IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

CLAIM No. CV 725 of 2022 (No.2)

BETWEEN:

FOWLER WORKS ENTERPRISES LTD	Claimant/Respondent
and	
MINISTER OF NATURAL RESOURCES, PETROLEUM & MINING	1st Defendant/Applicant
THE ATTORNEY GENERAL	2nd Defendant/Applicant

Appearances:

Rt. Hon. Dean O. Barrow, SC for the claimant/Respondent
Ms Imani Burgess, Crown Counsel, and Mr Israel Alpuche, Crown Counsel for the defendants/Applicants

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13 June 2024

24 June 2024

JUDGMENT

Civil practice and procedure – Court of Appeal Rules 16, 17 & 19 - Stay of execution – Stay of proceedings – Stay of order – High Court jurisdiction – Declaratory Orders - Pleas on cost orders

[1] **HONDORA, J.:** this is my judgment on the Defendants'/Applicants' interlocutory application for an order staying Chabot J's 12 January 2024 ruling in which she upheld the validity and enforceability of the parties' contract for the sale and transfer of land.

[2] In my ruling, save where it is essential to differentiate between the parties, I shall refer to the defendants in the main matter, i.e., the Minister of Natural Resources, Petroleum and Mining and the Attorney General as the Applicants. Relatedly, I will refer to Fowler Works Enterprises, the claimant in the main matter and the respondent in this application, simply as Fowler Works.

I. Background

[3] The facts relating to this matter are summarised in Chabot J's 12 January 2024 decision. Consequently, I will restate only those facts that are relevant to my decision.

[4] In circa July-August 2020, the Ministry of Natural Resources agreed to sale and transfer to Fowler Works four parcels of land (the properties) for the aggregate sum of BZ$266,894.50.

[5] Following Belize's November 2020 elections, the Ministry of Natural Resources reneged on those contracts. The pleadings do not explain why the Ministry of Natural Resources was not included as a party. I presume that in the main matter, the Minister was sued vicariously. It stands to reason that the Minister who was in office when the disputed contracts were settled is not the one who decided against proceeding with the property transfer. Thus far, the case has proceeded on the basis that the legal suit against the current Minister of Natural Resources is sufficient without citation of the Ministry. However, this is an aside and the issue is not currently before me.

[6] In December 2022, Fowler Works instituted legal action against the Minister of Natural Resources and the Attorney General (Applicants in this matter) not for specific performance but for general and special damages in the sum of BZ$10,350,252.00. Fowler Works also claimed interest at 6% from the date of issue of the claim form, and interest pursuant to section 175 of the Senior Courts Act, 2022 on the amount of damages claimed. With apparent reference to the court's equitable jurisdiction, Fowler Works also claimed any other relief as the court "may deem fit".

[7] In their defence to Fowler Works' claim in the main matter, the Applicants contended that the agreements of sale and transfer of the four properties were, among others, tainted by illegality and contrary to public policy. In particular, the Applicants contended that the Finance and Audit (Reform) Act required the sale or lease of the largest piece of property, known as E19560-B1, which exceeded 500 acres, to be approved by the National Assembly. It was common cause between the parties that no such resolution was sought or passed by the National Assembly.

[8] On 24 April 2023, the presiding judge, Chabot J, ordered separate trials on (a) the validity and enforceability of the four contracts and on whether the Minister of Natural Resources breached those contracts; and (b) the claim for damages for the alleged breach of the four contracts.

[9] The first trial took place in September and November 2023. On 12 January 2024, Chabot J

issued her ruling and held (and I summarise) that the contracts for the sale and transfer of the four properties were valid and enforceable and that the Minister of Natural Resources' failure to transfer the properties constituted a breach of contract. The honourable judge's order stated:

"IT IS HEREBY ORDERED THAT

(1) The claim is granted.
(2) The court remains seized of this matter for the purposes of assessing damages.
(3) Costs in an amount to be determined at the conclusion of this matter are awarded to the claimant.

[10] Chabot J's order must be read in the context of her judgment. The claim that she granted was a declaratory order on the validity and enforceability of the contracts and that in not transferring the properties to Fowler Works after payment of the full purchase price, the Minister of Natural Resources breached the terms of the contract. Chabot J did not grant the claim for damages, which remained to be assessed.

[11] In response to Chabot's 12 January 2024 decision and order, the Minister and the Attorney General appealed to the Court of Appeal. That case is listed as Civil Appeal No. 2 of 2024.

[12] Not long after, the Applicants filed an application with this court dated 16 February 2024 seeking an order staying Chabot's 12 January 2024 order. Below, I set out my reasons for my decision dismissing the Applicant's application in part and granting it in part.

II. Issues falling for resolution

[13] The issues arising for resolution in this matter are deceptively complex. This was caused in part by how the Applicants' pleaded their case and by Fowler Work's opposition. At first glance, this appeared to be a straightforward application for a stay of execution of Chabot J's 12 January 2024 order pending the Applicants' appeal to the Court of Appeal. However, during oral submissions and on closer reading of the parties' pleadings and skeleton arguments, I distilled that this was an agglomerated application for a stay of execution, a stay of proceedings and suspension of the effect of Chabot J's 12 January 2024 orders.

[14] Since the apparent dominant theme in the Applicant's application concerned a stay of execution pending appeal, I was minded to disregard and/or strike out what appeared to be subsidiary applications for the suspension of the effect of Chabot J's 12 January 2024 order and/or a stay of proceedings on the assessment of damages leaving the door open for the Applicants to renew any one of their other applications if they were so inclined.

[15] In the end, albeit with much reluctance, I decided to address all three issues because it is readily apparent that the practical relief sought by the Applicants is for this court to not proceed with the trial on the assessment of damages. It's also clear that Fowler Works is very much alive to this fact. On its part, Fowler Works wants this court to proceed with the assessment of damages. The challenge for this court is that the parties' intertwined, and made little effort to differentiate between, the different types of stay applications.

