IN THE COURT OF APPEAL OF BELIZE, A.D. 2008

CIVIL APPEAL NO. 4 OF 2008

BETWEEN (FORT STREET TOURISM
(VILLAGE LIMITED APPELLANT

AND

(THE ATTORNEY GENERAL RESPONDENTS
(BELIZE PORT AUTHORITY
(BELIZE CITY COUNCIL
(BELIZE TOURIM BOARD
(BEDECO LIMITED
(BROWN SUGAR MARKET
(PLACE LTD

CIVIL APPEAL NO. 6 OF 2008

BETWEEN (BEDECO LIMITED RESPONDENTS/CLAIMANTS
(BROWN SUGAR MARKET
(PLACE LTD.
(
(AND

(THE ATTORNEY GENERAL APPELLANTS/APPLICANTS
(BELIZE PORT AUTHORITY
(BELIZE CITY COUNCIL RESPONDENTS/DEFENDANTS
(BELIZE TOURIM BOARD
(FORT STREET TOURISM
(VILLAGE LIMITED

AND
(
(MARITIME ESTATES LIMITED
(EUROCARIBE SHIPPING SERVICES
(LIMITED dba MICHAEL COLIN
(GALLERY DUTY FREE SHOP RESPONDENTS/CLAIMANTS

AND

(THE ATTORNEY GENERAL APPELLANTS/APPLICANTS
(BELIZE PORT AUTHORITY
(BELIZE CITY COUNCIL RESPONDENTS/DEFENDANTS
(BELIZE TOURISM BOARD
(FORT STREET TOURISM VILLAGE LIMITED

Before: Hon Justice Sir John Muria

23 April 2008

Mr. Rodwell Williams S.C. **with** ***Mr. Godfrey Smith*** **for the Applicant Fort Street Tourism Village Limited**
Mrs. Andrea McSweaney McKoy **for the Applicants Attorney General and Belize Ports Authority**
Mr. Fred Lumor S.C. **for the respondents companies Bedeco Limited, Brown Sugar Market Place Ltd, Maritime Estates Limited and Eurocaribe Shipping Services Limited dba Michael Colin Gallery Duty Free Shop**

R U L I N G

COURT OF APPEAL – Court of Appeal Act (Cap. 90) – section 3 (4) – Court of Appeal Rules – O. II, r 17 (1) – Application for stay of execution – Supreme Court Judge exercising jurisdiction of single judge of Court of Appeal – single judge of the Court present but unable to perform functions of office – provisions to be construed to enable functions of the office of the judge to be performed

COURT OF APPEAL – Notice of Appeal – preliminary objections – parties not named as respondents – whether Notice of Appeal valid and effective – whether application for stay properly brought – service on legal representatives acting for the parties at Supreme Court – whether service effective – Counsel maintaining legal representation of parties – continue in fact to have authority of parties

COURT OF APPEAL — application for stay of execution – legal principles to be applied – whether special or exceptional circumstances shown – no stay of execution of declaratory judgment

MURIA J.: I announced my decision together with the brief skeleton reasons for the decision on 23 April 2008. The following are the full reasons for my decision with the skeleton reasons incorporated herein.

These two applications, by the appellants, Fort Street Tourism Village Limited (FSTV) in Civil Appeal No. 4 of 2008, and Attorney General and Belize Ports Authority (BPA) in Civil Appeal No. 6 of 2008, came before me pursuant to Section 3(4) of Court of Appeal Act (Cap. 90) and Order II rule 17 (1) of the Court of Appeal Rules. The applications themselves are being made under Order II r 16(1) (c) of said Rules. Section 3 (4) provides:

> ***"(4) Any power exercisable by a single judge of the Court may at any time when there is no such judge present in Belize and able to perform the functions of his office be exercised by a justice of the Supreme Court as if that justice were a judge of the Court."***

And Order II r 17(1) states as follows:

> ***"r.17 (1) Applications referred to in rule 16 shall ordinarily be made to a judge of the Court, but, where this may cause undue inconvenience or delay, a judge of the Court below may exercise the powers of a single judge of the Court under that rule."***

Although Mr. Lumor S.C. for the respondents and affected parties submitted that the requirements under section 3(4) of the Act have not been satisfied in this case to confer jurisdiction on a Supreme Court judge to exercise the function of a single judge of the Court of Appeal, I form the view that the recusal of a single judge to hear the applications meant that he is not able to perform the functions of his office in this matter before the Court. Thus, Order II , rule 17(1) of the Court of Appeal Rules, read together with Section 3(4) of the Act, must be given the construction that will enable the Supreme Court Judge to perform the functions of a single judge of the Court of Appeal even where that single judge is present in Belize but unable to deal with the particular matter before him. The determining factor must be not the fact of his recusal, but his inability to deal with the matter before him. In this case, I have jurisdiction.

