

**IN THE SUPREME COURT OF BELIZE A.D. 2009**

**CLAIM NO. 743 OF 2009**

**BETWEEN**

**BCB HOLDINGS LIMITED**

**First Claimant/Respondent**

**THE BELIZE BANK LIMITED**

**Second Claimant/Respondent**

**AND**

**THE ATTORNEY GENERAL OF BELIZE  
(ON BEHALF OF THE GOVERNMENT  
OF BELIZE)**

**Defendant/Applicant**

Mr. Eamon Courtenay SC and Mrs. Ashanti Martin for the first and second claimants/respondents.

Mr. Michael Young SC and Ms. Magali Perdomo for the defendant/applicant.

**AWICH      Chief Justice (Ag)**

15.7.2011

**RULING**

1. *Notes:*                      *Civil Procedure and Practice; an application for a stay of execution pending appeal; whether application is to be made to the trial judge only before notice of appeal has been filed; whether application is made to the trial judge first in any event; whether a trial judge has jurisdiction to extend an order staying execution on a judgment after the appeal has been filed and after the order in the judgement has been drawn and sealed; and whether he has jurisdiction to hear application to extend the order*

*staying execution after the respondent has applied to the Court of Appeal for an order discharging the order of the trial judge, and the application has been heard by the Court of Appeal but decision is reserved; stare decisis; unlimited jurisdiction of the Supreme Court, s:95 of the Constitution..*

2. This ruling is in the joint application dated 30.6.2011, of BCB Holdings Ltd. and The Belize Bank Ltd. The question that parties argued in the application is whether this court has jurisdiction to entertain an application at this stage for an order extending an earlier order that the court made on 8.3.2011, staying execution on the judgment dated 22.3.2011, of Sir Muria J in this claim No. 743 of 2009. The judgment has been appealed and the appeal case has been registered as Court of Appeal, Civil Appeal No. 4 of 2011.
3. The Attorney General is the appellant. BCB Holdings Limited and The Belize Bank Limited are the respondents. The main complaint in the appeal against the judgment of Sir Muria J. was that the learned judge erred in deciding that the respondents were entitled to enforce in Belize an international arbitration award obtained by them from the London Court of International Arbitration, against the Government of Belize. The total sum of the award was BZ \$43,000,256.17.
4. After filing notice and grounds of appeal on 5.1.2011, Attorney General applied on 12.1.2011, to the Supreme Court (trial court) for an order staying execution on the judgment. In the meantime Muria J left the jurisdiction at the end of his tenure. The application was listed in my

court for hearing on 25.2.2011. I rendered decision on 8.3.2011, granting the application for stay of execution and ordered that: “the stay of execution will last until the next sitting of the Court of Appeal in June 2011, or until an order of the Court of Appeal varying or discharging this order.”

5. It was my view that it was unrealistic to expect the appeal to be heard in the Court of Appeal session commencing on 8<sup>th</sup> of March ending 25<sup>th</sup> of March 2011. However, I expected that it would be listed in the June session, given that an order staying execution was made. There is usually some urgency when execution on a judgment has been stayed. Parties were also hoping that the appeal would be heard in the June session which was three months away. The period of the order staying execution reflected the expectation that the appeal would be heard in June. Again, my expectation may have been unrealistic. The appeal was not heard in the session from 6<sup>th</sup> to 24<sup>th</sup> June 2011.
  
6. But the appeal file was listed on the cause list for the June session. I am unable to say for what business. The transcript of proceedings shows that a joint application dated 31.5.2011 (not an appeal), of BCB Holdings Ltd. and The Belize Bank Ltd. to the Court of Appeal for an order discharging the order I made on 8.3.2011, was presented to the Court on 14<sup>th</sup> and 23<sup>rd</sup> June 2011. It was objected to by the Attorney General on the ground that the Court of Appeal had no jurisdiction to entertain such an application, the proper proceeding would be an

appeal against the stay order. Despite suggestion by their Lordships that the stay order would expire in a matter of days, and there was no practical purpose in pursuing the application, learned counsel Mr. Eamon Courtenay SC for BCB Holdings Ltd. and The Belize Bank Ltd., urged the court to decide the issue in the application. I am grateful to counsel. Trial judges always wish to know answers to questions raised in the Court of Appeal and to have guidance from the Court. The Court heard submissions on the objection and reserved ruling; no date was given.