[16] I would have hoped for greater clarity and specificity in how both parties' pleadings were drafted and for agreement between esteemed legal counsel on the issues and the basis on which they required the court's decision. It needs little elaboration that although related, stays of execution, stays of proceedings and stays of orders are different discretionary remedies.

[17] In opting to address all three issues, I took into consideration the overriding objective and the rules set out in section 45 of the Senior Courts Act on finality in litigation and the need to avoid multiplicity of legal proceedings and unnecessary litigation costs. Section 45 of the Senior Courts Act provides:

> "The Court, in the exercise of the jurisdictions vested in it by this Act, shall, in every cause or matter pending before it, grant, either absolutely or on such terms and conditions as the Court thinks just, all such remedies whatever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided."

[18] Below, I set out the factual matrix, which illustrates how the parties addressed each of the three different types of stay remedies.

(a) On stay of execution

[19] The Applicants' case is set out in a short 16 February 2024 affidavit deposed by Mr Stanley Grinage, Crown Counsel, in which he referred at least four times to the application as being one for a "stay of execution" pending appeal of Chabot J's 12 January 2024 declaratory order.

[20] Fowler Works' opposition is set out in an affidavit deposed by Mr Calvin Reimer. In it, it's clear that Mr Reimer appreciated that the Applicants' application was – at least in part - for a stay of execution. At para. 5 of his affidavit he stated:

> "…there is no prospect of the assessment of damages being concluded except in due course. Thus there is no prospect of premature enforcement against the Defendants."

[21] At paras. 4 and 5 of his skeleton argument, Barrow, SC referred to the Applicants' application

as being one for a stay of execution pending appeal.

(b) On stay of proceedings

[22] Mr Grinage, in para. 8 of his affidavit, stated that he was of the belief that:

> "…should the Court proceed to deal with assessing damages in Claim No. 725 of 2022, it will cause a conflict with Civil Appeal No. 2 of 2024, and will cause hardship to the Government of Belize to pay under an assessment of damages where it may not be necessary."

[23] Relatedly, in para. 18 of her skeleton argument dated 10 May 2024, Ms Burgess, Crown Counsel, stated with reference to Chabot J's 12 January 2024 order, that it took effect from the date on which it was issued and that:

> "…[the] said judgment set in motion the process for steps to be taken for <u>a hearing for assessment of damages</u>…A hearing which the [Applicants] profusely contend <u>should be stayed pending</u> the hearing of the substantive appeal."

[24] That statement indicates that the Applicants' application is in part also for a stay of proceedings, i.e., a stay of the proceedings for the assessment of damages.

[25] In his affidavit, Mr Reimer also addressed the issue of a stay of proceedings and stated at para. 4:

> "'no' prejudice will result to the [Applicants] by proceeding with the assessment of damages stage of Fowler's Claim for which a bifurcated trial was ordered."

[26] And at para. 6 of his affidavit, Mr Reimer further added that:

> "…this Court can continue to assessment and thereafter a stay of the execution, if an appropriate case is made out for such a stay, until the Court of Appeal disposes of Civil Appeal No. 2 of 2024."

[27] This indicates that Mr Reimer understood the Applicants' claim to include a request for a stay of the High Court proceedings on the assessment of damages.

[28] Relatedly, at para. 1 of his skeleton argument, Barrow, SC submitted that:

> "*[The Applicants] <u>have made an application for a stay of proceedings</u> to this Court…*"

[29] This submission indicates that Fowler Works and its legal representatives understood the Applicants' application as being primarily about or at least including a request for a stay of this court's proceedings on the assessment of damages.

[30] I should add that during the hearing, I asked Ms Burgess whether as contended by Barrow, SC at para. 1 of his skeleton argument, the Applicants were in fact seeking only a stay of

proceedings on the assessment of damages. In response, Ms Burgess stated that the Applicants were seeking a stay of execution, but she also took the opportunity to ask the court to consider the Applicants' application as one requesting a stay of proceedings on the assessment of damages.

[31] Ms Burgess's submission contradicted her submission in para. 20 of her skeleton argument where she stated that Fowler Work's submission in its skeleton argument that the Applicants were seeking a stay of the proceedings on the assessment of damages was unfounded.

[32] Despite his submission in para. 1 of his skeleton argument, Barrow, SC objected to Ms Burgess' submission that the Applicants' application also be treated as one for stay of proceedings in addition to being an application for a stay of execution. The parties' shifting positions were less than ideal.

(c) On stay of effect of Chabot J's 12 January 2024 orders

[33] The Applicants' draft order requested the court to rule that:

> "The Orders made against the Defendants/Applicants by Honourable Madam Justice Chabot in Claim No. 725 of 2022 herein dated the 12th day of January 2024 is *(sic)* stayed pending determination of Civil Appeal No. 2 of 2024." [Emphasis added]

[34] In the ordinary course, a stay of an order means the stay of the effect of an order – in other words, the suspension of the effect of an order. The draft order's failure to identify and qualify the type of stay order sought gave rise to the strong inference that the Applicants were seeking a stay of the effect of Chabot J's 12 January 2024 order.

[35] This case also raised an additional and critically important question on the nature and extent of this court's jurisdiction over stays of execution as well as stays of proceedings and stays of orders in part because Fowler Work raised an objection to the court's exercise of jurisdiction. In my view, that question is a matter of general importance.

[36] Based on the foregoing considerations, the following issues fall for determination in this matter, i.e.:

(a) whether this court has jurisdiction to order stays of execution and relatedly stays of proceedings and stays of orders;

(b) whether this court should on the facts order a stay of execution pending appeal;

(c) whether this court should on the facts stay Chabot J's 12 January 2024 order pending appeal; and

(d) whether this court should on the facts stay proceedings on the assessment of damages pending appeal.

