IN THE SUPREME COURT OF BELIZE A.D. 2019
CLAIM NO. 638 OF 2019
BETWEEN
BENZER INTERNATIONAL COMPANY LTD.
CLAIMANT

AND

THE REGISTRAR OF INTELLECTUAL PROPERTY	**1st DEFENDANT**
THE ATTORNEY GENERAL OF BELIZE	**2nd DEFENDANT**
GLOBAL TOBACCO FZCO	**3rd DEFENDANT**

DECISION ON APPLICATION TO SET ASIDE CONSENT ORDER

Before the Honourable Mr. Justice Westmin R.A. James (Ag)
Date of Delivery: 14th December 2020
Hearing: 2nd 23rd November 2020

Mr. Eamon H. Courtenay SC, Mr Garvin Courtenay & Mr Hector D. Guerra for the Applicant/3rd Defendant
Mr. Anthony Sylvestre & Mr Wayne Piper for the Respondent/Claimant
Ms. Samantha Matute-Tucker for the Respondents/1st and 2nd Defendants

BACKGROUND

1. By Fixed Date Claim Form dated the 16th day of October, 2019, the Claimant pursuant to CPR Part 56.1(1)(c) and 56.7(1)(c) sought to challenge the decision of the then Deputy Registrar of the Belize Intellectual Property Office ("BELIPO"), issued the 11th day of January, 2019, in favour of the applicant which invalidated the registration of the trademark "Richman Royal" by the Claimant. The Claimant named BELIPO and the Attorney General, (the 1st and 2nd Defendant) as "Defendants" and Global Tobacco FZCO, the Applicant, as "Interested Party".

2. The matter was set before the Honourable Justice Abel who on the 28th November 2019 had made directions in the matter. The matter was further fixed for mention on 10th December 2019 with the First Hearing adjourned to 27th January 2020. On the 10th December 2019, Justice Abel made the following case management order:

"…
4. The Interested Party is permitted to file an application to be made a substantive party to the proceedings on or before the 13th of January, 2020.
5. Any application by any other party shall be filed on or before the 13th January 2020
…
8. Any and all applications in these proceedings will be heard on the 27th of January, 2020 at 2:30 pm."

3. On 10th January 2020, the Claimant applied for Judgment on Admission relying on the written submission of the Attorney General in another matter Appeal 3 of 2019 before Justice Young.

4. On 13th January 2020, the 1st and 2nd Defendants applied to strike out the the Claimant's claim on the ground that the claim was an abuse of the Court's process on the basis that the Claimant had failed to avail itself of the statutorily prescribed alternative remedy.

5. On the 14th January 2020, outside of the time ordered by the Court, the then Interested Party applied to be added as a Defendant to the proceedings and to strike out the Claimant's claim on the ground that the claim was an abuse of the Court's process.

6. On the 27th January 2020, in the presence of all parties an extension of time was granted for responses to any application, written submissions and any and all applications to be heard on the 24th February, 2020.

7. Before the hearing of any of the applications, on the 29th January 2020, the Claimant and the 1st and 2nd Defendants compromised the case and submitted a Consent Order for approval by Abel J. The above mentioned Consent Order was approved by the Honourable Justice Abel and perfected on the 3rd February 2020.

8. The Consent Order entered provided the following terms:

   "i. The Defendants hereby withdraw their Application to Strike Out the instant claim dated the 13th day of January, 2020;
   ii. The Claimant and the Defendants agree to have the Invalidation Application re-heard before the 1st Defendant ab initio without any admission of liability on the part of the Defendants; and
   iii. Each party shall bear their own costs of this Claim."

9. The Applicant, the then Interested Party, was served with the Consent Order on 6th February, 2020. This was the first time that the Consent Order came to the attention of the Applicant.

