IN THE COURT OF APPEAL OF BELIZE AD 2008

CIVIL APPEAL NO 1 OF 2008

WAN – I HUANG Appellant

v

ATTORNEY GENERAL Respondent

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BEFORE

The Hon Mr Justice Elliott Mottley	President
The Hon Mr Justice Manuel Sosa	Justice of Appeal
The Hon Mr Justice Boyd Carey	Justice of Appeal

H E Elrington for the appellant.
A McKoy and P Banner for the respondent.

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2008: 18 June and 17 October

MOTTLEY P

1. I have read the draft judgments of Carey JA and Sosa JA. I agree with their reasons and conclusion.

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MOTTLEY P

SOSA JA

Introduction

2. This is an appeal by Mr Wan – I Huang ('the appellant') from an order made in the court below on 22 January 2008 ('the order') in consequence of a

ruling made against him on an application (' the application') by the Attorney General ('the respondent') in claim No 453 of 2007. That was a claim for constitutional redress seeking '[a] Declaration that the Petroleum Act … is ultra vires the powers of … Parliament … in that section 26 (1) (b) contravenes the [appellant's] Constitutional rights [under] section 17 (1) of the Constitution not to be deprived of his property except in manner [thereby] provided for …', together with damages, costs and such other relief as might be deemed just by the court below. The application was for the striking out of the claim as an abuse of the process of the court and for costs. By the order, the application was granted and the claim was dismissed with costs in the sum of $5,000.00 to the respondent.

The background litigation

3. The appellant had also been the claimant in claim No 212 of 2007 in which the respondent and Belize Natural Energy Limited ('BNE') were defendants. That claim took the form of an application for 'leave to issue a claim against [the respondent] and the Minister of Natural Resources … for an Order for Judicial Review, by way of an Order of Certiorari to review and to quash the decision of the … Minister of Natural Resources dated the 5th day of April 2007 … directing the [appellant] to allow [BNE] to conduct Petroleum operations' over a period of two years on four parcels of land situated in the Cayo District. The decision in question (also referred to in the appellant's notice of application in the court below as an order) purported to have been made by the Minister under section 26 (1) (b) of the Petroleum Act ('the Act'). Heard on 23 July 2007 and decided

four days later, the application for leave was treated by the court below as one based on two grounds. In the words of the judge, at paragraph 4 of his judgment:

> 'The grounds on which the [appellant] relied for his application for permission were two, namely (1) that the Minister acted *ultra vires* his power in s. 26 (b) of the Petroleum Act; and (2) that if the Minister acted *intra vires*, then his action was not "in conformity with the Constitution of Belize". Section 17 of the Constitution was cited.'

4. The first of these grounds is of no relevance on this appeal and nothing further will be said of it in this judgment. The second is, however, so relevant and it is therefore important to note how the judge disposed of it. At paragraph 9 of his judgment, the judge said:

> 'The ground that the Minister's order authorizing the second respondent to enter the parcels of land and carry out petroleum exploration activities was, "not in conformity with the Constitution" is completely baseless. Section 17 of the Constitution provides protection from arbitrary taking possession of property or arbitrary acquisition of property of another. It protects right to property, but allows for taking possession or acquisition of another's property, provided it is done "under a law that – (a) prescribes the principles on which and the manner in which reasonable

compensation thereof (*sic*) is to be determined and given within a reasonable time and (b) secures to any person claiming an interest in or right over the property, a right of access to the court (*sic*) …" It is not clear from the ground and submission what facts are regarded as failure to conform with the Constitution. My explanation as to the reason for not accepting that the Minister's order did not "conform" with s. 17 of the Constitution is therefore based on the facts that I consider might be regarded as relevant to the question of whether the order is consistent with s. 17 of the Constitution.'

The judge continued as follows, at paragraph 10:

'The [P]etroleum Act under which the Minister made an order is a law that provides for taking possession and use of land owned or occupied; it prescribes (*sic*) for reasonable and prompt compensation, and for access to court; the matters required by subsections (*sic*) (a) and (b) of section 17 of the Constitution. So the [P]etroleum Act "conforms" with s. 17 of the Constitution. I agree with learned senior counsel Mr. D. Courtenay for the second respondent, that the ground advanced by the applicant did not seek to challenge the lawfulness of the Petroleum Act; nevertheless, I must mention that the Petroleum Act does not offend s. 17 of the Constitution, so as to answer fully the submission by the applicant.'