III. Whether the High Court has jurisdiction over stay applications

(a) The parties' contentions and the legal framework

[37] On behalf of Fowler Works, Barrow, SC argued in para. 2 of his skeleton argument that the Applicants had failed to "properly invoke" the High Court's jurisdiction and requested the dismissal of their application for stay for lack of jurisdiction. He argued that the Applicants were obliged to first make an application to a single judge of the Court of Appeal as required by Order II, Rule 17, which is contained in the Senior Courts Act, 2022.

[38] In reply, Ms Burgess submitted that:

> "The [] Applicants…accept and submit that the general rule is that a Stay Application should have been properly made to a single judge of the Court of Appeal". [Emphasis added]

[39] She argued, however, that Rule 17 of Order II of the Court of Appeal Rules provided an exception enabling a judge of the High Court to exercise jurisdiction in situations where there is/would be undue inconvenience or delay if the application for stay was made to a single judge of the Court of Appeal.

[40] In support of her clients' decision to approach the High Court for relief, Ms Burgess submitted that the Court of Appeal had not yet set a date for the case management of that case and that it sits three times a year and that these facts ought to be considered because in practice this introduced undue inconvenience and delay in the resolution of the Applicants' application for stay.

[41] This case and the parties' submissions raise the following critically important question: does the High Court have jurisdiction over applications pending appeal for stays of execution, stays of proceedings and stays of orders ***only*** if the applicant demonstrates that an application to a single judge of the Court of Appeal would result in "undue inconvenience or delay" in the resolution of their stay application?

[42] Put differently, pending an appeal to the Court of Appeal, does the High Court not have jurisdiction to order stays of execution of its orders, stays of its proceedings and stays of its orders save where an applicant demonstrates that approaching the Court of Appeal for similar relief would cause "undue inconvenience or delay"?

[43] In resolving the question whether the High Court has jurisdiction over such relief applications pending appeal to the Court of Appeal, reference must be had to Rules 16, 17 and 19 of the Court of Appeal Rules, section 95(1) of the Constitution, and both binding and persuasive precedent.

> **Rule 16(1) of the Court of Appeal Rules** provides:
>
> "In any cause or matter pending before the Court [of Appeal] a single judge of the Court [of Appeal] may upon application make orders for –
>
> ….
>
> (c) a stay of execution of any judgment appealed from pending the determination of such appeal."
>
> **Rule 17(1) of the Court of Appeal Rules** provides**:**
>
> "Applications referred to in rule 16 shall ordinarily be made to a judge of the Court [of Appeal], 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 [of Appeal] under that rule."
>
> **Rule 19(1) of the Court of Appeal Rules provides:**
>
> "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 [of Appeal] may Order, and no intermediate act or proceeding shall be invalidated except in so far as the Court [of Appeal] may direct."

[44] As noted above, both parties to this case agree that the High Court has jurisdiction to hear applications for stay of execution pending appeal <u>only</u> in cases where undue inconvenience or delay would result if the application were made to a single judge of the Court of Appeal. It is important to note at this stage that Court of Appeal Rule 16(1) refers only to stays of execution and makes no reference to stays of proceedings in the High Court or suspension by a High Court judge of their orders. Court of Appeal Rule 19(1) refers to both stays of execution and stay of proceedings. I shall return to this issue below.

[45] I am of the respectful view that learned counsels' reading of Court of Appeal Rule 16(1), 17(1) and 19(1) on the High Court's jurisdiction to hear applications for stays of execution, stay of proceedings and stay of orders pending appeal to the Court of Appeal is erroneous.

(b) Section 95(1) of the Constitution is the basis for the High Court's jurisdiction

[46] The High Court's jurisdiction on applications for stay of execution pending appeal (and other stays) is derived **<u>not</u>** from Rule 16(1), Rule 17(1) or Rule 19(1) of the Court of Appeal Rules but from section 95(1) of the Constitution of Belize. In this regard, section 95(1) of the Constitution codifies the common law.

[47] Section 95(1) of the Constitution of Belize provides:

> "The [High Court] shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such jurisdiction and powers as may be conferred on it by this Constitution or any other law." [Emphasis added]

[48] In this regard, I agree with Awich CJ's ruling in ***BcB Holding Ltd and Another v Attorney General***, BZ 2011 SC 36 at para. 27 in which he stated:

> "the jurisdiction of the [High] Court of Belize is…unlimited by authority of s. 95 of the Constitution. That must include any inherent jurisdiction."

(i) Binding precedent

[49] The leading case of ***Attorney General and Others v Prosser and Others***, Civil Appeal No. 7 of 2006 also considered the issue of the High Court's jurisdiction over applications for stays pending appeal. In that case, at para. 13, Sosa JA ruled that:

> "…[the Court of Appeal] has, like the [High Court] jurisdiction to order a stay of execution or of proceedings."

[50] Similarly, in ***Berezkin v Spilnichenko***, Civil Application No. 1 of 2016, the Court of Appeal reaffirmed its *stare decisis* and this time with all judges joining Sosa JA in ruling that the High Court has jurisdiction over applications for stay of execution pending appeal.

[51] The ***Prosser*** and ***Brezkin*** cases are authoritative on this point of law. These cases pertained to the application of Court of Appeal Rule 16(1) and Rule 19(1). Notably, the Court of Appeal did not hold that the High Court's jurisdiction over applications for stay of executions and proceedings were limited to cases of undue inconvenience or delay.

(ii) Persuasive jurisprudence

[52] In ***BcB Holding Ltd***, Awich CJ cited with approval the case of ***Bibby et al v Partap et al***, Privy Council Appeal No. 44 of 1995, in which that court affirmed in the context of Court of Appeal Rules for Trinidad and Tobago that:

> "Under English 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 like jurisdiction."

[53] Regarding the law and practice in England and Wales, Lord Denning noted in the case of ***T.C Trustees and Another v J.S Darwen (Successors) Limited***, [1968] EWCA Civ J1025-1 that:

> "It is true that the Courts have an inherent jurisdiction to stay proceedings, but only on grounds that are relevant to a stay."

