

IN THE COURT OF APPEAL OF BELIZE AD 2020
CIVIL APPEAL No 26 OF 2017

PASA BELIZE LTD.

Appellant/Respondent

V

LOPEZ EQUIPMENT CO. LTD.

Respondent/Applicant

Before:

The Hon. Justice Samuel Awich
The Hon. Madam Justice Minnet Hafiz Bertram
The Hon Justice Murrio Ducille

Justice of Appeal
Justice of Appeal
Justice of Appeal

E.H. Courtenay SC along with I. Swift for the appellant/ respondent
N. Barrow for the respondent/applicant

6 March 2018 and 28 July 2020

AWICH JA

[1] During the hearing of this matter and during the writing of the judgment, I took much more time figuring out, at different stages, what the case for each party might have been, than I took thinking out the decision. This case is an example of how **not to present a case** in the Supreme Court and in the Court of Appeal. The Supreme Court is the superior trial court and a court of first appeal from magistrate's courts in Belize. Judgments and orders of the Supreme Court are appealed to the Court of Appeal. I am accustomed to the very high standard at which all the attorneys who took part in this matter in the Supreme Court and in this Court usually present their cases. The high standard was not shown in this matter.

[2] What started as a straightforward claim for a sum of money has, instead of progressing to trial, taken a detour to two satellite trials and an appeal to this Court against an interlocutory order. Alongside all that, an interpleader claim was brought in the Supreme Court and decided. An appeal against that decision has been filed in this Court. It is Civil Appeal No. 5 of 2017. It is pending.

The Background and the facts

[3] The matter for our decision at this point is the notice of motion dated and filed on the 20 of October 2017, by the respondent in this appeal, Lopez Equipment Co Ltd. The motion application requests an order of this Court to “discharge” an order made by the learned judge, Arana J. (now the Chief Justice) in the Supreme Court, on 19 September 2017, in favour of the appellant, Pasa Belize Ltd. That order: (1) extended the time to apply for leave to appeal an earlier interlocutory decision of the judge delivered on 27 January 2017; (2) granted the leave to appeal; and (3) extended the time for appealing. The application on which the order of 19 September 2017 was announced, was filed on 10 July 2017, five months and thirteen days after the decision of Arana J. on 27 January 2017. The interlocutory appeal has since been filed. It is No. 26 of 2017. The ultimate objective of the motion application is to terminate the interlocutory appeal by Pasa Belize Ltd. against the decision of Arana J delivered on 27 January 2017, on the technical points raised therein.

[4] In the record is the notice of appeal dated 29 September 2017, filed the same day. It was given appeal No. 26 of 2017. It is the interlocutory appeal that is sought to be terminated by the notice of motion. Those are the three basic items in the case. Several more were in the record, or were simply referred to without being included in the record.

[5] The trail of this case is a chequered one. It is this. On 5 May 2016, Lopez Equipment Co. Ltd., the claimant, now the respondent in the appeal, made a claim No. 244 of 2016, in the Supreme Court against Pasa Belize Ltd., the defendant, now the appellant, for \$1,692,175.36. The sum was, “the price of work done and services provided”, by the claimant to the defendant. The, “work done and services provided”, were pursuant to a

subcontract between the parties. The job was in construction. The two companies have some common shareholders.

[6] Pasa Belize Ltd, failed to file a defence to the claim within the time limit of twenty eight days, under R10.3 (1) of the Supreme Court (Civil Procedure) Rules, 2005. On 7 June 2016, Lopez Equipment Co. Ltd. made a request for, and obtained a default judgment in the sum of \$1,709, 423.26 plus interest until payment, and costs. There is no issue in this Court about the judgment sum exceeding the sum claimed. On 4 October 2016, on an application by Pasa Belize Ltd., Arana J. set aside the default judgment entered on 7 June 2016, and ordered that Pasa Belize Ltd., “is allowed to file a defence on or before 18 October 2016.”

[7] Pasa Belize Ltd. again failed to file a defence (by 18 October 2016). Lopez Equipment Co. Ltd. again made a request to the Court by a letter dated 21 October 2016, from their attorneys, for a default judgment. By a hand written note on the letter, the Registrar of the Supreme Court may have put the letter from the attorneys for Lopez Equipment Co. Ltd. to the attention of the judge.

[8] Two parallel actions were taken. The first action was that, an order was made by the judge the same day, 21 October 2016. The order was that: (a) “the defendant failed to comply with the order made on 4 October 2016 that, unless by 18 October 2016, it files and serves defence, the default judgment [entered on 7 June 2016] stands”; (b) “the default judgment entered on 7 June 2016, stands”; and (c) “the claimant recover \$1,754,833.37 and interest at 10% per annum until payment, and costs”. This order was subsequently referred to as, “the sanction order”. I note that, the order at (a) did not restate accurately the words of the order of 4 October 2016, that set aside the default judgment entered on 7 June 2016.

[9] The second action taken was that, on 25 October 2016, the Registrar entered a default judgement, this time for the sum of \$1,755, 868.86, plus interest at 10 percent per annum and costs. There has not been an issue in this Court about the discrepancies in the figures.

