

IN THE SUPREME COURT OF BELIZE, A.D. 2012

CLAIM NO. 747 of 2011

**CHERYL SCHUH
ARTHUR SCHUH**

CLAIMANTS

AND

THE ATTORNEY GENERAL OF BELIZE

DEFENDANT

Hearings

2012

4th October

9th November

11th December

Mr. Dean R. Lindo SC for the claimants.

Ms. Illiana Swift for the defendant.

LEGALL J.

JUDGMENT

Facts

1. The claimants, married citizens of the United States of America, came to Belize in December 2003, through Mexico, and took up residence at San Pedro in the north of Belize. About two months after their

arrival in Belize, on 13th February, 2004, the United States District Court in the Eastern District of Wisconsin issued a sealed warrant of arrest for the second claimant in the case of USA v. Arthur Schuh Case No. 04-Cr-34 authorizing his arrest to answer an indictment charging him for the offence of Conspiracy to Distribute Cocaine, contrary to the laws of the USA. Due to international cooperation between the United States and Belize, and other states comprising Interpol, the Belize Police Department had arrangements to arrest and apprehend wanted fugitives from the US residing in Belize and to assist in any investigations.

2. Around May 2005, the Belize Police Department received information from the security office of the US Embassy in Belize, that the second claimant, a fugitive, was residing in Belize. On 23rd May, 2005, police officers, including Supt. Alford Grinage, armed with the said arrest warrant went to a house in Vista Del Mar, Ladyville, to which the claimants had moved from San Pedro, and found the claimants there, along with Thomas Schuh, the brother of the second claimant. The police, though not in possession of a search warrant, and knowing that the arrest warrant did not allege the commission of any illicit drug offence in Belize, and without, as we shall see below, reasonable grounds for suspecting that the claimants had illegal drugs, firearms or ammunition, proceeded on 23rd May, 2005 to search the house; firstly, at about 2:00 a.m., and a later search on the said date. There is agreement by the parties that a large amount of US dollars, and a small amount of Belize currency, were found as a result of the search; but there is vehement disagreement as to the amount of US currency

found. We will examine the evidence of this below. It is clear, though, that neither illegal drugs nor arms or ammunitions were found. At the house, the second claimant was arrested on the warrant, and the two other persons were taken to the police station.

3. According to Supt. Grinage, the only police officer to testify in this case, the first search revealed US\$32,000; but the second search revealed, according to him, “a large amount of US one hundred dollar notes” which he said he did not count, but placed it in a plastic bag and gave the bag to the first claimant and escorted her to the Income Tax Department. At the Income Tax Department, an officer issued a notice of assessment in relation to the second claimant, in the assessed amount of BZ\$68,800 and recorded a payment of \$64,000 relating to the said US\$32,000 of the first search. The officer also issued another notice of assessment, in relation to the second amount found that was not counted, according to Supt. Grinage, and assessed the second claimant for it, in the amount of US\$27,200 or BZ\$54,400 which was recorded on the assessment as paid. Both notices of assessments were assessments for the period January 2005 and February 2005 as business tax under section 111(3) of the Income and Business Tax Act Chapter 55 (the Act). The customs officers who actually issued the notices of assessments were not summoned to give evidence. They no longer worked at the Income Tax Department, and according to the present Commissioner of Income Tax, Mr. Clare, efforts to contact one of the officers, Mr. Eric Eusey, a former commissioner, failed, but he was successful in speaking to the other officer, Mr. Steve Young. The assessments prepared by these officers show that the

claimants were assessed in respect of business tax in the total amount of BZ\$118,400. The Commissioner of Income Tax testified that the said sums of \$64,000 and \$54,400, totaling \$118,400, were collected and received by the Income Tax Department.

4. All three persons taken from the house were not charged in relation to the US currency found in the house, or for any criminal offence involving illicit drugs or arms and ammunition. They were charged for the offence of failure to comply with conditions of a visitor's permit to which they pleaded guilty and were fined. In June 2005, the first claimant and Thomas Schuh were deported from Belize; and the second defendant was extradited to the USA to answer charges stated in the warrant. Prior to their deportation and extradition, the claimants had requested Supt. Grinage to return the monies found at their home; but this request was not complied with.