[54] The case of ***Reichhold Norway ASA and Another v Goldman Sachs***, QBCMI 1999/0081/3, at para. 1 and 4 is instructive on the fact that the High Court in England and Wales had and retains its inherent jurisdiction over stay proceedings.

[55] In ***Roussellon Freres Et Cie v Horwood Homewares Limited*** [2008] EWHC 160 (Ch) at para. 4, Warren J affirmed following an objection to his exercise of jurisdiction that:

> "CPR 52.7…does not itself confer a jurisdiction to grant a stay [it] simply states that an appeal does not bring about an automatic stay. The jurisdiction to grant a stay is, rather, part of the inherent jurisdiction of the court."

[56] Warren J made that ruling in relation to the England and Wales CPR 52.7, as it was then, which Rule was similar in all material respects to Court of Appeal Rule 19(1).

[57] Drawing on the above, I conclude that the High Court's jurisdiction over different types of applications for stay pending appeal is derived not from Court of Appeal Rule 16(1), Rule 17(1), or Rule 19(1) but rather from section 95(1) of the constitution, which codifies the common law rule on inherent jurisdiction.

(c) Court of Appeal Rule 17(1) is procedural and does not grant or amend the High Court's inherent jurisdiction

[58] Barrow, SC argued in his skeleton argument and oral submissions that the Applicants had not properly engaged/invoked the High Court's jurisdiction because they had not attempted to file their stay application before a single judge of the Court of Appeal. Implicit in that submission is the contention, which I have dismissed above, that the High Court enjoys jurisdiction over stay applications courtesy of the Court of Appeal Rules and that the High Court's jurisdiction is triggered/engaged only if it would be unduly inconvenient or result in delay if such applications were made to a judge of the Court of Appeal.

[59] It's worth repeating that Court of Appeal Rules 16(1), 17(1) and/or 19(1) do not grant, amend or restrict the High Court's inherent jurisdiction over applications for stays of execution, stays of proceedings and stays of orders pending appeal. Rule 17(1) in particular sets out the procedure to be followed by an applicant that has a case already pending before the Court of Appeal and that seeks a stay of execution or of proceedings regarding the decision appealed against.

[60] If those Court of Appeal Rules were intended to restrict the High Court's inherent jurisdiction over applications for stays, they would in my respectful view been drafted differently and their

ambit extended beyond stay of executions and stay of proceedings. In addition, it would be surprising if the High Court's inherent jurisdiction were to be restricted through Court of Appeal Rules and not through the Senior Courts Act.

[61] In ***Attorney General and Others v Prosser and Others,*** the Court of Appeal considered this very issue with Sosa JA posing the following question at para. 13 of his judgment**:**

> "whether the proper procedure is not for the party seeking a stay of execution or of proceedings to apply for the same to the [High Court]; the corollary question being whether this Court [i.e., the Court of Appeal] is only to be approached, (a) in the case of a stay of execution, in the event of a refusal first, by the court below and next, by the single judge of this Court, and, (b) in the case of a stay of proceedings, in the event of a refusal by the court below."

[62] In answer to this question, Sosa JA noted at para. 17, that:

> "The…failure of the draftsperson expressly to state that a stay of execution or of proceedings should be sought from [the Court of Appeal] only after having first been sought, without success, from the court below cannot, in my view, suffice to justify a reign of disorder in the practice of this Court and of a single judge." [Emphasis added]

[63] Sosa JA also pointed out that it is more meaningful for an application for a stay of execution to be made directly to the judge of the High Court whose judgment is the subject of an appeal rather than the Court of Appeal since:

> "…the trial judge will generally be fully seized of all the matters canvassed on the application for a stay. [The Court of Appeal] is particularly at a comparative disadvantage in a case, such as the present one, where it is asked to hear an application even although *(sic)* it has not had the benefit of a record of the proceedings in the claim below…The element of inconvenience is real."

[64] And in **para. 20** of his judgment, Sosa JA noted that the fact that the Court of Appeal Rules do not expressly require an application for stay of execution or proceedings to be made first to the trial judge was "***the result of [a drafting] oversight***".

[65] Although he did not cite the case, in arriving at his decision, Sosa JA was likely influenced by the Privy Council's decision in ***Bibby***, which ruled at para. 5 that:

> "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…"

[66] If it be argued that no majority ratio decidendi emerged from the ***Prosser*** case, a definitive and

binding ruling was made on the law and practice in Belize in the Court of Appeal's unanimous 2017 ruling in ***Berezkin*** (see para. 6) in which it stated:

> "…the only true interpretation of rule 19(1), where an application for a stay of proceedings is concerned, is that an application should first be made to the judge of the court below and that it is only in the event of the refusal of such an application that there should be an application to [the Court of Appeal]."[1]

[67] Although, the Berezkin case related to "an application for a stay of proceedings", Sosa JA's statement applies with equal force in proceedings for applications for stay of execution and a stay/suspension of an order.

[68] It is noteworthy as well that section 28(1) of the Senior Courts Act requires so far as is practicable for all matters and proceedings arising from a matter to be disposed of before a single judge. It provides:

> "Subject to any statutory provisions, every proceeding in the Court and all business arising thereout shall, so far as is practicable and convenient, be heard, determined and disposed of before a single judge, and all proceedings in an action subsequent to the hearing or trial, down to and including the final judgment or order, shall, so far as is practicable and convenient, be had and taken before the judge before whom the trial or hearing took place."

[69] There is no contesting, as noted by Sosa JA in ***Prosser***, that the judge best placed to resolve applications for stays of execution, stays of proceedings or stays of orders in the context of High Court proceedings is the presiding judge.

