

IN THE COURT OF APPEAL OF BELIZE, A.D. 2023

CIVIL APPLICATION No. 2 of 2021

THE ATTORNEY GENERAL OF BELIZE

**THE MINISTER OF AGRICULTURE, FISHERIES, FORESTRY, THE
ENVIRONMENT AND SUSTAINABLE DEVELOPMENT**

**THE MINISTER OF WORKS, TRANSPORT AND NATIONAL
EMERGENCY MANAGEMENT ORGANISATION**

INTENDED APPLICANTS

AND

**JOSE ICAL on his own behalf and on behalf of the Maya Village of Jalacte
ESTEVAN CAAL**

INTENDED RESPONDENTS

BEFORE

The Hon Mr. Justice Peter Foster

-

Justice of Appeal

Ms. Iliana Swift for the intended applicants.

Ms. Leslie Mendez along with Allister Jenkins for the intended respondents.

Hearing: 24 March 2022

Date of promulgation/handing down: 4 April 2023

DECISION

Introduction

[1] On 17 August 2021, the Applicants filed a Summons for an Extension of Time to appeal the Order of the Supreme Court made on 16 June 2021 and entered on 19 July 2021. At the date of filing, section 16 (1) of the Court of Appeal Act provided as follow:

“(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 sub-sections (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.”

[2] On 15 September 2021, almost one month after the filing of the Application, section 16 (3) of the Court of Appeal Act was amended by the Court of Appeal (Amendment) (No. 3) Act, 2021 to provide as follows:

“(3) The Court may, subject to such terms and conditions as it thinks fit, enlarge the time limits mentioned in sub-sections (1) and (2) or any provision that imposes a time limit herein, upon such terms as the justice of the case may require, and any such enlargement may be ordered although the application for the enlargement of time is not made until after the expiration of the time appointed or allowed under subsections (1) or (2), or the Court may direct departure from this in any another way where this is required in the interests of justice.”

[3] Prior to 15 September 2021, to extend the time for filing a Notice of Appeal, an applicant would have to satisfy the Court that he has been unavoidably prevented doing so. This new amendment allows the Court to extend time upon such terms as the justice of the case may require and where this is required in the interests of justice.

[4] The Respondents contend that the Government of Belize, the Applicants, seeking the extension, passed the amendment and that such an amendment was not applicable as it was not stated to be retroactive. The Applicants on the other hand contend that the amendment has a prospective effect and applicable to any matter heard after the amendment was enacted. The test for determination of this Application will consequently turn on this preliminary issue.

The law applicable to the Application

[5] The rule in relation to retrospective legislation is well established. In **Gany Holdings (PTC) SA and another v Zorin Sachak Khanand others [2020] ECSC No. 105** (delivered 30 March 2020) a case out of the Court of Appeal of the Eastern Caribbean Supreme Court, Michel JA, and relied on by the Respondents succinctly set out the principles applicable to the retrospective application of legislation.

[31] “At common law, there is a well-established presumption against the retrospective operation of legislation. The presumption is summarised by the authors of Maxwell on the Interpretation of Statutes, as follows:

‘it is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.’

The overarching policy underpinning the presumption in this area was simply expressed by Lord Mustill in L'Office Cherifien des Phosphates and Unitramp S.A v Yamashita-Shinnihon Steamship Co Ltd, as 'no more than simple fairness'. In more practical terms, Bennion on Statutory Interpretation states the policy on the presumption as follows:

'[t]he essential idea of a legal system is that current law should govern current activities. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it.'"

[6] This presumption is also qualified by the Privy Council in **Yew Bon Tew Alias Yong Boon Tiew and Another v Kenderaan Bas Mara (P.C.) [1983] 1 AC 553** to state that the proper approach in determining whether legislation is retrospective is to consider whether the legislation would, if applied retrospectively, impair existing rights and obligations. In essence, legislation is not to be interpreted retrospectively so as to impair an existing right or obligation unless unavoidable on the language of the legislation.

[7] Using this construction of interpretation, the presumption against retrospective legislation would not apply in relation to procedural legislation or amendments as no person has a vested right in the procedure previously applied or to be applied by the court in determining their matter.

[8] In **Ydun [1899] P. 236 A.L.**, Smith LJ put it quite clearly:

The rule applicable to cases of this sort is well stated by Wilde B. in Wright v. Hale, namely, that when a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. But where the enactment deals with procedure only, unless the contrary is expressed, the enactment

applies to all actions, whether commenced before or after the passing of the Act. The Act of 1893 is an Act dealing with procedure only.”

[9] This position has also been applied by the Court of Appeal in ***Braithwaite and Tait v The State TT 2009 CA 42*** (Unreported) where the court took the firm view that “*the presumption against retrospective construction has no application to enactments which affect only the procedure or practice of the Courts*”.

[10] There is no doubt that the amendment to section 16 (3) of the Court of Appeal Act provide a wider test for determination of applications for extension of time is procedural and does not impair existing rights and obligations of either party to these proceedings. The right of the Applicants to apply for an extension of time to appeal is not affected, only the procedure used to assert that right. The amendment would therefore apply to the Application regardless of whether the Application was filed prior to the amendment and would therefore apply prospectively. Indeed, it would therefore be wholly unsatisfactory for this court to apply a procedural test other than that in effect at the date of hearing of the application and particularly when the earlier test would have been more restrictive, warranting amendment by the Parliament.

