

**IN THE COURT OF APPEAL OF BELIZE A.D. 2023**  
**CIVIL APPLICATION NO. 3 OF 2022**

**FRESH WATER CREEK FARMS LIMITED**

**APPLICANT**

**AND**

**SILK GRASS FARMS LIMITED**

**RESPONDENT**

BEFORE

The Hon Madam Justice Hafiz-Bertram	-	President
The Hon Madam Justice Woodstock-Riley	-	Justice of Appeal
The Hon Mr Justice Bulkan	-	Justice of Appeal

Mr. Allister Jenkins for the applicant.

Mr. Andrew Marshalleck SC along with Jaraad Ysaguirre for the respondent.

Date of hearing: 8 March 2023

Date of promulgation: 14 April 2023

**REASONS FOR DECISION**

**HAFIZ BERTRAM, P**

**Introduction**

[1] Fresh Water Creek Farms Limited ('Fresh Water') made an application for leave to appeal to this Court, an interlocutory decision of Shoman J, ('the judge below') dated 17 February, 2022. That decision was in relation to an Agreement for Sale between Fresh Water and Fruit Processor Limited ('The Postema Contract') for 121 acres of land ('the property') which the trial judge found is *void ab initio* because it runs contrary to the provision of the **Land Utilization Act**, Cap 188 ('the Act') (amended by the Land Utilization (Amendment) Act, 2021) and consequently is not one which may be specifically enforced, nor can it confer

an equitable interest to Fresh Water who had paid part of the purchase price and took possession of the property.

[2] The interlocutory decision was in favour of the Respondent, Silk Grass Farms Limited ('Silk Grass') which brought an action against Fresh Water for Trespass and possession of the property which they (Silk Grass) purchased from Citrus & Cattle Limited, Fruit Processors Limited and Clarisse Pollack. Silk Grass had made an application to the court below to determine a preliminary issue and the trial judge ordered the trial of same which was decided in its favour.

[3] Fresh Water sought leave to appeal the decision of the judge below and that application was refused. A fresh application was made to this Court for leave to appeal the decision. This Court heard the application for leave by Fresh Water on 8 March 2023, which was granted. We promised to give reasons and do so now.

#### **The Application for leave to this Court**

[4] Fresh Water in its application dated 5 July 2022 sought (a) An Order granting leave to appeal against the decision of the judge below; (b) For the decision of the judge below and the trial of the Claim be stayed until this Court determines the matter; and (c) Costs to be determined upon the outcome of the appeal.

[5] The grounds of the application by Fresh Water were:

1. Silkgrass in Claim No. 75 of 2021 sought a declaration that Fresh Water is not entitled to enter upon and remain in possession of some 121 acres of land which Silkgrass asserts is its property.
2. Fresh Water asserts in its defence that it has an interest in and is the owner of the 121 acres of land pursuant to the Postema Contract by which it agreed to purchase subject to subdivision approval being obtained.
3. Upon an application by Silkgrass to determine a preliminary issue and by Order dated 2 July 2021, the judge below ordered a trial of the following preliminary issue:

*“Whether the Postema Contract confers an equitable interest in the Lots, 121 acres, from the Property (as described in the schedule below to the Defendant?”*

4. By Order dated 17 February 2022, and perfected on 23 March 2022, the judge below ruled that:

*“The Postema Contract is void ab initio because it runs contrary to the provision of the Land Utilization Act; and consequently is not one which may be specifically enforced, nor can it confer an equitable interest in the disputed 121 acres to the Defendant.”* (Fresh Water).