The applications are for stay of execution of the judgment of the learned Chief Justice given on 11 March 2008, in which his Lordship found and declared, *inter alia*, that the respondents' rights under section 15 (1) of the Constitution of Belize had been infringed.

Consequent upon that declaration, an order was made that the walls and structures impeding access to the respondents' properties be removed within 14 days. That order is the centre of the controversies in these applications. The appeals themselves, notices of which have already been given to the Court, are directed against the declarations made by the Chief Justice in his judgment rather than against the order for the removal of the walls and structures. I will deal with this aspect of the case later in this ruling.

By their Notice of Preliminary Objection, the respondents, Bedeco Limited (Bedeco), Brown Sugar Market Place Ltd. (Brown Sugar), Maritime Estates Limited (Maritime) and Eurocaribe Shipping Services Limited dba Michael Colin Gallery Duty Free Shop (Eurocaribe), took preliminary objections to the appellants' applications for stay of execution of the judgment of his Lordship the Chief Justice given on the 11 March 2008. The objections were firmly pressed upon the Court by Mr. Lumor S.C. on behalf of the respondents.

In order to save time and speedily deal with the two matters before the Court, I proceeded to hear both the preliminary objections and applications for stay of execution together. At the conclusion of the hearing I said I would first decide on

the preliminary objections and then on the applications for stay, depending on the outcome of the preliminary objections. All parties agreed to this course.

The preliminary objections

The respondents' principal case under the objections is that there is no appeal filed or lodged in which the applicant could make or properly make an application for a stay of execution of judgment. The respondents took three main lines of objections. First, that Maritime and Eurocaribe are not named as parties in Civil Appeal No. 4 of 2008 as required by Order II, rule 1 of the Court of Appeal rules and as such it is said that no appeal has been lodged against them. Consequently, it is further contended that the applicant, FSTV, could not properly seek a stay of execution against them. Second, although Bedeco and Brown Sugar were made interested parties to Civil Appeal No. 4 of 2008, the applicant failed to serve them with a copy of the Notice of Appeal. The applicant instead served the Notice of Appeal on Fred Lumor S.C. and Mrs. Samira Musa-Pott for and on behalf of the four companies. Both Counsel appeared for the four companies at the hearing of the Claims Nos. 28 and 29 of 2007 in the Supreme Court. Such service, argued Counsel, was in breach of Order I, r 8(1) and Order II, r 4(2) of the Court of Appeal Rules. The third line of objection is in respect of Civil Appeal No. 6 of 2008, namely, that the order to remove the walls and structures within 14 days is a

consent order and leave is required to appeal against that order. It is argued that since no leave have been sought and obtained, the applicants cannot bring the appeal and so cannot obtain an order for stay of execution of that order.

Order II rule 1 (1) relied on by counsel for the respondents is in the following terms:

> ***"(1) All appeals shall be brought by notice (hereafter called "the notice of appeal"), to be filed together with a copy thereof with the Registrar which shall set forth the grounds of appeal, state whether the whole or part only of the decision of the court below is complained of (in the latter case specifying such part), state also the nature of the relief sought and the names and addresses of all parties directly affected by the appeal, and be signed by the appellant or his legal representative."***

In so far as the first objection is concerned, the focus of Counsel's objection is on the failure to name Maritime and Eurocaribe in the Notice of Appeal. It is argued that the failure to name the two companies as respondents renders any appeal against them ineffective and hence no stay of execution can be ordered against them. The short answer to this objection is that, it flies in the face of the wide powers of the Court of Appeal as stated in section 19 of the Court of Appeal Act. That section provides:

"19(1) On the hearing of an appeal under this Part, the Court shall have power to -

(a) confirm, vary, amend or set aside the order or make any such order as the Supreme Court or the judge thereof from whose order the appeal is brought might have made, or to make any order which ought to have been made, and to make such further or other order as the case may require."

……...