[10] The following day, 26 October 2016, Pasa Belize Ltd. filed an application for an order to set aside this second default judgment entered on 25 October 2016; it exhibited a draft defence on the affidavit that supported the application. On 11 November 2016, Lopez Equipment Co. Ltd. filed a writ of execution on the second default judgment. On 2 December 2016, Pasa Belize Ltd. filed an amended application seeking among others, an order to set aside the default judgment; an order setting aside the order made by Arana J. on 21 October 2016 (the sanction order); and an order that, “execution on the judgment dated 25 October 2016 be stayed”.

[11] Arana J. heard the amended application, and on 27 January 2017, delivered a written decision dismissing the application. She made the order that: “the application to set aside both the sanction order dated November 4th, 2016 [actually made on 21 October 2017] and the second default judgment dated October 25th, 2016 is refused, costs awarded to the Claimant, to be paid by the Defendant, to be agreed or assessed.”

[12] On 27 February 2017, one month after the decision of Arana J., Pasa Belize Ltd. filed a notice of appeal against the decision. The notice of appeal was given appeal No. 4 of 2017. On 3 July 2017, Lopez Equipment Co. Ltd. filed an application for an order to strike out the appeal (No. 4 of 2017) on the grounds that, no leave had been obtained for the appeal which should have been an appeal by leave, and that the appeal was out of the time limit of twenty one days.

[13] On 10 July 2017, five months and thirteen days after the decision of Arana J. on 27 January 2017, Pasa Belize applied to Arana J. for orders: (1) to extend time to apply for leave to appeal the decision of the judge; (2) granting leave to appeal; and (3) granting extension of time to appeal. This application was not included in the record although it was important. It was referred to by counsel and by the judge in her decision. On 19 September 2017, Arana J. heard the application and granted the three orders.

[14] On 29 September 2017, Pasa Belize Ltd. filed another notice of appeal. It was given No. 26 of 2017. It is the appeal in this matter. On 20 October 2017, the motion application before this Court was filed. On 24 October 2017, Pasa Belize Ltd. withdrew Appeal No. 4 of 2017.

Determination.

(i) General

[15] From the above outline of the proceedings, one may say that, the matter has come to this Court at this point because Pasa Belize Ltd. believes that, although it has failed on two occasions to file its defence to the claim of Lopez Equipment Co. Ltd., within the time limit, and failed to file within the time limit, its application for leave to appeal against the interim (interlocutory) decision of Arana J. on 27 January 2017, dismissing the application to set aside the second default judgment and “the sanction order”, and failed to file within the time limit, its appeal, this Court should allow Pasa Belize Ltd. to proceed with its appeal against the decision of Arana J. She had ruled on 27 January 2017, among other reasons, that because of the default to file defence on two occasions, the second default judgment was properly entered against Pasa Belize Ltd. on the claim of Lopez Equipment Ltd. The learned judge, however, granted leave to Pasa Belize Ltd. to appeal to this Court against her decision dismissing the application for an order to set aside the second default judgment and “the sanction order”. If Pasa Belize Ltd. succeeds, these proceedings will return to the Supreme Court at the stage of filing defence.

[16] On the other hand, Lopez Equipment Co. Ltd. believes that, Arana J. correctly decided that, Pasa Belize Ltd. had inexcusably failed to file defence to the claim of Lopez Equipment Co. Ltd, and that Pasa Belize Ltd. has no prospect of succeeding on appeal. Lopez Equipment Co Ltd. seeks to stop the appeal of Pasa Belize Ltd. on that basis, and to proceed with execution on the second default judgment it has obtained.

(ii) Lopez Equipment Co. Ltd.’s application and the law.

[17] The notice of motion filed by Lopez Equipment Ltd. including the grounds of the application states this:

“NOTICE OF MOTION

TAKE NOTICE that the Court of Appeal will be moved on Friday the 16 day of March, 2017 at 10:00 o’ clock in the fore noon or so soon thereafter as counsel can be heard on the hearing of an application on the part of the Respondent for the discharge of an order to extend time in pursuance of Order II, Rule 16(1) (e) of the Court of Appeal Rules.

AND FURTHER TAKE NOTICE that, the grounds of this application are:

- (1) Order II, Rule 16(2) of the Court of Appeal Rules provides that every order made by a single judge of the Court in pursuance of Order II, Rule 16 of the Court of Appeal Rules may be discharged or varied by any judges of this Honorable Court having power to hear and determine the appeal;
- (2) A judge of the Court below exercising the powers of a single judge of this Honorable Court heard the Appellant’s application to extend time, made pursuant to Order II, Rule 16 (1) (e) of the Court of Appeal Rules, and extended the time for the Appellant to apply for leave to appeal;
- (3) There is no jurisdiction to extend the time limit for filing a notice of application for leave to appeal as the jurisdiction conferred by Section 16(3) of the Court of Appeal Act applies only to a notice of appeal and does not apply to applications for leave to appeal;
- (4) Further, or in the alternative, the Appellant failed to demonstrate that it was unavoidably prevented from filing its notice of application for leave to appeal within the time limit prescribed in Section 16 (1) of the Court of Appeal Act.
- (5) Order II, Rule 16(2) of the Court of Appeal Rules applies only to causes or matters pending before the Court of Appeal and

there was no cause or matter pending before the Court in which the applicant could make an application;

- (6) Further, or in the alternative, the Appellant failed, contrary to the provisions of Rule 17 (1), to make its application to extend time to this Honorable Court and instead improperly applied to the Court below.

