IN THE COURT OF APPEAL OF BELIZE AD 2014

CIVIL APPEAL NO 14 OF 2012

CHANNEL OVERSEAS INVESTMENT LIMITED
THAMES VENTURES LIMITED
GREAT BELIZE PRODUCTIONS LIMITED
KATALYST DEVELOPMENTS LIMITED **Appellants**

v

BELIZE TELEMEDIA LIMITED
THE BELIZE BANK LIMITED **Respondents**

CIVIL APPEAL NO 15 OF 2012

KEITH ARNOLD
PHILIP ZUNIGA
SHIRE HOLDINGS LIMITED
ROCKY REEF VENTURES LIMITED
IBIS INVESTMENTS LIMITED
SCARLET VENTURES LIMITED
SEASCAPE HOLDINGS LIMITED **Appellants**

v

BELIZE TELEMEDIA LIMITED
THE BELIZE BANK LIMITED **Respondents**

—

BEFORE

The Hon Mr Justice Dennis Morrison	Justice of Appeal
The Hon Mme Justice Minnet Hafiz-Bertram	Justice of Appeal
The Hon Mr Justice Christopher Blackman	Justice of Appeal

E Courtenay SC, along with I Swift for the appellants in Civil Appeal No 15 of 2012.
J Alpuche for the appellants in Civil Appeal No 14 of 2012.
M Young SC, CBE for the respondents in both appeals.

—

November 4 and 5, 2014; March 27 2015.

MORRISON JA

[1] I have read in draft the judgment in this matter prepared by my learned brother, Blackman JA. I agree entirely with his reasoning and conclusions and have nothing of value to add.

_____
MORRISON JA

HAFIZ-BERTRAM JA

[2] I read in draft, the judgment prepared by my brother Blackman JA, and I agree entirely with the reasons for the judgment and his conclusion.

_____
HAFIZ-BERTRAM JA

BLACKMAN JA

[3] These appeals are against the Order of Awich CJ (acting) (as he then was) dated 18 May 2012, which emanated from a written decision dated 20 February 2012, dismissing the appellants application to strike out, or in the alternative, to stay the respondents' claims.

[4] In April 2011, Belize Telemedia (Telemedia) filed a claim for relief against the appellants for loss and damage caused to it arising from alleged unlawful and wrongful acts by the appellants. Telemedia sought several declarations, orders, damages and costs, details of which are particularized in the Statement of Case.

[5] The seven appellants in Appeal No 15, having filed Acknowledgments of Service, applied on 30 May 2011 for the claims against them to be struck out on the basis that as former Directors of the Claimant Telemedia, they were entitled (a) to the benefit of the Indemnity provision of Article 112 of the Articles of Association which provided a clear and absolute indemnity by Telemedia to the applicants. The appellants, and (b) the provisions of a separate Deed of Indemnity dated 15 September 2006, executed by Telemedia in their favour. The appellants further asserted that as the Indemnity covered the allegations and claims made in the Statement of Case, no cause of action could arise in respect of matters covered by the Indemnity. Consequentially, the claim was an abuse of process.

[6] The four appellants in Appeal No 14, while not filing Acknowledgments of Service, applied on 31 May 2011, for the claims against them to be struck out on the basis that as former Directors of the Claimant Telemedia, the substantive claim disclosed no reasonable grounds for bringing the claim as the applicants/appellants had not acted ultra vires the objects of the company or their powers as directors.

[7] All of the foregoing appellants joined in an application dated 27 October 2011, for a stay of the proceedings pending the determination of related matters by the Caribbean Court of Justice.

[8] The learned judge dismissed the applications for strike out and the stay of proceedings for reasons set out in his judgment delivered on 20 February, 2012. With respect to the applications for strike out, he held that as there had been a failure to file and deliver a defence to the respondents/claimants within the time prescribed by Rules of Court, and that there had not filed an application for relief against sanctions, for the technical reasons given at paragraphs 7 to 10 the strike out applications should be dismissed.