10. On the 12th February 2020, the Interested Party filed an application to set aside the Consent Order. On the 24th February, 2020, Justice Abel made the following orders:

> *"i. Global Tobacco is removed as an interested party and is added as the 3rd Defendant to these proceedings;*
> *ii. The Claimant's Amended Fixed Date Claim Form and supporting Affidavits to be further amended accordingly by the Claimant on or before the 16th March 2020;*
> *iii. That Global Tobacco's strike out application is adjourned to 26th May 2020 at 10:00 am".*

11. Justice Abel was unable to hear the application before his retirement and the matter was assigned to this Court on 23rd September 2020. The matter was set for mention on the 5th October 2020. Hearings on the application took place on 2nd November 2020 and 23rd November 2020.

12. The sole issue for consideration by this Honourable Court at this stage is whether the Consent Order should be set aside. In order to answer this main question, the Court has to determine whether this Court has the jurisdiction to set aside a Consent Order and if so whether the Applicant had to be a party to that Consent Order.

Does the Court have the jurisdiction to set aside a Consent Order?

13. Learned Counsel on behalf of the 1st and 2nd Defendants argued that the Court cannot set aside a Consent Order properly entered into by the parties as the Court was functus. This she argued could only be done way of a fresh action or by an appeal. This Court is not prepared to accept such a contention.

14. The Supreme Court may in the exercise of its inherent jurisdiction set aside Consent Orders if the underlying agreement upon which they were based is void or voidable.[1] Such relief is discretionary even if some basis for setting aside the order has been established.[2] In ***Kisundaya Soogrim v Indar Singh***[3], Honourable Justice Kokaram (as he then was) at paragraphs 18 and 19 of his judgment recognized there is authority for the proposition that a Court has jurisdiction to set aside a consent order. He stated:

> *"18. ... There is authority that under the CPR Parts 1, 26 and Part 44 the Court retains wide discretion with regard to setting aside or interference with its order. See Ropac Ltd v*

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[1]*The Owners Strata Plan No 57164 v Yau [2017] NSWCA 341 at [72], [76], [80], [195] & [226]*
[2]*The Owners Strata Plan No 57164 v Yau, above, at [81]–[83], [195], [226].*
[3] *CV2015-03713 Kisundaya Soogrim v Indar Singh*

Inntrepreneur Pub Co (CPC) Ltd [2001] CP Rep 31 Ch D where Neuberger J stated at 31 that:

> *'To my mind, the CPR therefore gives the court rather more wide-ranging, more flexible powers than the RSC. In my judgment, those powers are to be exercised not merely to do justice between the parties, but in the wider public interest. Further, the objective to deal with a case justly must, as I see it, sometimes (albeit rarely) require the court to override an agreement made between the parties in the course of, and in connection with, the litigation.*
>
> *I consider that this means that the court has greater power to interfere than before. Having said that, I should add this. Where the parties have agreed in clear terms on a certain course, then, while that does not take away its power to extend time, the court should, when considering an application to extend time, place very great weight on what the parties have agreed and should be slow, save in unusual circumstances, to depart from what the parties have agreed."*
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> *See also Note 30.9 Caribbean Civil Court Practice 2011. If this Court does have a wide discretion under the CPR to set aside its orders, the grounds relied upon by the Claimant are insufficient to do so.'*

19. Consent orders are not to be set aside lightly. See Blackstone's Civil Practice (2016) paragraph 63.11. The Defendant advanced a number of grounds which fail to mount in my view a serious challenge to the recording of a true bargain struck by the parties. Although there has been no cross examination on the affidavits the Court is entitled to sift the evidence adduced by the Claimant to determine its merit."

15. In ***Petrojam Limited v The Industrial Disputes Tribunal and The Minister of Labour and Security***[4] the issue too was considered by Fraser J in the context of a judicial review. The Court held that the Court has the jurisdiction to set aside a Consent Order where the Court lacked the jurisdiction to grant those Orders. Further, Rattray J observed at paragraphs 53 to 54:

    "[53] This observation was recently made by Brooks JA in the case of In the matter of a claim by Sharon Allen [2017] JMCA Civ. 7. In that case, his Lordship in interpreting the case of Strachan (supra) noted that: - "

