IN THE SUPREME COURT OF BELIZE, A.D. 2016

CLAIM NO. 189 OF 2016

BETWEEN:

(MANUEL POP on his own behalf and	**Claimants/Applicants**
(on behalf of the Maya Village	
of SANTA CRUZ	
(	
(AND	
(	
(RUPERT MYLES	**First Defendant/Respondent**
(	
(THE ATTORNEY GENERAL	**Second Defendant/Respondent**
OF BELIZE	

BEFORE THE HONORABLE MADAM JUSTICE MICHELLE ARANA

Alistair Jenkins of Magali Marin Young & Co. along with Monica Coc Magnusson for the Applicants/Claimants

Samantha Matute Tucker Assistant Solicitor General in the Attorney General's Ministry for the Respondents/Defendants

1. This is an Application for Leave to Appeal a judgment of this court where this court decided

2. Legal Submissions On Behalf Of the Applicant/Claimant

Leave to appeal is required with respect to all orders except those of the types listed in s.14(1), 14(2)(a), or 14(3)(a) of the *Court of Appeal Act.* All other orders require leave from this Court or the Court of Appeal itself.

[*Court of Appeal Act,* R.E. 2000, Ch.90, s.14]

3. The Order appealed from in the present case does not fit into any of those categories. More specifically, it is neither a final order nor an order declared by rules of court to be of the nature of a final order.

[*Court of Appeal Act,* R.E. 2000, Ch.90, s.14]

4. To determine if an order is final or not, the Court must apply the "application test." That is, 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 one."

[*Summerlin Ltd. v. Martha Reneau et al*, Civil Appeal No. 35 of 2016 (Ct. App.) (hereinafter "*Summerlin*"), paras. 11, 22-24]

5. The Court of Appeal affirmed that the "application" test is the correct approach that same year in *Rudon*. As in the present case, *Rudon* involved a successful application to strike the claim. Following that case, an application to strike a claim never gives rise to a final order, because "if the judge had determined the application made by [the defendant] in favour of [the claimant], the claim would not have been struck out, but, rather, would have continued." Accordingly, even if the order is made in favour of a defendant and the claim is struck, the order is interlocutory in nature.

[*John Rudon v. Santiago Castillo Ltd*., Civil Appeal No. 28 of 2016 (Ct. App.) (hereinafter "*Rudon*"), paras. 13-14]

I. LEAVE FOR APPEAL SHOULD BE GRANTED

a. The applicable test for leave to appeal

6. The *Wang* standard for granting leave to appeal has been adopted by the Court of Appeal as follows. Leave should be granted if any of the following situations apply:

(i) where there is a prima facie case that the Court had made an error; or

(ii) where there is a question of general principle being decided for the first time; or

(iii) where there is a question of importance upon which a decision of the Court of Appeal would be to the public advantage

[*Karina Enterprises Ltd. v. China Tobacco Zhejiang Industrial Co. Ltd*., Civil Appeal 2014 (Ct. App.) (hereinafter "*Karina"*), para. 7, referencing *James Wang v. Atlantic Insurance Co. Ltd,* Sup. Ct. Action No. 114 of 1998]

7. In addition, when the order appealed from is interlocutory, additional conditions apply:

(i) the issue must be significant enough to justify the costs of an appeal; and

(ii) the procedural consequences of an appeal (i.e. loss of a trial date) must not outweigh the significance of the interlocutory issue; and

(iii) it may not be more convenient to determine the point at or after the trial

[*Belize Telemedia Ltd. v Belize Telecom Ltd. et al*, Civil Appeal No. 23 of 2008 (Ct. App.), (hereinafter "*Belize Telemedia*"), p. 4]

8. The applicant for leave must also demonstrate that they have realistic, as opposed to fanciful, prospect of success on appeal. That is to say, there must be cogent grounds for appeal.

[*Karina,* at para. 8, 11]

9. To summarize, in the present case "in order to obtain leave to appeal, the applicant [has] to

(i) satisfy the court that it had a real prospect of success

(ii) satisfy the court on either one or more of the three categories as stated [in *Wang*]

(iii) ... satisfy the court that none of the additional considerations arose as [stated in *Belize Telemedia*]."

[*Karina v. China Tobacco* (Ct. App.), para. 11]

10. The Claimants not only satisfy each point of this multi factor test, but also independently qualify under more than one of the three *Wang* categories.

b. <u>The Claimants have a *prima facie* case and a reasonable prospect of success on the grounds of appeal.</u>

11. By definition, demonstration of a *prima facie* case implies a reasonable prospect of success, unless there is a clear and unarguable defence available.

12. In order to establish a *prima facie* case that the Court has made an error, the Claimants must show a reasonable argument that the judge "made a mistake in law, disregarded principle, misapprehended the facts, took into account irrelevant material, ignored relevant material or failed to exercise [her] discretion."

[*Addari v. Addari*, No. 21 of 2005 C.A. Virgin Islands (unreported), pp. 5]

i. *There is a* prima facie *case that the Court disregarded a fundamental principle of law – or at least made a mistake in law - by ruling that it cannot grant relief as the claimant village's customary property rights have not been demarcated.*

13. The Claimants allege that the Government defendant has contravened the legal obligation imposed upon it by the Order of the Supreme Court of 18th October 2007 in Supreme Court Claim No. 172 of 2007, and by the Consent Order of the Caribbean Court of Justice of 22 April 2015 in *Maya Leaders Alliance v. Attorney General of Belize,* CCJ Appeal No. BZCV2014/002 (collectively referred to hereinafter as the "*Maya Land Rights* Orders").

