

IN THE COURT OF APPEAL OF BELIZE AD 2023

CIVIL APPLICATION No 2 of 2022

STAKEBANK ENTERPRISE LIMITED

Applicant

v

**THE ATTORNEY GENERAL
NATIONAL ENVIRONMENTAL APPRAISAL COMMITTEE
DEPARTMENT OF THE ENVIRONMENT**

Respondents

**PORTICO ENTERPRISES LIMITED
WATERLOO INVESTMENT HOLDINGS LIMITED
BELIZE CRUISE DEVELOPMENT LIMITED
BELIZE LOGISTICS TERMINAL LIMITED**

Interested Parties

BEFORE:

The Hon Madam Justice Hafiz-Bertram	-	President
The Hon Madam Justice Minott-Phillips	-	Justice of Appeal
The Hon Mr. Justice Foster	-	Justice of Appeal

William Lindo and Kia Marie Diaz-Tillett instructed by Glenn Godfrey & Co for the applicant.

Samatha Matute Tucker, Assistant Solicitor General, for the respondents.

David Morales for the 1st Interested Party

Hector Guerra of Marine Parade Chambers for the 2nd to 4th Interested Parties

Hearing: 17th October 2022

Date of promulgation/handing down: 24 February 2023

REASONS FOR DECISION

HAFIZ- BERTRAM, P

[1] I had the opportunity of reading in draft the reasons for decision of the Court made on 17 October 2022, prepared by my learned brother Justice Foster, and I agree with him.

HAFIZ-BERTRAM, P

MINOTT-PHILLIPS, JA

[2] I too had the opportunity of reading in draft the reasons for decision of the Court made on 17 October 2022, prepared by my learned brother Justice Foster, and agree with him.

MINOTT-PHILLIPS, JA

FOSTER JA

[3] This matter came up before us on the 17th of October 2022. At the conclusion of the hearing of an application for leave to appeal, the Court “(i) granted leave to the Applicant to appeal, (ii) ordered that the Applicant file its notice of appeal within 21 days of the date of the order, and (iii) ordered the cost of the motion for leave be the cost in the Appeal. We now give the reasons.

[4] This Application for Leave to Appeal arises from the Order of the Supreme Court dated 03 March 2022 and entered on 18 March 2022 where the Learned Judge struck

out the Fixed Date Claim for Judicial Review for failing to make the claim within 14 days in accordance with the Order granting permission to the file the claim.

[5] The Applicant filed an Application for Leave to Appeal before the Learned Judge on 05 April 2022 and by Order made on 30 May 2022, leave was refused on the ground that there was no real prospect of success on an appeal. The Applicant now applies for leave to the Court of Appeal in accordance with section 14(3)(b) of the Court of Appeal Act and Rule 2 of Order II of the Court of Appeal Rules.

[6] The test for the grant of leave is settled in Belize¹. The Applicant must satisfy the Court that its appeal has a real prospect of success. Case law establishes that the court will grant leave in the following categories of cases:

- a. Where they see a prima facie case that an error has been made;
- b. Where the question is one of general principle, decided for the first time; and
- c. Where the decision is one of importance upon which further argument and a decision of the Court of Appeal would be to the public advantage.

Background facts

[7] On 26 July 2021, the Applicant was granted leave to file a claim for Judicial Review in respect of certain grounds within 14 days of the date of the Order after an *inter partes* hearing. The Court also gave directions for certain disclosures, the filing of replies and scheduled a date for the hearing of the claim. The Fixed Date Claim and Supporting documents would have been due for filing on 10 August 2021. On 09 August 2021 at 4:49 pm, the Applicant uploaded the Fixed Date Claim Form and supporting Affidavits for filing

¹ Belize Telemedia Ltd. v Attorney General et al, Civil Appeal No. 23 of 2008; Karina Enterprises Limited v China Tobacco Zhejiang Industrial Co Ltd et al Civil Appeal No []; (Madam Registrar to put number of application).

on the Court's electronic filing system. The Applicant further issued an undertaking to the Court for the payment of the requisite fees. The Applicant received emails confirming the successful upload of documents and in relation to one document, confirmation was given that it was submitted. The "submitted" document was "not accepted" by the filing system as the file was too large. The Fixed Date Claim having been too large was resubmitted on 13 August 2021 and accepted by the Court.

