IN THE COURT OF APPEAL OF BELIZE AD 2020

CIVIL APPEAL NO 7 OF 2020

(1) **GAS TOMZA LTD**

(2) **WESTERN GAS COMPANY LTD**

(3) **SOUTHERN CHOICE BUTANE LTD**

dba as ZETA GAS

(4) **BELIZE WESTERN ENERGY LTD** Appellants

v

(1) **CONTROLLER OF SUPPLIES**

(2) **MINISTER OF ECONOMIC DEVELOPMENT, PETROLEUM, INVESTMENT, TRADE AND COMMERCE**

(3) **THE ATTORNEY GENERAL** Respondents

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BEFORE

The Hon Sir Manuel Sosa	President
The Hon Madam Justice Minnet Hafiz Bertram	Justice of Appeal
The Hon Mr Justice Murrio Ducille	Justice of Appeal

A Matura for the appellants.
A Finnegan, Crown Counsel, for the respondents.

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17 December 2020 (On Submissions in Writing)

RULING ON COSTS APPLICATION

SIR MANUEL SOSA P

Introduction: judgment in the substantive appeal

[1] On the night of 29 April 2020, ie during the course of the current COVID – 19 pandemic, the Court intimated to counsel for the parties by email from its registry that, for reasons to be given in writing at a later date, the appeal of Gas Tomza Ltd, Western Gas Company Ltd, Southern Choice Butane Ltd and Belize Western Energy Ltd ("the appellants") was dismissed. Because of the urgency of the appeal, the judgment of the Court was initially given as a majority judgment owing to the failure of all efforts made that night to obtain word from Ducille JA, who is not resident, and was not at the time, in Belize, as to his opinion on disposition. When the opinion of Ducille JA later became known to the other members of the Court, counsel were duly informed of the fact that the judgment of the Court was a unanimous one. With respect to costs, the announcement of the night of 29 April 2020 was essentially that each party was to bear its own costs, to be agreed or taxed, such order to be provisional in the first instance but to become final in seven days from the date of judgment, unless, within such period, any party were to file application for a contrary or different order, in which event the matter of costs would be determined on written submissions to be filed and delivered in ten days from the date of the filing of such application.

The application for a different costs order

[2] The respondents duly filed an application for a different costs order on 5 May 2020 ("the application"), seeking the award to them of costs of the appeal, to be agreed or taxed, and an order that the costs of the application be costs in the appeal. In compliance with the terms of the provisional order for costs, the respondents then filed submissions in writing purportedly in support of the application. The appellants, on the other hand, filed neither an application for a different costs order nor submissions in writing in response to the application.

Reasons for judgment in the substantive appeal

[3] The Court issued its reasons for judgment in the substantive appeal by email from its Registry to counsel for the parties on 3 December 2020. The only substantive reasons for judgment in the appeal were prepared by Ducille JA and concurred in by me and Hafiz Bertram JA. At para 6 of his reasons for judgment, Ducille JA identified the two broad issues before the Court, stating that the second was whether the learned Acting Chief Justice erred in holding that damages would be an adequate remedy for the appellants in their claim in the court below. He then said, in that same paragraph, "In my view issue 2 is determinative of the present matter". He proceeded to deal with that issue as being so determinative of the appeal.

[4] Notwithstanding that the true and sole purpose of the Court on 3 December 2020 was to render the reasons for its dismissal on 29 April 2020 of the substantive appeal, two members of the Court in fact referred to costs after dealing with their reasons for judgment. Thus Ducille JA said at para 11:

> " … I propose … that the costs of the appeal be the Respondents' to be taxed if not agreed."

Reacting to this proposal, and in the process (regrettably) distracted by it as well, I, for my part, said at para 1:

> "With regard to the costs order, I am unable to agree that, not having heard the parties on costs, it is appropriate to make an order which immediately takes effect as a final order. In my respectful opinion, the costs order should be provisional in the first instance and only become a final order if no party applies for a different order. I consider that the parties should be given 10 days from the date of their receipt of this judgment in electronic form within which to make such application, by letter to the Registrar copied to all other parties. I further consider that it should be ordered that, in the event of such an application, (a) each party should have 7 days from the date of such application within which to file and deliver to the other parties his or its written submission on costs and (b) such application should be determined on the basis of the written submission filed and delivered as ordered."

In my state of distraction, I failed to recall that, in fact, the necessary provisional-in-the first-instance-order had already been made on 29 April 2020. But, even in my distracted state, it was crystal clear to me that my opinion was not being concurred in by either of the other two panel members and could not therefore properly be considered an order of the Court. Put differently, it was neither a unanimous nor a majority view of the Court – only my own opinion.

[5] Correctly, I am prepared respectfully to say today, the third member of the panel, Hafiz Bertram JA, said no more than that she concurred in the reasons for judgment given by Ducille JA. She was thus silent on the matter of costs.

