

IN THE SUPREME COURT OF BELIZE, A.D. 2007

CLAIM NO. 292

(BELIZE TELECOM LIMITED	1ST Claimant
(JEFFREY PROSSER	2ND Claimant
(BOBBY LUBANA	3RD Claimant
(PUBLIC SERVICE UNION	4TH Claimant
(BELIZE NATIONAL TEACHERS UNION	5TH Claimant
(
(AND	
(
(THE ATTORNEY GENERAL OF BELIZE	Defendant
(AND	
(BELIZE TELEMEDIA LIMITED	Interested Party

Coram: Hon. Justice Sir John Muria

16 April 2008

Ms. Lois Young SC for Claimants

Mr. Eamon Courtenay SC for the Interested Party

RULING

CIVIL PROCEDURE RULES (CPR) – Judicial Review Claim – application for security of costs in judicial review claim by interested party – rules 24.1, 24.2 and 24.3 – section 254 of Companies Act (Cap. 250) – proper construction of the rules – whether rules preclude interested party from applying – constitutional challenge against public authority – whether just to make order for security for costs – Court’s general jurisdiction on costs under section 87(2) of Supreme Court of Judicature Act and the Rules – exercise of the Court’s discretion – claimants not to be deprived of opportunity to enforce their constitutional rights by subjecting them to burden of costs.

Muria J.: This is an application for security for costs brought by the Applicant/Interested Party against the 1st, 2nd and 3rd Claimants. The application is brought under Rules 24.3(1) and (b), 24.5(a) and (b) and section 254 of the Companies Act (Cap. 250 of the Laws of Belize). The Orders sought are:

- (1) that the First Claimant Belize Telecom Limited, the Second Claimant Jeffrey J. Prosser, and the Third Claimant Bobby Lubana do give security for the Applicant's Costs to the satisfaction of the Court;
- (2) that the claim be stayed until such time that the security for costs is provided; and
- (3) that if the First, Second and Third Claimants fail to provide the security within the time specified by the Court that the Claim, as it pertains to the First, Second and Third Claimants, shall be struck out.

The applicant raised two main grounds, namely that the Second and 3rd Claimants are ordinarily resident outside Belize, and that 1st Claimant has no assets in Belize or elsewhere to satisfy an award of costs in favour of the applicant. In support of the application, the applicant relied on the affidavit of Ediberto Tesucum sworn to on 17th March 2008 and filed with the application.

I feel the first question to be asked, before considering the grounds for the application is whether the applicant who is an Interested Party in these proceedings can maintain an application for security for costs against the 1st, 2nd and 3rd Claimants, in the present claim before the Court. Ms. Lois Young SC, strongly argued that Part 24 of the CPR, in particular Rule 24.3 as read with Rules 24.1 and 24.2, clearly show that only the Defendant in the present claim can apply for an order for security for costs against the Claimants. Counsel further contended that

the applicant here is an Interested Party, not a Defendant, and who has joined as a party to protect its interest in these proceedings by its own free choice. On the other hand, Mr. Courtenay S.C. argued that the applicant is a necessary party to these proceedings and therefore, it should be entitled to seek an order for security for costs against the 1st, 2nd and 3rd Claimants. Counsel further contended that Court ordered costs of \$25,000.00 against the Defendant and the applicant when it dismissed their application for striking out. Counsel urged that if the Court has jurisdiction to award costs against the Interested Party, then it must also have the power to make order for security for costs in favour of the applicant in this application. In any case, Mr. Courtenay S.C. submitted that the Court has inherent jurisdiction.

I set out the legal provisions referred to by the parties in this application. Rules 24.1, 24.2 and 24.3 are as follows:

- 24.1 *This Part deals with the power of the court to require a claimant to give security for the costs of the defendant.*
- 24.2 (1) *A defendant in any proceedings may apply for an order requiring the claimant to give security for the defendant's costs of the proceedings.*
- (2) *Where practicable, such an application must be made at a case management conference or pre-trial review.*
- (3) *An application for security for costs must be supported by evidence on affidavit.*
- (4) *The amount and nature of the security shall be such as the court thinks fit.*

24.3 *The court may make an order for security for costs under Rule 24.2 against a claimant only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order, and that -*

- (a) the claimant is ordinarily resident out of the jurisdiction; or*
- (b) the claimant is an external company; or*
- (c) the claimant –*
 - (i) failed to give his address in the claim form; or*
 - (ii) gave an incorrect address in the claim form; or*
 - (iii) has changed his address since the claim was commenced, with a view to evading the consequences of the litigation;*
or
- (d) the claimant is acting as a nominal claimant, other than as a representative claimant under Part 21 and there is reason to believe that the claimant will be unable to pay the defendant's cost if ordered to do so; or*
- (e) the claimant is an assignee of the right to claim and the assignment has been made with a view to avoiding the possibility of a costs order against the assignor; or*
- (f) some person other than the claimant has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover; or*
- (g) the claimant has taken steps with a view to placing the claimant's assets beyond the jurisdiction of the court.*

and section 254 of the Companies Act (Cap. 250) provides as follows:

“Where a limited company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.”

I accept the point raised by Ms. Lois Young S.C. that the nature of the claim before the Court is one in public law against an action of a public body, the Government of Belize, and quite properly the Attorney General is made the Defendant. The real dispute in the present is the constitutionality of the Vesting Act and real parties to that dispute are the Claimants and Government of Belize represented by the Defendant Attorney General. I also accept the contention by Ms. Lois Young S.C. that Rules 24.1, 24.2, and 24.3 do support the view that the power under the Rules mentioned is exercisable by the Court upon application by the Defendant and not upon application by an Interested Party.

