Neutral Citation No. [2011] NIQB 73 | *Ref:* **WEA8260**

Judgment: approved by the Court for handing down | *Delivered:* **27/07/2011**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (COMMERCIAL)

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STOTHERS (M&E) LIMITED

Plaintiff

-v-

LEEWAY STOTHERS LIMITED

Defendant

WEATHERUP J

[1] The question that arises is whether a decision in this action dated 3 March 2011 – neutral citation [2011] NIQB 35 - is but a ruling or whether it is an interlocutory Order or a final Order. On this turns the entitlement of the plaintiff to appeal the decision of 3 March 2011 to the Court of Appeal and whether leave to appeal is required. Mr Horner QC appeared for the plaintiff and Ms Anyadike-Danes QC for the defendant.

[2] The decision of 3 March 2011 stated at paragraph 1 that this was a preliminary ruling in relation to two matters that had arisen during the hearing of the action. The first matters concerned the meaning of the expression 'qualified electrician' in the contractual documents. The second matter concerned the nature of the contractual arrangements for work undertaken by an apprentice electrician.

[3] When the case came on for the hearing it was opened for the plaintiff and agreed by Counsel that the two preliminary issues referred to above should be dealt with first. There was no formal operation of Order 33, Rule 3 which provides that the Court may Order any question or issue arising in a cause or matter, whether of fact or law or partly of law, to be tried before, at or after the trial of the cause or matter and directions may be given as to the manner in which the question or issue may be stated. The evidence was heard in relation to the two issues and I gave the decision of 3 March 2011. The hearing of the action was adjourned while the parties considered the

implications of the decision. The plaintiff issued a Notice of Appeal against the decision, which notice was issued after three weeks but within six weeks of the commencement of the time for appeal.

[4] The Judicature (Northern Ireland) Act 1978 section 35(2) provides –

> "No appeal to the Court of Appeal shall lie -
>
> (g) without the leave of the judge or of the Court of Appeal from an interlocutory order or judgment made or given by a judge of the High Court, except in the following cases…."

[5] Order 59 Rule 4 provides -

> "(1) Subject to the provisions of this rule, every notice of appeal must be served under rule 3(4) within the following period (calculated from the date on which the judgment or order of the court below was filed), that is to say:-
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> (a) in the case of an appeal from an interlocutory order …. 21 days;
>
> (b)
>
> (c) in any other case, 6 weeks."

[6] To the defendant the decision of 3 March 2011 was a ruling from which the plaintiff can not appeal until, in the hearing of the substantive case, there is either an interlocutory Order or a final Order. To the plaintiff the decision of 3 March 2011 was a final Order on the two issues that it addressed, no leave to appeal is required and the notice to appeal was issued within the six week period required by the Rules.

[7] In White v Brunton (1984) QB 570 an Order was made for the hearing of a preliminary issue and the plaintiff sought leave to appeal the judgment on the preliminary issue. It was held that since a preliminary issue was the first part of a final hearing, and not an issue preliminary to a final hearing, any party may appeal without leave against an Order or judgment made on the preliminary issue if he could have appealed without leave against the Order or judgment if that appeal had been heard as part of the final hearing.

[8] Sir John Donaldson, Master of the Rolls, stated that it is plainly in the interests of the more efficient administration of justice that there should be split trials in appropriate cases, as even when the decision on the first part of

a split trial was such that there would have to be a second part, it may be desirable that the decision should be appealed before incurring the possibly unnecessary expense on the second part. Any party may appeal without leave against an Order made at the end of one part if he could have appealed against such an Order without leave if both parts had been heard together and the Order be made at the end of the complete hearing.

[9] Amendments have been made to the Rules in England and Wales by Order 59, Rule 1A which prescribes which orders are final and which orders are interlocutory for the purposes of appeals to the Court of Appeal. Paragraph 3 provides that a judgment or Order shall be treated as final if the entire cause or matter would (subject only to any possible appeal) have been finally determined whichever way the court below had decided the issues before it. Paragraph 4 provides that for the purposes of paragraph 3, where the final hearing or the trial of a cause or matter is divided into parts, a judgment or Order made at the end of any part shall be treated as if made at the end of the complete hearing or trial. The amendments have not been introduced in Northern Ireland.

[10] The White Book commentary at 59/1A/2 refers to a residual general test in Rule 1A(3) and (4) and states that Rule 1A(3) re-enacts the test in White v Brunton. It is stated that Rule 1A(4) combined with Rule 1A(3) deals with cases where a final trial is split into parts. It applies to split trials and sub trials and preliminary issues that form part of the final trial or hearing.

[11] The defendant contends that for a matter to amount to a part of a hearing and for the decision to amount to an Order or judgment it must relate to the remedy in the proceedings. As the decision of 3 March 2011 is not a definitive part that relates to the remedies, that is to the entitlement to terminate the contract, the defendant contends that the decision is not an interlocutory Order or a final Order. I do not accept the defendant's argument. It is not necessary that the decision on the part of the hearing or the trial should determine a part of the remedy.

[12] This was a sub-trial on the two issues. The finding was determinative of the two issues, subject to the right of appeal. Had the decision on the two issues been given at the conclusion of the hearing it would clearly have been determinative of the two issues, subject to the right of appeal. That there are other parts of the action that have yet to be determined does not detract from that conclusion. Accordingly the decision of 3 March 2011 was a final Order and not an interlocutory Order. As a final Order on the two issues, leave to appeal is not required.

[13] If I am wrong in concluding that the decision of 3 March 2011 was a final Order on the two issues, subject to the right of appeal, and the decision was indeed an interlocutory order, then leave is required. In addition the

Notice of Appeal was served outside the time limited for appeals against interlocutory Orders. The plaintiff requires leave to appeal and an extension of time for service of the Notice of Appeal. I do not grant leave to appeal or an extension of time for service of the Notice of Appeal,