[70] The procedure proposed by Barrow, SC that the Applicants ought first to have approached a single judge of the Court of Appeal before approaching a judge of the High Court with their application for stay of execution leads to the "reign of disorder", which Sosa JA feared and reproached in the ***Prosser*** case (see **para. 17 and 18**). It would introduce unnecessarily convoluted and complex procedures, which most litigants would find confusing. The risk of litigants shuttling back and forth between a single Judge of the Court of Appeal, a High Court judge and the Court of Appeal in that order is likely to give rise to significant litigation cost and delay challenges. Such a practice would do little to advance the objectives set out in section 28(1) of the Senior Courts Act. In this regard and for clarity of practice and procedure, it is important that rules of court are read consistently with the provisions of the Senior Courts Act, 2022 and as relevant section 95(1) of the Constitution.

[1] I believe that the reference to Rule 19.1 of the Court of Appeal Rules was an editorial mistake. Sosa JA must have intended to Rule 16.1, which is the one that refers to applications being made to a single judge of the Court of Appeal.

[71] In future amendments to the Court of Appeal Rules, consideration should be given to addressing the casus omissus identified by Sosa JA in ***Prosser***. There is merit in clarifying that an application for stay should ordinarily be made to the judge of the court a quo before such an application is renewed before a single judge of the Court of Appeal or the full court.

[72] In my view, Court of Appeal Rules 16(1), 17(1) and 19(1) apply to those cases where the Court of Appeal is already seized with an appeal and more likely has listed the same for a hearing and/or has part-heard the matter. In such situations, a litigant who wishes to secure a stay should "ordinarily" make their application to a single judge of the Court of Appeal and where that is likely to result in undue inconvenience or delay, they can make their application to a judge of the High Court. Obviously, the undue inconvenience or delay must be demonstrated on a balance of probabilities. In addition, the applicant must satisfy the other rules on stay of execution – if that be the case, i.e., proving that a stay of execution is in the interests of justice and/or that their appeal has good prospects of success. In the latter regard, see for example the persuasive jurisprudence set out in (i) ***Leicester Circuits Ltd v Coates Brothers P***lc [2002] EWCA Civ 474; (ii) ***London Borough of Haringey*** [2011] EWHC 3544 (Fam); (iii) ***C-Mobile Services Limited v Huawei Technologies Co. Limited*** BVIHCMAP 2014/0017.

(d) Authorities relied upon by the parties to litigation

[73] There are at least three High Court decisions, whose rulings the parties' either expressly or impliedly relied upon in their submission that the High Court has jurisdiction over applications for stays of execution <u>only</u> in the cases of undue inconvenience of delay. These include the case of ***Tiabo v Tiabo*** Claim No. 502 of 2021 that was cited in ***Gryffyn v FBS Markets Inc***. Claim No. 42 of 2020 and ***Bowman v Herrera and Ors,*** Claim No. 370 of 2020.

[74] In the 2 May 2023 ***Tiabo v Tiabo*** decision***,*** the Honourable Chabot J stated at para. 30, that:

> "Under the Senior Courts Act and the amended Court of Appeal Rules, the High Court <u>has retained the jurisdiction</u> to make an order for the stay of execution of its judgment pending the appeal. This <u>jurisdiction</u> is clearly laid out in sections *(sic)* 16(c), 17 and 19 of Order II of the Court of Appeal Rules. I note that pursuant to section *(sic)* 17, an application for stay of execution should normally be made to the Court of Appeal, unless doing so would cause undue inconvenience or delay" [Emphasis added]

[75] In the Honourable judge's 18 July 2023 decision in the case of ***Gryffyn v FBS Markets Inc***, Alexander J stated at para. 12 of her decision that:

> "There is no dispute that the High Court has power to entertain this application, having <u>retained the jurisdiction</u>, in cases of undue inconvenience and delay: see the Senior

Courts Act."

[76] In the Honourable judge's 23 October 2023 decision in the matter of ***Bowman v Herrera and Others,*** Alexander J held at para. 14 that:

> "…the retention of the [High Court's] jurisdiction is limited to cases where there will be 'undue' inconvenience and delay if the application is made to the Court of Appeal".

[77] The Honourable judge also stated that this position was clarified and confirmed by Chabot J in ***Tiabo v Tiabo*** stating:

> "On the advent of the Senior Courts Act, the High Court retain[ed] the power to entertain and dispose of applications for stay, in cases of undue inconvenience and delay. The Honourable Madam Justice Chabot clarified and confirmed this position in Edmond Tiabo v Englebert Tiabo."

[78] And, at para. 14, the Honourable judge stated:

> "From a plain reading of [Rules 16-19 of the Court of Appeal Rules], the retention of…jurisdiction is limited to cases where there will be "undue" inconvenience or delay if the application is made to the Court of Appeal…The Court of Appeal, like the High Court, was likely surprised by this change in jurisdiction and would need some time to adjust, to accommodate the instances where applicants would be unable to satisfy the requirement of 'undue inconvenience or delay' that allows the application to be made in the High Court."

[79] I have not followed the above-mentioned decisions in preference for the Court of Appeal's decisions in ***Prosser*** and ***Berezkin***, which are binding on me. For completeness, I must state that this was after much anxious consideration and with due deference to my honourable colleagues' decisions whose statements on the High Court's jurisdiction were obiter and consequently do not appear to have been subjected to full analysis.

[80] Having established that this court has inherent jurisdiction pending appeal over applications for stays of execution, stays of proceedings and stays of orders, I now turn to address whether I should exercise my discretion in favour of the Applicants' agglomerated application.

IV. Whether the court should order a for stay of execution pending appeal

[81] In response to the Applicants' request for an order staying the execution of Chabot J's 12 January 2024 order, Barrow, SC pleaded that the Honourable judge's decision was declaratory in nature and incapable of enforcement save following an assessment of, and issuance of an enforceable order for, damages.