Dated this 20th day of October, 2017.”

[18] Lopez Equipment Co. Ltd. mentions in the grounds of its motion application that, its application is made under **O.II r.16 (2) and r.17(1) of the Court of Appeal Rules**. The order made on 19 September 2019, in favour of Pasa Belize Ltd., sought to be discharged, was stated by Arana J. to have been sought and obtained under O.II r.3(4), r.16(1) (e) and r.17. It will help this Court much if in future attorneys cite in the heading of their applications or other documents, the statutory law that they rely on. It makes for certainty about the law relied on. Both authorization claimed for the application by Pasa Belize Ltd. in the Supreme Court and the authorization claimed for the application by Lopez Equipment Co. Ltd. in this Court include **O.II r. 16**. It is not clear though whether Arana J. made the order on 19 September 2017, under O. II r. 16 (1) (e) or under O.II rr. 2 and 3.

[19] Order II.r.16 obtains its authority from **s.16 of the Court of Appeal Act**. It is convenient for reference purposes, to set out s.16 of the Court of Appeal Act and O.II.rr.16 and 17.

[20] Section 16 of the Court of Appeal states as follows:

16-(1) Where a person desires to appeal under this Part to the Court he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of court within twenty-one days from the date on which the order of the Supreme Court

or a judge thereof was signed, entered or otherwise perfected.

- (2) The appellant shall file notice of his grounds of appeal within twenty-one days after he has been notified by the Registrar that the record is ready for his use.*

- (3) The Court may, subject to such terms and conditions as it thinks fit, extend the time limits mentioned in subsection (1) and (2) if the appellant shows to the satisfaction of the Court that he has been unavoidably prevented from filing his notice of appeal or grounds of appeal, as the case may be:*

Provided that on the hearing of any application for an extension of time under this subsection, the opposite party shall have an opportunity of being heard and, if the Court thinks fit, of adducing evidence against the granting of leave.

[21] Order II rule 16 states:

16 (1) In any cause or matter pending before the Court a single judge of the Court may upon application make orders for:

- (a) giving security for costs to be occasioned by any appeals;*
- (b) leave to appeal in forma pauperis;*
- (c) a stay of execution on any judgment appealed from pending the determination of such appeal;*
- (d) an injunction restraining the defendant in the action from disposing or parting with the possession of the subject matter of the appeal pending the determination thereof;*
- (e) extension of time;*

and may hear, determine and make orders on any other Interlocutory application.

- (2) *Every order made by a single judge of the Court in pursuance of this rule may be discharged or varied by any judges of that Court having power to hear and determine the appeal.*

[22] Order II r.17 states as follows:

17(1) *Application referred to in rule 16 shall ordinarily be made to a judge of the Court, but where this may cause undue inconvenience or delay, a judge of the Court below may exercise the powers of a single judge of the Court under that rule.*

- (2) *The Registrar of the Court below shall send to the Registrar one copy of any application made to a judge of the Court below and of the order made therein.*

[23] Some other rules: **O. II rr. 1, 2, 3** and **4** are also relevant, in that they provide for the manner in which appeals are filed, and are particularly relevant to appeals by leave of the court. They are the following:

Order II

CIVIL APPEALS

Notices of appeal, cross-appeal and preliminary objections

1. -(1) *All appeals shall be brought by notice (hereinafter called “the notice of appeal” to be filed together with a copy thereof with the Registrar which shall set forth the grounds of appeal, state whether the whole or part only of the decision of the court below is complained of (in the latter case specifying such part), state also the nature of the relief sought and the names and addresses of all parties directly affected by the appeal, and be signed by the appellant or his legal representative.*

- 2 (1) *Where an appeal lies by leave only, any person desiring leave to appeal shall apply for leave within twenty-one days, either by notice of motion or by summons (whichever is appropriate) and such application shall be made to the Court or to the court below or to the judge who made the order; the period of twenty-one days shall run from the date of the decision against which leave to appeal is sought.*
- (2) *If leave is granted the appellant shall file a notice of appeal as provided by rule 1 of this Order within twenty-one days from the grant of leave and a copy of the order granting leave shall be annexed to the notice of appeal.*
- 3 (1) *Subject to this rule, no appeal shall be brought after the expiration of twenty-one days from the date of judgment delivered or order made, against which the appeal is brought.*
- (2) *An appeal shall be deemed to have been brought when the notice of appeal has been filed with the Registrar.*
- (3) *A judge of the Court may by order extend the time prescribed in paragraph (1) within which an appeal may be brought, provided an application for this purpose is made within one month of the expiration of the time prescribed.*
- (4) *In exceptional circumstances, the Court having power to hear and determine an appeal, may on application extend the time within which an appeal may be brought beyond the period delimited for an application to a judge of the Court under this rule.*
- (5) *Every application for enlargement of time when made to a judge of the Court shall be made by summons, and when made to the Court shall*

be by motion. Every summons or notice of motion filed shall be supported by an affidavit setting forth good and substantial reasons for the application and by grounds of appeal which prima facie show good cause therefor.