[11] The Respondents rely on the Federal Court of Appeal of Canada case of ***Incremona-Salerno Marmi Affini Siciliana s.n.c. v Castor [2003] 3 F.C. 220*** in support of their contention that the amendment would not be given retrospective effect in procedural applications. In this particular case, the court was of the view that the amendment was substantial and not procedural and found that even if the change in the law was procedural, it would apply prospectively and not have retroactive effect on the institution of proceedings. The respondent in this particular case was seeking to rely on an amendment to the law that conferred jurisdiction to bring proceedings in Canada. The court said at paragraph 21:

“[21] Thus, procedural statutes, from the time of their coming into force, apply to regulate future procedural steps. They are given an

immediate and general effect, but they are not given retroactive effect. In the present matter, what the respondents seek is to apply subsection 46(1) to a stage of proceedings, namely the institution of their action against the defendants, that was completed before the subsection came into force. Thus, as I have already indicated, for subsection 46(1) to apply herein, it must apply retroactively.”

[12] I am of the view that the amendment to s16(3) of the Court of Appeal (Amendment) (No. 3) Act, 2021 applies to the Applicants’ Application for extension of time to appeal. I will now go on to consider whether it is in the interests of justice to grant the application.

Test for Extension of time

[13] S16(3) of the Court of Appeal (Amendment) (No. 3) Act, 2021 does not set out the factors to be considered by the Court in determining whether it was in the interest of justice to grant an extension of time. This Court has in *AG of Belize Minister of Natural Resources v Villanueva, Civil Appeal No. 5 of 2021* (delivered on 22 June 2022) settled on the factors consistent with the principles applied by the Courts of Appeal in the Region and the Caribbean Court of Justice:

- (i) *the length of delay;*
- (ii) *reasons for delay;*
- (iii) *the prospects of success on an appeal; and*
- (iv) *the degree of prejudice to the parties.*

Length of the delay

[14] The delay under consideration in this Application is 8 days and 3 days. The Notice of Appeal was due for filing on 10 August 2021 and the evidence from the Applicants is that the Court Order came to their attention on 15 August 2021 and the extension applied for on the 17 August 2021. The delay is not inordinate.

Reasons for the delay

[15] In considering the reasons for the delay, the court is expected to consider whether the delay was excusable or whether there is a good explanation. The Applicants reasons for delay are:

- (i) The perfected order of the court was served on the Officers of the Attorney General on 20 July 2021 having been entered on the 19 July 2021. Contrary to the Procedural Guidelines for Legal Assistants in place at the Attorney General's Ministry, the order was not immediately brought to the attention of the Assistant Solicitor General who had custody of the matter or any Crown Counsel's attention.
- (ii) On 14 August 2021, the Assistant Solicitor General was informed that the Order had been perfected and served on the Office of the Attorney General. On review of the files, it was noted that the Order had indeed been received and filed contrary to the Procedural Guidelines for Legal Assistants.
- (iii) The Application to the court for an extension was filed 4 days after the Order was discovered.

[16] The Respondents contend that this is not a good or substantial reason for the delay as the explanation reveals mere administrative error or inefficiency as the delay. I find some difficulty with the Respondents' contention as it must be accepted that we as people are not infallible and in law offices, there is always a possibility that administrative errors would arise which would at times cause some delay. The Applicants' evidence shows that there are Procedural Guidelines in place to ensure Orders are brought to the attention of specific individuals and this is a case where that procedure was not followed. The Respondents' submission does not demonstrate any inefficiency in the procedure or an intention to flagrantly disregard the rules of court in relation to the appeal. As I have stated before, the delay was not inordinate. If it was, then the Applicants reasons would not have passed this test.

[17] I agree with the Respondents that there is a duty on counsel to follow up the status of orders and make inquiries, particularly if there is an intention to appeal. However, this does not attribute any fault on the Applicants for missing a deadline which accrues within a specific period after the Order was perfected.

[18] I am of the view that a good and substantial reason has been provided by the Applicants.

Prospects of Success

[19] The Applicants have to show that they have a good prospect of success on the appeal and it is not hopeless and without merit. The Applicants have submitted 16 intended grounds of appeal which raise significant questions of law and fact particularly with the findings of the Learned Chief Justice that the land in issue is Customary Mayan Land and not National Land within the meaning of the National Lands Act and used and occupied by the Maya village of Jalacte in accordance with Maya customary land tenure and in violation of Orders of the Caribbean Court of Justice and the reasoning of these orders in making a substantial award of damages. It is not for this court to make any determinations on the appeal at this time.

However, I am of the view from a review of the grounds of appeal and the decision of the Learned Chief Justice that the Applicants have a good prospect of success on the appeal.

Degree of Prejudice

[20] The Applicants contend that they have a high chance of success on the appeal and given the high financial value of the claim, it would be disproportionate and prejudicial to deprive the Applicants of their right to an appeal because of an administrative lapse.

[21] The Respondents contend that an extension of time will only result in undue and unnecessary litigation and they have already experienced a significant delay in the proceedings having waited five years for a resolution of the matter. The Respondents were under the impression that the litigation had ended when the Notice of Appeal was not filed within the prescribed time and contend that the Applicants should not be allowed to change the rules of procedure after its non-compliance with the rules.

[22] It is clear that there would be prejudice either way this Application is determined. However, after finding that the delay was short and there was a reasonable excuse and good explanation for the delay, and that there is a good prospect of success on appeal, I am of the view that the Applicants would face greater prejudice by being deprived of the right of appeal.

Conclusion

[23] For the reasons given above, I make the following order:

1. The Applicants are granted an extension of time, within two weeks of the promulgation of this decision, to file the Notice of Appeal of the

Order of the Hon. Chief Justice (Ag) Michelle Arana made on 16 June 2021 and perfected on 19 July 2021;

2. Costs shall be costs in the appeal.

PETER FOSTER, JA