14. Those orders require the Government to "cease …any acts … by third parties acting with its leave, acquiescence or tolerance, that might adversely affect the value, use or enjoyment of the lands that are used and occupied by the Maya villages" except under certain limited circumstances. This obligation on the Government exists only "until such time as the measures in paragraph 2 are achieved". The measures referred to are "affirmative measures to identify and protect the customary property rights of the Maya villages," further particularized in paragraph 3 to include "the legislative, administrative and/or other measures necessary to create an effective mechanism to identify and protect the property ...."

[*Re Maya Land Rights*, Consolidated Civil Claims No. 171 & 172 of 2007 (hereinafter "*Maya Land Rights I*"), para. 136(d)]

[*Maya Leaders Alliance v. Attorney General of Belize*, CCJ Appeal No. BZCV2014/002 (hereinafter "*Maya Land Rights II*"), Order of 22 April 2015, paras. 2-4.]

15. In arriving at the Order from which leave is sought to appeal, the Honourable Madam Justice stated that:

… the Government has yet to demarcate, identify and register the lands being claimed as belonging to the Mayan people. Until that occurs, this court cannot grant the relief which is being sought as against the Government.

[Civil Claim 189 of 2016, Ruling of 18 October 2019 (hereinafter *"Ruling*"), para. 13]

16. Since the Government's obligation of non-interference under the *Maya Land Rights* Orders only exists until the Government has identified and protected Maya villages' customary property, and this Ruling states that that the Court cannot enforce or otherwise give effect to that obligation until after the Government has identified and protected that property, the Ruling effectively renders the obligation unenforceable until such time as it no longer exists.

17. This interpretation of the *Maya Land Rights* Orders effectively nullifies an obligation imposed by two courts, including the highest in the land. The maxim *ubi jus ibi remedium* means where there is a right, there is a remedy. Conversely, where there is no remedy, there is no right. A court should not make an order that renders nugatory a party's right.

[*Johnson v. Voight & Co*. (Lagos) (Privy Council) (12 May 1896), p. 1, 2]

18. An interpretation that nullifies a legal provision, such as this one does, is an absurdity. An interpretation is absurd if it "leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object" of the instrument being interpreted. Courts should avoid absurd results where other reasonable interpretations are available.

[*Rizzo & Rizzo Shoes Ltd*. (Re), 36 O.R. (3d) 418 (Supreme Court of Canada), para. 27.]

19. Finally, by applying an interpretation that effectively nullifies part of a prior court order that is binding on both parties – as in this case – the court gave effect to a collateral attack on two final decisions that have not (or cannot) be appealed. The defendant's arguments, accepted in the Ruling, that paragraph

4 is effectively unenforceable is particularly egregious given that the defendant both contributed and consented to the wording of the CCJ Order.

[*Wizard Trust Ltd. v. Cove Ltd et al*, Civil Claim No. 245 of 2016 (Sup. Ct.), Ruling of January 31, 2019, paras. 9-11, 22]

20. A collateral attack includes a challenge to the legal effect of a court order. The argument and holding that effectively nullifies a provision of the *Maya Land Rights* Orders directly undermines the legal effect of those Orders. Seeking and obtaining contradictory court orders is also abuse of process, because it threatens to bring the administration of justice into disrepute.

[*Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79* [2003] 3 S.C.R. 77 (Supreme Court of Canada), paras 33-34, 37]

21. Not only does this interpretation nullify the interim injunctive relief expressed in paragraph 4 of the *Maya Land Rights Orders,* it encourages the Government to delay compliance with the provisions in those Orders requiring it to identifying and protect those rights. If failure to comply with the primary relief mandated by the *Maya Land Rights* Orders – identify and protect Maya customary title – is the basis for escaping any consequences for violating its

obligations under paragraph 4 of those Orders, then the Government's legal wrong gains the status of a legal defence.

22. It is a basic principle of law that a party cannot rely on his own wrongdoing, be it illegal or immoral, as a defence. "The courts are always refusing to assist in any way, shape or form those who violate the law …. *Ex dolo malo non oritur actio."*

[*Elford v. Elford*, [1922] S.C.J. 31 (Supreme Court of Canada) p. 5, (*citing Gascoigne v. Gascoigne,* [1918] 1 K.B. 223)]

23. The Order appealed from therefore reflects a disregard of several fundamental principles of law that a court should not interpret legal instruments in a way that produces absurd results, nullifies a right, upholds a collateral attack, or permits a party to use his own wrongdoing as a defence.

ii. There is a prima facie *case that the Court misapprehended relevant facts and ignored relevant materials concerning the nature of the Second Defendant's alleged wrongdoing.*

24. The Court based its decision on the fact that the claimant's cannot prove interference with Santa Cruz lands because the lands have not been demarcated. However, the pleadings in this case did not raise any dispute as to whether the lands are in Santa Cruz village.

25. On the contrary, the Second Defendant's own evidence in defence acknowledges that the Attorney General asked their responding witness to provide information about "matter of Rupert Myles "occupation of land in the village of Santa Cruz". The witness then stated that the Uxbenka site (where the trespassing and damage occurred) is "located at the village of Santa Cruz in the Toledo District. The site covers an area of 3.5 square kilometers and literally encompasses the village." The Government's other responding witness does not reference the location of Mr. Myles' occupation. None of the witnesses aver to the fact of the demarcation of Santa Cruz's lands or lack thereof.

