

IN THE COURT OF APPEAL OF BELIZE A.D. 2021

CIVIL APPEAL NO 18 of 2016

BETWEEN

CURTIS DALE SWASEY

APPELLANT/APPLICANT

And

BELIZE TELEMEDIA LIMITED
MMR BELIZE LIMITED

FIRST RESPONDENT
SECOND RESPONDENT

IN THE COURT OF APPEAL OF BELIZE A.D. 2021

CIVIL APPEAL NO. 19 of 2016

BETWEEN

BELIZE TELEMEDIA LIMITED

APPELLANT/RESPONDENT

And

CURTIS DALE SWASEY

RESPONDENT/APPLICANT

IN THE COURT OF APPEAL OF BELIZE A.D. 2021

CIVIL APPEAL NO. 33 OF 2016

BETWEEN

BELIZE TELEMEDIA LIMITED

APPELLANT/RESPONDENT

And

CURTIS DALE SWASEY

RESPONDENT/APPLICANT

BEFORE:

The Hon. Marguerite Woodstock-Riley
The Hon. Sandra Minott-Phillips
The Hon. Peter I Foster

Justice of Appeal
Justice of Appeal
Justice of Appeal

I. N. Swift for the applicant.

M. Balderamos-Mahler for the respondent.

5 April 2022 (On Submissions in Writing)

WOODSTOCK-RILEY JA

[1] I have read the draft decision of Foster JA. I concur.

WOODSTOCK-RILEY JA

MINOTT-PHILLIPS JA

[2] I have had the privilege of reading in draft the decision of my brother, Foster, JA. I agree with his decision and reasons and have nothing to add.

MINOTT-PHILLIPS JA

FOSTER JA

[3] The Applicant, Curtis Dale Swasey, “Swasey” applies to this Court for leave to appeal to the Caribbean Court of Justice “CCJ”. The application is made by virtue of Section 6 (a) of the Caribbean Court of Justice Act (CCJ Act), and Section 104 (1) (a) of the Belize Constitution.

[4] Section 6 of the Caribbean Court of Justice Act CAP. 92 provides that:

“An appeal shall lie to the court from final decisions of the Court of Appeal as of right, (a) in civil proceedings where the matter in dispute on appeal to the Court is

*of a value of not less than \$18,250 or where the appeal involves directly or indirectly a claim or question respecting property of a right of the aforesaid value.
.....”*

Section 104 (1) (a) of the Belize Constitution provides that:

“An appeal shall lie from the final decisions of the Court of Appeal to the Caribbean Court of Justice as of right in the following cases-

- (a) in civil proceedings where the matter in dispute on appeal to the Caribbean Court of Justice is of the value of not less than \$18,250 (or such other amount as may be prescribed by the National Assembly), or where the appeal involves directly or directly a claim or question respecting property or a right of the aforesaid value.”*

[5] On the 26 day of October 2020, the Court of Appeal allowed the appeals of the Respondent, Belize Telemedia Limited, “BTL” Nos. 19 of 2016 and 33 of 2016 and dismissed the appeal of the Applicant, Curtis Dale Swasey, No. 18 of 2016 “Swasey”. The Court in its judgment dated 11 June and 26 October 2020, set aside the order of the Supreme Court pronounced by the Honourable Mr. Justice Courtney A. Abel dated the 23rd day of February 2016 where he ordered that:

- “1. Belize Telemedia Limited pay to Curtis Dale Swasey damages assessed in the sum of \$25,000.00 for breach of contract and breach of confidence.
- 2. Belize Telemedia Limited and MMR Limited pay to Curtis Dale Swasey costs to be agreed or assessed by this Judge.”

[6] On the 9 day September 2016, a certificate of taxation was issued by Justice Abel in the Court below where he awarded agreed costs to Swasey to be paid by the Defendants in the sum of \$58,789.10.

[7] The application to this Court is resisted by BTL on the grounds that Swasey’s claim arises from a claim for unliquidated damages flowing from a breach of contract and breach of confidence. BTL argues that the preliminary issues in dispute, as well as the issues on appeal, have no monetary value, as the damages to be awarded are not predetermined by the contract the parties entered into, and therefore fail to meet the criteria or threshold set in section 104 (1) (a) of the Belize Constitution and section 6 (a) of the CCJ Act.

[8] BTL further argues that the procedure to be followed and as set out by rule 10.3 (2) of the CCJ Rules was not followed by Swasey. BTL contends that the application is inherently flawed as Swasey has not set out “*such facts as may be necessary in order to demonstrate that the applicant is entitled to appeal*”. Section 10.3 (2) of the CCJ Rules provides that

“(1) ...