[9] With regard to the respective substantive issues raised by the applicants as to the scope of the Indemnity and their powers as directors, the learned judge considered the dicta of **Lord Browne-Wilkinson** in the House of Lords decision in ***X (Minors) v. Bedfordshire County Council*** [1995] 2 AC 633 at page 740 that: "*an action can only be struck out under R.S.C where it is clear and obvious that the claim cannot succeed. Where the law is in a state of development.....it is normally inappropriate to decide novel questions on hypothetical facts."* and followed in ***Electra Private Equity Partners v KPMG Peat Marwick (A firm and others*****) [1999] EWCA Civ 1247** where **Auld LJ** had observed "*Certainly a Judge, ... where the central issue is one of determination of a legal outcome by reference to as yet undetermined facts should not attempt to try the case on affidavit.*"

[10] In dismissing the applications to strike out, the Acting Chief Justice observed that condition (b) of Article 112 which required the directors to assist the company in recovering loss from any other person as a condition for benefiting from the indemnity, was reason enough to keep the directors in the claim which sought to recover loss from the appellants in appeal No 14. He was further of the view that it was possible to interpret the indemnity clauses both in the Articles of Association and the Deed of Indemnity as being applicable only where loss had been caused by a director or any other officer. Moreover, it was not plainly obvious that the terms of Article 112 extended to acts of negligence or dishonesty, and that the writing off of loans and distribution of assets were within the objects of the Articles of Association, and consequently legal.

[11] In the circumstances, he held that it would be "*improper for the court to examine and assess conflicting facts ... only on the affidavit evidence on which the deponents had not been cross-examined."*

[12] The application for a stay of the proceedings on the ground of time and expense as related issues pending before the Caribbean Court of Justice was also refused.

[13] On the question of costs, the learned Acting Chief Justice being of the view that the three applications had been made improperly, and on very weak grounds, ordered

the eleven applicants to pay costs fixed at one-third of the total costs of the claim "***straightaway since prescribed costs can be computed straightaway."***

[14] From that decision the appellants appealed, with the parties in the respective appeals, each filing eleven grounds of appeal.

[15] At the outset of the appeal, Mr. Eamon Courtenay SC, lead Counsel for the appellants in appeal No 14, submitted that while the issues for consideration, in order of significance were (a) the Indemnity Issue; (b) the failure to file a defence; (c) the refusal of a stay and (d) the Costs Order, he would elect to commence with the defence issue, being **Grounds 1, 2 and 3.**

[16] In my view, however, a determination of the grounds of appeal relating to the (non) filing of the defence, cannot be considered in isolation from the substantive issue of the significance of the indemnities.

Grounds 4,5,6,7, and 8 - the Indemnities

[17] Counsel for the appellants in appeal No 15 submitted that as directors of Telemedia, the appellants had the benefit of an absolute indemnity pursuant to Article 112 of the Telemedia's Articles of Association and by a separate Deed of Indemnity dated 15 September 2006, which had been executed by Telemedia.

[18] Article 112 stated:

> *"Subject to the permissions of and to the extent permitted by the Statutes, every director or other officer or auditor of the Company shall be indemnified out of the assets of the Company against all liabilities incurred by him in the actual or purported execution or discharge of his duties or the exercise or purported exercise of his powers or otherwise in relation to or in connection with his duties, powers or office but:*
>
> *(a) this indemnity shall not apply to any liability to the extent that it is recovered from any other person; and*

(b) the indemnity is subject to such officer or auditor taking all reasonable steps to effect such recovery, to the extent that the indemnity shall not apply where an alternative right of recovery is available and capable of being enforced."

[19] By the terms of the Deed of Indemnity, the Appellants were further indemnified by Telemedia against "*all costs, charges, losses, expenses and liabilities incurred by him in the execution and discharge of his duties or in relation thereto including any liability incurred by him in defending any proceedings, civil or criminal, provided that nothing in this clause 2 shall require the Company to indemnify the Individual against any liability to the extent that such indemnity would exceed the Company's powers under its articles of association or be void, illegal or unenforceable as against the Company under any applicable law*.