[First Affidavit of George Thompson, Exhibit GT3, para. 1]

26. Nor does the Defendant's Application to Strike nor its Affidavit nor Skeleton Argument in support of that application contain any assertion or argument that the location where the facts occurred is not part of Santa Cruz's village lands.

27. Therefore, the Court erred in basing its Ruling on (a) facts that ware not before the court –that Santa Cruz village customary title lands have not been demarcated, and (b) an issue that was not raised by the parties in any pleadings – that of whether the land in fact was used and occupied by Santa Cruz village. The Claimants faced this assertion and argument for the first time in oral argument.

28. The Court also erred by misapprehending the facts and materials that were before it. In arriving at her decision, the Honourable judge only considered the claim against the Second Defendant based on the Government's obligation under the *Maya Land Rights* Orders. The learned judge failed to consider that the Claimants were seeking to include a direct allegation of trespass against the Second Defendant, through its agent CISCO, based on facts alleged in the First Defendant's defence of which the Claimants had previously been unaware.

29. These allegations were that the Second Respondent instructed or allowed its agent, CISCO Construction Limited, to bulldoze a road leading to the land the First Defendant was occupying within the Uxbenka Archaeological site on the Claimants' Maya village lands. This bulldozing destroyed part of an

unexcavated temple mound, and was done without the consent of the Claimants.

[Witness Statement of Edward Eck, dated 23rd October 2016 (Attached to the Defence & Counterclaim of First Defendant), paras. 1-4]

[First Affidavit of Manuel Pop, dated 22nd February 2016 (Attached to Claimants' Fixed Date Claim Form), para. 17]

[Witness Statement of Romaldo Cal, dated 22nd December 2016 (Attached to the Defence & Counterclaim of the First Defendant), paras. 5-7]

30. An Application to amend the Claim and add CISCO as a party as before the court, and was scheduled to be heard on the same day as the defendant's Application to Strike. Only the latter was actually heard however.

[Claimants' Notice of Application (29th June 2017)]

[Order of the Honourable Justice Madame Michelle Arana, (2nd June 2017)]

iii. There is a prima facie *case that the Court made a mistake of law in finding that the claims against the First and Second Defendants must be brought separately.*

31. In the Ruling upon which the Order giving rise to this Application, the Court held that "I agree with [the arguments] of the Learned Solicitor General. The

case against Mr. Myles for trespassing should have been brought separately from the case against the Government of Belize. Mr. Myles, as a private citizen, is not an agent of the State and he should therefore be held responsible for his actions in a private claim."

[*Ruling*, para. 13]

32. The Government's argument was that Rule 56 of the CPR disallows a claim against a private citizen and constitutional relief against the State to be brought together in a single Fixed Date Claim Form proceeding. The Court failed to consider that Rule 56 does not prohibit a combination of private and public law proceedings. On the contrary, it allows the court the flexibility, for example to convert claims pled as a claim for damages/private law claim into an application for an administrative order/public law claim (Rule 56.6), and mandates that any claims the Claimant may have for other relief be joined to or included in the claim for constitutional redress (Rule 56.8). Rule 56.8(3) merely permits, but does not mandate, the claim for other relief to be dealt with separately.

[*Ruling,* para. 2]

[CPR, s. 56, and in particular s. 56(7) and 56(8)]

33. In addition, the Learned Judge failed to consider Rule 8.4 of the *Supreme Court (Civil Procedure) Rules* (hereinafter "CPR") specifically states that "a claimant may use a single claim form to include all, or any, other claims which be conveniently disposed of in the same proceedings."

[*Supreme Court (Civil Procedure) Rule, 2005,* s. 8.4]

34. The same fact situation gives rise to the claims against both Defendants. This reality would not only have made it convenient to dispose of both claims in the same proceedings, but nearly essential. Bringing separate actions against the First Defendant for trespass and the Second Defendant for constitutional redress and breach of the *Maya Land Rights* Orders would open the possibility for conflicting judgments and brining the administration of justice into disrepute. Further, the facts disclosed by the First Defendant in his defence have a direct bearing on the nature of the claim against the Second Defendant. Therefore, it was appropriate for the Claimants to bring both claims under the same fixed-date claim form and the Court erred by striking the claim on those grounds.

35. In conclusion, there is a *prima facie* case that errors of law were committed by the Court, and that the Claimants have a reasonable prospect of success on appeal.

c. <u>There are questions of general principle to be determined for the first time</u>

36. In holding that no remedy is available to the Claimants for Government failure to protect their land use until their customary property rights are demarcated, this Ruling directly contradicts the Supreme Court decision made on an identical argument in 2014. In that case, the Government argued, despite the *Maya Land Rights I* judgment and the (then) judgment of the Court of Appeal in *Maya Land Rights II* case, that "since the lands claimed by the Maya people have not been demarcated, or surveyed, then it is not clear whether those lands" are Maya customary property.

[*Sarstoon Temash Institute for Indigenous Management (SATIIM) et al v. Attorney General of Belize et al*, (April 3, 2014), Civil Claim No. 394 of 2013 (hereinafter "*SATIIM*"), p. 30]

37. The Court rejected that argument and ruled that "the judgement of Conteh CJ in Maya Lands case No. 1 plainly puts the onus of demarcating property belonging to the Maya on the Government of Belize in consultation with the Mayas. It is not for the Mayas to come and prove that their land lies [in a particular area]. "

[*SATIIM*, p. 31]

38. Furthermore, the court found that, although Maya lands were not yet demarcated, "the failure of the Government of Belize to obtain the free, prior and informed consent of the Maya people prior to granting the concessions and permissions [at issue in that case] for the construction of a road and drilling for oil … was unlawful."