Obviously driven by the lack of clarity to which he had referred in paragraph 9, the judge assumed it to be a contention of counsel that the Minister's order was unconstitutional because it contained no provision for compensation. This assumed contention the judge proceeded to reject on the ground that the Act nowhere requires that an order made by the Minister should contain such provision.

5. The appellant filed a notice of appeal against the decision of the court below in claim No 212 of 2007 on 9 August 2007. On 11 June 2008 BNE, for its part, filed notice of a preliminary objection to the hearing of that appeal. Two days later the appellant responded by filing a notice indicating a desire to withdraw his appeal. By Order II, r 14 (1) of the Court of Appeal Rules, an appeal stands dismissed with costs upon the taking by the appellant of such a step. There had been no alteration of the state of affairs created by the operation of this rule up to the time when this Court completed its hearing of the present appeal.

The application

6. The main ground of the application, as stated in the respondent's notice of application, was as follows:

> 'The alleged violations of the Belize Constitution have previously been litigated and decided on their merits in the Supreme Court … in Claim No.

212 of 2007, and thus the instant claim is an abuse of the process of the Court.'

7. Sworn by Mrs Iran Tillett Domínguez, Crown Counsel in the office of the Solicitor General, and filed in support of the application was an affidavit, paragraphs 4 and 5 of which read as follows:

'4. Although Claim No. 212 of 2007 was strictly for permission to bring judicial review proceedings, the requested permission was based on the allegation that the Petroleum Act is *ultra vires* the Belize Constitution in that it allows the deprivation of property without compensation, contrary to section 17 of the Belize Constitution.

5. The same facts and arguments being relied on by the Claimant in the instant action were also relied on by the Claimant to advance Claim No. 212 of 2007.'

8. The court below, granting the application, said, at page 2 of its brief judgment:

'I am afraid I must accede to the objection to the claim going further … although claim No. 212 of 2007 and the instant claim are in specie different in that the former relates to permission for Judicial Review and

the latter, i.e. the instant claim, relates to a Fixed Date Claim challenging the constitutionality of the Petroleum Act, they both, however, raise in substance and in effect, the same issue, viz., whether the Petroleum Act contravenes Section 17 of the Constitution of Belize and whether the Minister's Order which was sought to be judicially reviewed in Claim 212 was ultra vires the said Act and the Constitution and therefore unlawful. In substance the issue whether by Judicial Review or a Fixed Date Claim, which incidentally fall under Part 56 of the Supreme Court Rules dealing with Application for Administrative Order, sight should not be loss (*sic*) of the sub-stratum (*sic*) of the issue sought to be agitated, in this case, the deprivation of property as claimed by the claimant and therefore contrary to Section 17 of the Constitution.'

Later on in its judgment (at page 5), the court below added:

'I am afraid that the underlying issue such (sic) in the present claim to be agitated, i.e. the conformity of the Petroleum Act with the Constitution of Belize has been adverted to and decided albeit in an application for permission for Judicial Review by Mr. Justice Awich in his judgment dated 27 July 2007 in Claim No. 212 of 2007 between virtually the same parties apart from the addition of [BNE] as the Second respondent/defendant in that claim … I will accordingly strike out and dismiss the claim.'

The appeal

9. The notice of appeal raised a single ground of appeal which, as amended, complained (albeit in manner reminiscent of a pleading) that:

> 'The Learned Chief Justice erred and was wrong in law in holding that the Constitutional claim raised the very same issues as were raised in Claim No. 212 of 2007 and even if it did, which is denied, could not ground the defence of res judicata.'