    > *[26] On the issue of jurisdiction, it must also be said that Mason v Desnoes and Geddes Limited and Leymon Strachan v The Gleaner Company Limited and Another [2005] UKPC 33 demonstrate that <u>a judge may, in certain circumstances, set aside an order made by a judge of concurrent jurisdiction. Examples of such circumstances are, firstly, if the application before the first judge was made, in the absence of a party, or, secondly, where the merits of the case were not decided at that first hearing. It is usual that the application to set aside is placed before the</u>*

[4] [2018] JMSC Civ.166

same judge who made the order, which is sought to be impugned. Where, however, as in this case, that judge is not available, another judge may hear and decide the application to set aside the first order." [Emphasis supplied]

[54] Brooks JA concluded, that a judge may, in certain circumstances, set aside an Order of another judge, and went on to outline some examples, which in my view, are not meant to be exhaustive. He also specifically indicated in the passage cited above, that "It is usual that the application to set aside is placed before the same judge who made the order, which is sought to be impugned." Additionally, if a judge can set aside another judge's Order, then there ought to be no contention that the same judge can set aside his own Order, particularly in circumstances where the Court fell into error in granting the said Order. The only way of recourse in my view, is not by way of an appeal to the Court of Appeal."

16. I concur with this view, the Court must be able to resolve any dispute as to whether and on what terms proceedings have been compromised or settled, and if necessary, set aside or vary the order or judgment implementing a compromise or settlement if, for example, the Rules were not complied with. I would adopt the words of Awich J *"it surely cannot be right that a third party with no notice of a consent judgment between two other parties can do nothing about it save by starting a new Action. Indeed, it is hard to see the basis of such a new Action and who should be a party to it, and I have no holding in that a third party prejudiced by a consent judgment can intervene in an action in order to set it aside, provided that he himself did not consent to the terms of that judgment."*[5]

17. This Court therefore holds that in certain circumstances such as where the provisions of the Rules for the entering of the Consent Order are not complied with, the Court surely retains the power to revoke the exercise of its coercive power by making an order to set aside that order.

Whether the 3rd Defendant/Interested Party had a right to be party to the Consent Order.

18. Having found that the Court does have the jurisdiction to set aside a Consent Order outside a new case or an appeal, the next issue for determination is whether the applicant was 'a party' to the proceedings.

19. This is a case where the Applicant was enjoined as an Interested Party by the Claimant. There is no status under the CPR of Belize for an "Interested Party" except Part 69 that deals with admiralty proceedings, but the Applicant was so joined. The phrase has been used in Belize on a number of occasions.[6]

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[5] *Claim 49 of 1996 Development Finance Corporation (DFC) v Honorio Duran et al dec*

[6] Examples of it use in administrative law cases*: Belize Alliance For Conservation Non- Governmental Organization v Public Utilities Commission BZ 2002 SC 8 (Administrative Law); Belize Electricity Company Limited v Public Utilities Commission, Minister of Public Utilities and Attorney General BZ 2011 SC 13 (Administrative Law); Belize*

20. The Jamaican High Court in ***Maurice Tomlinson v AG***[7] in an application by a group collectively called the Churches to intervene in a case by Mr. Tomlinson on the Jamaican anti-sodomy law indicated that the term "interested party" meant the same as a person with "sufficient interest". The Court stated:

> *"[77] Counsel for the Claimant has made heavy weather of the distinction between an "interested party" as used in the UK CPR and an "intervenor." In my view, too much emphasis need not be placed on the precise label used for purposes of these applications. The use, or what is argued to be the misuse of the term "interested party" may have its origins in the absence of the term from our CPR and the fact that the term, for convenience if for no other reason, has become one that is informally used to represent a party that is joining proceedings pursuant to CPR 56.13(2)(c)."*

21. Further in Belize, CPR 56.11(2)(c) states that the Court at a first hearing may allow any person or body appearing to have sufficient interest in the subject matter of the claim to be heard whether or not served with the claim form. Therefore, an Interested Party in this context means a person with sufficient interest.

22. The Applicant was named as an Interested Party by the Claimant and therefore as someone who had a sufficient interest in the matter and upon whom the Order would have affected. Had this not been the Claimant's true intention the Claimant would have merely served the Applicant with a copy of the proceedings and not join the Applicant as an Interested Party. Even if this was not the case the Court had the right under CPR Part 56.11(2)(c) to allow any person or body who appear to have sufficient interest in the subject matter of the claim to be heard whether or not served.