[*SATIIM*, p. 31]

39. The opposite conclusion was reached in the present case on the question of whether the operation and enforceability of Maya customary land rights and the *Maya Land Rights* Orders depends on the demarcation of the boundaries of the Maya villages. There are therefore conflicting Supreme Court decisions on this issue, which has never been considered by the Court of Appeal and creates confusion in the law.

d. <u>There questions raised on appeal are of significant importance and a decision from the Court of Appeal would be to the advantage of the Maya communities of southern Belize, Belize generally, and the international community.</u>

40. The present claim is one of only a handful of cases dealing with indigenous peoples' rights in the history of Belizean jurisprudence, and the interpretation of how the Maya customary land rights recognized in those cases affect government procedure and obligations. This decision will guide both public and private activity in most of the Toledo District and parts of Stann Creek District.

41. Perhaps most immediately important for the parties, this case offers the first opportunity for the Maya people and the Government of Belize to seek judicial interpretation of paragraph 4 of the 2015 CCJ Order, which obligates the Defendant to "cease and abstain from any acts, whether by the agents of the government itself or third parties acting with its leave, acquiescence or tolerance, that might adversely affect the value, use, or enjoyment of lands that are used and occupied by the Maya villages. . . ."

[*Re Maya Land Rights II (CCJ Order), para. 4]*

42. For the Belizean public and Maya people generally, and the Claimants specifically, there are very real and imminent concerns: (1) the possibility of continued destruction of Maya communal property, sacred sites, and archaeological treasures; (2) the undermining of traditional Maya governance systems since village leaders are unable to effectively protect their lands from

incursions in the absence of State assistance or recourse to the courts; and (3) the erosion of public confidence in effectiveness of pursuing legal action to remedy threats to their lives, livelihoods, and rights. The significance of these realities cannot be overstated.

43. Internationally, the *Maya Land Rights* cases are part of the developing body of domestic and international human rights law concerning indigenous peoples' rights; one of the most significant areas of jurisprudential progress of recent decades, particularly since the passing of the United Nations Declaration on the Rights of Indigenous Peoples in 2007. Yet, in the grand scheme of international human rights law, indigenous peoples' rights remain one of the least developed areas and relies heavily on the standards set by a handful of countries undertaking to undo some historical wrongs, like Belize. Thus, the interpretation and application of the *Maya Land Rights* Orders will affect not only the Maya people in Belize, but potentially dozens, if not hundreds of indigenous communities and post-colonial governments around the world.

[*See Devroy Thomas et al v. Attorney General of Guyana et al*, Civil Claim No. 166 of 2007 (Sup. Ct. of Guyana), pp. 27-28, 36-37]

44. The Claimants submit that this case satisfies not only one, but all three *Wang* categories, and as such, it is appropriate to grant leave to appeal. They now turn to the conditions specific to the appeal of interlocutory orders.

e. <u>The significance of the issues raised by the Claimants far outweighs the cost of an appeal</u>

45. The past and potential destruction of irreplaceable Maya archaeological sites alone would justify the cost of an appeal in this case. Add to that the issue of the effect and enforceability of a CCJ Order and the relevance of the case to all of the Maya communities of the south, and it is clear that the significance of the issues raised far outweigh the cost of an appeal.

f. <u>The significance of the interlocutory issues in this case far outweigh the procedural consequence of appeal</u>

46. At the moment, there is no trial date set for this claim and there are no upcoming dates scheduled. This appeal, therefore, will have no procedural consequences for the claim.

g. <u>It would be incredibly inconvenient to determine these issues at or after trial</u>

47. Given that the Order is to strike the claim against the Second Defendant, it would be impossible to determine the issues raised in this appeal at trial, since there would be no trial against the Second Defendant.

48. Additionally, it would be a prodigious waste of judicial economy to proceed with two separate claims and trials to determine an issue or issues that arise out of the same set of facts and circumstances. Therefore, granting leave for this appeal will save time and judicial resources, and if leave is denied, it will pose an incredible inconvenience to all involved.

III. THERE WAS NO ABUSE OF PROCESS ON BEHALF OF THE CLAIMANTS

a. <u>The Claimants brought an application for leave to appeal in a timely fashion</u>

49. In the event that the Government seeks to stay or dismiss this application as an abuse of process because the Claimants filed a Notice of Appeal with the Court of Appeal at the same time as this Application for Leave to Appeal was filed with the Supreme Court, the Claimants submit that both were filed within the statutory deadlines out of an abundance of caution in order to preserve the rights of the Claimants while their counsel assured themselves of the proper categorization of the Order.

50. The Claimants subsequently assured themselves that leave to appeal is required, and withdrew their Notice of Appeal from the Court of Appeal.

51. The Claimants apprised counsel for the Second Defendant of both filings, and of their intent to withdraw the Notice of Appeal. The Defendants were not prejudiced or burdened by having to respond to both proceedings.

CONCLUSION

52. In light of these submissions, and pursuant to Section 14(3)(b) of the Court of Appeal Act, the Claimants humbly asks that the Court grant leave to appeal

the Order striking out the claim against the Second Defendant entered by the Registrar on 13 February 2020.