(6.) *A copy of the summons and supporting affidavit and four copies of the notice of motion and supporting affidavit, in addition to the filed copies, shall be left with the Registrar at the time of filing.*

(7.) *When time is so enlarged a copy of the order granting such enlargement shall be annexed to the notice of appeal.*

(iii) The submissions for Lopez Equipment Co. Ltd.'s application.

[24] In her submission, learned counsel Ms. N. Barrow, for Lopez Equipment Co. Ltd., asked the Court of Appeal for, “an order to discharge”, the order of Arana J. made on 19 September 2017. Counsel described that order as, “an order to extend time in pursuance of Order II rule 16 (1) (e) of the Court of Appeal Rules.” The order was more extensive than that; it was three orders in one. It extended the time for Pasa Belize Ltd. to make an application for leave to appeal, and straightaway granted the leave and extended the time for appealing up to 3 October 2017.

[25] Counsel introduced her submission by a statement that, Arana J. granted the order under O.II.r. 16(1) (e), and that the judge was, “exercising the powers of a single judge of the Court of Appeal under O.II.r.17, so the order made by Arana J. may be discharged by the full Court under O.II.r 16(2). Counsel cited **Attorney General and Others v Jeffery Prosser and Others, Civil Appeal No. 7 of 2006**, to support that submission.

[26] The first substantive ground on which Lopez Equipment Co. Ltd. asked the Court to discharge the order of Arana J. extending time under O.II.r 16(1) (e), was that, applications [and therefore orders], made under O.II.r.16 are to be made in a cause or matter pending before the Court of Appeal. The application by Pasa Belize Ltd. was not made in a matter that was pending before the Court; so Arana J., exercising the powers

of a single judge of the Court of Appeal, had no jurisdiction in the application; the order made by her on 19 September 2017, should be discharged.

[27] In the alternative, counsel submitted that, if an application for extension of time for applying for leave to appeal could properly be made, “in the circumstances,” in a matter that was not pending before this Court, then Pasa Belize Ltd. made the application to the wrong court, the court below, without first applying to a single judge of this Honourable Court. Counsel relied on paragraphs 38, 39 and 40 of the judgement of Carey JA in the **Attorney General and Others v Prosser and Others case**. Carey JA at paragraph 40 stated: “*It is a safe conclusion that applications under rule 16 are to be heard by a single judge of the Court. Where such a judge is unavailable, then the application should be made to a judge of the Supreme Court. Recourse is not to the full Court. What is to be noted is that the full Court is given the power to review the order of the single judge.*”

[28] The second substantive ground for an order to discharge the order of Arana J. made on 19 September 2017, was that, there is no jurisdiction at all for the Court of Appeal to extend time for making an application for leave to appeal. Ms. Barrow submitted that, s.16 (3) of the Court of Appeal Act grants jurisdiction for extension of time for filing notice of appeal and grounds of appeal only. Counsel argued that, O.II rr.1(1) and particularly, rr.2(1) and 3(3), regarding making an appeal with leave, do not mention extension of time for applying for leave. Counsel cited **Sheryard Deanne v Cynthia Allamby [2016] CCJ 21 (AJ)** for the dictum of the Honourable Dennis Byron, President of the CCJ that:

“powers conferred by statute must be read subject to the limitations and conditions prescribed by statute; and that where a time limit is prescribed by statute the Court does not have power to extend the time, unless the statute gives it the power to do so”.

[29] The third substantive submission was made in the further alternative. It was that, if the Court decides that, the relevant legislations granted jurisdiction to the Court of Appeal to extend time for applying for leave to appeal as well, then Pasa Belize Ltd. did not “demonstrate” to Arana J. that, “it had been unavoidably prevented from applying for leave to appeal and from filing notice of the appeal within the prescribed time,” in order to be granted leave and to be permitted to file the notice of appeal after twenty one days.

Counsel submitted further that, the affidavit evidence about the delay in applying for leave to appeal was that the appellant held, “the erroneous view” that, the order of Arana J. made on 27 January 2017, was a final order. Counsel submitted on, that an error in law had been held not to be sufficient ground to show that an appellant was unavoidably prevented from filing his notice of appeal or grounds of appeal. She cited several cases to support this submission. Some of them are: (1) *The Prime Minister and Minister of Finance and Attorney General v Alberto Vellos and Others Civil Appeal No. 11 of 2008*; (2) *Matus v Melhado unreported, May 1998, and In the matter of an Application for Extension of Time, Order II r 3 of the Court of Appeal Rules, unreported, decided 25 May 1983*; and (3) *Derek Aikman v The Belize Bank, Civil Case Appeal No. 12 of 1992*.