[20] Mr. Courtenay in his written submissions noted that Mr. Philip Zuniga had given affidavit evidence on his own behalf and on behalf of the other appellants that:

"5 *I agreed to serve as a director of the Respondent on the basis that I would be indemnified against all claims, suits, demands, damages, losses and expenses whatsoever and howsoever arising as a result of any and all acts and decisions which he performed and made as a director.*

6 When I agreed to serve as a director of the Respondent I was aware of the indemnity contained at Article 112 of the Articles of the Respondent. I relied on it as providing complete protection to me for my service as a director of the Respondent.

7 I also relied on the fact that the said indemnity would continue to provide protection and immunity to me in respect of any and all claims that might arise as a result of my serving as a director of the Respondent even after I had ceased to be a director.

8 *Based on discussions that took place at a meeting of the Board of Directors of the Respondent, I am aware that each of the Appellants were and are of the same view as I have expressed in paragraphs four to six [sic] inclusive of this affidavit. I have been duly authorised by each [of] them to say so on their behalf."*

[21] Mr. Courtenay submitted that the appellants had the full benefit of the indemnity under Article 112 of Telemedia's Articles of Association as the evidence before the Court confirmed that the appellants had accepted their appointment as directors "*on the footing of the articles*" which should consequently be implied as a term of their contract with Telemedia and the express indemnity under the Deed of Indemnity. As a consequence, it followed that no cause of action vested in Telemedia to sue the Appellants for any alleged wrong that was purportedly done by the Appellants in their capacity as directors and the claim should therefore be struck out.

[22] In support of the foregoing, Counsel cited ***Globalink Telecommunications Ltd v Wilmbury*** [2002] EWHC 1988 (QB) and ***Viscount of the Royal Court of Jersey v Barry Shelton and Another*** [1986] 1 WLR 985, a decision of the Privy Council on appeal from the Court of Appeal of Jersey. In **Globalink** the Court had determined that an indemnity in a company's articles may be expressly or impliedly incorporated into the contract between the company and the director, and that relatively little evidence was required for such an implication with **Stanley Burnton J** stating at paragraph 30:

> *"The articles of association of a company are as a result of statute a contract between the members of a company and the company in relation to their membership. The articles are not automatically binding as between a company and its officers as such. In so far as the articles are applicable to the relationship between a company and its officers, the articles may be expressly or impliedly incorporated in the contract between the company and a director. They will be so incorporated if the director accepts appointment 'on the footing of the articles', and relatively little may be required to incorporate the articles by implication."*

[23] In the ***Barry Shelton*** case, The Viscount had instituted proceedings on behalf of the company against the defendants for loss allegedly incurred by the company by acts *ultra vires* the company, without making any allegation of dishonesty. In that case, it was noted that by article 46 of the company's articles of association, the director was indemnified against all losses incurred by him in the conduct of the company's business and was not liable for loss in the execution of his duties "*unless the same shall be through his own dishonesty*."

[24] Counsel for the appellants cited the remarks of **Lord Brightman** at page 991 where he stated:

> *"In the opinion of their Lordships article 46 is worded in a manner which is apt to exonerate a director who has innocently participated in an act which is ultra vires the company, and to excuse him from the obligation which would otherwise have lain upon him to reimburse the company for any loss thereby occasioned ... The directors are prima facie liable to the company for the loss. But that liability was incurred "in the conduct of the company's business." The directors are therefore entitled to be indemnified against such liability. A company has no cause of action against a director in respect of a matter against which the company has agreed to indemnify him.*"

and further at page 992:

> *"The plain purpose of article 46 was to give blanket exoneration to a director for any mistake that he has made which is not tainted by dishonesty.*
>
> *... An article which exonerates a director from personal liability for a loss incurred by the company by reason of an ultra vires act in which the director has participated, does not have the indirect effect of validating the act which caused the loss. The act remains ultra vires notwithstanding that the company is precluded from suing the director. The clause does not ratify the ultra vires act,*

but only restricts the persons who can be sued for the loss which the ultra vires act has caused."