53. In light of the foregoing, the court ought also to grant cost in the cause.

54. Respectfully submitted.

55. **Legal Submissions in the form of Speaking Notes on behalf of the Respondents/Defendants**

The Second Respondent filed a Notice of Application to Strike out the Claim filed by the Claimant on the basis that the Claim is an abuse of the process of the Court for several reasons, including that the Court has no jurisdiction to entertain a mixed claim concerning private law remedy for trespass and constitutional remedy for violation of the Constitution.

56. The Application came up for hearing on the 5th day of February, 2018, and the Court in making its determination stated at paragraph 13 of the judgment:

> "***It is beyond dispute that the Mayan people are legally entitled to constitutional rights over certain lands in Belize. However, the***

process of demarcating these lands is a long and arduous one and is presently ongoing, and the nature and extent of these constitutional rights of the Mayan people and the manner in which these rights are to be exercised and enforced is still to be determined by a tribunal. Learned Counsel for the Respondent conceded in her oral arguments that the Government has yet to demarcate, identify and register the lands being claimed as belonging to the Mayan people. Until that occurs, this Court cannot grant the relief which is being sought as against the Government. I also bear in mind the cautionary words of the Learned Solicitor General in his oral arguments before me that while the rights of the Mayan people are fully recognized and upheld in the Consent Order, the CCJ has declared constitutional authority still vests in the Government of Belize." (Emphasis added)

57. Since this determination, the Claimant is now seeking the leave of the Court to appeal the above determination.

Issue

58. The issue for determination by this Honourable Court is whether leave to appeal should be granted to the Claimant to appeal the learned Trial Judge's decision on the application to strike out.

Submissions

Leave to Appeal

59. The relevant principles to determine whether leave to appeal is to be granted has been distilled in the case of ***Millien v BT Trading*** at paragraph 6 where it states:

> "*This Court is guided as the test for the granting of leave to appeal an interlocutory decision by the Court of Appeal's decision in Belize Telemedia Ltd v Belize Telecom Ltd et al – Civil Appeal No. 23 of 2008. The principles therein set out by Carey, JA were restated by Hafiz, JA in Karina Enterprises Ltd v China Tobacco Zhejiang Industrial Co Ltd – Civil Appeal dated November 7, 2014. His Lordship adopted the following principles set out in the judgment of Sosa, J (as he then was) in Wang v Atlantic Insurance Co Ltd (unreported):*
>
> > *"... leave will be granted by the English Court of Appeal in three categories of case, viz*

1. ***Where they see a prima facie case where an error has been made;***

2. ***Where the question is one of general principle, decided for the first time; and***

3. ***Where the question is one of importance upon which further argument and a decision of the Court of Appeal would be to the public advantage.***

Carey, JA went on to adopt the Practice Note (Court of Appeal Procedure) [1999] 1 All ER 186 by Lord Woolf, MR that addresses applications for leave to appeal from interlocutory orders. The Practice Note reads:

"Appeals from interlocutory orders

An interlocutory order is an order which does not entirely determine the proceedings. Where the application is for leave to appeal from an interlocutory order, additional

conditions arise: (a) the point may not be of sufficient significance to justify the costs of an appeal; (b) the procedural consequences of an appeal (e.g. loss of trial date) may outweigh the significance of the interlocutory issue; (c) it may be more convenient to determine the point at or after the trial. In all such cases leave to appeal should be refused."

In the recent Karina case, Hafiz, JA confirmed that the applicant was required to, firstly, satisfy the court ***that there existed a real prospect of success****, then secondly, persuade the court that one or more of the three categories listed by Sosa, J applied and, thirdly, that, in the case of an interlocutory matter, none of the considerations in the Practice Note arose*." (Emphasis added)

60. Therefore, from the above, it is to be gleaned that the following considerations must be taken into account in order for leave to be granted:

 i. Whether the Applicants have a real prospect of success in respect of the intended grounds of appeal as appears from the application; and

ii. Whether there is a prima facie case that an error has been made by the Court; or

iii. Whether the question is one of general principle decided for the first time; or

iv. Whether the decision is one of importance upon which further argument and a decision of the Court of Appeal would be to the public advantage; and

v. Whether the point is of sufficient significance to justify the costs of an appeal; and

vi. Whether the procedural consequences of an appeal (e.g. loss of trial date) may outweigh the significance of the interlocutory issue; and

vii. Whether it may be more convenient to determine the point at or after the trial.

<u>Real prospect of success</u>

61. It is the Second Defendant's humble submission, that the application for leave to appeal that is before this Honourable Court does not satisfy the threshold that it has a real prospect of success.

62. The Second Defendant humbly submits, that the matters that are being complained of and for which the Claimant seeks relief have already been determined by our Apex Court, the Caribbean Court of Justice (the "CCJ") in ***BZCV2014/002 Maya Leaders Alliance et al v AG*** from which a consent order was entered into between the parties acknowledging the existence of Maya customary land tenure in Belize and the need for protection thereof.

63. The Consent Order states:

> "*By CONSENT IT IS ORDERED AND DECLARED THAT:*
>
> *1. **The judgment of the Court of Appeal of Belize is affirmed insofar as it holds that Maya customary land tenure exists in the Maya villages in the Toledo District and gives rise to***

collective and individual property rights within the meaning of sections 3(d) and 17 of the Belize Constitution.

