IN THE COURT OF APPEAL OF BELIZE, A.D. 2010

CIVIL APPEAL NO. 28

BETWEEN:

BELIZE OFFSHORE CENTRE LIMITED **CITY HOLDINGS LIMITED**	**Applicants**
WORLDWIDE PROPERTY MANAGEMENT LIMITED	**Respondent**
AND	
IT SOLUTIONS LIMITED	**Interested Party**

BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Barrow	**-**	**Justice of Appeal**

Ms. Lisa Shoman SC for the applicants
Ms. Ashanti Arthurs Martin for the respondent.

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7, 12 October 2010 and 16 May 2011.

MOTTLEY P

[1] I have read the judgment in draft of Barrow JA. I concur in the judgment.

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MOTTLEY P

SOSA JA

[2] On 12 October 2010 I was in agreement with the other members of the Court that the application of Belize Offshore Centre Limited and City Holdings Limited for leave to appeal should be refused, without hearing counsel for Worldwide Property Management Limited ('the respondent'), and that the respondent should have its costs, to be taxed if not sooner agreed. I concur in the reasons for judgment set out by Barrow JA in his judgment, which I have now read.

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SOSA JA

BARROW JA:

[3] At the end of oral argument by counsel for the applicants this Court dismissed the renewed application for leave to appeal, Legall J having previously refused leave. These are my reasons for concurring in that decision.

[4] The renewed application was made by Belize Offshore Centre Limited and City Holdings Limited (hereafter the applicants) for leave to appeal the decision of Legall J given on 10th March 2010 refusing their application to strike out a claim, No 354 of 2009, brought against the applicants by the respondent, Worldwide Property Management Limited (hereafter Worldwide). The basis of the strike out application was that the claim sought to be struck out was the third claim brought by Worldwide, claiming substantially the same relief against the same defendants, and it was an abuse of the process of the court for Worldwide to bring that third claim against the applicants.

[5] On 6th October 2006 Worldwide brought its first claim against City Holdings Ltd. That claim was for rescission of a transfer of shares to City Holdings Ltd and rectification of the Register of Members of Belize Offshore Centre Limited (hereafter Belize Offshore) on the grounds that the transfer was in breach of the company's articles of association, was fraudulent and was for no consideration. Worldwide twice failed to comply with case management orders to amend the statement of case and failed to comply in time with an order for delivery of witness statements, although it delivered the witness statements after the prescribed time had passed. Apparently it failed altogether to comply with the order to amend. On 17th October 2007, the day before the claim was to be heard, Worldwide discontinued the first claim and on the same day filed a second claim.

[6] A second claim, No 467 of 2007, was brought by Worldwide against a different defendant, Belize Offshore, and named City Holdings Ltd as an interested party. The second claim sought the same outcome as the first, rectification of the register of Belize Offshore, but on a different ground; namely, that the name of Worldwide had been omitted from the register of members without sufficient cause. There was no claim that there had been a fraudulent transfer. (In the present application for leave to appeal it went unremarked that it was one and not two claims that had previously been brought against Belize Offshore and I am content to simply note the point.) Claim No 467 of 2007 was dismissed by Awich J on 23rd October 2008 for failure of Worldwide to attend the first hearing of the Fixed Date Claim.

[7] In a written Ruling in Claim No 467 of 2007 delivered on 18th March 2009 Awich J refused an application by Worldwide for him to set aside his dismissal order, primarily on the ground that the applicant had given no good reason for its failure to attend the first hearing. The judge considered the explanation given in an affidavit filed on behalf of the applicant stating that Worldwide had changed its lawyers not long before the hearing date and the new lawyers had omitted to file a notice of change of attorneys and, as a result, the new lawyers were not notified of the hearing date. The judge was unimpressed with this explanation in view of his finding that the former

lawyers had telephoned a principal of Worldwide and 'reminded' him of the hearing date. The person who Awich J thought received that telephone call did not swear an affidavit to explain why he did not himself attend court on the scheduled date and inform the court of the change of legal representation. Awich J therefore treated the non-attendance of Worldwide at the first hearing as a "disregard of notification" and found there was no "good reason" for it.

[8] The third claim brought by Worldwide, No 354 of 2009, was filed on 8th May 2009 and named Belize Offshore as defendant and City Holdings as interested party. On 15th September 2009 Belize Offshore applied to join City Holdings Limited as a defendant (to which Worldwide consented) and to strike out the claim on a number of bases. These were narrowed down on the hearing before Legall J to the single ground that it was an abuse of the process of the court for Worldwide to proceed with a third claim.