(iv) *The Submissions for Pasa Belize Ltd.*

[30] Learned counsel Mr. E. Courtenay SC., for Pasa Belize Ltd., submitted that, the Court of Appeal Act, and the Court of Appeal Rules “empowered courts” to grant extension of time to apply for leave to appeal and to grant extension of time to appeal. Further, counsel submitted that, Arana J. exercised judicial discretion which, “an appellate court can disturb only in very limited circumstances”.

[31] The details. First counsel submitted that, s. 16(1) provides for an appellant to give notice of appeal or notice of his application for leave to appeal, within twenty one days; subsection (2) provides for filing grounds of appeal within twenty one days after the appellant has been informed by the Registrar that, the record of appeal is ready; subsection (3) then “empowers the Court” to extend the time limits in subsections (1) and (2), if the appellant shows that he was unavoidably prevented from filing his notice of appeal or grounds of appeal in time. Counsel proposed that: “section 16(3) [meaning, the words, ‘notice of appeal’ in s.16 (3)] must be construed to mean a notice of appeal as of right or the notice of appeal consequent to leave having been granted”. Based on that, Mr. Courtenay argued that, Arana J. had the jurisdiction under s.16 (3) to extend time for making an application for leave, and to extend time for filing notice of appeal when she made the order on 19 September 2017.

[32] But, Mr. Courtenay also argued that, the requirement to show that the appellant was, ‘unavoidably prevented...’ only applies to failure to file notice of appeal and grounds

of appeal in time, not to failure to apply for leave in time. The words of the submission were these. “It is to be noted that [the] requirement that the intended appellant demonstrate that he has been ‘unavoidably prevented’ is only applicable to an application to extend time for a notice of appeal or grounds of appeal. There is no such threshold for an application to extend time to apply for leave to appeal.”

[33] Counsel proceeded to explain that, Pasa Belize Ltd. sought, and obtained from Arana J., extension of time to apply for leave, obtained the leave and obtained extension of time to appeal the decision of Arana J. made on 27 January 2017, because Arana J. accepted that, there were “exceptional circumstances” in the proceedings. The exceptional circumstances were, counsel submitted, that upon receipt of the letter dated 21 October 2016, requesting a default judgement the second time, two orders were made, the first, “the sanction order”, made by the judge on 21 October 2016, without an application having been made to the Court asking for the order, and the second, a default judgement signed by the Registrar on 25 October 2016.

[34] Counsel submitted further that, the decision that, there were exceptional circumstances was a discretionary decision of Arana J. based on the facts, and that an appellate tribunal may only disturb an exercise of a judicial discretion in limited circumstances. He cited **Dafour and Others v Helenair Corporation Ltd (1946) 52WIR 188**, in support. The actual words of the submission were these: “As submitted above, the test of ‘unavoidably prevented’ is inapplicable to an application to extend time for leave to appeal. The applicable test as applied by Her Ladyship is whether there are exceptional circumstances. Whether there are exceptional circumstances and to extend time is determined based on the facts before the Court, and is within the Court’s discretion to determine. In concluding that there were special circumstances and that, time be extended, Her Ladyship exercised a judicial discretion.”

[35] Counsel asked this Court not to disturb the discretionary decision of Arana J. made on 19 September 2017. That request is in effect that, this Court may proceed to hear the present appeal, No 26 of 2017, of Pasa Belize Ltd, based on the leave and extension of time granted by Arana J. on 19 September 2017.

[36] In reply to the submission for Lopez equipment Co. Ltd. that, O. II.r 16, was about only applications in matters pending in the Court of Appeal, Mr. Courtenay made this submission: “The issue of the Supreme Court’s jurisdiction is being raised for the first time in this appeal. The respondent participated at the hearing of the application for extension of time and leave to appeal. The respondent did not object to her Ladyship’s jurisdiction.... It is therefore, while not admitted that the court below lacked jurisdiction, it is submitted that the respondent has waived its right (if any) to object to Her Ladyship’s jurisdiction.”

[37] In the alternative, counsel submitted that “ O. II r.16 (1)(e) also provides a general power for extension of time,” and further that, O.II rr.2 and 16, grant concurrent jurisdictions to the Supreme Court and the Court of Appeal to grant leave to appeal, to extend time for applying for leave and to extend time for appealing. Where concurrent jurisdictions are granted, the procedure is to approach the Supreme Court first, counsel submitted. He also cited the **Attorney General and Others v Jeffrey Prosser and Others** case, in support.

(v) The decision.