[25] Mr. Alpuche Counsel for the appellants in appeal No 14 in adopting the written submissions filed on behalf of the former directors in Civil Appeal No. 15 of 2012, submitted that the indemnities were near absolute and that the former directors are indemnified by the Company for the very conduct which Telemedia sought to impeach. He too placed reliance on ***Viscount of the Royal Court of Jersey v Barry Shelton and Another*** (supra).

[26] Mr. Alpuche further submitted that if the claim against the Directors is struck out, then there was no distinct cause of action pleaded against his clients and consequently the claim against them should also be struck out. It would be contrary to the overriding objective to allow the claim to proceed to trial where it is clear that there is no cause of action in its own right that can stand against the appellants.

[27] Counsel further submitted that even if the Court allowed the claim against the former directors to proceed by dismissing the strike out application, there was no basis for his clients to remain joined in the claim as defendants and that consequently, the claim against the appellants in appeal No 14 should be struck out in any event.

[28] Mr. Michael Young, SC, Counsel for Telemedia submitted that the Deed of Indemnity was delimited by the Articles, and must be read and can only have effect subject to Article 112. Consequently, it was his view that the Deed could not require the Company to indemnify the directors to the extent that such indemnity would exceed the Company's powers under its articles.

[29] In relation to the technical reasons given by the learned Acting Chief Justice in dismissing the applications, Mr. Courtenay submitted that there was no requirement in the CPR, as a precondition to the consideration of a strike out application that a party should first file a defence, nor was there a requirement that a strike out application should be made within the time prescribed by the CPR for the filing of a defence. He observed that **CPR Rule 26.3**, stated that the Court may strike out a statement of case or part thereof if it appears to the *court "...(c) that the statement of case or the part to be*

struck out discloses no reasonable grounds for bringing or defending a claim ..." and that the time for filing a defence was only relevant to the matter where the claimant was entitled to default judgment.

[30] He noted that Telemedia never applied for default judgment nor did it object to the Appellants' filing a defence to the claim as was the case in ***C.O. Williams Construction (St. Lucia) Limited v Inter-Island Dredging Co. Ltd.*** (HCVAP 2011/017) where the Respondent had applied for a default judgment. Counsel also relied on St***. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited*** Civil Appeal No. 6 of 2002, where the Court of Appeal of the Eastern Caribbean considered the specific issue whether a strike out application operated as a stay of the requirement to file a defence. In that case, the defendant filed a strike out application within the time limited for filing a defence. Notwithstanding the existence of the strike out application, the court office entered default judgment, and the Judge refused to set aside the default judgment. The Court of Appeal observed:

> *"[37] ... it seems to me that a litigant in the bank's position, who makes a genuine application to strike out a claim, ought not to be required, purely to stop time from running, to file a Defence to the very claim that said litigant is asking the court to strike out ..."*

[31] Mr. Jose Alpuche Counsel for the Appellants in appeal No 14 also observed that there was no requirement in the CPR for a defence to be filed before a strike out application can be entertained, and the learned Judge erred in considering that there was such a requirement. The only consequence of not filing a defence within the prescribed time is the risk that the Claimant may enter default judgment. In the instant case the Respondent had not applied for default judgment, and the judge therefore erred in considering that it was necessary to make such an application before the Appellants' strike out application could be entertained.

[32] Mr. Alpuche relied on the submissions of the Appellants in appeal No 15 on the strike out application and its effect on the defence.

[33] Mr. Michael Young submitted that an application to strike out did not operate as a stay on the requirement to file a defence. He further contended that the authority of St***. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited*** relied upon by the appellants did not support the position they had asserted. Mr. Young submitted that Rule 9.7 rather than Rule 26.3 of the CPR was the relevant rule in the cited case, in that a majority of the Court had not disagreed with the trial judge's finding that an application to strike out did not operate as a stay on the requirement to file a defence, and that the final disposition avoided any statement of principle that the filing of an application to strike out acted as an automatic stay.

