[2012] CCJ 1 (AJ) (R)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Appeal No CV 4 of 2011
BZ Civil Appeal No 31 of 2010

BETWEEN

DEAN BOYCE	**APPELLANT**

AND

THE ATTORNEY GENERAL OF BELIZE **THE MINISTER OF PUBLIC UTILITIES**	**RESPONDENTS**

AND

CCJ Appeal No CV 6 of 2011
BZ Civil Appeal No 30 of 2010

BETWEEN

BRITISH CARIBBEAN BANK LIMITED	**APPELLANT**

AND

THE ATTORNEY GENERAL OF BELIZE **THE MINISTER OF PUBLIC UTILITIES**	**RESPONDENTS**

Before The Rt Honourable	**Mr Justice Dennis Byron, President**
And The Honourables	**Mr Justice Saunders, JCCJ**
	Mme Justice Bernard, JCCJ
	Mr Justice Hayton, JCCJ
	Mr Justice Anderson, JCCJ

Appearances

Mr Godfrey P Smith and Ms Magali Marin Young for the Appellant in CV 4 of 2011

Mr Edward Fitzgerald, QC on the application of Fortis Energy International (Belize) Inc to intervene in CV 4 of 2011

Mr Eamon H Courtenay, SC and Mrs Ashanti Arthurs Martin for the Appellant in CV 6 of 2011

Mr Denys Barrow, SC, Ms Lois Young, SC and Mr Andrew Bennett for the Respondents in CV 4 of 2011 and CV 6 of 2011

RULING
of
The President and Justices Saunders, Bernard, Hayton and Anderson
Delivered by the President
The Right Honourable Mr Justice Dennis Byron
on the 26th day of January 2012

RULING

[1] At a Case Management Conference held on 6th December, 2011 this Court ordered the parties to these appeals to file written submissions on the question whether the appeals should be stayed. The idea of a Stay was first suggested by this Court at the said Conference and was premised on the considerable impact on the appeal of legislation enacted by the Belize Parliament in the days and months following the decision of the Court of Appeal against which the appeals have been brought. The suggestion was readily accepted by the Respondents but opposed by the Appellants. We decided that the Appellants should be afforded an opportunity to show cause why the appeals should not be stayed. The Respondents were also permitted to make written submissions, in substance advancing their own reasons in support of a Stay. Both sides were asked also to include in their submissions their respective views on what conditions should be attached to any order for a Stay should the Court be confirmed in its provisional view that the appeals should indeed be stayed.

[2] We have read the very extensive submissions and accompanying affidavits filed. As this is a mere case management decision the Court does not intend to render as full and detailed a judgment as if we were deciding the appeal itself. But since the matter has occasioned a tremendous degree of contention, and in fairness to the able and very thorough submissions that have been advanced, the Court considers that it should articulate the different voices that have influenced its deliberations and outline, even if only briefly, the reasons for its decision.

[3] The background to the issue can be quickly stated. The Government of Belize had acquired the Appellants' interests in certain property with effect from 25th August 2009. In the courts below, the Appellants sought declarations that the 2009 legislation was unconstitutional and void and also sought further consequential relief which included (a) such other declarations, orders and directions as were appropriate for the purpose of enforcing or securing the

enforcement of the declarations of invalidity; (b) damages, including punitive damages; (c) interest; and (d) such other relief as the Court deemed just and equitable.

[4] The Appellants were unsuccessful in the High Court. But they prevailed before the Court of Appeal. That court held on 24th June, 2010 that the 2009 legislation was inconsistent with the Constitution and was invalid, affirming that the Appellants had suffered an unlawful invasion of their fundamental rights guaranteed under the Constitution of Belize. But apart from costs, the Court of Appeal awarded no consequential relief, no submissions having been made as to such relief, the Appellants no doubt believing that the Government would respect all the consequences of the legislation being declared void.

[5] It did not, so the Appellants wrote to the Court of Appeal on 28th June, 2010 urging the Court to address the issue of consequential relief but the Court of Appeal, no doubt considering itself *functus*, declined to entertain the request.