10. Mr Hubert Elrington, for the appellant was, with respect, less than persuasive in arguing that the court below erred in reaching the conclusion that the two claims in question raised a common issue, namely, the constitutionality or otherwise of section 26 (1) (b) of the Act. That conclusion finds firm and ample support in the reasoning set out in the passages of the judgment of the court below quoted at paragraph 8 above, to which no further reference is, in my view, necessary. To the content of those two paragraphs of the judgment of the court below, I would only add the observation that it does not lie in the mouth of Mr Elrington, who appeared for the appellant in both claims, to suggest that it was the judge below and not him (counsel) who made the constitutionality of section 26 (1) an issue in claim No 212 of 2007. In the absence of a clear definition of the issues by Mr Elrington, the judge can hardly be faulted for having adopted the cautious approach which he explained in paragraphs 9 and 10 of his judgment, quoted above, at paragraph 4. Indeed, as I understood Mr Elrington at

the hearing of this appeal, while indirectly admitting that he had raised before the court below (on the hearing of the application for leave) the issue whether section 26 (1) (b) of the Act contravened section 17 of the Constitution, he was somehow prepared to contend that that court 'was not constituted to pass on a constitutional issue'. This amounted, I fear, to the absurdity of saying in one breath that he was entitled to raise the issue but the court below was precluded from deciding it.

11. The second point raised by the ground of appeal was that *res judicata* did not apply. Counsel alluded in this regard to the decision of the Privy Council in *Gairy and another v Attorney General of Grenada* [2001] UKPC 30. In that case, the Privy Council, disagreeing with the Court of Appeal of Grenada, held, *inter alia*, that the doctrine of *res judicata* had no application given the way in which circumstances had changed since the entry and amendment of a consent order made in favour of the appellant. In the opinion of the Board, the change of circumstances was such as to make it both reasonable and just for the appellant to raise, at a later stage of the proceedings, an issue which had been earlier raised. Speaking of both *res judicata* and abuse of process under the rule in *Henderson v Henderson* (1843) 3 Hare 100, Lord Bingham of Cornhill, giving the advice of the Board, said, at paragraph 27:

> '…these are rules of justice, intended to protect a party (usually but not necessarily) against oppressive or vexatious litigation. Neither rule can

apply where circumstances have so changed as to make it both reasonable and just for a party to raise the issue or pursue the claim in question in later proceedings.'

I respectfully agree with this statement of the law but have not been placed by Mr Elrington's submissions in a position to see how it can assist in the determination of this appeal. While emphasising the failure of the judge to state in his ruling that he had considered whether it was reasonable and just for the appellant to raise in claim No. 453 of 2007 the issue of the constitutionality of section 26 (1) (b) of the Act, Mr Elrington did not suggest that he at any stage invited the judge to conclude that, because of a change of circumstances or any other sufficient reason, it was in fact reasonable and just for the appellant so to do. Nor was I assisted by Mr Elrington, or able on my own, to discern such a change of circumstances or other sufficient reason on the facts of the instant case. In my opinion, therefore, counsel's criticism of the application by the court below of the doctrine of *res judicata* is lacking in substance and must be rejected.

12. I consider it necessary to be clear on one further matter before leaving the Board's decision in *Gairy's* case in so far as it relates to *res judicata*. This need arises because of the stress laid by counsel for the appellant on the importance of the provisions of section 106 of the Constitution of Grenada for purposes of that decision. In my opinion that stress was wrongly laid in the context of a discussion of *res judicata*. Section 106, which is similar to section 2 of the Belize

Constitution, provides for the supremacy of the Constitution of Grenada and for it to prevail, subject to other constitutional provisions, over any other law which may be inconsistent with it. The Board considered that section 106 provided an answer to the suggestion of the Attorney General, supported by its earlier decision in *Jaundoo v Attorney General of Guyana* [1971] AC 972, that 'historic common law doctrines restricting the liability of the Crown or its amenability to suit' could stand in the way of 'effective protection of fundamental rights guaranteed by the Constitution'. The Board did not, however, in rejecting the discrete submission of the Attorney General that *res judicata* applied, place any reliance whatever on the provisions of section 106; and, what is more, there is no indication in the report of the case, which includes summaries by the editors of counsel's arguments, that it was ever suggested on behalf of the appellant that the doctrine of *res judicata* was also inconsistent with the Constitution of Grenada.