7. During the hearing of the objection to the application of BCB Holdings and The Belize Bank Ltd. in the Court of Appeal, learned counsel Mr. Michael Young SC, for the Attorney General, seemed to have understood that the Court of Appeal would not make any order regarding further stay of execution while the appeal remained pending beyond the June session of the Court. On 21.6.2011, he filed an application dated the same day for an order extending the order I made on 8.3.2011. On 24.6.2011 Mr. Young came to see me in chambers. He reported that the appointment arranged by him and agreed to by Mr. Courtenay, was for both Mr. Courtenay and himself to see me to have a date appointed for hearing an application by the Attorney General for an order extending the order I made on 8.3.2011, but that Mr. Courtenay later advised that he would not attend. I directed that the intended application would be presented to court on notice on

7.7.2011, at 10:30 a.m., the earliest occasion on the court calendar. I extended the order made on 8.3.2011 to 7.7.2011.

8. Mr. Courtenay for his part, filed two applications, one dated 29.6.2011, the other 30.6.2011. I listed both for hearing on 7.7.2011 conveniently. The first application is for an order that Mr. Joseph Waight, a deponent, attend for cross-examination. The second is the application the subject of this decision. It is for an order that:

“1. The issue of whether this Honourable Court has jurisdiction to entertain any application by the Attorney General of Belize after its order made on 8<sup>th</sup> March 2011 and which was perfected on the 27<sup>th</sup> day of April 2011, be tried in priority to all other issues.

2. Such further order as the court deems just.

3. Costs.”

9. At the hearing in this court Mr. Courtenay requested and Mr. Young agreed that, “the application” regarding jurisdiction of this Court be heard first. Both counsel assumed that in the second application, a request was made for an order that this court has no jurisdiction. They proceeded on that footing. The quotation in paragraph 7 shows that there was no such request in the application, although jurisdiction was

referred to as “the issue”. There was also no mention of jurisdiction in the application of the Attorney General or in the grounds.

10. In the circumstances, I do amend the application of BCB Holdings Ltd. and The Belize Bank Ltd., to convey the understanding of both counsel, rather than waste valuable time by asking Mr. Courtenay to apply for amendment of the application, which might require giving time to Mr. Young to simply confirm that he will not oppose an application for amendment introducing a request for an order that this court has no jurisdiction at this stage, to grant an order staying execution while the appeal remains pending.
  
11. Regarding the application to have Mr. Waight cross-examined, counsel for the Attorney General said that the Supreme Court (Civil Procedure) Rules require a deponent to be given seven days notice and that counsel desired Mr. Waight to “enjoy” seven days notice; otherwise counsel had no objection to Mr. Waight being cross-examined. I wondered why an application was necessary, instead of the usual notice for cross-examination issued to a deponent. A discussion as to adjournment to allow Mr. Waight time would then follow. It is distasteful to have disagreement on every minor procedural matter.

12. ***Submissions by respondents***

Mr. Courtenay's first submission was that upon the Attorney General filing a notice of appeal on 5.1.2011, against the judgment of Sir Muria J, the Supreme Court (trial court) became *functus officio*; an application for stay of execution should have been made to the Court of Appeal and not to myself sitting in the trial court. He relied on **McKnight v McKnight (1983) 44 WIR 349**.

13. The second submission was that, the stay order made by myself on 8.3.2011, had the effect of making me, the trial judge, *functus officio*, I could not reopen the order made on 8.3.2011, and amend it. Mr. Courtenay relied on, **Ladd v Marshall [1954] 1 WLR 1489**, and on **Taylor v Lawrence [2002] EWCA Civ. 90: [2003] Q.B. 528**. He contended that an order extending the order made on 8.3.2011, was an amendment or variation of the order; and that an amendment of the order cannot be made now after the order has been perfected and an appeal has been filed.

14. The third submission was that the stay order made on 8.3.2011, was already before the Court of Appeal on 21.6.2011, when the Attorney General filed the application to the Supreme Court for extending the order, it was an abuse of process to seek the jurisdiction of the Supreme Court; and that it would lead to chaos and disorder.

15. The fourth submission was a complaint that I erred when on 24.6.2011, I granted an extension of my order of 8.3.2011 to 7.7.2011, on an *ex parte* application of the Attorney General. I do not consider that the extension granted on 24.6.2011, was made on an *ex parte* application. Mr. Courtenay was afforded opportunity and chose not to come. Short notice is notice nevertheless. In any case, I do not consider the point material in the consideration of the question of jurisdiction.

16. ***Submissions by applicant***

Mr. Young's submissions were to the contrary. His first submission was that the Supreme Court of Belize (a trial court) has jurisdiction to stay execution; and even after the judgment order has been signed and sealed, and notice of appeal has been filed. He relied on the common law inherent jurisdiction of the Supreme Court of Belize, and cited the Privy Council case, **Selwyn Bibby v Sumintra Partap (Trinidad and Tobago) [1996] UKPC 13** in support.