[82] In response, Ms Burgess, lead Crown Counsel, argued at para. 16 of her skeleton argument,

that the issue of Chabot J's order being declaratory was "irrelevant". In a rather prosaic statement, she also made the following point in para. 18 of her skeleton argument, that:

> "[a] "judgment order takes effect from the day it is given…and a party must comply with it immediately [and that the] said judgment set in motion the process for steps to be taken for a hearing for assessment of damages [which] hearing [the Applicants] profusely contend should be stayed pending the hearing of the substantive appeal."

[83] Clearly, that was an inadequate response to Barrow, SC's submission that Chabot J's order was declaratory in nature and not enforceable. As a general rule, ordering a stay of execution of an order that is on its face incapable of enforcement would be an exercise in futility. And courts may not make brutum fulmen orders.

[84] Although neither Barrow, SC nor Ms Burgess referred to it, this question on the enforceability of declaratory orders arose in the Court of Appeal case of ***Prosser***. In that case, Sosa JA posed the following question, which was raised in the case of ***Chief RA Okoya and Others v S Santili and Others***, SC, 200/1989, i.e.:

> "[w]hether a defendant who has filed an appeal against purely declaratory orders made against him is entitled to apply for a stay of execution of those orders pending the hearing and determination of the appeal".

[85] All members of the Court of Appeal answered the question in the negative and drew a distinction between declaratory orders and executory orders.

[86] As did Sosa JA, I will quote Agbaje J's reasoning in ***Chief RA Okoya and Others v S Santili and Others***. He stated:

> "First: (i) [An] Executory judgment declares the respective rights of the parties and then proceeds to order the defendant to act in a particular way, e.g., to pay damages or refrain from interfering with the plaintiff's rights, such order being enforceable by execution if disobeyed.
>
> Declaratory judgments, on the other hand, merely proclaim the existence of a legal relationship and do not contain any order which may be enforced against the defendant.
>
> Second: A declaratory judgment may be the ground of subsequent proceedings in which the right…violated, receives enforcement but in the meantime there is no enforcement nor any claim to it."

[87] Many of the authorities analysing the issue of stays of execution of declaratory orders cite the statement made by Zamir and Wolf in their publication titled "***The Declaratory Judgment***", 4th edition in which the authors state:

> "A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs. It is to be contrasted with an executory, in other words, coercive, judgment which can be enforced by the courts. In the case of an

executory judgment, the courts determine the respective rights of the parties and then order the defendant to act in a certain way, for example, by an order to pay damages or to refrain from interfering with the plaintiff's rights; if the order is disregarded, it can be enforced by official action, usually by levying execution against the defendant's property or by imprisoning him for contempt of court. A declaratory judgment, on the other hand, pronounces upon a legal relationship but does not contain any order which can be enforced against the defendant. Thus the court may, for example, declare that the plaintiff is the owner of certain property, that he is a British subject, that a contract to which he is a party has or has not been determined, or that a notice served upon him by a public body is invalid and of no effect. In other words, the declaration simply pronounces on what is the legal position."

[88] Reference is also typically made to the Young QC's publication, "***Declaratory Orders***", 2nd Edition in which he states at para. 212 that:

> "The enforceability of a declaratory order is the weak spot in its amour, as there is no sanction built into the declaratory relief."

[89] In the Caribbean region, in addition to the case of ***Prosse***r, the following cases all ruled that in exercising its discretionary power it was not open to a court to order a stay of execution of a declaratory order. Examples include the Jamaican cases of: (i) ***Bowen v Robinson and Another*** [2010] JMCA App 27; (ii) ***Director of Public Prosecution v Mark Thwaites and Others***, SCCA, No. 14/2009, Application 39/2009;[2] (iii) ***Farrel and Others v Reid and Others*** [2012] JMCA App 16; (iv) ***Rainford v Sir Patrick Lien and Others*** [2014] JMCA App 26.

[90] And so too in England and Wales. See for example, the case of ***West Tankers Inc. v Allianz SpA and Another*** [2012] Bus. L.R. 1701.

[91] Applying the above considerations, I hold that the Applicants have not demonstrated any valid basis justifying an order by this court staying the execution of Chabot J's 12 January 2023 declaratory order.

[92] The terms of Chabot J's order are incapable of enforcement and the Applicants have not pleaded or demonstrated that they are. In addition, the honourable judge's order did not require any of the parties to take or refrain from taking action of any kind in which case the issue of a stay of execution does not arise (see ***Miller v Ocean Breeze Hotel Limited and Another*** [2016] JMCA App 1, at para. 21].

[93] As pleaded by Barrow, SC, it is not in dispute that Fowler Works cannot execute against Chabot

2 The case of ***Director of Public Prosecution v Mark Thwaites and Another*** cited with approval the Belize Court of Appeal case of ***Prosser*** (see para. 5).

J's 12 January 2024 order. There are no proceedings ongoing or threatened for the enforcement of the honourable judge's order that can be the legitimate subject of a stay of execution order issued by this court. Consequently, this court will not exercise its discretion and issue an order staying a non-executable court order. Relatedly, the Applicants have not pleaded that there is any risk of third parties taking irrevocable action adverse to the rights and interests of the government of Belize off the back of Chabot J's 12 January 2024 order.

[94] In the circumstances, I dismiss the Applicants' application for stay of execution of Chabot J's 12 January 2024 declaratory order.

V. Whether the court should suspend the effect of Chabot J's Order

[95] In their draft order, the Applicants requested this court to stay Chabot J's 12 January 2024 order. I was not referred to and neither have I found any Belizean authority on suspension of declaratory orders pending appeal.

[96] As noted above, declaratory orders pronounce on the legal situation as regards the rights and interests of the parties to litigation. A declaratory order does not require any party to do or refrain from taking any action. It is these factors that underlie the general rule that declaratory orders are not enforceable and cannot be subjected to a stay of enforcement pending appeal. However, in my view, this is a general rule only, which should not be interpreted too rigidly as statute or as imposing an absolute bar to all requests for stay of declaratory orders pending appeal.