[8] The Defendants all responded to the Fixed Date Claim in November 2021 and on 13 January 2021 applied to strike out the claim on the grounds that it was not filed within the 14-day period ordered by the Court.

[9] The Learned Judge struck out the claim on the grounds that:

- (a) A document is filed in the E-Filing Portal of the Registry once it has been uploaded, the undertaking accepted on the Apex System and returns a notification on the document, bearing its date stamp and the claim consequently was not filed within the 14 day period;
- (b) The Court has no jurisdiction to extend the time for the filing of the claim.

[10] The Applicant contends that it has a reasonable prospect of success on the appeal and there is a *prima facie* case that the Learned Judge erred in her decision by:

- (a) Failing to appreciate the distinction between the process of a party *filing* a document in accordance with the CPR as opposed to the Court Office *issuing* the document;
- (b) Treating Practice Direction No. 1 of 2021 as an implied repeal of Rule 3.7 of the CPR;
- (c) Falling into error by relying exclusively on Practice Direction No. 1 of 2021

and in particular, interpreting the meaning and import of the word 'file';

- (d) Failing to treat with the issue that the Defendants/Respondents filing a complete defence to the claim herein effectively waived their right to any objection of irregularity;
- (e) Interpreting Part 56 of the CPR as having circumscribed the Court's general powers of case management as cumulatively provided for by Part 26 of the CPR;
- (f) Failed to resolve the conflict of evidence by Ronald Arias and Giovanni Tillett by ordering cross-examination of both affiants;
- (g) Concluding that the permission granted to the Applicant to make an application for judicial review was conditional, although the perfected Order approved by the learned judge was unconditional and made provision for the parties to apply to the Court in respect of the timelines set out in the order granting leave to apply for judicial review.

[11] The Applicant also contends that the appeal will involve questions of significant importance to be decided for the first time as it relates to the meaning of '*filing*' within the meaning of the Belize Supreme Court (Civil Procedure) Rules, 2005 read along with Practice Direction No. 1 of 2021 which seeks to conflate *filing* by a party with the Court Office *issuing* the said document and the issues arising on the appeal are of importance to the public and the development of the law.

Discussion

[12] The first and primary ground for consideration by this court is whether there is a real prospect of success on an appeal and whether there is a prima facie case that an error has been made. This first requires an examination of the rules and practice direction providing for the filing of documents.

[13] CPR 3.7 provides that

“(1) A document may be filed by-

- (a) delivering it;
- (b) posting it; or
- (c) sending it by FAX;

to the court office where the claim is proceeding or intended to proceed.

(2) *The document is filed on the day when it is received at the court office or, where it is received at a time when the court office is closed, on the next day on which the court office is open.*

(3) *Where a fee is to be paid the document is not to be treated as filed until-*

- (a) *the fee is paid; or*
- (b) *an undertaking to pay the fee acceptable to the Registrar is received.”*

[14] Further to the implementation of electronic filing in Belize, the Honourable Chief Justice issued **Practice Direction No. 1 of 2021** which at **paragraph 7** provides:

“7. *Time for filing*

(1) *A document filed by electronic means shall be deemed to be filed within the meaning of the CPR at the date and time when the following requirements are satisfied:*

- (a) *The document is submitted by electronic means and received by the Court Office;*
- (b) *The filing fee (where applicable) is received by the Court office; and*

(c) *A copy of the submitted document bearing the stamp (and where applicable the seal) of the Court is transmitted to the filing party”.*

[15] I agree with Counsel for the Applicant that the Practice Direction appears to change the provisions for the filing of a document under **CPR 3.7**. **CPR 3.7** provides for a document to be deemed filed on delivery of a document for filing at the court office by various means. However, the Practice Direction provides for a document to be deemed filed upon some action being undertaken by the Court Office that is accepting the document, affixing the stamp and transmission of the document to the filing party. The Practice Document requires issuance of the document by the Court Office and this is a derogation from the **CPR 3.7** which only provided for some action by the filing party.

[16] It is understood that with electronic filing, the submission of a document, issuance of the stamping and transmission to the filing party is almost instantaneous if undertaken properly and if there are no errors recorded by the system. However, there are various reasons on which a document might not be accepted by an electronic filing system on being uploaded or ‘delivery’ to the Court Office, such as occurred in this case. The document, whilst recorded as ‘submitted’ was ‘not accepted’ because it was too large. An electronic filing system could also undergo errors in processing and not issue the filed document. A filing party should not be prejudiced by some error in the filing system or failure of the court office or an instant response regarding an error in the ‘filing’ of a document.