[6] The Appellants were dissatisfied. They obtained leave to appeal to this Court (a) the question whether the Court of Appeal was right to decline to award them consequential relief and (b) the rejection by the Court of Appeal of their allegation of being treated in a discriminatory manner. The Respondents (the Attorney General and the Minister of Public Utilities) did not appeal the judgment of the Court of Appeal.

[7] Instead, after the judgment of the Court of Appeal, the Government continued its possession and management of the property in question and on 4th July, 2010 the Parliament of Belize enacted new legislation amending the legislation that had been declared null and void by the Court of Appeal and re-acquired the property, and on 25th October, 2011 by the Belize by the Belize Constitution (Eighth Amendment) Act it amended the Constitution of Belize. This entire package of legislation is referred to in this decision as “the 2011 legislation”. The re-

acquisition was done retroactively to the date of the 2009 acquisition order, that is, to 25th August 2009, presumably so that the Government could achieve what it thought it had by the 2009 legislation.

[8] When this appeal first came before us for Special Leave, the Appellants undertook then to file in the High Court a challenge to the validity of the 2011 legislation. The Appellants have made good on this undertaking. Claims 597 and 686 of 2011 have been filed by them challenging the constitutionality of the 2011 legislation.

[9] Despite the pendency of these claims, the Appellants now assert a right to argue before this Court the issues raised in that challenge regarding the validity of that legislation. They wish this Court to determine those issues as part and parcel of their appeal. They justify this course on the basis that a stay will lead to "a deferral" of their remedies and/or a "smothering" of those remedies "in procedural delays and difficulties". They submit that this Court has the jurisdiction to adjudicate *de novo* on the constitutionality of the 2011 legislation. They claim that this Court's duty to interpret and apply the 2011 legislation must perforce extend to determining its validity and that as a matter of good judicial policy, and in fairness to them, this Court should seize the opportunity to rule on the 2011 legislation so that their appeals could be determined in the light of such ruling. They state also that given the nature of the property acquired (essentially a telecommunications company which we refer to here as "Telemedia"), there is a real need for expedition, indeed urgency, in hearing the appeal and, by necessary extension, determining the challenge to the 2011 legislation. Essentially, so far as the challenge is concerned, the Appellants seek to leap-frog the courts below and so accelerate all the processes involved in pursuing their challenge that has been filed in the High Court as claims numbered 597 and 686 of 2011.

[10] It is entirely understandable why the Appellants should passionately put forward this position. They have raised powerful arguments in support of it. Again, our

brevity in treating with those arguments is not a true reflection of our appreciation of them.

[11] The indisputable fact is that the 2011 legislation, and in particular its retrospective element, could have a devastating impact on the appeals. While we recognize the dilemma in which the Appellants have thereby been placed, and notwithstanding the submissions that have been made by them, the majority of us still consider that the better course is indeed to stay the appeals pending the outcome of the challenge in the normal manner to the 2011 legislation.

[12] We start first with a few observations. Our colleague Justice Anderson has not been able to agree with the majority and takes as his point of departure the fact that there is extant before us a judicial decision by the Court of Appeal declaring that certain constitutional rights of the Appellants have been infringed by the Government, represented by the Respondents. The relevant function of this Court must be to ensure that the Appellants have an opportunity to challenge the decision not to award consequential relief. That opportunity is critical to the Appellants' right to the enjoyment of the protection of the law. He also considers that the mere fact that the award of a timely and effective remedy may require that this Court navigates through and takes appropriate account of legislation and a constitutional amendment enacted by Parliament after the judicial decision in favour of the Appellants can in no way justify a deferral of the responsibility to make the award. Indeed, in his respectful view, these developments make the discharge of the fundamental obligation of this Court not less but more urgent because they implicate the most critical of all the functions of this Court, that is, the duty to uphold the rule of law.

[13] We all agree, as the Appellants themselves readily acknowledge, that some of the issues that are likely to emerge from the challenge to the 2011 legislation are novel, wide ranging and of the utmost public and constitutional importance. Their determination can potentially have a huge impact far beyond the parties to these

proceedings and indeed, beyond Belize as well bearing in mind that this Court is also the final Court of Appeal for other CARICOM States.

