IN THE COURT OF APPEAL OF BELIZE AD 2017

CIVIL APPEAL APPLICATION NO 1 OF 2016

MAKSYM BEREZKIN Applicant

v

VOLODYMYR SPILNICHENKO Respondent
SABCO (OFFSHORE FINANCIAL SERVICES) LIMITED Interested Party

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BEFORE

The Hon Mr Justice Sir Manuel Sosa	President
The Hon Mr Justice Samuel Awich	Justice of Appeal
The Hon Madam Justice Minnet Hafiz Bertram	Justice of Appeal

A Arthurs Martin for the applicant.
A Reyes for the respondent.

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27 October and 2 November 2016 and 30 May 2017

SIR MANUEL SOSA P

Introduction

[1] This was an application for a stay of proceedings ('the stay application') made to this Court by the applicant ('Mr Berezkin') pursuant to a notice of motion filed on 25 October 2016 which, for its part, followed another notice filed by Mr Berezkin on 19 July 2016. By the latter notice, Mr Berezkin seeks leave to appeal from a decision of Abel J made in the court below on 31 May 2016; but the hearing of that application remains

pending at this time. With the consent of the parties, the Court determined that the stay application should be decided on the basis of written submissions only. Having read the submissions filed by counsel on both sides, the Court refused the stay application, with costs, on 2 November 2016, stating that it would be giving its reasons for decision at a later date. I give my own reason below.

The law

[2] Order II, rule 19(1) of the Court of Appeal Rules ('rule 19(1)') states as follows:

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

There can be no gainsaying, as I noted in my judgment in *The Attorney General and Others v Jeffrey J Prosser and Others*, Civil Appeal No 7 of 2006 (judgment delivered on 8 March 2007), para **[17]** that such rule clearly assumes 'that this Court has, like the court below, jurisdiction to order a stay ... of proceedings'.

[3] That was a case in which, amongst the questions canvassed, was that whether the proper procedure to be followed by a party seeking a stay of proceedings is to apply to this Court only in the event of a prior refusal by the court below. (That was in fact but one part of a composite question raised by me in oral argument.) I expressed the firm opinion in the judgment in question ('my *Prosser* judgment') that the answer to that question could only be in the affirmative. I do not see any necessity to repeat, in the instant judgment, the reasoning I adopted in *Prosser*, which can be found, interwoven with my reasoning on an allied question not presently relevant, at paras **[18]**-**[20]** of my *Prosser* judgment.

[4] It is a cause for some regret that Carey JA did not, in his judgment in *Prosser*, address the specific part of the composite question I have referred to in the immediately preceding paragraph.

[5] Morrison JA, was, not insignificantly, prepared to accept the oral assurances of counsel for the respondent Attorney General in *Prosser* that the entirely novel types of applications encountered in that case had been made to and refused by the court below before being put before this Court, comprised of three judges: see para **[58]** of his judgment in *Prosser*. He did not, admittedly, expressly hold, as I did, that a prior application to, and a refusal by, the court below were prerequisites, under rule 19(1), to an application to this Court for an order for the stay of proceedings. On the other hand, he clearly was of the view that there was wisdom in making it a part of his judgment that he was satisfied that the judge below had both heard and refused such an application, an indication, to my mind, that he was not prepared to rule out the possibility that that rule could properly be construed as imposing such requirements.

[6] Standing by the reasons for decision I gave in *Prosser*, I consider that 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 this Court. Litigants have lived with such a seemingly harsh rule in other situations, for which see my *Prosser* judgment at para **[20]**, and they will undoubtedly do likewise in this one.

[7] That, in my respectful view, is the law that applies to the facts of the instant case, to the description of which I now turn.

The facts

[8] In the present case, the facts, as material, are in very short compass. As summarised in the submissions filed on behalf of Mr Spilnichenko, they are that Mr Berezkin was poised to make application to the judge but, for reasons which are not clear, chose not to go ahead and do so. Mr Berezkin, who filed submissions before Mr Spilnichenko, did not see fit to seek leave to file further submissions by which to dispute this account.