2. The Court accepts the undertaking of the Government to adopt affirmative measures to identify and protect the rights of the Appellants arising from Maya customary tenure, in conformity with the constitutional protection of property and non-discrimination in sections 3, 3(d), 16 and 17 of the Belize Constitution.

3. ***In order to achieve the objective of paragraph 2, the Court accepts the undertaking of the Government to, in consultation with the Maya people or their representatives, develop the legislative, administrative and/or other measures necessary to create an effective mechanism to identify and protect the property and other rights arising from Maya customary land tenure, in accordance with Maya customary laws and land tenure practices.***

4. The Court accepts the undertaking of the Government that, until such time as the measures in paragraph 2 are achieved, it

shall cease and abstain from any acts, whether by the agents of the government itself or third parties acting with its leave, acquiescence or tolerance, that might adversely affect the value, use or enjoyment of the lands that are used and occupied by the Maya villages, unless such acts are preceded by consultation with them in order to obtain their informed consent, and are in conformity with their hereby recognized property rights and the safeguards of the Belize Constitution. This undertaking includes, but is not limited to, abstaining from:

> *a) issuing any leases or grants to lands or resources under the National Lands Act or any other Act;*
>
> *b) registering any interest in land;*
>
> *c) issuing or renewing any authorizations for resource exploitation, including concessions, permits or contracts authorizing logging, prospecting or exploration, mining or similar activity under the Forests Act, the Mines and Minerals Act, the Petroleum Act, or any other Act.*

5. ***The constitutional authority of the Government over all lands in Belize is not affected by this order.***

…" (Emphasis added)

64. The Order acknowledges that the rights attached to Maya customary land are to be given constitutional protection; but also sets out that the Government of Belize has undertaken to take steps to ensure the protection of the rights attached to Maya customary land. This includes the demarcation of lands that will form Maya customary lands in the Toledo District.

65. The Second Defendant respectfully submits, that if it is that the Claimant was of the view that the actions of the Government were in violation of the terms of the Consent Order, it ought to have properly taken that matter before the CCJ for relief. Therefore, it is improper for the Claimant to say

66. Moreover, contrary to what has been submitted by the Claimant, the interpretation applied by the trial judge did not nullify any of the terms of the Consent Order, nor did it lead to an absurd conclusion. It is the Second Respondent's humble submission that it would have been improper or would

have led to an injustice if the Court prematurely made a decision on a matter that is still ongoing and live before the CCJ.

Question of general importance decided for the first time

67. It is the Second Defendant's humble submission, that the question is not one of general importance ***being decided for the first time***. As has been pointed out by the Claimant in his submissions, there has been other decisions that have addressed the issue of Maya customary lands, and the demarcation thereof. This includes the ***Maya Leaders Alliance*** case, which has provided constitutional protection of the rights that are attached to Maya customary land tenure in Belize.

68. Moreover, as was stated by the learned trial judge in her decision on the Strike Out Application referencing the submissions made by Counsel for the Claimant:

> "*It is res judicata that the Government longstanding failure to recognize Maya customary land rights and to provide the Mayas with official documentation is a violation of Santa Cruz's rights…*"

69. The Second Defendant respectfully submits, that this further buttresses the submission that the matter is not one of general importance ***being decided for the first time***.

Importance of Decision

70. It is the Claimant's submission, that a decision on the present claim will guide both public and private activity in most of the Toledo District, and also offers an opportunity to seek judicial interpretation of paragraph 4 of the Consent Order. However, the Second Defendant respectfully submits, that there is no question before the Court that will provide those answers. What is alleged by the Claimant is a breach of his constitutional right for having been deprived of his property. Issues of the rights that are attached to Maya customary lands, and the protection offered thereof, have already been determined by the CCJ in ***Maya Leaders Alliance***, and does not warrant further arguments before the Court of Appeal or any public advantage.

Other considerations

71. The Second Defendant humbly submits, that the issues raised does not outweigh the costs of the appeal for the same reasons that the matters now being asked to make a determination on has already been determined in other cases including the ***Maya Leaders Alliance*** case.

72. Further, because the Claim has been struck out, there are no issues to be considered as against the Second Defendant.

Conclusion

73. In light of the foregoing, the application should be dismissed, denying leave to appeal, and costs awarded to the Second Defendant.

74. Written Submissions on Behalf Of Respondents/Defendants

These submissions are prepared in furtherance of the Speaking Notes of the Second Defendant dated the 3rd day of June, 2020, and pursuant to a Court Order made on the said 3rd day of June, 2020.

<u>Submissions</u>

<u>Real prospect of success</u>

75. The Second Defendant humbly restates his submission that the application for leave to appeal that is before this Honourable Court does not satisfy the threshold that it has a real prospect of success, as the conclusion reached by the Court was proper and appropriate in the circumstances.

76. It is the Claimant's contention at his paragraphs 18 and 19 of his written submissions that the decision to strike out the Claim as against the Second Defendant amounted to a collateral attack on two decisions that have not been challenged, and it in effect undermines the legal effect of the terms of the Consent Order. The Second Defendant however, respectfully rebut this submission by the Claimant.

77. ***Black's Law Dictionary***, Fifth Pocket Edition (**TAB 1**), defines "collateral attack" as:

> *"An attack on a judgment in a proceeding other than a direct appeal; esp., an attempt to undermine a judgment through a*

judicial proceeding in which the ground of the proceeding (or a defense in the proceeding) is that the judgment is ineffective."