(2)The powers of the Court under this section may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the Supreme Court or the judge thereof from whose order the appeal is brought or by any particular party to the proceedings in that court, or that any ground for allowing the appeal of for affirming or varying the decision of that court is not specified in such notice; and the Court may make any order on such terms as the Court thinks just to ensure the determination on the merits of the real question in controversy between the parties."

Thus not only does the Court have power to make orders affecting the appellant and respondent in an appeal, but also affecting the parties to the controversy under appeal. The two companies concerned are actually *"parties directly affected"* by the appeal and have thus been so named, in the Notice of Appeal, notwithstanding

that Notice of Appeal in Civil Appeal No. 4 of 2006 has not named them as respondents.

It might be that the appellant in Civil Appeal No. 4 of 2008 inadvertently omitted to name the two companies as respondents, or it might have deliberately chosen to leave them out as respondents but to notify them as "*parties directly affected*." Be that as it may, it is still open to the appellant, with leave of the Court, to amend its Notice of Appeal so as to include the two parties as respondents (See Rule 6(1) of the Court of Appeal Rules). In my view O.II r1(1) above, cannot be given the construction pressed upon the Court by Mr. Lumor S.C., rather the rule should be given a construction which assists, not hinder, parties who have legal rights to bring their disputes to the Courts. That is what rule 1(1) of Order II of Court of Appeal Rules provides.

Thus the failure to include the two interested parties as respondents is not fatal to the Notice of Appeal in Civil Appeal No. 4 of 2008. The omission does not bar the Court of Appeal from giving relief to a party whose name was inadvertently omitted form the Notice of Appeal. In any case, the appellant still has the opportunity to amend its Notice of Appeal so as to include the two companies as respondents, if it so wishes.

The appellant may deliberately name only some of the parties to the action as respondents in its Notice of Appeal. It is incumbent on the appellant, however, to serve the Notice of Appeal on *all parties directly affected* by the appeal. The Court may also direct the appellant to serve the Notice of Appeal upon all or any parties to the action. (See Rule 4(1)). One of the main reasons for serving the Notice of Appeal on all parties directly affected by the appeal is to ensure that any order obtained by appellant as an incident to the appeal is known to those parties. Further, with leave of the Court, the appellant may amend the Notice of Appeal at any time (Rule 6(1)).

The first objection by the respondents, therefore, cannot be sustained.

The second objection raises the issue of proper or effective service of the Notice of Appeal.

I set out the provisions relied on by Counsel, namely Order I r8(1) and Order II r4(1) and (2). Order I rule 8 (1) provides as follows:

> ***"r.8 (1). Service of the documents mentioned in the first column hereunder shall be executed by leaving a true copy thereof in the manner specified in the second column - by personal service on the party or his authorised agent, or on the person not a party.***

Order II, rule 4(1) states:

> ***"A true copy of the notice of appeal shall be served upon all parties directly affected by the appeal and it shall not be necessary to serve any party not so affected; but the Court may direct notice of appeal to be served on all or any parties to the action or other proceeding, or upon any person not a party and in the meantime may postpone or adjourn the hearing of the appeal on such terms as may be just, and may give such judgment and make such order as might have been given if the persons served with such notice had been originally parties.***
>
> ***(2) A true copy of the notice shall be served upon the respondent within seven days after the original notice has been filed."***

The two respondents and two interested parties were not served personally in respect of Notice of Appeal in Civil Appeal No. 4 of 2008, but rather through their Counsel who represented them at the hearing of the claim in the Supreme Court.

The contention here is that, Counsel's remit or instructions from the four companies ended at the conclusion of the Supreme Court hearing. That may well be so, but the argument faces two hurdles. First, the four companies, two of which are named as respondent in the Notices of Appeal in this case, are parties to the appeal and certainly all parties to the claim before the Supreme Court. By virtue of Rule 4(1) Maritime and Eurocaribe are parties directly affected by the appeal and therefore necessary to be served with the Notice of Appeal. Service on the respondents is provided for under Rule 4(2). Their legal representatives still on the record in the claim are those who had been served with the Notices of Appeals, namely Fred Lumor S.C. and Mrs. Samira Musa-Pott.