(2) *An application to the court below for leave to appeal in cases in which the appeal is claimed to be as of right shall -*

(b) *state succinctly such facts as may be necessary in order to demonstrate that the applicant is entitled to appeal under the provision so identified;*

(c) *... ..*”

[9] BTL’s main argument on this issue is that Swasey “*has not properly established that the matter in dispute actually meets the threshold as set out under section 6(a) of the CCJ Act. There are no facts and/or circumstances set out within the application as to demonstrate the basis of the Applicant’s request for leave*”. BTL further contends that “*it is the common practice that applications, particularly those of this type are supported by facts by way of affidavit evidence*”. BTL argues that there is a lack of evidence to support the application which is therefore fatal. BTL states that there is “*no affidavit filed in support of the application that properly sets out the facts and circumstances that the Applicant*

believes would support the application other than the bland and singular assertion made in the application itself". It is submitted that the Applicant must make some attempt to set out the basis of his application and, in these circumstances, prove that the value of the matter in dispute has a value in excess of the statutory threshold". (para. 6 of the Respondent's speaking note).

[10] In my analysis of the matter before this Court, I have not found favour with the argument that the application offends section 10.3 (2) of the CCJ Rules. Whether or not it is a common practice that such applications are accompanied by affidavit evidence to this Court with the content as posited by BTL, the CCJ Rules do not impose that requirement. The section simply provides that in cases where the Applicant claims to have a right of appeal that:

- "(b) the 'application' ... shall state succinctly such facts as may be necessary in order to demonstrate that the applicant is entitled to appeal under the provision so identified; and*
- (c) be signed by the applicant or the applicant's attorney-at-law".*

There is no requirement that the 'application' must be supported by affidavit evidence over and above that necessary to demonstrate the entitlement to appeal (in this case) as of right. I cannot impose a rule where there is none.

[11] What is incumbent on Swasey, for the purposes of this application, is to establish in his application to appeal to the CCJ as of right, that:

- a. the decision of this court is final,
- b. the matter in dispute on appeal to the CCJ is of the value of not less than \$18,250,
- c. it is a civil matter.

Procedurally, and as it relates to this application, (rule 10.3 (2) (b) of the CCJ Rules) requires the applicant to “*state succinctly such facts as may be necessary in order to demonstrate that the applicant is entitled to appeal*” under section 104 (1) (a) of the Belize Constitution and section 6 (a) of the CCJ Act (being the relevant sections).

[12] There is no dispute that the matter before the Court of Appeal was a civil matter, was a final decision on the matter heard in the Supreme Court, and as Swasey contends, that the matter in dispute relates to an award of damages in the sum of \$25,000. The application clearly sets out, for the purposes of my deliberation, the facts seeking to establish Swasey’s claim to be entitled to appeal to the CCJ. BTL has simply stated that Swasey, in his application has not set out sufficient facts to establish the entitlement as of right to appeal to the CCJ. However, the application sets out the matter in dispute being a breach of contract and breach of confidence in which damages were awarded him in the Supreme Court in the sum of \$25,000. Swasey appealed to the Court of Appeal on the basis that “*the learned trial judge erred in law in failing to make an award for Restitutionary Damages; erred in law in failing to take into account the Appellants evidence as to his occupation and time spent on the project in assessing the damages to be awarded; and that he erred in assessing the damages awarded to the Claimant only on the basis of compensatory damages. The relief sought was the award of compensatory damages be varied and that the court substitute the award as it deems fit and just or remit the case to the Supreme Court for reassessment of damages*”. See para [6] of this Court’s judgment. Swasey therefore appealed on the basis that the award of \$25,000 was too low and ought to be varied or remitted to the Supreme Court for reassessment. BTL had appealed to the Court of Appeal on the basis that Swasey had in essence no cause of action and that the orders of the Supreme Court judge (including the agreed award of costs of \$58,789) be set aside. The Court allowed BTL’s appeal, dismissed Swasey’s appeal and set aside the costs awarded to him. It is not for this Court to examine the merits of the judgment as a prelude to determining whether to grant the application to appeal to the CCJ. From the evidence, although quite succinct, there is enough for me to determine whether Swasey has met the criteria set out in paragraph [9] above.

[13] I have considered the speaking notes of Swasey and BTL (both filed on the 8th October 2021 at which time they agreed to have this application determined on paper). I am thankful to learned counsel for their thorough submissions on the issues. BTL relied on the cases **Jacpot Ltd v Gambling Regulatory Authority [2018] UKPC 16**, **Sands, Controller of Bank Crozier Limited (In Liquidation) and Louison, Liquidator of Bank Crozier Limited Civil Appeal, Grenada 001 of 2007; (ECCO) Inc. v Mega-Plex Entertainment Corporation [2019] ECSCJ No. 253**. I would agree with counsel for Swasey that these authorities do not assist the Court as none of these cases concerned a matter in dispute of the requisite monetary amount. These authorities dealt with other issues as in **Sands**, concerning the existence of a right to indemnity; and in **ECCO** where the matter determined that the learned judge's order on the preliminary issue of standing to sue "was therefore an interlocutory order" not giving rise to an appeal as of right. At para 12 Justice of Appeal Webster stated

"The matter in dispute in the proposed appeal is ECCO's standing to sue Mega-Plex for breach of copyright. That does not have a monetary value and therefore would not meet the requirement of having a value of \$1,500 or more".