17. The second submission was that, **Order II R 19(1), a schedule to the Court of Appeal Act, Cap. 90**, recognised the jurisdiction of the Supreme Court. In addition he relied on practice and procedure in the High Court of Justice in England which are deemed applicable in Belize by **s:18(2) of the Supreme Court of Judicature Act, Cap. 91, Laws of Belize**.



18. The third submission was that **Rs 17.4(7) and (8) of the Supreme Court (Civil Procedure) Rules 2005**, provide for the power of the Supreme Court to extend an interim order it had made. Mr. Young also relied on **R 47.2(2)** which gives the court the power to make or vary orders even after judgment; and in particular, the power to suspend a writ of execution.
19. The fourth submission was that, the Supreme Court (Awich Ag. CJ) was not *functus officio* when it made the order of 8.3.2011; the *functus officio* rule does not apply to all purposes. He argued that the rule does not apply to an order for stay of execution. Mr. Young relied on the **Selwyn Bibby** case, and **Barke v Seetec Business Technology Centre Ltd. [2005] EWCA Civ 578**.
20. The fifth submission was that a stay of execution on a judgment is not a variation or an amendment of an earlier judgment or order, and so **McKnight's** case cannot apply to the application for extension of the stay order made on 8.3.2011.
21. ***Determination***

The first submission by Mr. Courtenay that, a trial judge at the Supreme Court became *functus officio* upon the filing of appeal on 5.1.2011, is mistaken in two ways. First, if the proposition was correct, the *functus officio* rule would operate in regard to the judgment of Sir

Muria J, dated 22.12.2010. That is the judgment in respect of which notice of appeal has been filed. The application dated 21.6.2011, of the Attorney General, does not seek to amend the judgment of Sir Muria J. The application seeks to extend, and not to amend the stay order I made on 8.3.2011; and there has been no appeal against the order.

22. Secondly, the submission is mistaken that, an application for a stay of execution should be made only to the Court of Appeal once a notice of appeal has been filed. It is correct that, **O.II r.16(1) of the Court of Appeal Rules, 1965**, gives power to the Court of Appeal to, “*make an order for a stay of execution on a judgment appealed from pending the determination of such appeal*”, and to make orders on any other interlocutory application. The power is however, not exclusive to the Court of Appeal. **O.II r.19(1)** acknowledges that the court below has power as well. The rule states:

“19-(1) An appeal shall not operate as a stay of execution or of proceedings under the judgment appealed from, except so far as the court below or the Court may order, and no intermediate act or proceedings shall be invalidated, except so far as the Court may direct.”

23. These words are clear that, an appeal cannot automatically operate as a stay of execution or proceeding; there has to be an order made by the court below (the Supreme Court of Belize) or the Court of Appeal.
24. The source of the jurisdiction of the trial court is the common law inherent jurisdiction of a superior court (the Supreme Court of Belize). The Privy Council case, **Selwyn Bibby** is the authority – see also **BMW AG v Commissioners of HM Revenue and Customs [2008] EWCA Civ. 1028**. In **Selwyn Bibby's** case, a trial judge made a summary order for possession of land in favour of the claimants against the defendants, but stayed the order. The defendants applied for leave to the Court of Appeal to appeal and also for continuation of the stay order. The Court of Appeal granted leave, but refused stay order, holding that it did not have jurisdiction to order a stay of execution. On appeal to the Privy Council, their Lordships' Board held as follows:

*“Under English [common] law a court of first instance which grants relief, whether interlocutory or final, has an inherent power to suspend (stay) its order until an appeal or would-be appeal to the Court of Appeal is disposed of. The Court of Appeal has a like jurisdiction. The existence of this parallel jurisdiction is assumed, and thereby confirmed by RSC Order 59 rule 13(1):-*

*‘Except so far as the court below or the Court of Appeal or a single judge of the Court of Appeal may otherwise direct, an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below.’*”

25. We benefit further, from the direction made by their Lordships’ Board in these words:

*“In the ordinary course, an application for a stay should be made to the Court of first instance. It is obviously convenient, and it is the usual practice, for the application to be made to the judge whose decision is sought to be appealed, and for the application to be made at the time judgment is given. If the judge refused a stay as asked, or imposes unacceptable terms, the appellant or would-be appellant may renew his application to the Court of Appeal ...”*

26. Order 59 r.13(1) (England) is the same as Order II R.19(1) of the Court of Appeal of Belize quoted earlier, so the decision of their Lordships apply to cases in Belize. I accept Mr. Young’s submission on the point