I do not think the legal representatives' instructions or authority in the claim before the Supreme Court precluded the service of the Notice of Appeal on them nor does it precluded them from accepting service of the said Notice on behalf of the two companies. A part from the fact that they are still on record as the legal representatives of the two companies who are parties directly affected by the Appeal, the Court of Appeal Rules do not provide for any particular manner in which a legal representative's authority is essential for him to accept service on behalf of his client who is a party to an appeal. There was no suggestion or indication that Mr. Fred Lumor S.C. and/or Mrs. Samira Musa-Pott lacked the

authority of their clients. There is every indication that at all material times Mr. Fred Lumor S.C. and Mrs. Samira Musa-Pott were indeed the legal representatives of the Maritime and Eurocaribe who are parties directly affected by the Appeal.

To further buttress the position I have alluded to, I need also to refer to Order I Rule 6 of the Court of Appeal Rules which provides for the right of audience before the Court of Appeal. That provision states:

> ***"6. In all proceedings before the Court, the Registrar, or the Registrar of the Supreme Court, the parties may appear in person or be represented by an attorney-at-law."***

Thus a party to an appeal may be represented by any attorney-at-law, as long as that attorney-at-law in fact has the authority of the parties to represent them, which authority need not be in writing. See ***Gladston Watson -v- Rosedale Fernandez*** [2007] CCJ1 (AJ).

Second, having been served with the Notices of Appeal on behalf of the four companies, Counsel maintains his legal representation of all four companies, all of which are named as respondents in Civil Appeal No. 6 of 2008 and in Civil Appeal No. 4 of 2008, two are named as respondents and two, as interested parties. It is open to this Court to accept that in the circumstances, Counsel continues in fact to

have the authority to represent the four respondent companies and as such service had been properly and effectively done on the said respondents.

The third preliminary objection, concerns the order for removal of the walls and structures. This order is said to be a consent order and therefor it cannot be appealed against without leave of the Court. This objection in my view goes to the substance of the appeal in this case. If it is a consent order, then leave is required before it can be challenged on appeal. If it is not, then the Court is to determine it at the hearing of the appeal. I shall therefore need not deal with this objection at this stage. It will have to wait its proper turn to be determined.

For all those reasons, the preliminary objections by the respondents cannot be sustained and I dismiss them.

I now turn briefly to the question of whether a stay of execution of the judgment of the Chief Justice should be granted.

The appellants/applicants both in Civil Appeal Nos. 4 and 6 of 2008, are adamant that this is a proper case for the grant of a stay of execution.

The applicant in Civil Appeal No. 4 of 2008, sought to rely on the affidavit of James Nisbet in support of its application. The applicants in Civil Appeal No. 6 of 2008, relied on the affidavit of Major Lloyd Jones. Reliance is placed on ***Lynotype-Hell Finance Ltd v Baker*** [1992] 4 All ER 889; [1993] 1 W.L.R. 321 by the applicants on the principle that if the stay of execution is not granted they would be ruined and that they have some prospect of success in their appeals. Thus the question: will the applicants face ruin if a stay is not granted?

In opposing the application for stay the respondents relied on the affidavits of Martha Williams and Hector Rivera. Mr. Lumor S.C. submitted that on the evidence contained in those affidavits, it is in fact the respondents who will suffer financial ruin if the stay is granted to the applicants. Counsel also cited the ***Lynotype-Hell Finance case*** and ***Blackstone's Civil Practice 2008.*** The main contention of Counsel is that in the exercise of its discretion to grant a stay of execution pending appeal, the Court will take into account all the circumstances of the case in order to avoid injustice being done. I accept the principles cited by Counsel for the parties. In my view, they all go to affirm the salient principle in this type of application that the applicant must establish special or exceptional circumstances to justify the grant of a stay of execution.

Thus the Court's power to grant a stay of execution, being discretionary, must be exercised based on legal principles, including the principle that the applicant must establish that there are special or exceptional circumstances justifying the grant of a stay of execution. This is because in a contested case the successful party ought not to be deprived of the fruit of a judgment given in his favour: ***Annot Lyle*** (1886) 11 P.D. 144 applied in ***Lawrence Okafor -v- Felix Nraife*** (16th October 1987) Supreme Court of Nigeria, S.C. 89/1987.

An application to stay execution of a judgment means exactly what it says, to stay execution. A stay must be to prevent a party from taking executory measures on a judgment under appeal.

The orders made by the learned Chief Justice are all declaratory orders saved perhaps for the order *"that the boardwalk be cleared of the walls and other structures thereon that impede access from it to any of the properties of the claimants abutting thereon."* That order, however, follows on from the previous declaration, and is basically general in nature. The parties are obliged to come to some suitable arrangements to ensure that access to the claimants' premises is not impeded and to ensure security measures are put in place in compliance with the ISPS Code.