5. More than six years after the search and seizure of the money, on the 28th November, 2011, the claimants issued this claim against the Attorney General for reliefs, including the return of the money found on May 2005. This is how the reliefs claimed are drafted in the claim form:

- “1. A declaration that the agents and/or servants of the Commissioner of Income Tax and agents and/or servants of the Police Department fraudulently seized some USD Eighty Thousand (\$80,000.00) Dollars from the claimants on or around the 23rd May,

2005 and that such seizure is null and void and of no effect;

2. A declaration that the Commissioner of Income Tax failed to and/or refused to comply with the provisions of the Income and Business Tax Act in purporting to lawfully seize monies from the claimants and as such the decision of the Commissioner of Income Tax was fraudulent and/or mistaken;
3. An order that the aforementioned sum of monies be returned to the claimants forthwith together with interest thereon at the statutory rate of six per centum per annum from the date of the seizure;
4. Costs.”

Applications

6. Before undertaking an examination of the claims, an application to strike out the claims must first be considered. It was submitted that the claims in this matter arose in May 2005 when the claimants’ house was searched, and the monies were found; but the claimant brought the claim on 28th November, 2011, more than six years after the claims or cause of action arose, contrary to section 27(1) of the Limitation Act Chapter 170. There was, it was submitted, delay in bringing the claim, far outside the limitation period; and therefore the claim was an abuse of the process; and an application was made that the claim should be struck out. Section 27(1) states:

“27.-(1) No action shall be brought against any person for any act done in pursuance, or execution, or intended execution of any Act or other law, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act or other law, duty or authority, unless it is commenced before the expiration of one year from the date in which the cause of action accrued.”

7. The defendant submits that the limitation period also applied to this action, in which fraud is claimed, because the claimants discovered, or with reasonable diligence could have discovered, the alleged fraud in May, 2005. Hence the claim is outside the limitation period. The sole witness in the case for the claimants was the first claimant whose evidence showed clearly that she knew about the seizure of the money in May 2005 which formed the basis for the claims of fraud. She also testified that in May 2005 the police took her to the Income Tax Department and was given the notices of assessment. She gave no evidence of any subsequent date of discovery of the alleged fraud.

8. But the claimants, on the basis of the Privy Council decision of *Gordon (Lemuel) v. AG 1997 51 WIR 280*, state that “the period of limitation only arises in actions done lawfully.” It was submitted that since the search by the police was unlawful, the limitation period did not apply. In *Gordon*, the claimant alleged that police officers in the course of their duty, maliciously and without reasonable cause, killed the son of the claimant. The Attorney General applied to strike out the claim on the ground that it was not commenced within one year of the occurrence of the cause of action as required by section 2(1)(a) of

the Public Authorities Protection Act (UK). The action was struck out at first instance, which was upheld by the Court of appeal. On a further appeal to the Privy Council, it was held, allowing the appeal, that since the statement of claim had raised two issues, namely whether the police officers had been acting bona fide in the execution of their duty, and, if they had not, whether the Crown was nonetheless liable for their action, that neither issue could be resolved without a trial, and accordingly, the writ should not have been struck out. In the course of the judgment, the Privy Council had to consider the meaning of the words “act done in pursuance, or execution or intended execution ... of any public duty,” as appeared in section 2(1) of the UK Act, which words also appear in section 27(1) of the Act; and held that “The Act necessarily will not apply if it is established that the defendant had abused his position for the purpose of acting maliciously, in that case he has not been acting within the terms of the statutory or other legal authority; he has not bona fide endeavouring to carry it out ... he has abused his position for the purpose of doing a wrong, and the protection of this Act, of course, never could apply to such a case”: per Lord Lloyd of Berwick at page 282 quoting *Lord Finlay* in *Newell v. Starkie (1919) 83 JP 113 at page 117*.

9. On the basis of *Gordon*, I refused the application to strike out the claim, because I felt that the search and the taking of the monies on an arrest warrant for income tax purposes appeared to be an abuse of the powers of the police; and therefore was not done in pursuance of their public duty or authority.