DISCUSSION

[34] The issue for determination is whether the terms of the indemnities were so unambiguous that the applications should be struck out in the context that CPR Rule 26.3 provides that the Court may strike out a statement of case or part thereof if it appears to the *court "...(c) that the statement of case or the part to* be *struck out discloses no reasonable grounds for bringing or defending a claim."*

[35] Mr. Courtenay, in addition to the **Viscount** authority already referred to, cited three other matters where the language of the indemnities in those cases were similar to each other, and to the terms of indemnity in the instant matter.

[36] In ***Re Brazilian Rubber Plantations and Estates Limited*** [1911] 1 Ch 425, a company was incorporated to acquire property in Brazil and had entered into a specified contract with a syndicate. The directors of the company issued a prospectus inviting subscription for shares which contained statements that were untrue, particularly in relation to the area of the estate and the number of rubber trees thereon. The statements were taken from fraudulent report furnished to the directors by M. Before the whole of the purchase money was paid, the directors received information that the statements in the prospectus and the report were untrue but they nonetheless proceeded to complete the purchase.

[37] The company's Articles contained a provision that "*no director shall be liable ... for any loss, damage or misfortune whatever which shall happen in the execution of the*

duties of his office or in relation thereto, unless the same happen though his own dishonesty."

[38] The Liquidator of the company issued a summons claiming damages against the directors for misfeasance consisting of gross negligence in entering into the contract without proper examination and in not repudiating it when they discovered the errors in the report.

[39] The Court held that the conduct of the directors did not amount to gross negligence, and even if it had been gross negligence the directors were protected by the provision in the Articles, with **Neville J** at page 440 of the decision stating:

> "*I think upon its construction this Article is intended to relieve directors who act honestly from liability for damages occasioned even by their negligence, where such negligence is not dishonest. And, having regard to the above decision, I do not see how to escape from this conclusion that this immunity was one of the terms upon which the directors held office in this company. I do not think that it is illegal for a company to engage directors upon such terms. I do not think, therefore, that an action by this company against its directors for negligence, where no dishonesty was alleged, could have succeeded*." [underline added]

[40] In **Leeds City Brewery Limited v Platts** [1925] Ch 532, the company instituted a claim to recover damages from the trustee for the debenture holders for not having acted in accordance with their duty in the purchase of a hotel which was bought with the intention that it should form part of the security held by the trustees for the debenture holders.

[41] The debenture included a provision at clause 30 that the company " *... shall at all times hereafter keep indemnified the said trustees and each of them and their and his heirs executors and administrators estates and effects from and against all actions proceedings costs charges claims and demands whatsoever which may arise or be brought or made against them or him in respect of the execution of the trusts hereof or*

in respect of any matter or thing done or omitted (without their or his own wilful default) with respect or relating to the premises."

[42] In considering whether the trustee's conduct amounted to 'wilful default' which would not be protected by the indemnity, **Lord Sterndale MR** stated at pages 537

> "*I take it that the company could not sue Mr. Beevers for a matter against which they had undertaken to indemnify him and therefore it might - I do not say it does, but it might - come within cl. 30 and he might be protected by that clause, unless it was done by his own wilful default*." [underline added]

[43] While the Court of Appeal agreed that there was some want of prudence by the trustee, they did not agree with the trial judge that the trustee was guilty of wilful neglect.

[44] In ***Re City Equitable Fire Insurance Company Limited*** [1925] Ch 407 the Court of Appeal held, following ***Re Brazilian Rubber***, that the immunity afforded by Art. 150 was one of the terms upon which the directors held office in the company, and was equally applicable on a misfeasance summons by the Official Receiver under s. 215, as in an action by the company against the directors for negligence.

[45] In the instant matter as noted at paragraph 20 above, Mr. Zuniga asserted that when he agreed to serve as a director of the respondent, he did so because of the provisions of Article 112 reproduced at paragraph 16 above. Moreover, as was submitted in the court below (page 797 of the Record of Appeal) there was no assertion by the respondent that any of the indemnities were invalid. Indeed, the terms of Article 112 were exhibited to the third affidavit of Nestor Vasquez sworn on 28 March 2011, (Page 120 of the Record of Appeal). In all the circumstances, when the words "*every director or other officer or auditor of the Company shall be indemnified out of the assets of the Company against all liabilities incurred by him in the actual or purported execution or discharge of his duties or the exercise or purported exercise of his powers or otherwise in relation to or in connection with his duties, powers or office"* are considered in light of the abovementioned authorities and the extracts shown hereunder, it seems clear that the indemnity afforded the appellants is of equal effect.