[14] Secondly, we have deliberated carefully on the question whether the effect of granting a stay would be a deferral of their rights to a hearing on consequential relief. On the one hand, Justice Anderson concludes that the order granting leave to appeal would have given the Appellants an expectation for an expedited hearing for this Court to consider whether or not there should have been an award of consequential relief and if necessary to overrule the Court of Appeal by ordering the same. In ordering special leave this Court must be taken to have accepted that, notwithstanding the enactment of the 2011 legislation, the Appellants had demonstrated a realistic chance that their appeal from the decision of the Court of Appeal would succeed[1]. Accordingly, the previously made Order granting Special Leave tends to militate against a stay of the appeal in circumstances where the granting of special leave contained no hint or indication that a stay would be contemplated. To stay that hearing pending the completion of the challenges to the 2011 legislation will cause delay as the vicissitudes of litigation may protract final adjudication as their entitlement to the protection of the law will await the outcome of litigation over whose progress this Court has no real control.

[15] The majority of us were persuaded that it would be premature to conclude that the Court of Appeal neglected to decide the issues as they ought to have been decided. Having carefully considered the case placed before it the Court of Appeal decided not to award consequential relief. They may have been perfectly right so to do. Or they may not have been. While we suspend judgment on that question, the bare fact is that at this point in time, the Appellants have no right to any particular consequential relief or to any further award. What they do have is a right to challenge the Court of Appeal's judgment. It is not as if specific

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[1] *Brent Griffith v Guyana Revenue Authority and Attorney General of Guyana* CCJ Application No 1 of 2006, at [22-23] per Nelson, JCCJ; *Barbados Turf Club v Eugene Melnyk* [2011] CCJ 14 (AJ) at [7]-[8] per Anderson, JCCJ

consequential relief, damages for example, had actually been awarded and the 2011 legislation had purported retrospectively to claw back such relief.

[16] The argument of the Appellants that in the circumstances of this case, a stay is likely to amount to the dismissal of the appeal without a hearing, as litigation over the 2011 legislation could overtake the present appeal, found support with Justice Anderson. Were the challenge to the 2011 legislation to be successful the issue of relief consequential to the Court of Appeal's decision would be entirely overtaken because of the retrospective nature of that legislation. But if the challenge was unsuccessful there would be no need to consider consequential relief under the appeal presently before us as the same would become subsumed under any consequential relief awarded pursuant to any successful challenge to the 2011 legislation. Either way, in Justice Anderson's view, if this Court ultimately had to consider the validity of the 2011 legislation this appeal could not then be revived. However, the majority of us were persuaded that this consideration militated in favour of granting the stay, since the nature and extent of consequential relief would precisely depend on the outcome of the challenge to the 2011 legislation.

[17] In considering the presumption of constitutionality of the 2011 legislation Justice Anderson considered that the primary effect of the Court of Appeal's decision was that the 2009 legislation was null and void. As such, the 2011 legislation purporting to amend legislation declared null and void could not provide a sufficient basis on which to stay the appeal.

[18] However, the majority considered that it is also trite that until and unless set aside, the 2011 legislation is valid and must be given full force and effect. Its validity is to be presumed. To stay the appeal pending a determination of the filed challenge is, therefore, not to deny the Appellants a right to effective redress but to permit them the time and space to challenge the validity of the 2011 legislation via High Court claims 597 and 686 of 2011. The stay will ultimately be removed and the

substantive appeal considered and heard after it is clear whether and if so to what extent that challenge succeeds.

[19] We have examined the several authorities cited by the Appellants. They do support the notion advanced by the Appellants that where a law changes during the period between a hearing and an appeal, the appellate court must consider the law as it stands as at the date of the hearing of the appeal, especially where that law is applied retrospectively.