23. The presence and participation of the Applicant was never challenged by either the Claimant or the 1st and 2nd Defendants. The Applicant was allowed to make an application to strike out the claim without challenge and the Applicant made an application to be made a full party. To this Court, the naming of the Applicant as an "interested party" meant it was a body that had sufficient interest in the subject matter and so was a party to the proceedings for the purposes of the Rules.

Whether the Applicant's consent was necessary for the entry of Consent Order?

Institute for Environmental Law v Chief Environmental Officer et al BZ 2008 SC 13 (Administrative Law); Belize Telecom Limited et al v Attorney General of Belize and Belize Telemedia Limited BZ 2007 SC 35 (Judicial Review); Belize Telecommunications Limited v The Attorney General of Belize et al BZ 2003 CA 1 (Judicial Review); Belize Water Services Limited v Public Utilities Commission of Attorney General BZ 2005 SC 17 (Judicial Review); Feinstein v Attorney General, Belize Tourism Board and Fort Street Tourism Village ltd BZ 2015 SC 46 (Judicial Review); Peninsula Citizens For Sustainable Development Limited v Department of the Environment and Placencia Marina Limited BZ 2011 SC 48 (Judicial Review); R. Et Al v Ex Parte, Belize Telecommunications Limited BZ 2002 SC 10; Travellers Rest Lodge Belize Ltd. And Young v Haylock (President od Nich) National Institute of Cultural and History and Cruise Solution (Interested Party) BZ 2009 SC 8; Viable Belizean Properties ltd v The Attorney General Et Al BZ 2015 SC 29.

[7] *[2016] JMSC Civ. 119*

24. As a party with sufficient interest the next step for determination was whether the Consent Order could be entered without the knowledge, concurrence or hearing of the Applicant.

25. CPR Part 42.7 dealing with Consent Orders states:

    "(1) This Rule applies where –

    (a) none of these Rules prevents the parties agreeing to vary the terms of any court order; and

    *(b) all **relevant parties** agree the terms on which judgment should be given or an order made.*

    (5) Where this Rule applies the order must be –

    (a) drawn in the terms agreed;

    (b) expressed as being "By Consent";

    *(c) signed by the legal practitioner acting for **each party to whom the order relates**; and*

    (d) filed at the court office for sealing."

26. It is a fundamental right for anyone with a dispute before a Court to be heard before orders that affect them are made, the very right the Claimant seek to invoke in the substantive claim. I would adopt the words of Nyeri in the case of ***Richard Ncharpi Leiyagu v Independent Electoral and Boundaries Commission and 20 others*** CA No. 18 of 2013:

    "The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."

27. The CPR specifically provides that for there to be a Consent Order *"all relevant parties"* must agree on the terms of the judgment and the agreement must be signed by each party to whom the order relates. This provision does not limit Consent Orders to only the Claimant and Defendant but rather specifies *"all relevant parties"* and to those whom *"the order relates."* The Applicant who participated in all aspects of the case up until the entry of the Consent Order was therefore a relevant party to which Rule 42.7(1)(b) applied.

28. Furthermore, the Order related to proceedings in which the Applicant was a party and in which the Applicant was successful in striking out the Claimant's mark. The Consent Order had the effect of revoking a decision of which the Applicant was the beneficiary and have a re-hearing of that application without its knowledge, concurrence or participation. The Consent Order also has the effect of dismissing the Applicant's application to have the Claim struck out and be named a substantive party without first obtaining the Applicant's

express authority. The Consent Order itself by dealing with the application of 1st and 2nd Defendants highlights this.

29. In my view, the Consent Order was proceduraly irregular and unlawful since it entirely excluded the Applicant and so therefore failed to satisfy the conditions of Rule 42.7 with respect to Consent Orders. The application to set aside the Consent Order entered on 3rd February 2020 is therefore granted.

30. The cost of this application is costs in the cause.

Westmin R.A. James
Justice of the Supreme Court (Ag)