[6] Fresh Water in its application to this Court stated that the judge below made a *prima facie error* in fact and law in that:

- (1) The judge below failed to find as a fact, as established by the evidence, that the 121 acres abuts Fresh Water land, and that therefore, subdivision approval was not necessary for the sale of 121 acres to the Applicant pursuant to section 18(a) of the Act;
- (2) The judge below erred in finding that the Postema Contract is void ab initio for running contrary to the provisions of the Act as it does not expressly provide that an agreement for sale of land in breach of the provisions of the Act is void and unenforceable. The failure to comply with the Act amounts to an offence, and the intended consequence for such a breach is a fine, not to render such an agreement for sale of land, such as the Postema Contract, void and unenforceable;
- (3) The judge below erred in law in finding that as a result of the breach of the Act, the Postema Contract could not be specifically enforced and so could not create an equitable interests in the disputed 121 acres, when this was not the intended consequence for such a breach; and
- (4) The Postema Contract was therefore capable of conferring a beneficial interests

in the 121 acres to Fresh Water as Silkgrass acknowledged the Postema contract and Fresh Water's beneficial interest and the Deed of Conveyance to Silk Grass expressly referred to same.

[7] Fresh Water states that there are grounds of appeal with real prospect of success. That the issues to be raised in relation to the interpretation of the Act and its application to agreements for sale of land which are in breach of the said Act are of general importance for which a further decision by the Court of Appeal would be to the public advantage. Therefore, leave to appeal the order of the trial judge ought to be granted. Further, it is just that a stay of the trial be granted until the determination of the appeal.

[8] The Application for leave to appeal was supported by the Affidavit of John Postema sworn on 5 July 2022. Mr. Postema exhibited a Draft Notice of Appeal.

#### **Decision of the trial judge**

[9] At paragraphs 28 and 29 of the decision of the judge below she said:

*“When there is a conflict between law and equity, it is the law that prevails. Equity can only supplement the law - it cannot supplant the law. Section 7 of the Land Utilization Act clearly prohibits the sale, lease, gift or any manner of alienation of the land to be subdivided until final subdivision approval is obtained.*

*The Postema Contract is void ab initio because it runs contrary to the provisions of the Land Utilization Act; and consequently is not one which may be specifically enforced, nor can it confer an equitable interest in the disputed 121 acres to the Defendant.”*

#### **Test for the grant of leave**

[10] The test for the grant of leave and the additional criteria for interlocutory matters are well established. In Prime *Minister & Minister of Finance v Vellos, Civil Appeal No. 11 of 2008 (unreported) dated 14 March 2008*, this Court approved *James Wang v Atlantic Insurance Co. Ltd., Action No. 114 of 1998*, where the Supreme Court of Belize considered the issue of leave to appeal to the Court of Appeal. Carey JA in the *Vellos* case said that the

**Wang** case sets out the circumstances in which such leave would be granted and that view had never been doubted or called into question. In the **Wang's** case, a judgment of Sosa J, (as he was then), the court adopted the circumstances in which the Court of Appeal in England would grant such leave. Sosa J stated that, "... *"Circumstances in which leave will be granted, appearing in The Supreme Court Practice 1991, Volume 1, page 964, at paragraph 59/14/7, leave will be granted by the English Court of Appeal in three categories of case, viz.:*

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

[11] Further, In ***Practice Note (Court of Appeal: procedure) [1999] 1 All ER 186***, Lord Woolf MR set out the practice in relation to applications for leave to appeal. At paragraph 10 of the Directions, page 187, he states:

*"... The general rule applied by the Court of Appeal, and thus the relevant basis for first instance courts deciding whether to grant leave, is that leave will be given unless an appeal would have no realistic prospect of success. A fanciful prospect is insufficient. Leave may also be given in exceptional circumstances even though the case has no real prospect of success if there is an issue which, in the public interest, should be examined by the Court. Examples are where a case raises questions of great public interest or questions of general policy."*

[12] At paragraph 17, Lord Woolf MR stated the practice for appeals from interlocutory orders:

*"An interlocutory order is an order which does not entirely determine the proceedings ... Where the application is for leave to appeal from an interlocutory order, additional*

*considerations arise: (a) the point may not be of sufficient significance to justify the costs of an appeal; (b) the procedural consequences of an appeal (eg. loss of the trial date) may outweigh the significance of the interlocutory issue; (c) it may be more convenient to determine the point at or after the trial. In all such cases leave to appeal should be refused.”*

[13] In *Belize Telemedia Ltd. v Attorney General et al, Civil Appeal No. 23 of 2008*, this Court accepted those additional considerations stated by Lord Woolf MR which applied to interlocutory appeals and adopted the above **Practice Note**. See also *Karina Enterprises Limited v China Tobacco Zhejiang Industrial Co. Ltd. et al*, a decision of this Court dated 7 November 2014.