78. The Second Respondent humbly submits that in consideration of the definition above, it cannot be said that there is a collateral attack on the terms of the Consent Order, as the Second Defendant has never said Maya land rights do not attach to certain Maya lands in the Toledo District, nor that he did not intend to carry out the terms of the Order. The Court did not make a contrary finding. However, the Court, taking into consideration the arguments presented was cognizant that further steps will need to be taken to give effect to the terms of the Consent Order, and in particular, to protect those lands that form part of the Maya customary lands. To do this, the critical step of demarcation will need to take place to identify what all lands encompass Maya customary lands, and this is an ongoing process. As the Court stated at paragraph 13 of the Judgment (**TAB 2**):

"***… the process of demarcating these lands is a long and arduous one and is presently ongoing, and the nature and extent of these constitutional rights of the Mayan people and the manner in which these rights are to be exercised and enforced is still to be determined by a tribunal. Learned***

Counsel for the Respondent conceded in her oral arguments that the Government has yet to demarcate, identify and register the lands being claimed as belonging to the Mayan people. Until that occurs, this Court cannot grant the relief which is being sought as against the Government. I also bear in mind the cautionary words of the Learned Solicitor General in his oral arguments before me that while the rights of the Mayan people are fully recognized and upheld in the Consent Order, the CCJ has declared constitutional authority still vests in the Government of Belize." (Emphasis added)

79. As such, the Second Respondent humbly restates his submission that it would have been improper or would have led to an injustice if the Court prematurely made a decision on a matter that is still ongoing, and is being supervised by the CCJ.

80. Moreover, to grant constitutional relief without any concrete evidence that the lands form belong to the Claimant or to Santa Cruz Village, would further buttress an unjust and improper finding by the Court.

81. Therefore, the Second Respondent humbly submits that there is no *prima facie* case that the Court made an error in its determination, and the Claimant does not have a real prospect of success at appeal.

Question of general importance decided for the first time

82. The Second Defendant wishes to restate its submissions made under this sub-heading.

83. The Second Defendant humbly submits that the question is not one of general importance ***being decided for the first time***. As has been pointed out by the Claimant in his submissions, there has been other decisions that have addressed the issue of Maya customary lands, and the demarcation thereof. This includes the ***Maya Leaders Alliance*** case, which has provided constitutional protection of the rights that are attached to Maya customary land tenure in Belize.

84. Moreover, as was stated by the learned trial judge in her decision on the Strike Out Application referencing the submissions made by Counsel for the Claimant:

> "*It is res judicata that the Government longstanding failure to recognize Maya customary land rights and to provide the Mayas with official documentation is a violation of Santa Cruz's rights*…"

85. The Second Defendant respectfully submits, that this further buttresses the submission that the matter is not one of general importance ***being decided for the first time***.

Importance of Decision

86. The Second Defendant further restates his submissions made under this sub-heading.

87. It is the Claimant's submission, that a decision on the present claim will guide both public and private activity in most of the Toledo District, and also offers an opportunity to seek judicial interpretation of paragraph 4 of the Consent Order. However, the Second Defendant respectfully submits, that there is no

question before the Court that will provide those answers. What is alleged by the Claimant is a breach of his constitutional right for having been deprived of his property. Issues of the rights that are attached to Maya customary lands, and the protection offered thereof, have already been determined by the CCJ in ***Maya Leaders Alliance***, and does not warrant further arguments before the Court of Appeal or any public advantage.

Other considerations

88. The Second Defendant humbly submits, that the issues raised does not outweigh the costs of the appeal for the same reasons that the matters now being asked to make a determination on has already been determined in other cases including the ***Maya Leaders Alliance*** case.

89. Further, because the Claim has been struck out, there are no issues to be considered as against the Second Defendant at or after trial.

Conclusion

90. In light of the foregoing, the application should be dismissed, denying leave to appeal, and costs awarded to the Second Defendant.

Legal Submissions on behalf of the Applicant/Claimant in Response to Speaking Notes and Written Submissions of the Respondents/Defendant

Real Prospect of Success

91. The Second Defendant contends that the Claimants do not have a real prospect of success because the matters that are being complained of and for which the Claimants seek relief have already been determined by our Apex Court, the Caribbean Court of Justice ("**the CCJ"**) in *BZCV20/4/002 Maya Leaders Alliance et al v AG* ("**CCJ proceedings**"). A Consent Order dated the 22nd April, 2015 ("**Consent Order**") was entered into between the parties acknowledging the existence of Maya customary land tenure in Belize and the need for protection thereof.

92. The Second Defendant misconceives the issues. The decision of the Learned Trial Judge was that she could not grant the relief being sought by the Claimants based on the Second Defendant's failure to comply with paragraph 4 of the Consent Order because the boundaries of the Claimants' Villages customary lands had yet to be demarcated. The issues in this proceeding are

about the government's obligation under paragraph 4 of the Consent Order, and the failure of the Government of Belize to comply with it; and further, whether by failing doing so, it has breached the Claimants' constitutional rights that were determined to exist by the Consent Order.

93. The Second Defendant is absolutely right that "*further steps will need to be taken to give effect to the terms of the Consent Order"*. The effect of that, however, is not that while the Government of Belize takes its time to comply with its obligations, Maya Customary land rights do not exist or are not constitutionally protected. The Claimants argue to the contrary, their constitutional rights exist and there is an obligation to protect these rights until and after the demarcation of the boundaries of the Maya villages in the Toledo District, Belize.