[9] Legall J delivered a reserved judgment on the strike out application (dated 10th March 2010) to which I would pay tribute for its clear appreciation of the exercise the judge was required to perform and its clear reasoning. The essence of the claim, as the judge summarized it, was that a director of Worldwide, now deceased, who was employed by the law firm that then looked after the affairs of Worldwide, which firm was owned by a director of City Holdings, had improperly and without authority transferred to City Holdings the shares of Worldwide in Belize Offshore. The shares had been bought for between US$80,000.00 and US$100,000.00 and were stated to have been transferred to City Holdings for a price of $13,500.00 which, allegedly, had not even been paid to Worldwide. The judge examined a number of authorities relied on by Ms. Shoman S.C., counsel for the applicants. These cases were **Securum Finance Ltd v Ashton** [2000] 3 W.L.R. 1400***;*** **Wallis v.Valentine** [2002] EWCA 1034; **Lace Coordinates Ltd. v. Nem Insurance Co. Ltd.** [1998] W.I. 104266 (sic); **Janov v. Morris** [1981] 1 WLR 1389; and **Mohabir v. Phillips** (TT) No. 30 of 2002.

[10] From these cases the judge extracted the principle, among others, that in considering whether to strike out a claim as an abuse of process the court was obliged to consider the overriding objective of dealing with cases justly and apply that objective. The judge also derived from the cases that wholesale disregard of the Rules could amount to abuse of process but that it was not automatic that striking out should follow; rather, the court had to be satisfied that it was fair to do so. After reviewing the application of this approach in a number of the cases that were cited the judge proceeded to his determination by first advising himself as follows (at 39):

> "39. It seems to me that the court has a discretion to strike out a case as an abuse of the process where there has been contumelious conduct on the part of the claimant, that is to say, conduct which shows a deliberate failure to comply with specific orders of the court, or where the claimant was guilty of a series of separate, inordinate and inexcusable delays, in complete disregard of the Rules of the Court. The facts of this case show several failures to comply with orders of the court, delays and various breaches of the Rules of Court by the claimant. But before exercising the discretion to strike out a claim as an abuse of the process of the court, although there are noncompliance with orders and breach of the Rules, the court ought to look at the facts and circumstances of the particular case in question and the need of the court to allot its own limited resources to other cases, and ask itself the question: Is it just and fair that the claim should be struck out as an abuse of the process of the court? This is the general principle of the cases examined above."

[11] After so advising himself the judge looked again at the facts pertaining to the failure of Worldwide to appear at the first hearing of the Fixed Date Claim in the second claim. The judge reproduced passages from an affidavit, sworn by the local agent of Worldwide that had been filed on behalf of Worldwide on the application before Awich J to restore the second claim that

he had dismissed. The pith of that evidence was that it was at about 9:45 on the morning of the scheduled hearing date that the former attorneys telephoned the deponent (not the person that Awich J thought) and asked if he was aware that Worldwide needed to be in court that morning. The local agent deposed that he had not been aware of that date because it was the fact that a previous notice from the Registry had scheduled a different and later date for the first hearing and Worldwide had been preparing for and was set to go to court on that later date. This deponent said that when the new lawyers checked with the former lawyers for the reason why the former lawyers had not notified the new lawyers of the new, advanced date the former lawyers explained that they had already handed over their file to Worldwide and did not know who were the new lawyers and where they should have sent the notice.

[12] Legall J decided this was a "plausible explanation" for the failure of Worldwide to attend the first hearing at 9:00 o'clock in the morning of the day when the local agent had received telephone notification, at 9:45, that there was to be a hearing that morning. He reminded himself that an explanation for conduct that would otherwise be considered an abuse of process could operate to make it fair and just not to strike out the claim.

[13] The judge also considered the nature of the allegations advanced by Worldwide and thought that a claim of fraud attracted the particular scrutiny of the courts. While being careful to note that these were only allegations at this stage and could be completely cleared away at trial, he thought there was need for a trial. He concluded that it was one thing to prevent a claimant from relitigating a matter that had been tried on the merits but it was an altogether different thing to prevent a claimant from having his claim heard, at all; at para 47.