13. It was for the reasons given above that, on 18 June 2008, I concurred in the judgment of this Court dismissing the appeal, with costs to the respondent, to be taxed if not agreed, and affirming the order.

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SOSA JA

CAREY JA

14. This is an appeal against an order of the Chief Justice dismissing the appellant's claim for constitutional redress by way of a declaration that the Petroleum Act, Chapter 225, is *ultra vires* the powers of the Parliament of Belize, in that "section 1(b) proviso contravenes the (Applicants') Constitutional rights conferred upon him by section 17(1) of the Constitution not to be deprived of his property except in manner provided for by section 17 of the Constitution of Belize". The basis for the rejection of the claim was that the Chief Justice held that the "underlying issue sought in the present claim to be agitated, i.e., the conformity of the Petroleum Act with the Constitution of Belize has been adverted to and decided in an application for permission for Judicial Review by Awich J in his judgment dated 27 July 2007 in claim No. 212 of 2007 between virtually the same parties".

15. The solitary ground in its amended form, which sought to challenge the order of the Chief Justice, was settled in these terms:-

> "1. The learned Chief Justice erred and was wrong in law in holding that the Constitutional claim raised the very same issues as were raised in claim No. 212 of 2007 and even if it did, which is denied, would not ground the defence of *Pres Judicata*".

THE BACKGROUND

16. The appellant owned two parcels of land in the Cayo District which he alleged that the Minister of Natural Resources, acting under powers granted to him by section 26(1) of the Petroleum Act, Chapter 225, purported to take away his rights as landowner to occupy the said plots. He brought judicial proceedings to quash an order of the Minister of Natural Resources directing Belize Natural Energy Ltd., to conduct petroleum operations on the appellant's land. The grounds of the application were these:

> (i) that the Minister acted *ultra vires* his power in section 26(b) of the Petroleum Act, and
>
> (ii) that, if the Minister acted *intra vires*, then his action was not in conformity with section 17 of the Constitution of Belize.

The matter came before Awich J who, in an *inter partes* hearing, refused permission. The appellant did not challenge this decision: there was no appeal. He proceeded to launch proceedings for constitutional redress by way of a fixed date claim in which he sought the following declaration:-

> "That the Petroleum Act, Chapter 225 of the Laws of Belize is *ultra vires* the powers of the Parliament of Belize in that section 26(1)(b) proviso contravenes the (Applicant's Constitutional rights conferred on him by

section 17(1) of the Constitution not to be deprived of his property except in manner provided by section 17 of the Constitution of Belize".

And he also prayed for damages. This matter came before the Chief Justice who, conjointly with that action, heard an application on behalf of the Attorney General to strike out the appellant's claim on a number of grounds, the principal one being that – the alleged violations of the Belize Constitution have previously been litigated and decided on their merits in the Supreme Court of Belize in claim No. 212 of 2007, and thus the instant claim is an abuse of the process of the court. The Chief Justice as, I stated earlier upheld the objection, holding that the appellant's claims "raise in substance and in effect, the same issue, viz., whether the Petroleum Act contravenes section 17 of the Constitution of Belize and whether the Minister's order, which was sought to be judicially reviewed in claim 212, was *ultra vires* the said Act and the Constitution and therefore unlawful"

THE APPEAL

17. Mr. Elrington deployed his attack on three fronts as set out in the skeleton arguments with which we were provided. He submitted first that the principle of *res judicata* was not applicable because the proceedings before Awich J was an interlocutory application and that before the Chief Justice was in the nature of a substantive application. The significance of that, he contended, was that the decision could never be binding " in the High Court or the Constitution Court". It

is quite unclear on what recognizable principle this conclusion rests. The reason advanced, appears to be that litigation took place" in a judicial review application and not in a trial. The second attack was that the judicial review proceeding before Awich J did not raise a constitutional issue, but an issue of administrative law viz. whether a statute had conferred on the Minister the power which the Minister claimed it had and whether he had in exercising the statutory power, acted *intra vires*. The third attack was put in this way – where an application for constitutional redress is made, it can only be barred on the ground of *res gestae*, if a constitutional application had raised the same issue and a court sitting as a Constitutional Court had heard and determined the issues. This, he said, follows from the fact that the Constitution is superior to all other laws and constitutional issues are superior to all other issues raised. In maintaining his submissions on the primacy of the Constitution, he relied on *Gairy and another v. Attorney General of Grenada {2002} 1 A.C. 167.*