[97] There exists jurisprudence in the context of intellectual property law that has placed applications for stay of the effect of declaratory orders on broadly the same footing as applications for stay of execution of executory orders. For example, in the case of ***Rousselon Freres et Cie v Horwood Homeowners Limited*** [2008] EWHC 1660 (Ch), while acknowledging that there is in principle no need for enforcement and consequently no scope for a stay of execution pending appeal of a purely declaratory order having effect between the parties, Warren J (see para. 13) suspended a declaratory order he had issued.

[98] The Honourable judge suspended the order because on the facts of that case there was a risk that third parties could rely upon his declaratory order to take irrevocable action adverse to the rights and interests of one of the litigants. Warren J ruled that the interests of justice required him to suspend the operation of that declaratory order pending an appeal.

[99] On whether the High Court had jurisdiction, Warren J stated:

> "the court must surely have, at least pending an appeal, a jurisdiction to prevent possibly irrevocable action being taken in reliance upon a declaration" (see also para. 14 and 17).

[100] More recently, Gleeson J endorsed Warren J's ruling in ***Rousselon Freres et Cie***, which in that honourable judge's view reflected the correct statement on the law and practice on stays of declaratory orders pending appeal. See the case of ***Banca Generali S.p.A and Another*** [2023] EWHC 2073, at para. 18.

[101] Quoting Buckley LJ in ***Minnesota Mining and Manufacturing Co v Johnson and Johnson*** [1976] RPC 671 at 676, Gleeson J saw his task as one requiring him (based on the facts before him) to "arrange matters that, when the appeal comes to be heard, the appellate court may be able to do justice between the parties, whatever the outcome of the appeal may be" and in his view a stay of the declarations he had made was the best way of achieving the end of justice.

[102] I too am of the view that in the exercise of its inherent jurisdiction the High Court has discretion to suspend in the interests of justice the operation of a declaratory order pending an appeal including in those circumstances where such declaratory order could result in possibly irrevocable action adverse to a party's rights or interests being taken by third parties relying upon the declaration.

[103] I use the word "including" advisedly because, the circumstances in which an application for the suspension of the operation of a declaratory order might be made are infinitely variable.

[104] Considering the above-mentioned principles on the suspension of declaratory orders, I dismiss the Applicants' request, which is set out in their draft order, for the suspension of the effect of Chabot J's 12 January 2024 order. In my view, the one-line request in the Applicants' draft order is insufficient to warrant a grant of relief.

[105] The Applicants have not established that there is any risk of third parties relying on Chabot J's 12 January 2024 order to take irrevocable action adverse to the rights and interests of the Ministry of Natural Resources or the government of Belize.

[106] Although I do not foreclose the door to any such plea, the nature of the contractual issue in dispute does not suggest that there reasonably could be third parties that might use Chabot J's declaratory order to take irrevocable action adverse to the rights and interests of the government of Belize.

[107] In sum, I dismiss the Applicants' request for a stay of Chabot J's 12 January 2024 order as it has no merit.

VI. Whether this court should proceed and assess damages pending appeal

[108] In her 12 January 2024 decision, Chabot J ruled that the High Court remained seized of the matter for the purpose of assessing damages. And, as noted above, in their pleadings both parties made representations, albeit perfunctorily, on whether this court should proceed and hold a trial on the assessment of damages.

[109] The parties do not dispute that Chabot J had relevant case management power pursuant to CPR 26.2(f) to decide the order in which the issues on (a) the validity and enforceability of the contracts; and (b) any damages arising for breach of contract should be tried. In addition, the parties do not dispute that I have power and discretion to order a stay of proceedings pending appeal, including as part of the case management process.

[110] The court's broad power to stay proceedings pending an appeal must, of course, be exercised cautiously and in the interests of justice. Additionally, in arriving at its decision, the court is required to balance the parties' respective claims and have regard to all relevant considerations arising in the matter.

[111] It is not in dispute between the parties that the Applicants' filed their Notice of Appeal in time and that consequently there is a prima facie valid appeal pending before the Court of Appeal. Fowler Works has not argued or demonstrated that the Applicants' appeal lacks merit. Rather, its submission on the merits of the appeal is tentative. In para. 13 of his skeleton argument, Barrow, SC describes the Applicants' appeal as

> "…not one that can be characterized as strong so as to warrant a stay in the absence of exceptional circumstances."

[112] It is not for me to pronounce on the merits of the Applicants' appeal, and I will refrain from so doing since this court is in effect functus officio on the question of the validity and enforceability of each of the contracts. The extent of my analysis is restricted to the question whether the Applicants' grounds of appeal raise an arguable point of law.

[113] It is not in dispute between the parties that the Belize Finance and Audit (Reform) Act requires the lease and sale of any land that is 500 acres and above to be approved by parliament and that parliament was not asked to and did not pass a resolution authorising the sale of the

property known as E19560-B1, whose size is said to be 1,850.43 acres. It is not in dispute between the parties that the contract breached the provisions of the Finance and Audit (Reform) Act. Whether the contract is valid and enforceable on the pleaded grounds is in my view an arguable point of law.

[114] In my estimation it does not appear that there is any definitive ruling by the Court of Appeal on this point of law, which is arguably of general importance. Relatedly, Fowler Works has not argued in these proceedings that the Applicants' appeal to the Court of Appeal is abusive, oppressive, frivolous and/or vexatious or brought in bad faith or that it did not raise any arguable point of law.

[115] If the Court of Appeal does rule in favour of the Applicants' appeal on one or more of the grounds presented in the Notice of Appeal (and it has not been contended that such an outcome is fanciful) it will result in Chabot J's order being set aside. In view of this, it would not be prudent or in the interests of justice for this court to proceed with an assessment of damages before the Court of Appeal pronounces itself on the matter of which it is currently seized.