[6] Axiomatically, then, not only is it the case that the opinion I expressed in para 1 of the judgment of 3 December 2020 was unsupported by either of the other two panel members: it is also the case that the proposal of Ducille JA made at para 11 of the same judgment was similarly unsupported by either of his colleagues on the panel. In my view, then, both my opinion and his proposal were like things writ on water.

[7] It is as well to deal briefly at this point with a letter dated 8 December 2020 which was received by the Assistant Registrar (Appeals) from Ms Matura, counsel for the appellants. The letter purports to be an "application against costs" made pursuant to judgment rendered by me on 3 December 2020. As has just been explained above, however, neither unanimously nor by majority did this Court make any order as to costs on 3 December 2020. Ms Matura's purported application on behalf of the appellants is unfounded, having been sought to be made on the strength of a non-existent order.

The next appropriate step

[8] With the reasons for judgment of the Court now in the hands of the parties, and no order having been thus far entered pursuant to the judgment in the appeal, it is appropriate now to determine the application.

The submissions

[9] As already noted above, the only submissions before the Court are those of the respondents. They refer to section 18 of the Court of Appeal Act as containing the governing statutory provisions. To my mind, the chief contention deployed is that it is just in all the circumstances for this Court to award costs to the respondents primarily because the appellants unreasonably and urgently sought an injunction knowing full well that it would not serve any useful purpose. But counsel does not stop there. She further says that the injunction was belatedly directed, at a decision which, as the appellants knew, had been made as far back as August 2019. The sense of urgency was contrived and artificial rather than real and natural. The respondents were, it is argued, unreasonably placed in a position of disadvantage where they had to rush to present their case to this Court in a matter of some 19 hours. *Straker v Tudor Rose (a firm)* [2007] EWCA Civ 368 is relied upon as containing useful relevant legal guidance for this Court as to the step-by-step approach to be taken.

Discussion

[10] In *Espat etc v Peyrefitte and Others*, Civil Appeal No 1 of 2017 (ruling on costs application delivered on 21 June 2019), the majority in this Court acceded, in notably nuanced fashion, to the invitation of counsel for the applicant to take guidance from the approach adopted by the Court of Appeal of England and Wales in *Straker*. In the sole substantive judgment in the application, I wrote, at para [15]:

> "I must state from the very outset that I find utterly irresistible the approach commended by Mr Marshalleck to the court seeking to decide whether to make a costs order. I so find it not because I consider the *Straker* decision to be of binding or persuasive authority in this Court, given the rules by which this Court is now governed, but because it is an approach which is shaped and dictated by good sense. Therefore, without committing the indiscretion of following and applying *Straker*, I would adopt the approach in question for the simple reason that, in my view, it is a sound and practical approach which can safely be adopted within the capacious framework of section 18 of the [Court of Appeal] Act."

The adoption of that approach was a crucial reason for the decision in *Espat* to make a different order awarding costs to the applicant there. And, in *Espat*, Hafiz Bertram JA concurred in my reasons for judgment. Following, then, the decision of the majority in this Court in *Espat*, I would again adopt the approach of the Court of Appeal of England and Wales in *Straker*.

[11] Under that approach, the first question to be answered is whether a costs order is appropriate in the case at hand. I am persuaded by the submissions of Ms Finnegan that the answer must be one in the affirmative. To declare that one is so persuaded is, however, to say that one no longer considers that each party should bear its or his, as the case may be, own costs. Clearly, an explanation is in order. I begin that explanation with the twofold observation that, as already pointed out above, the substantive appeal was decided back on 29 April 2020 and that, as made clear in the reasons for judgment given on 3 December 2020 (at para 6, for whose key words see paragraph **[3]**, above), the sole determinative issue was that relating to the adequacy, or otherwise, of damages as a remedy for the appellants. Put in different language, the focus in reaching judgment as a matter of urgency on the evening of 29 April 2020 was on that particular issue. Continuing with my explanation, I come to the written argument of Miss Finnegan. That argument invites the Court to direct its attention to another aspect of the case. That is the aspect concerned with the conduct of the appellants in coming to the courts for relief. She does not omit to remind in issuing her invitation that, under the *Straker* approach, a court is entitled to have regard to such conduct. Her detailed description of that conduct, found at paras 14-16 of her written submissions, has been summarised by me at para **[9]**, above.

[12] The relevant passage of the judgment in *Straker* is at para 12, where Waller LJ spoke of the following as being, among others, pertinent circumstances:

> "whether a party has unreasonably pursued … an allegation or an issue"

and

> "the manner in which someone has pursued an allegation or an issue".

[13] In stressing the point that the appellant's approach to the courts, that below as well as this one, was characterised throughout by unreasonableness, Miss Finnegan pointed to the serving on the respondents on 7 April 2020 of the appellants' urgent notice of application dated 11 March 2020 concerning the alleged refusal to approve and/or issue import licences after 30 April 2020.