AN ANALYSIS

18. With respect to the first limb of his submissions, it was entirely fallacious. It does not in any way represent the true position at law which may be found in Halsbury's Laws of England (4th ed.) vol. 16 para. 982. The learned editors state as follows:-

> "the doctrine applies equally in all courts, and it is immaterial in what court the former proceedings were taken, provided only that it was a court of competent jurisdiction, or what form the proceedings took, provided they were really for the same cause".

It remains then to apply these principles to the circumstances of the instant case. The fact that the application before Awich J was interlocutory and that before the Chief Justice was substantive, is of no moment. More importantly were the applications in the same cause? The grounds of the first application were twofold:- (i) that the Minister acted *ultra vires* his powers in section 26(b) of the Petroleum Act and (ii) that if the Minister acted *intra vires*, his action was not in conformity with the Constitution of Belize, scilicet, section 17 of the Constitution.

Thus a basis of the application for judicial review was the constitutionality of the Act under which the Minister purported to Act. To assert that "The application upon its proper construction did not raise a constitutional issue", must be disingenuous. In the proceedings before the Chief Justice, Mr. Elrington put his case in this way – "was this an Act (i.e. the Petroleum Act) that could have been passed by the Parliament Constitutionally if it contains section 26(1) which, we say conflicts with the Constitution? So we are raising an issue here about the constitutionality of the Act of the legislature".

One is driven ineluctably to conclude that the proceedings were for the same cause. This is sufficient to dispose of the first two limbs of counsel's attack.

19. His final attack was founded upon the primacy of the Constitution. He argued that in the case of *Gairy and another v. Attorney General of Grenada (supra)*, it was held that the doctrine of *res judicata* was intended to protect a party against oppressive and vexatious litigation and could not apply where, it was in all the circumstances reasonable and just for a party to raise an issue even if that issue had already been raised and decided in an earlier litigation.

He said that the Board in that case held that in all the circumstances, it was reasonable and just to allow the party bound by the consent judgment, to apply for constitutional redress notwithstanding the doctrine which because the courts were on the same hierarchical level clearly applied under normal circumstances. He concluded his argument on this aspect of his case by asserting that Gairy's case decided that even if there is before the court, a proper case, for the application of the *res judicata* doctrine, the court had a duty to ask itself whether in all the circumstances of the case, it would be both reasonable and just to apply doctrine of *res judicata* to the case before it.

20. What then did *Gairy and another v. Attorney General (supra)* decide? First, Lord Bingham who delivered the judgment of the Board, did not at any point express the view that the doctrine of *res judicata* was in applicable to

constitutional cases. What was held was that in the changed circumstances which had occurred since the prior hearing, it would be unjust to refuse constitutional relief on the basis of a rule designed to protect against oppressive and vexatious litigation. In the context of the instant case, nothing had changed since the former proceeding before Awich J. There was not and could not have been any necessity for the Chief Justice to consider as Mr. Elrington suggests, whether in all the circumstances, it was reasonable and just to apply the doctrine. The issue simply did not arise. There was a complete misunderstanding or misconception of the decision in *Gairy v. Attorney General (supra)*.

21. Counsel also contended that the principle of *"stare decisis"* requires that "for the doctrine to apply, the court must be on the same level o on a lower level". At an earlier stage of these reasons, it was shown that it was not a relevant consideration what court the former proceedings were taken provided only that it was a court of competent jurisdiction. But I am obliged to return to it because of the reference to *stare decisis* which is concerned with the binding force of precedent and bears no relation to the doctrine of *res judicata*, a rule designed to protect against oppressive and vexatious litigation. The contention must be rejected as lacking any merit.

22. It was for these reasons, essentially, why I concurred in the decision that the order of the Chief Justice be confirmed and the appeal dismissed with costs to the respondent to be taxed, if not agreed. The court intimated that it would give reasons. This is my contribution.

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CAREY JA