10. It was further submitted that the claimants ought to follow the statutory appeal process under Act by appealing the assessments to the Appeal Board established by that Act, before approaching the Supreme Court for a remedy. But it is to be noted, that the claimants in this case had not stated in the claim form that the Commissioner of Income Tax erred when he assessed the claimants to business tax. It is alleged in the claim form that the Police and the Commissioner of Income Tax fraudulently and unlawfully seized monies from the claimant. It is the seizure of their monies that is alleged by the claimants in the claim form, for which they request an order and declarations, and not the assessments by the Commissioner. Even if it is assumed that the claims in this matter challenge the jurisdiction of the Commissioner of Income Tax to make the assessments, it has been held that a challenge to jurisdiction of a statutory body or authority is unusual and the circumstances exceptional which carry the matter outside the general principle that the statutory appeal procedure should be followed prior to approaching the Supreme Court: see *Belize Bank Limited v. Central Bank No. 433 of 2011 and Bevans v. Public Service Commission BLR 155*.

Evidence

11. We may now examine the evidence in this matter. There is no evidence that the claimants were charged for any offence in Belize concerning illegal drugs or arms and ammunition; and there is no evidence that they were suspected of being involved in Belize with illegal drugs or arms and ammunition. Servants of the defendant without a search warrant searched the claimants' home and seized the

money; but the claimants were not charged for unlawful possession of property or the money under the Unlawful Possession of Property Act Chapter 113. The search itself was not authorized by a search warrant. The question is whether the search was nevertheless lawful on the ground that the police had reasonable grounds for suspecting that the claimants were in possession of illegal firearms or controlled drugs or narcotics. The arrest warrant mentioned that the first claimant was charged in the USA for conspiracy to distribute cocaine. Does this evidence rise to the level of reasonable suspicion that the claimants had illegal drugs or ammunition at their home in Belize? Is the fact that the charge against the No. 1 claimant in the USA and the consequent arrest warrant, amount to reasonable grounds for suspecting that the claimants were in possession of illegal arms, ammunition or drugs at the home of the claimants in Belize, thus authorizing the search? I do not think that, on these facts, reasonable grounds for such suspicion against the claimants are established. But even if I am not correct in so finding, the money seized as a result of the search was not the subject of any criminal charge brought by the police against the claimants in relation to illegal drugs or ammunition or for a charge of unlawful possession of property under the Unlawful Possession of Property Act, Chapter 113. There is no evidence that the money seized was connected to any illegal or criminal activity by the claimants. As the money was taken and assessed as business tax, learned counsel for the defendants cited *Minister of Finance v. Smith 1927 AC 193* for the proposition that profits derived from the illicit trafficking of liquor were income and therefore taxable. The Privy Council in that case held that such profits were liable to taxation

under the Income War Tax Act 1917. But in that case there was clear evidence that the respondent Smith gained profits from illegal trafficking in liquor. There is no evidence before me that the money seized was obtained from any illegal or criminal activity on the part of the claimants, thus setting a basis for the seizure of the money.

12. It was further submitted by learned counsel for the defendant that considering the evidence as a whole, including the finding of large sums of US dollars; no evidence of the payment of taxes by the claimants, or that the dollars were brought or received in Belize; or that the claimants declared the money upon their entering Belize, that the evidence amounts to “reasonable inference that these monies were generated in Belize,” and therefore subject to tax. The claimant swore that neither she nor her husband earned any money or income in Belize. This evidence of the claimant is supported by the evidence of Supt. Grinage for the defendant that there is no evidence that the claimants had a job within Belize. Mr. Grinage has testified that there is no evidence of any of the claimants working. The first claimant says that the money seized was not brought to Belize by them, but was sent to her. The first claimant in an affidavit dated 1st October, 2012 enumerated several instances of collection of monies from the sale of shares held by them in various companies in the USA to a total amount of US\$169,627.23. The above evidence, in my view, rebuts the alleged inference that the money found was income generated in Belize.