[38] I accept the interpretation of s.16(3) of the **Court of Appeal Act** urged upon us by Mr. Courtenay that, the subsection grants jurisdiction to extend time for filing a notice of appeal as well as the jurisdiction to extend time for applying for leave to appeal. In my view, that is the literal meaning of the sentence in subsection (3). The subsection states:

(3) The Court may, subject to such terms and conditions as it thinks fit, extend the time limits mentioned in subsection (1) and (2) if the appellant shows to the satisfaction of the Court that he has been unavoidably prevented from filing his notice of appeal or grounds of appeal, as the case may be:

[39] The time limit “mentioned in subsection (1)” which the Court may extend, by the authorization in subsection (3), is the time limit for, “[giving] notice of appeal or notice of his application for leave to appeal..., within twenty one days from the date on which the order of the Supreme Court or a judge thereof was signed...” The time limit “mentioned in subsection (2)” which the Court may extend, is the time limit for, [filing] grounds of

appeal within twenty one days after [the appellant] has been notified by the Registrar that the record is ready for his use.” The latter is not the subject of the matter before the Court now. The words ‘notice of appeal’ in subsection (3) which the intending appellant must show that he was unavoidably prevented from filing means, a notice of appeal commencing an appeal as of right, and a notice of appeal when leave has been obtained, to be filed to commence an appeal by that leave.

[40] Assuming that, some people may regard as also probable the interpretation of s.16 proposed by Ms. Barrow that, subsection (3) excludes jurisdiction to extend the time for filing an application for leave, one then has to resolve the double meaning of s.16 by applying the golden rule of interpretation of statute. In applying the golden rule, the double meaning is resolved by taking the **Court of Appeal Act** as a whole and determining the intention in the Act.

[41] We need not search far. The intention in **Part III of the Act** is to give jurisdiction to this Court to hear and determine appeals in civil cases from judgements and orders of the Supreme Court, and to hear and determine questions in cases stated. It is mainly about correcting errors, in that event, made in the court below. Appeals from final judgments and orders are made by the intending appellants straightaway “as of right”. Appeals from interim orders (interlocutory orders) in the course of trial and final orders made by a judge in chambers are made with permission, that is, by leave of the Court or of the Supreme Court- see **ss.13 and 14 of the Act**.

[42] In my view, when **s.14 of the Act** creates the right to appeal without leave and the right to appeal by leave, and s.16 (1) directs that, both rights be exercised within twenty one days, the intention is to get the appellant to proceed to appeal without delay, if he intends to appeal. The intention is not to exclude either right of appeal. Put in a negative way, the intention is to terminate both rights, not one or the other, in the event of a delay of more than twenty one days.

[43] However, if the appellant has not filed his notice of appeal or application for leave to appeal within twenty one days, because he has been “unavoidably prevented”, from doing so, the intention is to excuse the unavoidable delay and allow an appeal later than twenty one days. The excuse for this good reason cannot conceivably apply to one kind

of appeals only without some justification. Intending appellants in both kinds of appeals would have been victims to unavoidable prevention. It would not be fair. The difference between an appeal as of right and an appeal by leave lies in the nature of the order made in the court below. It is not directly relevant to pursuing an appeal with expedition. The reason for denying a right of appeal is delay for more than twenty one days, not the kind of the appeal.

[44] Moreover, the right to both kinds of appeals having been granted, subject only to the limitation of twenty one days, the provision of **s.16 (3)** of the Act allowing extension of time on the ground that, the appellant was unavoidably prevented from proceeding within time cannot be applied only to an appeal without leave, when the words of the section do not state unambiguously so.

[45] Although I accept the submission that, s.16 (3) authorizes extension of time for applying for leave to appeal as well as extension of time for filing a notice of appeal, I do not accept the submission that, when Arana J. sat on 19 September 2017, and made the three orders, she sat by the authority of **O.II r. 16** as a single judge of the Court of Appeal. I accept the submission by Ms. Barrow on the point.

[46] The opening words of **O.II.r.16** are: “**(1) In any cause or matter pending before the Court (the Court of Appeal) ...**” So there must be a matter already pending before the Court of Appeal. When Arana J. sat on 19 September 2017, this matter or cause was not pending before the Court of Appeal between the parties. Pasa Belize Ltd. was at that point making the application to obtain leave to appeal in order to enable it to appeal the decision of Arana J. made on 27 January 2017. It succeeded and filed the appeal on 29 September 2017. It is my respectful view that, Arana J. erred to the extent that, she extended time for applying for leave, granted the leave and extended the time for filing the notice of appeal, believing that she was acting as a single judge of the Court of Appeal under **O.II.r17**, exercising the powers in **O.II.r16 (1) (e)** in a pending matter.

[47] The above preliminary error regarding jurisdiction aside, the dominant and crucial issue remains jurisdiction. It is raised regarding each of the orders made on 19 September 2017. Mr. Courtenay attempted to forestall detailed examination of the question. He

submitted that, “**the issue of the Supreme Court’s jurisdiction was being raised for the first time in this appeal**, Lopez Equipment Co. Ltd. waived its right, if any”.