[14] Ms. Shoman S.C. submitted the applicants satisfied at least one of the three tests upon which to decide whether to grant leave to appeal which were stated by Sosa J (as he then was) in Supreme Court Action No 114 of 1998 **James Wang v Atlantic Insurance Co. Ltd** (unreported; judgment dated 21

July 1998) and approved by the Court of Appeal in Civil Appeal No 23 of 2008 **Belize Telemedia Ltd v Belize Telecom Ltd** (unreported; judgment delivered 27 March 2009). The three circumstances in which leave will be granted are:

1. Where the court sees a prima facie case that an error has been made;
2. Where the question is one of general principle, decided for the first time; or
3. Where the question is one of importance upon which further argument and a decision of the Court of Appeal would be to the public advantage.

[15] It was fairly obvious that the applicants could not satisfy either the second or third test. The question of striking out a claim that has been repeatedly brought, as an abuse of the process of the court, is a very familiar and commonplace question and decisions on it are legion. The decisions cited above, from which Legall J extracted the principles to apply in considering whether to strike out the claim before him, show it would be hopeless to contend that the question has been decided for the first time. Equally, the legal principles established in these decisions are so well settled that there could be no public advantage to having further argument or a decision of the Court of Appeal on the question.

[16] To get the applicants past the first test, that it appears prima facie that an error has been made by the court below, counsel set out in her skeleton argument the six proposed grounds of appeal alleging error on the part of the judge. Counsel's oral argument focused on two matters, namely that the judge had failed to properly consider that the claimant had squandered the court's time and that the judge had found the claimant had given a plausible explanation for its failure to attend the first hearing of the Fixed Date Claim and this was contrary to the finding of Awich J that the claimant had given no good reason for its failure.

[17] In support of the first of these arguments counsel relied heavily on the statement of Sykes J in the Jamaican case of **Tomlinson v Attorney**

General (unreported; judgment delivered 8 February 2005). At para 20 the judge said : "It cannot be in the interest of justice that a claimant, who imposes a cost on a defendant, fails to comply with court orders, fails to attend the date of trial and engages the scarce resources of the court should expect any indulgence from the court in the absence of any explanation." (Emphasis added). The behavior of the claimant in that case, said Sykes J, had deprived other litigants of their opportunity to have their cases heard. In the present application the emphasis counsel placed on this consideration seemed almost like elevating it to a condition; as if to suggest that once a litigant has wasted the court's time his claim must be struck out. The extension of counsel's argument contained more than a suggestion that a judge who does not place proper emphasis on that consideration has gone substantially wrong.

[18] There is, of course, no such principle. It is for a judge in a particular case to make an assessment, in light of all the circumstances of the particular case, of the overall conduct of a litigant and decide whether it amounts to an abuse. As the underlined portion of the quote from Sykes J indicates, there can be a credible explanation for what could otherwise be simply and egregiously a waste of the court's time. In any event, while the observation by Legall J on the matter of wasting the court's time was more concise than the observation of Sykes J, Legall J expressly adverted to wasting court time in considering whether it would be just and fair to strike out the claim as an abuse of the process of the court; at para 39; see [10], above. It is no prima facie error that the vigour of the judge's expression did not match the zeal with which counsel thought the value of the court's time should be vindicated.

[19] As to the second of counsel's argument, to my mind there is no prima facie error arising from the apparent difference in the finding by Awich J, that the claimant had offered no good reason for its failure to attend the first hearing of claim No 467 of 2007, and the finding by Legall J that the claimant had given a plausible explanation for this failure. The two judges were considering distinctly different aspects of the same occurrence and were required to perform different exercises. In deciding whether to set aside his

earlier order dismissing claim No 467 of 2007 Awich J was required to consider whether the claimant had a good reason for failing to attend the hearing. In contrast, in deciding whether to strike out claim No 354 of 2009 as an abuse of process, because the claimant had already had an opportunity to litigate its claim, Legall J was considering whether the claimant's explanation for why its earlier claim was struck out by Awich J showed conduct that was other than a wanton disregard of the court's process. There is a significant difference between disregarding notice of a court hearing because of an oversight and disregarding such a notice intending to be contemptuous of the court. Indeed, Awich J was prepared to accept that it was through oversight that the claimant was not represented at the first hearing but determined this was not a good reason for restoring the dismissed claim; (para. 16 of the Ruling of Awich J dated 18th March 2009). It was, therefore, perfectly proper for Legall J to find that the claimant did not deliberately disregard the notice and, therefore, intended no abuse when it failed to attend the first hearing at which Awich J dismissed the first of the two claims against Belize Offshore.

[20] In my view, the applicants satisfied none of the tests for granting leave to appeal.

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BARROW JA