[20] But neither that proposition nor the cases cited in support has caused the majority of us to alter our view that the appeals should be stayed pending a determination of the challenge as to the very validity of the 2011 legislation. Indeed, there is a material difference between on the one hand, "considering" a new law and on the other, entertaining arguments in the appeal to strike down the same. In *Attorney-General v Vernazza*[2] for example, at the appellate hearing, the retrospective legislation passed was properly regarded as being effectual. That was not a case where the validity of the retrospective legislation was being challenged. Lord Denning's statement at page 978 of the relevant report is interesting. He states that an appellate court can *give effect* to a retrospective Act passed in the interval since the case at first instance. The same principle is to be found in *Quilter v Mapleson*[3]. In that case, the law having been changed during the pendency of the case, the Court of Appeal was entitled to decide the appeal on the basis of the validity and efficacy of the new law. This approach is also demonstrated in *Zainal bin Hashim v Government of Malaysia*[4].

[21] We have not been referred to a case where an appeal has embraced or hinged upon a challenge to the validity of legislation which was not in existence at the time of the decision appealed from. *Bowe and another v The Queen*[5] and *Reyes v*

[2] [1960] AC 965
[3] (1882) 9 QBD 672
[4] [1980] AC 734 (PC)
[5] [2006] 1 WLR 1623

The Queen[6] were not cases where new legislation was being considered. In those cases novel constitutional points were raised in relation to pre-existing law which the courts below could and, with hindsight, should have interpreted differently.

[22] The Trinidadian case of *The State v Brad Boyce*[7] is about a new constitutional issue arising for the first time out of newly enacted legislation. The validity of the new legislation was being challenged for the first time. Brad Boyce was indicted for murder on 19th September, 1996. A new law permitting the State to appeal against acquittals in certain instances came into force on 29th October, 1996. Boyce was acquitted on 27th July, 1998. The State appealed pursuant to the new law. Boyce argued on appeal that (i) since he was indicted before the new law came into force the Court of Appeal could not permit the State's appeal and that (ii) in any event the law on which the appeal hinged was unconstitutional. The Court of Appeal held that it had jurisdiction to hear the challenge to the constitutionality of the new law.

[23] *Brad Boyce* does not really assist the Appellants. The case is distinguishable for two reasons. Firstly, the new law was in existence before the acquittal. Secondly, the State's entire appeal, indeed its very right of appeal, was founded on the validity of the new law. It was impossible to sever the constitutionality of the new law from the conduct of the appellate proceedings.

[24] Without delving into and thus commenting one way or another on the issue of whether we possess jurisdiction to do what the Appellants have asked of us, we are prepared to agree with the Appellants that fundamentally, the decision to stay or not stay these appeals is a matter of judicial policy. The operation of that policy requires us to have full regard to the nature of the legal and constitutional challenge being made to the 2011 legislation discussed above briefly at [11] and [13]. Against that background, we consider that before this Court rules on the

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[6] [2002] 2 AC 259

[7] Criminal Appeal No 89 of 1998

challenge it would be more appropriate first to hear the views of the courts below. The circumstance that, as compared with the London based Privy Council, it cannot be said either that we are "a distant court" or that we lack "familiarity with local conditions" is quite beside the point. The views of the judges below in the light of the continuous refinement of counsel's submissions as the case progresses through the system as well as any learned comment in academic journals are not to be discounted. These opinions constitute vital material helping to inform and shape the views of a final court especially where the matter at hand is as described at [13].

[25] Moreover, the challenge to the 2009 legislation occasioned reams of affidavit evidence much of which was conflicting. There is every possibility that the challenge to the 2011 legislation will also produce a like amount of evidence and will similarly require the courts to make important findings of fact. We are not convinced about the Appellants' assurances to the contrary. Even if we were persuaded that we had jurisdiction, as the final court of Belize, we are loathe to undertake such an exercise as if we are a court of first instance.

[26] We are sympathetic to the Appellants' desire to have their filed appeals heard, and dealt with expeditiously, given the subject matter of the property acquired and all the other circumstances that attend this case.

