English rules of procedure, Lord Esher's test proved convenient for certain purposes and at certain periods. For instance, where an action is dismissed for being frivolous and vexatious, and an abuse of the judicial process, it must strike a court as slightly absurd if the plaintiff could wait for eleven months and then, without leave, file an appeal against the judgment. Far better that such a party satisfy the court, on an application for leave to appeal, that he is not seeking to add insult to injury by filing the appeal.

It is easy to see how, to ensure proper screening in such a case, a court will be inclined to classify the order as interlocutory and therefore not appealable without leave. One can also see how once such a decision has been made it would tend to be generalised as a precedent applicable to other situations of a different sort, such as where an action is dismissed for lack of jurisdiction.

While it may be considered absurd to allow a litigant 12 months within which to lodge an appeal as of right against a judgment dismissing his action as frivolous and abusive of the court's process, it may be suggested that the situation is somewhat different where, as in Papua New Guinea, the period is only 40 days. Indeed it may be argued that in light of the specific provisions of Papua New Guinean law the absurdity will lie the other way. Take the case of an appeal against an order dismissing an action for a lack of jurisdiction, say, because the matter in contention is held to be non-justiciable. Objection is then taken that the appeal is incompetent since, the order being interlocutory, plaintiff/appellant had not first sought leave to appeal.

If the objection is upheld, it may be open to the appellant to apply for the appropriate leave, or if the period for appealing has expired, to apply for an extension of time within which to make the application for leave. As Lord Denning observed:

> "If Dr. Ghosh had any merits ... we would certainly extend the time. We never like a litigant to suffer by this mistake of his lawyers."

Unfortunately, no such convenient solution is available to the appellant under our law, which in the Supreme Court Act provides as follows:

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65. See note 40 above.

17. "Where a person desires to appeal to or to obtain leave to appeal from the Supreme Court, he shall give notice of appeal, or notice of his application for leave to appeal .... within 40 days after the date of the judgment by a Judge on application made within that period of 40 days."

Here the application for an extension of time must itself have been made within 40 days of the judgment. Thus in our example, no matter how meritorious the case of the applicant, no matter how important the point of law at issue, no matter how difficult and novel that point, and therefore, no matter how understandable the mistake of appellant's lawyers, no extension of time is permissible, and the case does not get to be heard by the Supreme Court. (66)

It should be noted that the practical difference between a notice of appeal and notice of application for leave to appeal is that a different piece of paper is filled in in each case, containing much the same basic information. Indeed, it is provided that:

> "... when leave to appeal has been granted the Supreme Court may treat the notice of application for leave as notice of appeal." (67)

Further, as there is no separate hearing of the leave application followed by a notice and a hearing of the appeal proper, both the leave application and the appeal being taken together if leave is granted, the difference of whether you file a notice of appeal or notice of an application for leave to appeal turns on the merest of technicalities.

To return to our example of the appeal against an order dismissing an action for want of jurisdiction two months after judgment, our appellant would lose a chance to get the Supreme Court to even rule on whether his appeal is worthy of being heard, all because his lawyers filled the wrong piece of paper. The absurdity of this situation is highlighted when it is remembered that because of the slowness of judicial administration in this

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66. In **Avia Aihi** (No.1) [1981] PNGLR 81 see note 60 above, the Supreme Court exercising its inherent powers as set out in s.155(4) of the **Constitution**, made an order extending time for an application for leave to appeal. But as the Court pointed out, this was an appeal from a conviction for a wilful murder, an appeal attended by very special circumstances. In view of these factors, and of comments made out of court by one of the members of that bench, this is not a power the Court is likely to exercise lightly!

67. Rules of Court of the Supreme Court, P.S. 9(3)

administration in this country 40 days is not an awfully long time within which to get all the necessary paper work done in order to file a notice of appeal or of an application for leave.

For all these reasons convenience would appear to argue for an interpretation of the law such as would avoid such a result, i.e., that would permit the appeal to be heard on its merits. Since owing to the nature of the order in our example a refusal to hear the appeal would amount to the final settlement of the rights of the parties, the court, on this view, ought to classify the order as final, and thus appealable without leave.

On the other hand, had the order in our example been one upholding the jurisdiction of the court to hear the case, then the force of any argument, along the lines developed above, for classifying the order as final for leave purposes would be much reduced. For, then, refusal to hear the appeal in the particular circumstances would only mean that the rights of the parties would have to be settled on the merits by the lower court, after which the aggrieved party could lodge an appeal. In this appeal it would be open to him to invite the Supreme Court to rule on, among other matters, the very issue of justiciability which formed the subject-matter of his rejected notice of appeal. Clearly in this latter case the impact of the rejection of the earlier notice of appeal on the rights of the parties would be totally different from what it was in the case where jurisdiction had been denied.

The burden of Lord Alverstone's test is that in the recognition of this difference an order dismissing the action should be considered final for the purposes of the appeal requirements, while an order allowing the action to go on should be considered interlocutory for the same purpose. The burden of our argument is that in the specific conditions of Papua New Guinea's 40-day period for lodging an appeal as well as for applying for an extension of time to do so, Lord Alverstone's test provides the more justice and makes the more sense, while the gratuitious symmetry of Lord Esher's test yields avoidable absurdity in some cases.

## IV. CONCLUSION

We have moved a long way away from the **Milne Bay Case** and **Shelley.** Now to get back.

We have, we hope shown that the decision in **Shelley,** to the extent that it purports to lay down a general test for deciding whether an order is final or interlocutory, is bad law, and should not be followed. We have done this by demonstrating, first, that the Supreme Court in that case did not have the benefit of an adequate canvassing of all the relevant and readily-available case law on the subject. For this, of course, the Court was not entirely to blame. The second basis of our argument is that in relation to such cases as were brought to its

attention the Court did not take the critical and creative stance required of our highest Court by our Constitution, in that it failed to address the suitability of the supposed test to the conditions of our law and practice.

In conclusion, we would observe that if **Shelley** gives us bad law on this question of whether a judgment is final or interlocutory, it also constitutes a striking example of bad judicial practice producing bad law.