[48] The submission is mistaken. The matter before this Court is not an appeal, at least not yet. It is a motion application by Lopez Equipment Co. Ltd. to set aside the orders made on 19 September 2017, granting extension of the time for applying for leave to appeal, granting the leave to appeal and extending time for appealing. Mr. Courtenay, in fact, included in earlier parts of his submissions the argument that, Arana J. exercised the powers of a single judge of appeal, she exercised the appellate jurisdiction in O.II r. 16(1)(e). In that event therefore, there is no appeal to the Court of Appeal from an order made by Arana J., a judge of the Supreme Court, exercising the powers of a single judge of the Court of Appeal. When an application is made to the quorum of the Court of Appeal for an order to set aside an order made by a single judge of the Court or of a judge of the Supreme Court exercising the powers of a single judge of the Court of Appeal, the hearing is not an appeal, it is a rehearing.

[49] I proceed on to examine the dominant issue of the jurisdiction of Arana J. when she presided in the proceedings on 19 September 2017. Although regrettably a copy of the actual application presented to Arana J. was not included in the record, the learned judge in her decision helpfully stated: “*This is an application by defendant pursuant to O.II. Rule 3(4), Rule 16 (1) (e) and Rule 17 of the Court of Appeal Rules for [an] order that, time be extended to apply for leave to appeal, an order that the defendant be granted leave to appeal, an order that time be extended for the defendant to appeal and further or other relief and costs in the cause.*” I take that to be accurate.

[50] For its application on 19 September 2017, for orders extending time for applying for leave to appeal, granting the leave and extending the time to appeal, Pasa Belize Ltd. relied on O.II.rr.3(4) and certainly also on other related rules. One of the rules is **O.II.r.2(1)** which states: “Where an appeal lies by leave only, any person desiring leave to appeal shall apply for leave within twenty one days..., **such application shall be made to the Court or to the court below or to the judge who made the order...**” So, Arana J. initially had jurisdiction to hear the application for leave to appeal in this matter as, “the judge who made the order,” on 27 January 2017, dismissing the application for an

order to set aside “the sanction order” made on 21 October 2016, and who oversaw the entering of the second default judgement on 25 October 2016.

[51] The application for leave was late by five months and thirteen days, and so was the intended appeal. The first order to be sought would be an order extending the time for applying for leave to appeal. In my view, the application for that order would be made under **s.16 (3) of the Act** and **O.II r. 3(4)**, as part of an application for an order extending time within which an appeal may be brought, since obtaining leave for an appeal by leave is concomitant to filing the notice of the appeal and bringing the appeal by leave. **Compare Derek Aikman v The Belize Bank Ltd. Civil Appeal No. 12 of 1992**, in which a concomitant act was treated the same way as the main act, the significant act. The learned Justices stated that, the power expressly given to extend the time for filing the notice of appeal must necessarily include the concomitant power not expressly provided for, to extend the time for serving the notice of appeal. The application was more than one month late, so it would be made to, **“the Court having power to hear and determine an appeal”** -see **O.II r (3) (4)**.

[52] It is my view though, that whereas Arana J., a judge of the court below, had jurisdiction under **O.II r. 2(1)** to hear and grant or refuse leave to appeal in an appeal by leave, she had no jurisdiction at all to extend the time for making the application, whether the application for extension of time was made within one month from the expiry of the twenty one days prescribed under **O.II r. 3(3)**, or made after one month under **O.II r. 3(4)**.

[53] These are my reasons. The jurisdiction under **O.II r.3(3)** to hear an application made within one month of the expiry of the time prescribed, is given to a **judge of the Court of Appeal**. There is no rule as in **O.II r.17** which authorizes in the alternative, a judge of the Supreme Court to exercise the jurisdiction of a single judge of the Court of Appeal under **O.II r. 3 (3)**, or of the Court itself under **sub-rule 3(4)**. **Order II r.17** applies only to applications brought under **O.II r.16 in a matter or cause pending before the Court**.

[54] Secondly, the jurisdiction to hear an application brought after one month, for extension of time is given in **O.II r. 3(4)**, in my view, exclusively to, **“the Court having power to hear and determine an appeal”**, that is, to a quorum of the Court. There is no

rule authorizing, in the alternative, a single judge of the Court, let alone, a judge of the Supreme Court, to exercise the jurisdiction when an application is made after one month.

[55] Arana J. sat on 19 September 2017, to hear an application for extension of time and for leave made five months and thirteen days after her decision on 27 January 2017. She no longer had jurisdiction to hear the application for leave and the related application for extension of time for applying for leave after one month. So, she also no longer had jurisdiction to extend the time for filing the notice of appeal. In my respectful view, the learned judge erred. I would make the order that, the orders made by Arana J. on 19 September 2017, extending the time for making application for leave, granting the application and leave, and extending the time for appealing, be set aside. It would follow that, leave was not ever obtained by Pasa Belize Ltd. for the “appeal”, No. 26 of 2017, “filed” on 29 September 2017; and it is now out of the time limit.

[56] It serves no purpose to leave the matter at a stage where the parties would return to this court. In the case of Pasa Belize Ltd., to pursue yet another satellite proceeding before this Court for, an order extending time for applying for leave to appeal, an order granting leave and an order extending time for filing notice of appeal. In the case of Lopez Equipment Co. Ltd., to oppose yet again. This Court has “power” to, among others, set aside orders made in the Supreme Court, or by a single judge of this Court, make any such order as the Supreme Court or judge might have made, or make any orders which ought to have been made by the Supreme Court— see **s.19 of the Court of Appeal Act**. It is desirable that, this Court resolves the matter of whether or not Appeal No. 26 of 2017 is terminated.