Consideration

[9] The commendably concise argument, properly positioned (as it turns out) at the forefront of his written submissions by counsel for Mr Spilnichenko, reads thus:

> '11. As stated above, [Mr Berezkin] did not move [his] application for a stay of proceedings in the [court below]. [Mr Berezkin] simply abandoned this application on the assumption that it would have been dismissed by [the judge]. Although [the judge] has shown an inclination for the matter to progress in the [court below], [Mr Berezkin] ought to have pursued [his] application for a stay of proceedings. The judge ought to have been afforded the benefit of submissions which could have resulted in the application being granted.
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> 12. [Mr Berezkin] has therefore sought to leapfrog the [court below] and has applied directly to this Court for an order to stay the proceedings in the court below. This should not be countenanced. [Mr Berezkin] ought to be directed to move [his] application in the [court below] before [he] can file any application before the Court of Appeal.'

[10] To this argument of Mr Spilnichenko's counsel there is, not unsurprisingly, no discernible response.

[11] The present case thus bears an uncanny factual resemblance to *Prosser*, in which I was quite unable to muster up the generosity of Morrison JA and proceed, like he did, on the basis that counsel for the Attorney General was being truthful in his account of what had transpired in the court below, an account which ran counter to that contained in the official transcript. I preferred the version given by the official transcript, which was to the effect that, at the end of the day, an application which had, at one stage, been under some degree of contemplation was, in fact, never made. (In the instant case, the absence of any dispute as to whether or not a prior application was made to the judge rendered resort to an official transcript completely unnecessary.) Even if I could be persuaded to adopt a more flexible legal stance than that which I articulated in *Prosser* and accept that there may be exceptional situations in which leapfrogging over the head of the court below

may be permissible, I could not see my way to regard the instant case as anywhere near to exceptional. After all, Mr Berezkin went, so to speak, to the very edge of the perfectly potable water (of the court below) and, inexcusably, made no attempt to drink. He comes thence to the edge of the no more potable water (of this Court) claiming to be thirsty and asking to be allowed to drink.

Conclusion

[12] I respectfully fail to see, how, in these circumstances, the stay application could possibly have succeeded before this Court. It stood roundly to be dismissed without adjudication on the ground that, as I put it in *Prosser*, 'this Court lacked the jurisdiction to hear the [application] at the [point] in time when it was called upon to do so' [original emphasis]. It was for this reason that I moved on 2 November 2016 that the stay application be dismissed, with costs to Mr Spilnichenko, to be taxed if not agreed.

Postscript: By way of caution

[13] At para 2 of her submissions in writing, counsel for Mr Berezkin remarked, almost casually, as it seemed to me, that section 43(1)(e) of the Court of Appeal Act ('the Act') and rule 19(1) 'each set out the powers of a single judge as including the power to stay proceedings'. I must point out, for the benefit of practitioners in general, that section 43 falls under the part of the Act numbered IV and headed Criminal Appeals and therefore has no application to civil appeals or applications relating to them. I cannot imagine that counsel intended thereafter to refer to rule 19(1). She must have meant to advert to Order II, rule 16(1), that being the rule which deals with powers of the Single Judge in civil matters. It is, however, settled, in my opinion, by what was stated in *Prosser*, at paras 41-42 and 59-60, that such rule, which makes no express reference to stays of proceedings, is not to be construed as empowering the Single Judge to order such stays.

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SIR MANUEL SOSA P

AWICH JA

[14] I agree to the reason for judgment stated by Sir Manuel Sosa P.

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AWICH JA

HAFIZ BERTRAM JA

[15] I am in total agreement with the reason for judgment given by the President in his judgment for dismissing the stay application and granting costs to the respondent and I have nothing else to add.

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HAFIZ BERTRAM JA