IN THE COURT OF APPEAL OF BELIZE AD 2017

CIVIL APPEAL NO 35 OF 2016

SUMMERLIN LIMITED	Appellant
v	
MARTHA RENEAU **Administratrix of the Estate of Maurice Watkin Bladon**	1st Respondent
HAROLD BLADON	2nd Respondent
MAURICE BLADON	3rd Respondent
DENIKA LOAGUE	4th Respondent
LUKE LOAGUE	5th Respondent
THE REGISTRAR OF LANDS	Interested Party

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BEFORE

The Hon Mr Justice Samuel Awich	Justice of Appeal
The Hon Madam Justice Minnet Hafiz-Bertram	Justice of Appeal
The Hon Mr Justice Murrio Ducille	Justice of Appeal

M Marin-Young SC for the Appellant.
D Bradley for the Respondents.
R Gonzalez for the Interested Party.

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22 March and 27 October 2017.

AWICH JA

[1] We have determined this matter by deciding the preliminary objection raised by the respondents. I agree with Hafiz-Bertram JA that leave of the court below or of this

Court was required for this intended appeal. The decision and order of the learned trial judge, Young J, in the Supreme Court was about an interlocutory matter. I concur in the order that, there has been no appeal in this matter, the notice of appeal is "void" and is a nullity. Leading text books advise attorneys to consider carefully whether they will take a case on appeal, and to advise their clients against appealing just because appeal is an available step. This is a case where there should have been serious consideration not to appeal. Summerlin Ltd. shall pay the costs of the proceedings in this Court. The costs are to be agreed or taxed and should be provisional in the first instance as shown at paragraph 26 below.

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AWICH JA

HAFIZ-BERTRAM JA

Introduction

[2] This is an appeal against the decision of Madam Justice Sonya Young dated 7 November 2016, dismissing an application to strike out claim, which was made by Summerlin Ltd ("the appellant"). The Court heard the appeal and preliminary objection on 22 March 2017 and reserved judgment.

[3] The appellant is a company incorporated under the Companies Act, Chapter 250 of the Laws of Belize. The five respondents/claimants ("the respondents") in their amended fixed date claim form claimed against the appellant for declarations concerning prescriptive title and orders in relation to such title.

[4] The respondents claimed that they have acquired title to Parcel 818, Block 16, in the Caribbean Shores Registration Section, ("the property") by prescription pursuant to Part IX, including Section 138(1) of the **Registered Land Act**, **Chapter 194** of the laws of Belize, by virtue of their peaceful and uninterrupted possession of the property for a period exceeding twelve years.

[5] On 7 October 2016, the appellant, after filing an acknowledgement of service in relation to the claim, made an application, pursuant to **Rule 9.7** of the **Supreme Court (Civil Procedure) Rules, 2005,** ("CPR") for a declaration that the Court had no jurisdiction to try the claim and that the claim be struck out for want of jurisdiction. The application was supported by the affidavit of Jose Cardona, sworn to on 7 October 2016.

[6] The grounds of the application were:

(a) The court lacked jurisdiction since the area where the land in dispute is located, has been declared for mandatory registration pursuant to the Registered Land Act, Chapter 194 of the Laws of Belize ("RLA");

(b) The property now forms part of the Caribbean Shores registration section;

(c) The RLA exclusively governs the property and it expressly gives the Registrar of Lands jurisdiction to make determinations in relation to acquisition of land by prescription under section 138 of the RLA;

(d) The Supreme Court lacks jurisdiction to hear the respondents' claim seeking declarations as to their interest in the property since the jurisdiction is vested with the Registrar of Lands.

[7] The trial judge dismissed the application to strike out and ordered costs to be in the cause. Young J further ordered that the appellant may file a defence by way of affidavit in answer by 23 November 2016.