However, I need add that in my view the said Rules are more particularly applicable in the ordinary civil cases and have opened up new avenues for obtaining security for costs against claimants as can be seen in factors set out in 24.3. Significant changes in the new Rules make provisions in respect of involvement of other parties in civil litigation, in particular, judicial review proceedings. Thus Part 56 of CPR, makes provisions for other parties (“the interested parties”) to participate in judicial review proceedings, not by choice but in compliance with the provisions of the Rules, not only of Part 56 but also Parts 25 to 27 of the Rules.

In the present case, the applicant was served on 10/7/07 with copies of (1) Fixed Date Claim, (2) two supporting affidavits sworn to by the 2nd and 3rd Claimants, (3) Notice Form, (4) Acknowledgment of Service Form, and (5) Defence Form. (See Affidavit of Emelda Quinonez, Supreme Court Process server, sworn to and filed on 11/7/07). Having been served, the applicant have participated in these proceedings and caused costs to be incurred not only upon itself but also upon other parties to these proceedings. The applicant is, thus, a party to these proceedings and entitled to seek an order from the court for security for costs. In my respectful view, it would be highly undesirable to have a situation where an interested party being required to take active part in a judicial review litigation and thereby incurring costs, and yet has no means to obtain costs for so participating in such proceedings. See *Terence Patrick Ewing –v- Office of Deputy Prime Minister & Anor.* (2005) EWCA Civ. 1583.

The starting point is section 87 of the Supreme Court of Judicature Act which confers on the Court general power on costs. Section 87(2) provides that subject to section 88 and rules of court, “*the costs of and incidental to any proceeding in the Court shall be in the discretion of the Court or judge.*” The Court retains general jurisdiction on costs which in my view can be exercised to allow an interested party to obtain an order for security for costs in judicial review proceedings under Part 56 of the CPR.

Further, in my judgment, Rules 24.1, 24.2 and 24.3, deal with the power of the Court to require the claimant to provide security for the costs of the defendant. However they are silent on the power of the Court to deal with a claim requiring a claimant to provide for the costs of an interested party in judicial review proceedings. In my respectful view, those provisions cannot be interpreted so as

to preclude the Court from exercising its discretion to order security for costs on the application of an interested party in judicial review proceedings.

I therefore hold that the applicant is entitled to apply for an order for security for costs against the claimants in this case.

Whether security for costs be ordered

There are two aspects to be satisfied before the court can exercise its discretion to grant an order for security for costs. Just as it applies to a defendant under Rule 24.3, the interested party in the judicial review proceedings, must satisfy the court that it is just to make an order security for costs and that one or more of the factors mentioned in paragraphs (a) to (g) of that Rule have been met.

The affidavit of Ediberto Tesucum in support of the application show that the 2nd and 3rd defendant are ordinarily resident outside of the jurisdiction. As to the 1st Claimant, Mr. Tesucum deposed to the fact that it is a resident company which is impecunious and has no assets to satisfy any order of costs in favour of the applicant in this case. Presently there is already an outstanding debt of \$14,325,994.00 against it in favour of the applicant. The 1st Claimant has no assets in Belize to satisfy that debt as well. Reliance is also placed by the applicant on section 254 of the companies Act (Cap. 250). I do not think it is much of a dispute that the 2nd and 3rd Claimants are resident in the USA nor do the 1st Claimant can deny the fact that it is unable to satisfy the applicant's judgment for \$14,325,994.00 except that if it is successful in its present claim.

I am quite certain in my mind that had this claim been in the nature of a commercial claim instituted against the defendant and the applicant, I would have

no hesitation in accepting the applicant's suggestion that the Claimants do put up security for costs for their claim and an order to that effect would be well justified not only under the Rules, but also under section 254 of the Companies Act, in so far as the First Claimant is concerned. However, the present claim is not in the nature of a commercial claim, despite the interested party assertion earlier made that it was a commercial claim dressed up in constitutional law claim. It is here that the question of whether it is just to make an order for security for costs must be determined.

To answer the question just posed, I feel I can do no better than to follow the same view I had expressed on 24/9/07 when I refused the defendant's application for security for costs against the same Claimants in this same claim. In doing so, I accept the sentiment expressed by Ms Lois Young S C that the claimants are simply taking steps to protect their rights by challenging the validity of an enactment, namely the Vesting Act 2007 which they had no part in its making but which directly affects their interest, personal and economic. It is certainly not an abuse of process nor is it unreasonable for them to bring this claim and need not be visited with costs. See *The Attorney General –v- Martinus Francois* (March 29, 2004) Court of Appeal of St Lucia, Civil Appeal No. 37 of 2003. Thus they bring this claim under Part 56 of CPR which allows challenges to actions of public authorities without being subjected to the burden of costs.

In addition, it can be said that this is a constitutional law claim in which the Claimants are seeking to enforce their constitutional rights. In such a case, the courts are very reluctant to deprive deserving Claimants of the opportunity to enforce their rights under the constitution.

I need mention that at the hearing of the Defendant's application for security for costs on 19 September 2007 learned Senior Counsel Mr. Eamon Courtenay S.C. did not wish to be heard nor made any submission at the hearing of that application. I accept that the application then was by the Defendant and the Interested Party might well feel that there was no need for it to make any submission then. It does not, of course, prevent the applicant from coming to Court in this application, as it has now done. But it would have saved everybody the time and effort which we have now found ourselves in.

In the circumstances of this case, and for the reasons I have stated in this ruling, the justice of the case demands that in the exercise the court's discretion, I must refuse the applicant's application for security for costs.

I feel that it is also just that there will be no order as to costs in this application.

Order: Application refused.

No order on costs.

Hon Justice Sir John Muria