27. It is my respectful view that the jurisdiction of the Supreme Court of Belize is in any case unlimited by authority of s:95 of the Constitution. That must include any inherent jurisdiction.
28. A direction similar to that given in **Selwyn Biddy's** case has been given by Manuel Sosa JA in the Court of Appeal of Belize in the case of: **Attorney General, Minister of Public Utilities and Belize Telecommunications Ltd. v Jeffrey Prosser, Bobby Lubana and Others, Civil Appeal No. 7 of 2006.**
29. The facts of the **Prosser's case** are long and complicated. A brief simplified version is this. When Belize Telecommunications was privatised in 1987, by the Government from a statutory corporation to a private business corporation, the Articles of Association created "a special share" of a nominal value of \$1.00. Attached to the special share were important rights and privileges in the management and control of the company such as the right to appoint two of the six directors and the non executive chairman, and the right to attend and speak at meetings of shareholders of any class. The Government owned the special share. Transfer of it would be only by authorisation of the Cabinet Minister responsible. Though not expected, the Government sold the special share to the claimants. Later the Government wished to ensure that in companies providing public utilities, entrenched rights such as attached to the special share are

used in the interest of public policy and public security. It amended the Public Utilities Commission Act and issued two Minister's Statutory Orders to effect its intention. One of the powers given under the amendment Act was the power of the Minister to appoint an inspector of affairs of utility companies in regard to entrenched rights, on his own consideration or pursuant to a court order.

30. The claimant's challenged the amendment Act and the Minister's Orders and an appointment of an inspector made by the Minister. The Supreme Court held and made declarations that the amendment Act and the two Orders made thereunder were unconstitutional. But it denied certain reliefs to the claimants. The Government, acting by the Attorney General, appealed and applied for "a stay of judgment". Likewise the claimants cross-appealed and applied for "a stay of judgment". The Court of Appeal of Belize refused both applications, holding that they had no jurisdiction since the applications had not been made in the first place at the Supreme Court (the trial court).
  
31. Regarding the third submission by Mr. Courtenay, I incline to the general proposition that, in an appeal, a point must be reached at which the Court of Appeal should be regarded as having taken complete control of the appeal case, and should be regarded as seized of the case. At that point, to have some aspect of the proceedings continuing concurrently at the trial court would appear to be an abuse of process.

32. In this appeal and application, I would have thought that such a point has been reached. The appeal has been listed and an application regarding the order of the trial judge (myself) staying execution has been contested and argued at the Court of Appeal. The trial court no longer has exclusive knowledge of the circumstances in the case and the advantage associated with the knowledge. Moreover, it is now the Court of Appeal that knows how long it will be before the appeal is heard and decided.
33. Going by what I have said, I should rule that this court, the trial court, has ceased to have jurisdiction in the entire appeal. However, as a trial Court, I am bound and obliged to follow the decision of the Court of Appeal in, **Attorney General and Others v Jeffrey J. Prosser and Others**, in which the learned judge, Sosa JA said that in an application for an order staying execution on a judgment, it is **a condition** for the existence of the jurisdiction of the Court of Appeal to hear the application, that a judge of the court below has heard and refused the application. He stated that at paragraph 20 in these words:

*“I have no doubt that it is, and rightly so, a condition for (a) the existence of the jurisdiction of this Court (not to mention its single judge) to hear, determine and make orders on an application for a stay of execution and (b) the existence of the like jurisdiction of this Court on an application for a stay of*

*proceedings that a judge of the court below should have previously heard and refused such an application.”*

34. That quotation means that an application for a stay of execution or an extension of the order can be commenced only at the trial court, it may be made to the Court of Appeal only if the applicant has been unsuccessful at the trial court. Accordingly, and despite my view, I must hold that this court has jurisdiction to hear the application dated 21.6.2011, of the Attorney General for an order for a further stay of execution or for an extension of the order that I made on 8.3.2011.
35. Had Sosa JA not made it a condition that the Supreme Court must first hear an application for an order for a stay of execution, I would have distinguished this case from **Prosser’s** case and **Selwyn Bibby’s** case on the facts that this appeal has already been listed for hearing, the stay order made by the trial judge is currently the subject of an application at the Court of Appeal, and the Court is considering it. The words, *“it is a condition for, (a) the existence of the jurisdiction of this Court ... to hear, determine and make orders on an application for a stay of execution ... that a judge of the court below should have previously heard and refused such an application ...”*, are too strong to be overlooked by a trial judge.



36. The remaining matter before court is now the application dated 6.2.2011, of the Attorney General. It is adjourned to 25.7.2011 at 11:00 a.m. The order made on 8.3.2011 is extended until that date. Mr. Waight is required to attend for cross-examination. Court adjourns.

37. **Delivered this Friday the 15<sup>th</sup> day of July 2011**

**At the Supreme Court**

**Belize City**

**SAM LUNGOLE AWICH  
Acting Chief Justice  
Supreme Court**