BTL relies on the dicta Webster JA [Ag] at para 13 where he stated

"ECCO's claim for monetary loss is unparticularized. It is a claim for unliquidated damages. If the Court of Appeal had found that ECCO had standing to sue, and that Mega-Plex was liable in damages, the case would have proceeded to an assessment of damages. The Privy Council has ruled in Zuliana and others v Veira (1994) 45 WLR 188 on appeal from this Court, that the statutory right to appeal to appeal under the equivalent provision of section 108 (1) of the Saint Lucia Constitution must be strictly construed and an application for leave to appeal against an award of unliquidated damages does not meet the monetary threshold in the section".

At para 14 Webster JA went on to state that

“In the circumstances I find that ECCO is not entitled to appeal to the Privy Council as of right. The decision being appealed is not a final decision and even if it were, the matter in dispute (ECCO’s standing to sue) does not have a monetary value and therefore does not satisfy the monetary threshold in section 108 (1) of the Constitution”.

[14] In ***Khouly Construction & Engineering Ltd v Edmund Mansoor ANUHCVAP2020/0023***, a judgment recently delivered in the Eastern Caribbean Supreme Court, and which considered whether the role of the Court of Appeal in applications to the Privy Council as of right impose a broader inquiry by the Court of Appeal by evaluating the merits of the proposed appeal in determining whether it raises a genuinely disputable issue. The Chief Justice Dame Janice Pereira at para [17] reiterated that:

*“... where an appeal lies as of right to the Privy Council under the Constitution, the Court of appeal has no discretion to impose any conditions fettering that right let alone engage in a merits evaluation of the proposed appeal, but the Court of Appeal does have a right to police such applications to ensure the appeal raises a genuinely disputable issue in the prescribed category of case-in short, that it is ‘not one which has merely been contrived for the purpose of obtaining leave to appeal to Her Majesty in Council as of right’. This in our view captures the essence of what is truly meant by the statement that the proposed appeal must raise ‘a genuinely disputable issue in the prescribed category of case’.
.....”*

At para [13] of that judgment Chief Justice Pereira stated:

*“To like effect is the decision of the Court of Appeal in ***Aleceo Zuliani and Ors v Vernon S. Veira*** in which it was held, in relation to an application to appeal to the Privy Council pursuant to section 99(1)(a) of the Constitution of Saint Kitts and Nevis (in similar terms to section 122(1)(a) of Antigua and Barbuda) and in reliance on two Privy Council decisions namely ***Allan Pratt and Meghji Lakamski &****

Brothers v Furniture Workshop, that the amount of the judgment or liability thereunder not having yet been determined, it could not:

‘... be asserted with certitude that the value of the matter in dispute on appeal – ‘looked at from the point of view of the appellants’ –is of the prescribed value to render the appellate judgment appealable by the applicants under section 19 (99 sic) (1) of the Constitution of Saint Christopher and Nevis’.

...”

In **Zuliani** the award although granted and remained to be assessed, had not yet been determined.

[15] However, in this application, an award had been determined by the Supreme Court in the sum of \$25,000. The Court of Appeal set it aside. In **Maghji Lakhamshi & Brother v Furniture Workshop**, Lord Tucker at page 274 letter D stated,

*“... . It was laid down by this Board in **Macfarlan v. Leclaire** ... ‘ (1) that ‘the value of the subject matter in dispute’, under corresponding legislation relating to Canadian appeals, must be determined by looking at the judgment as it affects the interests of the party who is prejudiced by it and who seeks to appeal. The same test was applied in **Allan v Pratt** ... (2) to a case of an appeal from a judgment awarding damage for personal injuries, it being held that **the value was the sum awarded and not the sum claimed.**” (our emphasis).*

In this case there was a sum awarded of \$25,000 and that sum exceeds the threshold provided in the Belize Constitution and the CCJ Act. The matter in dispute before this Court was therefore the award of \$25,000 by the court of first instance, whether it was proper and, if so, whether it was a sufficient award, and the costs arising from that award in the sum of \$58,789.10. The Court of Appeal dismissed the appeal by Swasey, but it remains a live issue before the court of final appeal as to whether the court’s allowing of

BTL's appeals and its dismissal of Swasey's appeal, the setting aside of his award of damages in the sum of \$25,000 and the consequent award to him of costs, was correct. The CCJ will make this determination.

[16] I have found that Swasey has met the requisite criteria inclusive of the matter in dispute which is of a value of not less than \$18,250.

[17] Accordingly, leave to appeal as of right pursuant to section 6(a) of the Belize Caribbean Court of Justice Act and section 104 (1) (a) of the Constitution is granted on condition that-

- a. The Applicant within a period not exceeding ninety (90) days provide security for costs which the Applicant may become liable or be ordered to pay in an amount not exceeding that specified in Schedule 5 of the Caribbean Court of Justice (Appellate Jurisdiction) Rules, 2019; and
- b. The Applicant provide to the proper officer within a period not exceeding ninety (90) days a list of the documents which he proposes should be included in the record of appeal.

[18] Costs of this Application are to be costs in the appeal to the Caribbean Court of Justice.

[19] The Applicant is to prepare and submit a draft of this order.

FOSTER JA