[17] **CPR 3.6(2)(b)** provides that the “*Chief Justice may by practice direction prescribe the conditions under which documents may be served or filed electronically*”. The Practice Direction is therefore delegated legislation which the Chief Justice is fully empowered to issue under the Rules of Court. The Rules of Court are however made pursuant to **Section 95 of the Supreme Court of Judicature Act Cap 91 of the Revised Laws of Belize**, have the force of law, and override the Practice Direction in the event of an inconsistency with the Rule. The Practice Direction therefore cannot alter Rules of

Court and can only provide for the specific procedure within the limits and in accordance with the power granted under the Rule.

[18] This difference between Practice Directions and Rules of Court and the powers thereunder was summarised by Hale LJ in **Re C (Legal Aid: Preparation of Bill of Costs) [2000] EWCA J1220 23 at para 21 to 23:-**

- “21. *Unlike the Lord Chancellor's orders under his 'Henry VIII' powers, the Civil Procedure Rules 1998 themselves and the 1991 Remuneration Regulations, the practice directions are not made by statutory instrument. They are not laid before Parliament or subject to either the negative or positive resolution procedures in Parliament. They go through no democratic process at all, although if approved by the Lord Chancellor he will bear ministerial responsibility for them to Parliament. But there is a difference in principle between delegated legislation which may be scrutinised by Parliament and ministerial executive action. There is no ministerial responsibility for practice directions made for the Supreme Court by the Heads of Division. As Professor Jolowicz says [2000] CLJ 53, 61, 'It is right that the court should retain its power to regulate its own procedure within the limits set by statutory rules, and to fill in gaps left by those rules; it is wrong that it should have power actually to legislate'.*
22. *Mr Burrows relies upon the definition given to 'subordinate legislation' in the Interpretation Act 1978, section 21(1):*
23. *This is to confuse the fact that an instrument may fall within the definition of subordinate legislation because it is 'made under' an Act of Parliament with what that Act of Parliament allows it to do. Indeed insofar as the practice directions apply to the Supreme Court, they are probably not 'made under' any Act at all: the fact that the CPR 'may refer' to them does not mean that they are 'made under' the*

1997 Act. In any event, there is nothing in section 74A of the County Courts Act 1984 or in the Civil Procedure Act 1997 to confer power upon those making practice directions to revoke or amend rules or regulations made by statutory instrument. Indeed such powers are not expressly conferred on the rule making body. The rules must be confined to the purposes for which the power to make them is granted. The only express power to revoke or amend other legislation in consequence of the CPR is that given to the Lord Chancellor by section 4 of the Act.”

[19] The Practice Direction issued pursuant to **CPR 3.6** was limited to prescribing the conditions under which documents could be served and filed electronically. In my view, the Practice Direction prescribed those conditions but may have gone a step too far in altering the Rules of Court which provided that documents would be deemed filed on delivery to the court office. The evidence before the Court shows that the documents were submitted to the Court.

[20] I am therefore of the view that the Applicant has a real prospect of success on grounds **a** and **b** of its prospective appeal (set out in numbered paragraph 10 of these reasons) having submitted the documents for filing on the electronic filing system; and the Practice Direction in so far as it required a copy of the submitted document to be transmitted to the filing party may be *ultra vires* the Rule 3.7.

[21] Consequently, I am of the view that the Applicant has established that there is a *prima facie* case that an error was made by the Learned Judge in striking out the Fixed Date Claim.

Conclusion

[22] Having concluded the Appellant's proposed appeal has a real prospect of success on the above basis, we did not find it necessary for the purpose of this application to also consider grounds **c – g** of the Applicant's proposed grounds of appeal.

[23] For these reasons, the Court:

- a. Granted the Application for leave to appeal the Order of the Supreme Court made on 03 March 2022 and entered on 18 March 2022;
- b. Ordered that the Applicant shall file its Notice of Appeal within 21 days of the date of our Order made on the 17th of October 2022; and
- c. Ordered costs of the Application for leave to appeal to be costs in the Appeal.

FOSTER JA