[46] ***In Re Brazilian Rubber Plantations and Estates Limited*** the like terms are to the effect that *no director shall be liable for loss, damage or misfortune*. In ***Leeds City Brewery*** the indemnity was against "*all actions, proceedings, costs charges claims and demands whatsoever which may arise or be brought or made against them ...*" while in ***Re City Equitable Fire Insurance Company Limited***, the indemnity related to "*actions, costs, charges, losses, damages and expenses which they or any of them ... shall or may incur or sustain ...*"

[47] In considering the foregoing indemnities, the relevance of the provisions of CPR Rule 26.3 which provides that the Court may strike out a statement of case or part thereof, if it appears to the *court "...(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim ..."*, are now very clear.

[48] In addition to the authority of ***St. Kitts Nevis Anguilla National Bank*** (supra at paragraph 30 and seq.) the Court has been referred to Belize SC Action No. 695 of 2008 ***Belize Telemedia Limited et al v Usher et al*** (unreported). In that action, Conteh CJ, determined at paragraph 23 of his decision dated 17 December 2008, that for the reasons stated at paragraphs 19 and 20, he should accede to the application to strike out.

[49] Paragraphs 19 and 20 stated as follows:

> "19. *The provision of the Rules in Part 26.3(1)(c) which enables the Court to strike out a claim because it discloses no reasonable grounds for bringing or defending the claim is undoubtedly a salutary weapon in the Court's armory, particularly at the case management stage. It is intended to save the time and resources of both the Court itself and the parties: why devote the panoply of the Court's time and resources on a claim such as to go through case management, pre-trial review and scheduling a trial with all the time and expense that this might entail, only to discover at the end of the line that there was no reasonable ground for bringing or*

defending a claim that should not have been brought or resisted in the first place? This provision in the rules addresses two situations:

(i) When the content of a statement of case is defective in that even if every factual allegation contained in it were proved, the party whose statement of case it is cannot succeed; or

(ii) Where the statement of case, no matter how complete and apparently correct it may be, will fail as a matter of law.

*(See **Green Book, The Civil Practice 2008**, CPR 3.4 [4] at p. 76 and **The White Book 2005**: **Civil Procedure** at paras. 3.4.1 and 3.4.2.*

20. It is important to bear in mind always in considering and exercising the power to strike out, the Court should have regard to the overriding objective of the rules and its power of case management. It is therefore necessary to focus on the intrinsic justice of the case from both sides: why put the defendant through the travail of full blown trial when at the end, because of some inherent defect in the claim, it is bound to fail, or why should a claimant be cut short without the benefit of trial if he has a viable case?"

[50] I gratefully adopt the observations of **Conteh CJ** cited above, and conclude that in the circumstances of the indemnities given and the plethora of authorities cited, the trial judge erred in dismissing the appellants' several applications to strike out.

[51] In light of the foregoing conclusion, the matter of the refusal of the stay of proceedings is no longer relevant. In any event, from a consideration of the submissions filed by the appellants in appeal No 15, Claim 597 of 2011 was heard on 12 March, 2012. There is no indication of how that matter was disposed, and as a consequence the matter no longer needs determination.

[52] The appeals are therefore allowed and the Amended Fixed Date Claim filed by Telemedia in Action No. 145 of 2011 in the Supreme Court is ordered to be struck out. The orders for costs made by Awich CJ (acting) at paragraphs 50 and 52 are also set aside.

[53] The respondent Telemedia is ordered to pay the costs of the appellants both in appeal No 14 of 2012 and in the court below, to be taxed in the absence of agreement. The respondent Telemedia is also ordered to pay the costs of the appellants in appeal No 15 of 2012, as well in the court below, certified fit for two counsel, such costs to be taxed in the absence of agreement.

_____

BLACKMAN JA