[116] I have considered the fact that if this court were to make an award off the back of Chabot J's 12 January 2024 decision but prior to the Court of Appeal finalising its decision on the appeal the Applicants may very well make an application for a stay of execution. Fowler Works acknowledges this reality with Mr Reimer stating in para. 6 of his affidavit that:

> "…this Court can continue to assessment and thereafter a stay of the execution, if an appropriate case is made out for such a stay, until the Court of Appeal disposes of Civil Appeal No. 2 of 2024."

[117] This very real risk, which is accepted by Fowler Works, will result in an unnecessary multiplicity of litigation proceedings. Relatedly, if the Court of Appeal were to make a final decision on the appeal during this court's trial on the assessment of damages that vitiates all or parts of Chabot J's declaratory orders, that would result in this court vacating its trial or setting aside any decisions it may have made in the interim. That decision may also alter Chabot J's 12 January 2024 costs order. Added to that is that any party that loses before the Court of Appeal may decide to appeal the decision to the Caribbean Court of Justice. This would result in considerable and unnecessary bit-part litigation proceedings.

[118] Any such a development will increase the parties' costs of litigation and undermine the overriding objective. It will also adversely impact the judiciary, which like courts the world over

is hampered by limited resources. Belize is not alone in struggling with case backlogs, which explains the changes requiring active case management by judges and other judicial officers and the practice and procedure changes removing litigants' entitlement to exercise unfettered control over the conduct of proceedings.

[119] Proceeding with the assessment of damages while there is an ongoing appeal against Chabot J's decision on the validity and enforceability of the four contracts will likely increase litigation costs associated with this matter especially if the Court of Appeal rules against Fowler Works on one or more of the pleaded grounds.

[120] In addition, Fowler Works has not pleaded or demonstrated, and the facts as presented do not suggest, that it will suffer ruin or other manifest injustice if the proceedings on the assessment of damages are stayed pending appeal.

[121] While my decision will delay the scheduling of the damages assessment stage, this disadvantage is countervailed by the fact that any assessment will be undertaken based on a definitive ruling by the Court of Appeal or the Caribbean Court of Justice (assuming an appeal) on the validity and enforceability of each of the four contracts on the sale and transfer of national land.

[122] In the circumstances, I conclude that it would be in the interests of justice for the proceedings on the assessment of damages to be stayed pending the appeal.

Costs

[123] Although the Applicants asked that costs arising from this application be costs in Civil Appeal No. 2 of 2024 their application does not provide any justification for the request. For its part, Fowler Works sought the dismissal of the Applicants application with costs. However, like the Applicants, it too did not substantiate its request.

[124] The Applicants' request that this court rule that the costs of this application be costs in Civil Appeal No. 2 is presumptuous. The request assumes that I have power and/or that I am or should be inclined to issue a costs order that is binding on the Court of Appeal but in the absence of any cogent and persuasive submissions justifying such a decision. Certainly, the Applicants do not explain why this court ought not to make an order for costs separate from that which may or may not be made by the Court of Appeal.

[125] That both parties' pleas on costs are sparse on detail is surprising. Pleas on costs especially in cases raising complex issues must be substantiated both in the pleadings and in oral arguments. Certainly, it is never prudent to assume that the court will necessarily grant an unsubstantiated single-line litigation cost request.

[126] In addition, success on one or more or all arising pleas does not necessarily entitle a party to an award of some or all costs. The general rule is that an unsuccessful party in litigation proceedings pays costs (CPR 63.6). However, it should be noted that cost orders are discretionary and the court may deviate from the general rule as the interests of justice require. In this regard, litigants should assist the court to properly exercise its discretion through adequately substantiated pleas and submissions.

[127] The Civil Procedure Rules require the court in considering cost orders to have regard to all the circumstances pertinent to the proceedings (CPR 63.6(5)) and to pay due regard to the following factors listed in CPR 63.6(6), i.e.:

(a) the conduct of the parties both before and during the proceedings;

(b) whether a party has succeeded on particular issues, even if he has not been successful in the whole of the proceedings;

(c) whether it was reasonable for a party –
    (i) to pursue a particular allegation; and/or
    (ii) to raise a particular issue;

(d) the manner in which a party has pursued –
    (i) his case; or
    (ii) a particular allegation; or
    (iii) a particular issue; and

(e) whether the claimant gave reasonable notice of intention to issue a claim.

[128] Further, it would be remiss for me not to underscore the need for parties to try and secure agreement on costs arising from contested judicial proceedings. Discussing cost implications between counsel and with their respective clients also facilitates early settlement of disputes and promotes the overriding objective.

[129] Having considered the issues that have arisen for resolution in this matter, I hold that it is fair and just that each party pays its own costs. In arriving at this decision, I have considered that:

(a) both parties' respective pleas were successful in part and not in others;

(b) both parties relied upon some of the recent cases on the High Court's jurisdiction on

stays pending appeal to the Court of Appeal, which I have not relied upon in preference for the Court of Appeal's rulings in ***Prosser*** and ***Berezkin***; and

(c) my ruling staying proceedings on the assessment of damages is to all intents and purposes a case management order.

[130] In addition, although I have upheld the Applicants' application for the stay of proceedings, which Fowler Works objected to but not on any strong grounds, the Applicants' agglomerated application could have been better crafted. In the circumstances and on balance, the fairest outcome is for each party to bear its own costs.

[131] **I HEREBY ORDER THAT**

(1) The Applicants' application for the stay of execution of Chabot J's 12 January 2024 order pending the appeal against that order to the Court of Appeal is dismissed.

(2) The Applicants' application for the stay, i.e., suspension of the effect, of Chabot J's 12 January 2024 order pending the Applicants' appeal against that order to the Court of Appeal is dismissed.

(3) The Applicants' application for stay of proceedings in High Court Claim No. CV 725 of 2022 on the assessment of damages pending the Applicants' appeal to the Court of Appeal against Chabot J's 12 January 2024 order is upheld, i.e., the application succeeds.

(4) Each party is to pay its own costs.

Dr Tawanda Hondora
High Court Judge
Civil Division