[57] My conclusion is that, the appeal, No. 26 of 2017, must be regarded as dead on arrival. The application made later than one month for extension of time after the expiry of the time prescribed for applying for leave to appeal or for filing a notice of appeal, would be made to the quorum of this Court anyway. It would be made on the same facts and urged with the same submissions that have been presented to us already. Pasa Belize Ltd. would have to show on those facts, first that, there were exceptional circumstances to warrant this Court hearing the application made more than one month late. —see **O.II.r.3(4)**. It would then have to show that, it was unavoidably prevented from applying

for leave to appeal and from filing notice of appeal within twenty one days, so that it would be entitled to an order granting extension of time beyond twenty one days –see **s.16 (3) of this Court of Appeal Act**. In my view, this, Court is in a position to decide the issues and the appeal now.

[58] I do not see any exceptional circumstances in the fact that, two separate orders, “the sanction order” and the second default judgement order were made when the default judgment only could have sufficed. The “sanction order” did not contradict nor nullify the default judgement order, nor was it a ground for setting aside the default judgement. Both orders were to the same effect, they caused no difficulty in the way forward when a writ of execution issued. I would refuse to entertain the application for an order extending the time for applying for leave, and extending the time for filing notice of appeal, made later than one month after the expiry of the time prescribed.

[59] Assuming, without deciding now that, the submission is accurate that, the presence of “the sanction order” and the default judgment order were exceptional circumstances for the purposes of O.II.r.3(4), I would simply say that, the submission would be pointless in this matter. Counsel succeeded before Arana J. on 19 September 2017, and obtained extension of time and leave. But the learned judge did not have the jurisdiction to make the orders; the orders she made must be set aside regardless of the submission about exceptional circumstances.

[60] Mr. Courtenay, in fact, did not make submission to persuade this Court that, Arana J. considered that, the application before her for extension of time was made after one month, and that, she considered that Pasa Belize Ltd. needed to show exceptional circumstances, a requirement in **O.II.r.3(4)** for the application to be entertained in the first place. Instead counsel submitted that, an application generally (in permissible time) for an order to extend time for making an application for leave must be decided on the test of exceptional circumstances, and not on the test that, the intending appellant was “unavoidably prevented” from making the application within twenty one days. Arana J. herself omitted to consider that such an application had to be made within one month otherwise, the intending appellant had to show exceptional circumstances to the Court of Appeal (not even to a single judge of the Court) to justify the Court hearing the very late

application. That was also an error for which the orders made on 19 September could be set aside.

[61] The submission that, “the test” (consideration) for extending time for making an application for leave to appeal is whether exceptional circumstances exist, and not that the intending appellant was unavoidably prevented from making the application in twenty one days, is completely fallacious anyway. Exceptional circumstances are required to justify bringing the application later than one month after the prescribed time for making the application for leave or for filing notice of appeal has expired, not to justify failure to file a notice of appeal, or an application for leave to appeal, within the prescribed twenty one days. Moreover, the rule in **O.II r.3(4)** about exceptional circumstances cannot be read in a way that is inconsistent with the law in **s.16 (3) of the Court of Appeal Act** itself that, the intending appellant must show that, “he was unavoidably prevented from filing his notice of appeal or grounds of appeal”, within the prescribed twenty one days.

[62] The record shows that, Pasa Belize Ltd., did not present any evidence to show that, it was unavoidably prevented from making an application for leave within twenty one days, and therefore also unavoidably prevented from filing his notice of appeal within the twenty one days. In my view, learned Arana J. was too hard on herself when she marked down her judgment delivered on 27 January 2017 (dismissing the application for an order to set aside the second default judgment), as being open to prospect of an appeal succeeding against it. The judge should have refused leave to appeal.

[63] I would make these orders: 1: The three orders made by the learned Arana J., that: (a) “the defendant is granted leave to appeal”, (b) “the time be extended for the defendant to appeal to October 3rd 2017”, and (c) “costs be in the cause”, be set aside. 2. The appeal, No. 26 of 2017, be struck out. 3. Costs of “the appeal”, costs of the motion application filed on 20 October 2017, and of the proceedings in the Supreme Court in Claim No. 244 of 2016, are awarded to Lopez Equipment Co. Ltd., to be agreed or taxed. The order for costs is provisional, to be made absolute after seven days, unless parties apply within the seven days for a different order for costs.

AWICH JA

HAFIZ-BERTRAM JA

[64] I have read in draft the judgment prepared by my learned brother, Awich JA and I am in agreement with the disposition of the appeal and the orders proposed therein. There is nothing that I can usefully add.

HAFIZ BERTRAM JA

DUCILLE JA

[65] I have had the benefit of reading the draft judgment prepared by the Learned Justice Awich. I am in full agreement with his reasoning, conclusion and order and there is nothing that I can further add.

DUCILLE JA