[14] Therefore, in order to obtain leave to appeal, the applicant had to (i) satisfy the court that it had a real prospect of success as stated by Lord Woolf MR; (ii) satisfy the court on either one or more of the three categories, as stated at paragraph 10 above; (iii) Additionally, since this was an interlocutory matter, the applicant had to satisfy the court that none of the additional considerations arose as stated by Lord Woolf MR at paragraph 8 above.

**Whether a prima facie error had been made by the judge below**

[15] The trial judge found that the Postema Contract is *void ab initio* because it runs contrary to the provisions of the Land Utilization Act. As a consequence, she found that it is not one which may be specifically enforced, nor can it confer an equitable interest in the disputed 121 acres to the Defendant. The provisions relied on by the judge below in making the determination were sections 7 and 14 of the Act which provide as follows:

“7. (1) Any purported subdivision in contravention of the provisions of

this Act shall be void and no effect.

(2) A person who contravenes the provisions of this Act commits an offence and is liable on summary conviction to a fine not exceeding twenty five thousand dollars.”

.....

14. The applicant shall not sell, lease, give or in any other manner alienate any part of the land which is to be subdivided until he has received the final approval of the Minister.”

[16] Learned counsel for Fresh Water argued that it had satisfied the condition that the trial judge made a *prima facie* error because the contract was not *void ab initio* as section 14 of the Act is prohibitory (in the context that it prohibits a sale until subdivision approval is obtained). Learned counsel for Silk Grass argued that if the Postema Contract is valid, it must be construed as being entirely subject to necessary approvals being had and obtained because until that occurs it would be contrary to the law.

[17] In my view, Fresh Water had made out its case that the trial judge made a *prima facie* error when she treated the contract for the sale of the property as having no contractual effect from the very beginning (*void ab initio*). The court below ought to have considered whether the Postema contract itself is prohibited by the Act so as to render it *void ab initio*. That is, does the Act intend to prohibit the contract? Or does the Act intend to impose a penalty for contravention of its provisions? Section 14 does not expressly provide that if there is a breach of that provision to subdivide before sale, then a contract for sale of a property is void. The issue that should have engaged the lower court was whether there was a breach of section 14 and if so what is the effect of that breach. Whether as a consequence of any breach, Fresh Water is liable to pay a penalty as provided in section 7(2) of the Act.

[18] The consequential finding of the trial judge that the contract could not be enforced was as a result of the finding that the contract was *void ab initio*. In my view, the court made a *prima facie* error in not considering whether the Postema contract was subject to final approval being obtained under the Act. Although the contract is unenforceable at present, the judge should have considered whether it is still binding. I say so because if subdivision approval is obtained by Fresh Water then the Postema contract may become directly enforceable subject to any other issues that arise for consideration.

[19] Further, it is my view that the judge below made a *prima facie* error when she conflated sections 7 with section 14 of the Act. She ought to have considered whether sections 7 relates only to purported subdivision and section 14 prohibits a sale until final subdivision approval has been obtained.

### **Additional considerations in relation to interlocutory orders**

[20] The decision of the trial judge was made on a preliminary point which is crucial to Fresh Water's defence to the claim brought by Silk Grass and the final disposal of the claim. Therefore, the ruling that the contract was *void ab initio* is of sufficient significance to justify the costs of an appeal and the loss of the trial date.