[14] Those circumstances to which Miss Finnegan pointed were plainly such as to require extremely quick responses not only from the respondents but also from this Court at a time when this country, together with the rest of the world was already being hit by, and reeling under, the COVID – 19 pandemic which continues raging on to this day. Indeed, this was the first matter which the Court was called upon to determine, and determine extremely urgently, during this pandemic. These circumstances need to be viewed against a background painted by the very appellants in setting out the grounds of their application ('the grounds'). As the respondents remind this Court at para 2 of their written submissions, the appellants themselves stated, in setting out the grounds, that the relevant agreement between the government of Belize and National Gas Company Limited was entered into as far back as 10 July 2018 and that the relevant legislation, viz the National Liquified Petroleum Gas Project Act was enacted as far back as 4 September 2019. The writing by the first respondent of letters dated 28 February 2020 to the appellants informing them of the intended discontinuance of the issue of import licences in respect of liquid petroleum gas (referred to by the appellants at item c in the grounds) was not a bolt out of the blue in any sense of that expression; and, thus, such letters cannot properly be viewed in isolation by this Court. The handwriting had long been on the wall. Discontinuance had always been only a matter of time. In my opinion, the respondents' important, even if not central, point that the appellants' approach to the courts was characterised throughout by unreasonableness is fully made out. It follows from this, in my respectful view, that a costs order is eminently appropriate here.

[15] For the avoidance of doubt, I would point out that, I have accepted the bulk, but certainly not the entirety, of the contentions of Miss Finnegan. I have not considered it necessary to reach conclusion on her contention relating to the suggested futility of the motion for an interim injunction, ie her contention that there was unreasonableness in

pressing for an injunction which, to the knowledge of the appellants, was destined to serve no useful purpose. I consider that the unreasonableness argument succeeds even if no regard is had to this particular narrow aspect of it. It is unreasonableness in relation to the aspect of sheer dilatoriness that, from my standpoint, carries the day.

[16] For myself, I see fit to note in passing at this point, not because it is a reason for reaching the conclusion just stated above but because it helps to create context, the fact that, even after having put the panel to the inconvenience and hardship of reaching, under the harsh conditions of the pandemic, a decision on the very night of the filing of all written submissions because of the crucial significance in the case of the date of the next day, ie 30 April 2020, counsel for the appellants was so bold as to require of the Court in writing that it produce its written reasons for judgment in a matter of a few days from the issue of its judgment by email. Counsel used as a pretext for her unreasonable demand the circumstance that the appellants might decide to file an appeal to the Caribbean Court of Justice. She was probably blissfully unaware of the fact that the Caribbean Court of Justice will not necessarily require to see this Court's reasons for decision before hearing an appeal. That Court properly (if I may so with respect) heard and determined an appeal from the decision handed down by this Court on 21 March 2017 in *R v Baptist*, *Meighan and Leslie*, Criminal Appeal (an application in fact) No 1 of 2015 before this Court could deliver its promised written reasons for judgment. In any event, as occurred in a later case, viz the decision of this Court in *R v Calaney Flowers*, Criminal Application No 2 of 2017, if the Caribbean Court of Justice, in its discretion, considers that it should see this Court's written reasons for judgment, it will not hesitate to direct that such reasons be produced by a specified date.

[17] Continuing to follow the *Straker* approach, I ask myself, secondly, what is the general rule in regard to the awarding of costs and note the ready answer, ie that that rule is that costs follow the event.

[18] Proceeding to the third step, I ask myself who were the successful parties in the pertinent appeal. The answer here is beyond dispute: the respondents were the successful parties.

[19] Which brings me to the fourth question, which is as to whether there are any reasons why, in the present case, costs should not be paid by the appellants to the respondents. The appellants did not trouble themselves to apply for a different order or to file submissions in respect of the application during the time period fixed by the Court on the night of 29 April 2020. Not even in their counsel's misconceived letter dated 8 December 2020 did they bother to specify any such reason. For my own part, I can think of none, having now considered the conduct of the respondents and having had the benefit of the written submissions of Miss Finnegan. Quite to the contrary, there is, in the light of those submissions, good reason for concluding that costs should, in fact, be paid by the appellants to the respondents. It is the reason already respectively identified and canvassed at paras **[9]** and **[13]-[14]**, above. As I did in *Espat*, I keep in mind at this stage of the present exercise that the governing statutory provisions are to be found in section 18 of the Act.

Disposition

[20] For the reasons set out above, I would grant the application of the respondents for their costs of the appeal, to be taxed if not agreed and I would order that the costs of the application be costs in the appeal.

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SIR MANUEL SOSA P

HAFIZ BERTRAM JA

[21] I had the opportunity of reading the draft ruling of the learned President and I concur in his reasons given to grant the application of the respondents for their costs of the appeal, to be taxed if not agreed. I also concur with the order that the costs of the application be costs in the appeal.

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HAFIZ BERTRAM JA

DUCILLE JA

[22] I have read, in draft, the ruling on costs of the learned President and concur in the reasons given, and the orders proposed, therein.

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DUCILLE JA