[27] The challenge to the 2011 legislation that has been filed and is pending is premised on a variety of arguments including the submission that the 2011 legislation is bad on its face. The majority of us have considered whether it is at all possible to reach some middle way where the appeals can be heard without a full consideration and determination of the 2011 legislation but we could find none. Neither party has indicated the possibility of or any interest in or desire for any such middle ground. More importantly, we do not consider it wise or appropriate to segregate, for the purpose of determining its discrete validity, one aspect of the 2011 legislation from the remainder that must then be adjudicated

upon by the Belize courts hopefully later this year. We consider it likely that in attempting to deal with restricted issues within larger issues it will be difficult to avoid giving rise to implications which could embarrass the courts below and prejudice the fair hearing of claims 597 and 686 of 2011. On all the issues we consider it most important to have the views of the judges of Belize as emphasized already in [24] above and we consider it unnecessary and inappropriate to go into the issue now of whether particular litigation is necessarily bad on its face. This is for the Belize courts to rule on before any appeal comes to us.

[28] Having decided to stay the appeals, we turn our attention now to the conditions on which the Stay must operate. Justice Anderson would not stay, but rather would proceed to hear these appeals with a view to considering the grant of such consequential relief as the Appellants can show should have been awarded by the Court of Appeal pursuant to its decision dated 24th June 2011.

[29] On 16th August 2011 when special leave to appeal to this Court was granted, in contemplation of the timely hearing of these appeals the Court gave certain directions and issued a number of orders. Among the latter we had made orders (a) restraining the Respondents from implementing the 2009 legislation which the Court of Appeal had invalidated; (b) permitting the Telemedia Board of Directors appointed pursuant to the 2011 legislation ("the 2011 Board") to carry on the day to day management and business of Telemedia but (c) restraining the Respondents and the 2011 Board from taking any further steps to sell, transfer, charge, pledge, or grant any option or other rights over, or otherwise dispose of any of the remaining shares of Telemedia. Those orders were stated to last until the hearing and determination of the appeals or until further order. Since there is no question now of the Government implementing the 2009 legislation, we see no need for there to be an injunction restraining the Government from implementing the same.

[30] The Respondents had earlier undertaken by their Attorney-at-Law "to keep the already acquired proceeds from the sale of all the acquired shares in [Telemedia] separate and intact in accounts held by or for the benefit of the Government of Belize in the Central Bank of Belize or commercial banks until the hearing and determination by the Caribbean Court of Justice of the substantive appeal from the decision of the Court of Appeal of Belize in Civil Appeal No 30 of 2010 and Civil Appeal No 31 of 2010".

[31] Those orders and the undertaking given must naturally be re-visited since the period throughout which they will have effect will now be considerably longer than was originally envisaged. It was for that reason that at the Case Management Conference we also invited the parties to make submissions to this end. In all the circumstances, and after taking note of the submissions filed and the accompanying affidavits, we consider it appropriate that the Appeals should be stayed upon the Respondents undertaking (a) to cooperate with the Appellants in having Claims numbered 597 and 686 of 2011 heard in a timely fashion and (b) to keep the proceeds of sale of any of the acquired shares in Belize Telecommunications Limited separate and intact in accounts held by or for the benefit of the Government of Belize in the Central Bank of Belize or commercial banks provided that the proceeds may be used for the purpose only of paying compensation to those shareholders whose shares were acquired pursuant to a written agreement with the relevant shareholder or pursuant to an order of the Supreme Court of Belize.

[32] The second of these undertakings must subsist until the hearing and determination by this Court of the substantive appeal from the decision of the Court of Appeal of Belize in Civil Appeal No 30 of 2010 and Civil Appeal No 31 of 2010 or until further order but with liberty to each party to apply for any further orders or directions, any such applications to be listed for hearing within one month of being filed. For the avoidance of doubt such applications cannot extend to

applications via the Respondents' undertakings to have claims No 145 of 2011 and No 360 of 2011 stayed.

[33] The confirmation of our decision to stay these appeals pending the determination of the challenge to the 2011 legislation effectively means that the application by Fortis Energy International (Belize) Inc. to be added as an interested party to the appeals must be dismissed as that application rested entirely on the premise that this Court would hear the appeals and encompass within the appeals the challenge to the validity of the 2011 legislation.

[34] The Court makes no order as to Costs.

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The Rt Hon Mr Justice Dennis Byron (President)

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The Hon Mr Justice A Saunders	The Hon Mme Justice D Bernard
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The Hon Mr Justice D Hayton	The Hon Mr Justice W Anderson