The Appeal

[8] The appellant appealed the decision of Young J on the following grounds:

(a) The judge erred in law in construing the provisions of the RLA in holding that the Supreme Court had jurisdiction to entertain claims for a declaration of ownership by prescription in respect of registered land;

(b) On a true construction of sections 3, 11, 138, 139, 140, 142, 143, 145 and 159 and the scheme of the RLA, it is the Registrar of Lands who was vested with exclusive jurisdiction to entertain claims for prescriptive title and that the Supreme Court's jurisdiction was limited to appeals emanating from the decision of the Registrar of Lands;

(c) Alternatively, the judge failed to exercise her discretion that even if it was correct for her to have held that the Supreme Court enjoyed a residual jurisdiction, the Court should have weighed judicial policy that alternative tribunals should be exhausted first to conserve precious judicial time, before deciding to entertain the claim.

[9] The relief sought before this Court was for (a) an order setting aside the order of Young J to dismiss the strike out application made by the appellants; (b) a declaration that the Supreme Court lacks jurisdiction to entertain the claim for a declaration of title to registered land acquired by prescription and a rectification of the register; (c) an order that the claim in the court below be struck out for want of jurisdiction; (d) costs in the appeal and in the court below.

Preliminary point as to whether leave required to appeal

[10] When this matter was case managed, learned counsel Mr. Bradley raised a preliminary point as to whether the appeal is improper and a nullity because the appellant has appealed directly to this Court without first seeking leave of the court below or leave of this Court. He addressed this point in written and oral submissions. The appellant has responded likewise.

[11] Mr. Bradley argued that the appellants needed to obtain leave since their application to dismiss the claim for want of jurisdiction was an interlocutory matter and the decision of the court was not a final order or judgment of the court determining the matter either way. Counsel relied on the Eastern Caribbean Court of Appeal case of **Rosalind Williams v Lennox Creese** HCVAP 2007/001 from Saint Vincent and the

Grenadines where the court applied the "application test as opposed to the "order" tests in deciding whether a matter is interlocutory or final and relied on **Oliver Mc Donna v Benjamin Richardson** AXA, Civil Appeal No. 3 of 2005. At paragraph 5, George-Creque JA said:

> "….Barrow JA at paragraph 19 in **Mc Donna's** case put it succinctly this way:
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> > "The application test says that the court considering the question whether an order was interlocutory or final must look at the application pursuant to which the order was made. If, whichever way the application was decided that decision would have brought an end to the issue in litigation, the decision given in that application is a final order. If on the other hand, the proceedings would not have ended if one side as opposed to the other side won, the order is not a final order but is an interlocutory order."

[12] Mr. Bradley submitted that the appellant made the application on the ground that the court had no jurisdiction to deal with the matter of prescriptive title and as such the decision of the court below is not a final order because it would not have ended the litigation either way.

[13] Learned senior counsel, Mrs. Marin-Young for the appellant submitted that the order made by the trial judge which is under appeal is a final order under section 14(1)(a) and not "a final order of a judge of the Supreme Court made in chambers" under section 14(1)(g) and 14(3) of the **Court of Appeal Act, Chapter 90** ("the Act").

[14] Mrs. Marin-Young submitted that in this case the judge below had to separately try the issue of jurisdiction whether section 138 of the RLA gave the Registrar of Lands exclusive jurisdiction to hear claims for prescriptive title for registered land. She argued that the decision being appealed is therefore a final order on a substantive part of the claim and as such no leave was required before the notice of appeal was filed. Learned counsel relied on a plethora of authorities, namely: *The Supreme Court Practice 1985 Volume 1*; *Holmes v Bangladesh Bimon Corporation (Body Corporate)* [1988] WLR 624; *Peninsula Citizens for Sustainable Development v Department of the Environment et al* Civil Appeal No 37 of 2011; *Belize Telemedia Ltd v Belize Telecom*

et al Civil Appeal No 23 of 2008; Belize Electricity Limited v Public Utilities Commission, Civil Appeal No. 8 of 2009; *Harold Eiley v William Eiley and Registrar of Lands, Civil Appeal No. 11 of 2011 and Roerig v Valiant Trawlers Ltd [2002] EWCA Civ 21.*

The relevant sections of the Court of Appeal Act

[15] Section 14 of the Act provides for appeal as of right where an order is final and with leave in certain cases where the order is not final. Section 14 provides:

> "14. (1) An appeal shall lie to the Court in any cause or matter from any order of the Supreme Court or a judge thereof where such order is-
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> (a) **final** and is not such an order as is referred to in paragraph (f) or (g);
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> …….
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> (g) (i) a final order of a judge of the Supreme Court made in Chambers;
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> ……
>
> (3) No appeal shall lie from any order referred to in paragraph (g) …. of subsection (1) of this section :-
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> (a) except,
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> …….
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> (b) in any other case, except with the leave of the Supreme Court, or, if it refuses, of the Court."