I accept that it was following meetings and discussions between the parties that further details of implementing the Chief Justice's order came about namely, the provision of 14 days to have the walls and structures removed. It was then included in the formal order. The affidavits of Lloyd Jones and Martha Williams lend support to this position.

Thus clearly, the details as to how to implement that order were to be worked out by the parties concerned. That had been done and the result was the formal order for the removal of the walls and structures within 14 days.

Quite apart from that aspect of the orders of the learned Chief Justice, all the other orders are simply declaratory orders. There is nothing, as yet, executory about them. It is therefore, hardly something, the execution of which needs to be stayed. There cannot be a stay of execution of a declaratory judgment: See ***The Attorney General etal -v- Jeffrey Prosser etal*** (8 March 2007) Court of Appeal of Belize, Civil Appeal No. 7 of 2006; See also ***Chief RA Okoya & Ors v S Santilli& Ors.,*** Supreme Court of Nigeria, S.C. 200/1989, cited in ***The Attorney General v Jeffrey Prosser*** (above).

Further, when one turns to the Notice of Appeal, the parts of the decision complained of are set out in the Notice of Appeal. There are six parts to the judgment that the appellant/applicant in Civil Appeal No. 4 of 2008 and two parts of the judgment that the appellants/applicants in Civil Appeal No. 6 of 2008 complain about, all of which are declaratory in nature. Similarly, there are three grounds of appeal, relied upon by the appellant/applicant in Civil Appeal No.4 and one ground relied upon by the appellants/applicants in Civil Appeal No. 6, all of which relate to the declaratory orders made by the learned Chief Justice. The relief sought are three and one, respectively in number and they all pray for the setting aside of those declaratory orders of the learned Chief Justice. There is absolutely no mention of any complaint about the order for removing of walls and structures within 14 days in those parts of the decision complained of nor in the grounds of appeal, nor in the relief sought. Yet this application for stay is premised on the basis that the learned Chief Justice ordered the walls and structures to be removed within 14 days. That is not what the complaint is in either the Notice of Appeal in Civil Appeal No. 4 of 2008 or Notice of Appeal in Civil Appeal No. 6 of 2008.

There is no ground in either of the Notices of Appeals complaining of the order giving the defendants/appellants 14 days to remove the walls and structures, the process which had already begun by the dismantling of the unfinished structure in

the said area. In so far as the parts of the judgment complained of, the grounds of appeal and the relief sought in the Notice of Appeal, there is nothing, the stay of execution of which is required.

The respondents have failed in their preliminary objections to the application for stay of execution. The applicants, however, must succeed on the strength of their own cases and not on the weakness of their opposition. The onus lies on the applicants to satisfy the Court that there are special circumstances or exceptional circumstances justifying the grant of a stay of execution. This is because the successful litigant in whose favour a judgment was given must not be deprived of the fruit of that judgment.

The order of the Court here at stake has clearly, on the evidence before the Court, not been complied with. Evidence from Martha Williams and to a certain extent those of Major Lloyd Jones and James Nisbet do demonstrate that every possible effort has been taken by the applicants, FSTV and BPA, to frustrate the implementation of the order of the Supreme Court. The somewhat lax attitude on the part of the Attorney General, in not taking a firm stand on the need to enforce an order of the Court, does not help either.

The result is that the injustice found by the Supreme Court in this case is allowed to perpetuate. That must not be allowed to flourish, lest the orders of the Court are sure to be flouted at will by disgruntle litigants.

When one applies the principles governing applications for stay of execution to the present case, it is difficult to find where the special or exceptional circumstances exist in the applications, both by FSTV and Attorney General and Belize Ports Authority. When the application for stay of execution is put together with the Notice of Appeal both in Civil Appeal Nos. 4 and 6 of 2008, the strength of the applicants case in this application evaporates. Hence their application cannot stand.

It will work considerable hardship or injustice on the respondents in this case if the parties found to violate the constitutional rights of those respondents are allowed to continue that violation during the pendency of their appeals, simply because their grounds of appeal contained an arguable point of law or as Counsel for applicants called it, "jurisprudential" point.

Application for stay of execution is refused.

Each party to bear its own costs.

(Sir John Muria)