### **Reasonable prospect of success**

[21] In my view, there is a realistic prospect of success in overturning the decision of the trial judge in relation to the following proposed grounds of appeal as shown in the affidavit of Mr. Postema, that is, Grounds 3.3 (1) & (2) and 3.4.

*“3.3 The Learned Trial Judge erred in law and misdirected herself in finding that the Postema Contract is void ab initio for running contrary to the provisions of the Land Utilization Act as:*

*(1) the Land Utilization Act does not expressly provide that an agreement for sale of land in breach of the provisions of the Land Utilization Act is void and unenforceable; and*

*(2) the Learned Trial Judge failed to consider and apply the principle that where the statute does not expressly provide that an agreement in breach of its provision is void and unenforceable, and prescribes a penalty for the breach, the intended consequence is the prescribed penalty and not to render the agreement void and unenforceable;*

*3.4 The Learned Trial Judge therefore erred in law in finding that, as a result of breach of the Land Utilization Act, the Postema Contract could not be specifically enforced and so could not create an equitable interest in the disputed 121 acres, as the Postema Contract conferred a beneficial interest in the 121 acres to the Appellant, the very Deed of Conveyance to the Respondent having acknowledged the same.”*

### **Further argument and decision to public advantage**

[22] The Supreme Court Practice 1991, Volume 1, page 964, at paragraph 59/14/7, states that leave will be granted by the English Court of Appeal in three categories of case, one of those categories being “*where the question is one of importance upon which further*



*argument and a decision of the Court of Appeal would be to the public advantage.*” In relation to this category, leave may be given in exceptional circumstances even though the case has no real prospect of success if there is an issue which, in the public interest, should be examined by the Court.

[23] Fresh Water and Silk Grass submitted that previous authorities emanating from the Supreme Court of Belize provide that agreements for sale of land which are in breach of the Land Utilization Act are void and of no effect. See - (1) *Action No. 290, Norman Angulo McLiberty v Michael Arnold and Corozal Freezone Development Ltd.* (2) *Claim No. 147 of 2012, Southern Environment Association v Raquel Battle (Administrator of the Estate of Edlin Leslie)*. Fresh Water submitted that these decisions were wrongly decided and further arguments and decision of this Court would be to the public advantage. I am of the view that the issue raised by Fresh Water was indeed an important one and therefore, further arguments are needed in relation to whether a contract for the sale of land that required prior subdivision approval is *void ab initio* for failure to comply with the provisions of the Act.

#### **The other grounds – Fresh Water land abutting the 121 acres**

[24] Section 18(a) of the LUA provides that subdivision is not required “where the divided portion of any land is transferred to the owner of any land abutting on the subdivided portion.” Mr. Jenkins argued that Fresh Water property abuts the 121 acres and as such subdivision was not required for sale. This was not an argument in the court below and certainly not a defence to the claim although the affidavit evidence of John Postema shows that the property abuts the Fresh Water land. That very same affidavit showed that an Application was made for subdivision. The defence of Fresh Water in the claim was that it was prevented from getting final approval because of the sale to Silk Grass and the non payment of taxes.

[25] In my view, this Court should not entertain any new argument in the Appeal on abutment (as stated in the proposed grounds 3.1 and 3.2) without a decision from the court below on the issue.

## **Conclusion**

[26] For those reasons, I agreed to an Order in the following terms:

- (a) Leave was granted to the Applicant, Fresh Water to appeal the decision of the judge below made on 17 February 2022.
- (b) The Order of the judge below and the trial of the Claim were stayed until the determination of the Appeal by the Court of Appeal.
- (c) Costs of the Application was reserved to the hearing of the appeal.

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HAFIZ BERTRAM, P

## **WOODSTOCK-RILEY JA**

[27] I concur with the reasons given and the proposed order.

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WOODSTOCK-RILEY, JA

## **BULKAN JA**

[28] I have read the decision prepared by Her Honour Hafiz Bertram P and agree with the Orders as proposed in paragraph 26 above.

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BULKAN, JA