Is the order final or interlocutory?

[16] Mr. Bradley argued that the order made by the trial judge to dismiss was interlocutory and required leave of the court. Mrs. Marin-Young argued that the order made by the judge was a final order and therefore, the appeal was of right. **Section 14(1)(a)** of the Court of Appeal Act provides that an appellant may file an appeal as of right in respect to final orders. In relation to interlocutory orders, leave is required to appeal as provided by **section 14(1) (g)** and **14(3)**. It was confirmed in the Privy Council case of **Owens Bank v Cauche and others** [1989] 36 W.L.R. 599, that leave is required for an appeal to lie from an interlocutory judgment or order by virtue of the Eastern Caribbean Supreme Court [Saint Vincent and the Grenadines] Act, 1970,

section 32 (2) (g). As submitted by Mrs. Marin-Young, Blackman J of this Court in **Coventry Capital Inc v Antigua Overseas Bank Ltd (In Receivership)**, Civil Appeal, No. 4 of 2013, found that the **Owens** case is applicable to Belize because of the similarity of the wording of the Court of Appeal Act of Belize and that of Saint Vincent and the Grenadines.

[17] The Supreme Court Practice 1985 at paragraph 59/1/15 at pages 808-809 relied upon by Mrs. Marin-Young shows the distinction between final and interlocutory orders:

> "Where, however, the final trial or hearing is split into two or more parts the orders made in respect of each of the parts are final orders (***White v Brunton***, above). Thus, where judgment is given on liability with damages to be assessed, both the judgment on liability and the judgment fixing the quantum of damages are treated as final orders. Likewise, where there has been a direction for the trial of a preliminary issue, the order made at the trial of that issue will be a final order if the circumstances are such that it is equivalent to a split trial; (i.e. the issue is not an antecedent procedural point which falls to be determined in advance of the final trial, but is a preliminary issue which forms part of the final trial or hearing (***White Brunton,*** above, where the result in the **Bozson** case (above) was affirmed on those grounds). (Emphasis added)

[18] In my view, the issue of jurisdiction which was challenged in the instant matter cannot be equivalent to a split trial as it does not form part of the final trial. That issue had to be determined in advance of the trial itself. The trial judge in the court below could not hear the matter or split the trial if she had no jurisdiction to hear the matter.

[19] Likewise, the case of **Holmes v Bangladesh Bimon Corporation** relied upon by Mrs. Marin-Young cannot support her argument. In that case, a Bangladesh aircraft crashed on a domestic flight in Bangladesh. Mr. Holmes was a passenger and was killed. His widow brought proceedings against the airline claiming under the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Acts 1976. The preliminary issue that had to be determined was whether the claim was governed by schedule 1 to the Carriage by Air Acts or by the Bangladesh provisions incorporated in the contract between the passenger and the airline. The answer made a big difference

in relation to the sum that the plaintiff was entitled to recover. The trial judge took the view that the preliminary issue was interlocutory and the airline needed leave to appeal. On appeal, Lord Justice Bingham took the view that the issue formed part of the substantive trial.

Lord Bingham at page 5 relied on the Supreme Court Practice 1985 at paragraph 59/1/15 (mentioned above). He then said:

> "Order 33, rule 3 gives the court a wide discretion to order the separate trial of different issues in appropriate cases and a decision is not to be regarded as interlocutory simply because it will not be finally determinative of the action whichever way it goes. Instead, a broad commonsense test should be applied, asking whether (if not tried separately) the issue would have formed a substantive part of the final trial. Judged by that test this judgment was plainly final, even though it did not give the plaintiff a money judgment and would not, even if in the airline's favour, have ended the action."

[20] The issue tried in **Holmes** was a preliminary one which formed part of the substantive trial. The position is not the same in the instant case as discussed above. Though Young J had to try the issue of jurisdiction as a separate issue, it did not form part of the issues in the substantive matter.