13. According to Supt. Grinage when he found the second amount of money, he did not count it, but put it in a plastic bag and gave it to the first claimant and took her to the Income Tax Department where she was assessed to tax in the amount of BZ\$54,400 which is US\$27,200. It follows implicitly from Supt. Grinage evidence, that the second amount seized was US\$27,200. The No. 1 claimant disputes and disagrees with this evidence of Supt. Grinage. She testified that in relation to the second amount found, the police put the money in a paper bag and gave it to her and they went back to the police station with the money in her possession; and at the station she handed the money to a police officer. She states that she was not taken right away to the Income Tax Department with the money; but was taken there later where the money was counted in her presence, and she claims the sum found in the house in the second search was not US\$27,200. In paragraph 8 of her first affidavit she swore that US\$59,300 were seized on the second search. In the first search she states at paragraph 6 in the same affidavit that the amount of US\$30,000 was seized making a total seizure on both searches of US\$89,300. But in the claim form it is stated that the amount of US\$80,000 was seized. In her evidence in court, she stated that the amount of US\$94,000 was seized. There is inconsistency on her part as to the total amount of money seized

14. There is no evidence that the claimants carried on any kind of business in Belize. Yet they were assessed to business tax under section 111(3) of the Act. Section 111(3), under which the claimants were assessed, states:

“(3) Where it comes to the notice of the Commissioner that a person or entity has not reported or disclosed any receipts which ought to have been reported or disclosed, such unreported receipts shall, notwithstanding the rates specified in the Ninth Schedule to this Act, be taxed at the rate of 50% of such receipts, in addition to any other penalties leviable under this Act or regulations made thereunder.”

15. The word “receipts” is defined in section 105(1) of the Act as follows:

“Receipts” means all revenues, whether in cash or in kind, or whether received or accrued, of a person or entity carrying on trade or business or practicing his or its profession or vocation in Belize without any deduction, and includes:-“ . . .

16. Business tax is payable on all receipts of a person or entity carrying on trade or business or practicing his profession or vocation in Belize. Business means any trade, manufacture and venture or concern in the nature of a trade. There is no evidence that the claimants carried on any trade or business or practiced any profession or vocation in Belize. In the absence of such evidence, I am not satisfied that the claimants are liable to pay business tax under the Act in relation to the money found as a result of the search.

17. There is a practice of the police to refer some matters to the Income Tax Department for taxation purposes, when a person is found by the police during a search with large sums of money. But before the sums could be lawfully assessed to tax or business tax under the Act, both the police and officers of the Income Tax Department would have to be reasonably satisfied from the facts and circumstances, that the sums are subject to such tax under the Act.

Conclusion

18. There is no evidence that the police had reasonable grounds to suspect that the claimants were in possession of a controlled drug or arms and ammunition; or had reasonable cause to suspect the claimants committed in Belize or about to commit in Belize an offence relating to a controlled drug or arms and ammunition. There is no evidence that the policemen were in possession of a warrant authorizing them to search the premises of the claimants. Since the search was not authorized by law, the monies obtained by the virtue of the search were unlawfully obtained. There is no evidence that the claimants received revenues from carrying on any trade or business or profession or vocation in Belize. For all the above reasons, there is no lawful basis for the retention of the monies seized by the police and paid to the Commissioner of Income Tax.

Costs

19. Costs follow the event. The court has a discretion and in the exercise of that discretion the court can consider the conduct of the parties. There will be no order as to costs.

20. I therefore make the following orders:

- (1) A declaration is granted that the seizure of US\$59,200 owned by the claimants by members of the Belize Police Department is unlawful and void.
- (2) A declaration is granted that the seizure of US\$59,200 referred to at (1) above received by the Commissioner of Income Tax as business tax under the Business and Income Tax Act Chapter 55 is unlawful, null and void.
- (3) An order is made that the defendant shall return or cause to be returned the amount of US\$59,200 or BZ\$118,400 to the claimants on or before 1st March, 2013.
- (4) The defendants shall pay interest to the claimants on the amount at (3) above, at the rate of 6% per annum from 28th November, 2011 until the sum is fully paid.
- (5) There is no order as to costs.

Oswell Legall
JUDGE OF THE SUPREME COURT
11th December, 2012