94. The Claimants have presented, and would have presented at trial, evidence of their customary use and occupation necessary to establish their customary property rights to the area which is the subject of the dispute, notwithstanding that the lands have not been officially demarcated. It is the Maya people's customary use and occupation of the lands which create the constitutionally protected customary land rights, and not the physical act of demarcation, which the Government of Belize has failed to do. As is clear from all of the

judgements in the Maya Land Rights cases, those rights exist independently of the State's recognition of them. In fact, the State's failure to recognize them violated the Constitution. The courts' judgements did not create them, nor will demarcation create those rights. Demarcation will merely remedy the unconstitutional failure to acknowledge them.

95. The issue of the effect of the lack of demarcation was raised by the Second Defendant for the first time in oral arguments on its application. It was not pleaded. It did not form part of their defence, nor was it raised in its application to strike out the claim. The learned Trial Judge therefore erred when she determined the Second Defendant's application to strike out on an issue that was not pleaded, and raised, for the first time, in oral arguments at the hearing of the said application.

96. The Claimants therefore reiterate that the issues being raised in this claim are whether the Second Defendant failed to fulfill the obligations imposed on it pursuant to paragraph 4 of the Consent Order, and whether that failure is a violation of the Claimants' constitutional rights. The issue is *not* whether the Maya people have property rights to the lands and resources that they use and

occupy according to their custom. That issue has indeed been finally determined by the CCJ and is no longer a live issue.

Question of General Importance Decided for the First Time

97. The Second Defendant claims that the questions being raised are not of first impression because they have been raised and dealt with in the prior Maya Land Rights cases. Again, the issues raised in the Maya Land Rights cases were whether Maya customary land tenure exists in the Maya villages in the Toledo District and gives rise to collective and individual property rights within the meaning of sections 3(d) and 17 of the *Belize Constitution*.

98. It goes without saying that the Court resolved that issue in affirming at paragraph 1 of the Consent Order that Maya customary land tenure exists in the Maya villages in the Toledo District and gives rise to collective and individual property rights within the meaning of sections 3(d) and 17 of the *Belize Constitution*. The Court also ordered the government, at paragraph 4, to cease and abstain from any acts that could adversely affect the use and enjoyment of those lands until measures in paragraph 2 and 3 are achieved.

99. The issues at bar in the present application derive fundamentally from the question of whether the Second Defendant breached paragraph 4 of the Consent Order by its acts or inaction. To put simply, the real issue is how to interpret the Government's obligations under paragraph 4 or how the Government's obligation, or its failure to comply with its obligations, affect or further breaches the Applicants' constitutional rights. This issue of the Government's failure to uphold its obligations under paragraph 4 of the Consent Order has never been dealt with before and is a question of general importance. A decision by the Court of Appeal would not only guide the Government on how it ought to act until demarcation occurs but would also caution third party action as well.

100. In summation, while the Second Defendant mischaracterized the issues as being *res judicata*, these are actually questions of the interpretation and effect of the Consent Order, and whether a failure to comply amounts to a breach of the Claimants' constitutional rights. These issues would be decided for the first time at the Appellate level. The issue of *res judicata*, now being raised, was also not a part of the 2nd Defendant's Defence and it was not pleaded. It was also not a ground of the Second Defendant's application to strike out. The Learned Trial Judge's determination on the application to strike out did not

include whether the claim was *res judicata*, and that is simply not an issue being sought to be appealed by this proposed appeal.

Collateral Attack Argument:

101. The Second Defendant's arguments, upheld in this Court's ruling on the Second Defendant's Application to Strike is precisely "*an attempt to undermine a judgment through a judicial proceeding in which the ground of the proceeding (or a defense in the proceeding) is that the judgement is ineffective.*" The basis for striking the claim is that paragraph 4 of the Consent Order—which applies only until demarcation and implementation is complete—cannot be enforced until demarcation and implementation is complete. Respectfully, it is difficult to conceive of any interpretation that would render that paragraph of the Consent Order more ineffective.

Conclusion

102. In addition to the responses to the Second Defendant's Submissions and Speaking Notes contained herein, the Applicants also humbly restate their prior Written Submissions in Support of their Application for Leave to Appeal

date June 1, 2020—particularly with regard to the Second Defendant's assertion that the issues raised do not outweigh the costs of an appeal.

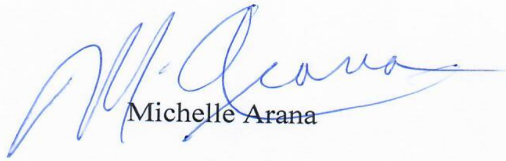
103. In light of the foregoing, the Applicants humbly ask the Court to grant leave to appeal the Order striking out the claim against the Second Defendant, entered by the Registrar on February 13, 2020, and to grant cost is the cause.

104. Decision

Upon review of the submissions for and against this Application for leave, I find that the Applicant/Claimant has satisfied the third limb of the *Wang* test. I therefore grant leave to appeal on the basis that there is a question(s) of importance upon which a decision of the Court of Appeal would be to the public advantage i.e. whether the Second Defendant failed to fulfill the obligations imposed on it pursuant to paragraph 4 of the Consent Order, and whether that failure is a violation of the Claimants' constitutional rights.

Each party to bear own costs.

Dated this 29th day of September 2021



Michelle Arana

Chief Justice (Acting)

Supreme Court of Belize

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