[21] The case of **Roerig** relied upon by Mrs. Marin-Young can also be distinguished from the instant matter. Waller J relied on the **Holmes** case and applied the broad commonsense test and asked the question whether the issue would have formed a substantive part of the final decision. As discussed above, in the instant matter there was no order by the trial judge to split the trial. Further, the issue of jurisdiction would not have formed a substantive part of the final decision.

[22] The **Rosalind Williams case** relied upon by Mr. Bradley, in my view, shows the correct approach that should be applied, that is, the application test. Many years ago judges had a difficult task in deciding which is the correct approach. In **Holmes** the court relied on **White v Brunton** [1984] Q.B. 571 at page 573 where Sir John Donaldson M.R. spoke of split trial. The Court also referred to the *Supreme Court*

Practice 1988, volume 1, at 59/1/25 where it looked at split trial (relied upon by Mrs. Marin-Young and quoted above). A careful look at paragraph 59/1/15 shows that the authors relied on **White v Brunton** and the **Bozson** case. All of these cases in my opinion, are distinguishable since there has been no split trial in the instant matter.

[23] The cases of **White v Brunton** and **Bozson** were discussed in the case of **Othniel Sylvester v Satrohan Singh,** Civil Appeal No 10 of 1992 of Saint Vincent & the Grenadines. In that case, Bryon JA as he was then, reviewed numerous authorities and concluded that the English Courts are committed to the application test in determining whether an order or judgment is interlocutory. At pages 10 – 11, Byron CJ (as he was then) said:

> "In conclusion the English Courts are now committed to the application test in determining whether an order or judgment is interlocutory. Applying that test, the order under appeal is interlocutory.
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> In addition, Order 59 rule 1 A[6][c] of the English Rules of the Supreme Court, [which incidentally does not regulate our practice or procedure] prescribes that the order is interlocutory. **I do not think that the order test would have produced a different result, because whereas the order effectively terminated the litigation, it did not determine any of the issues raised by the litigation.** It dealt only with the question of whether the proceedings could continue. Although in some cases the rights of a party are determined by such procedural issues, in this case that was not so. **The appellant's allegations of defamation were not disposed of by the order and could have been re-litigated.** If the effluxion of time (sic) has had any effect on his rights that could not be said to be a result of the order that the writ and its service were invalid. In my view, the only conclusion that can be drawn is that the order is interlocutory. The preliminary objection must be upheld, resulting in the declaration that the notice of appeal is void and there is no appeal."

[24] The **Rosalind Williams** case relied upon by Mr. Bradley was in the year 2007 and the application test had been applied. However, as shown in the **Othniel Sylvester** case, it is not necessary for me to discuss a preference between the application test and the order test. The substantive issues between the parties were not determined. That is, the issue of prescriptive title. Further, the issue of a split trial did not arise in the instant matter.

[25] Young J dismissed the application to strike out for want of jurisdiction and ordered costs to be in the cause. The judge also ordered that the appellant may file a defence by way of affidavit in answer by 23 November 2016. The matter was not brought to a finality by the decision of the trial judge to strike out the application to dismiss. In fact, case management order was given so that the matter could proceed to trial. Accordingly, it is my opinion, that the preliminary issue of jurisdiction was an interlocutory matter and leave was required to appeal.

[26] Therefore, I would propose that the preliminary objection by the respondent that leave was required to appeal should be upheld since the order made by the trial judge was interlocutory. I would also propose that it should be ordered that the notice of appeal is void and there is no appeal before this Court. Further, that Summerlin should be ordered to pay the costs in this Court, to be agreed or taxed. I would propose that this order as to costs should be provisional in the first instance, but becomes final and absolute on a date being seven full days after the delivery of reasons for judgment, unless application for a contrary order is filed before that date. I would also order that if such an application is filed, the matter of costs be decided by the court on written submissions to be filed and exchanged within 15 working days from the date of filing of the application.

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HAFIZ-BERTRAM JA

DUCILLE JA

[27] I am in total concurrence with the judgment of Hafiz-Bertram JA and do not wish to add anything further.

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DUCILLE JA