IN THE HIGH COURT OF BELIZE A.D. 2023

CLAIM No. 233 of 2023

BETWEEN

BELIZE NATURAL ENERGY LIMITED

CLAIMANT/APPLICANT

AND

TOLEDO ENTERPRISES LIMITED

BANANA ENTERPRISES LIMITED

DEFENDANTS/RESPONDENTS

BEFORE THE HONOURABLE MADAM JUSTICE MARTHA ALEXANDER

Oral Submissions Date: May 15, 2023

APPEARANCES:

Mr. Philip Zuniga S.C. for the Applicant

Mr. Godfrey Smith S.C. with Mr. Hector Guerra for the Respondents

DECISION

INTRODUCTION

1. At an *inter partes* hearing on May 15, 2023, I dismissed the applicant's urgent application for injunctive relief. I indicated that on the papers and having heard both counsel that the applicant had failed to satisfy me that it was entitled to get the relief sought and awarded costs in the cause. I now provide my written judgment, as promised, in respect of the application.

2. The applicant is a company engaged in oil and gas exploration, production and export that has a Production Sharing Agreement with the Government of Belize ("GOB"). The applicant sought an order to restrain the respondents from blocking its access to what it claims is property in its lawful possession by virtue of a Lease Agreement made on January 31, 2008 ("the Lease") and an Order of the Minister of Natural Resources, Petroleum and Mining under section 26(1)(b) of the Petroleum Act made on September 09, 2021 ("the Minister's Order"). The Minister's Order extended the time for the applicant to occupy the leased land for petroleum operations to September 08, 2024.

3. The applicant asks that the respondents be restrained from entering or remaining on or trespassing onto and/or locking out the applicant's security guards, servants, agents or employees ("the applicant's personnel") from its "leased land", where it is conducting petroleum operations. The leased land is situate at Big Creek Port, Big Creek, Independence, Stann Creek District, Belize ("the Big Creek Port").

4. The applicant alleges that the respondents breached both the Lease and the Minister's Order, when they blocked its access to the premises and to its crude oil and other highly dangerous and flammable substances stored on the premises. Denying the applicant access to the premises has the potential to cause widespread destruction to the surrounding areas. The respondents needed to be restrained urgently.

SUBMISSIONS

(a) Applicant's Submissions

5. Mr. Zuniga stated that the applicant has **no** access to the leased premises. This seems to be the main justification for approaching the court. It was a matter of grave urgency for its trained fire hazard prevention personnel to be allowed onto the premises, where flammable substances are stored including a full tank of crude oil, which needed to be monitored and safeguarded. The situation was a serious one, with a risk of catastrophic consequences.

6. Mr. Carlos Alberto Avila, the applicant's chief financial officer, stated in his first affidavit that the applicant was in possession of the leased property until April 13, 2023. On that day, the respondents removed the applicant's security guards and unlawfully retook possession. Mr. Avila's affidavit gave the barest details about the Lease or on how the applicant initially came into possession of the premises, but relies on what was pleaded in the claim and supporting documents.

7. In his affidavit, Mr. Avila references the Minister's Order, which he avers was breached by the respondents' action of locking out the applicant's personnel. He gave no evidence of the applicant being allowed access, controlled or otherwise, to its property on the leased land. Mr. Zuniga was adamant, however, that the applicant had **no** access to safeguard the dangerous materials stored on the premises.

8. As the Minister's Order granted an enlargement of the date for the applicant to retain possession of the leased premises, the applicant denounced the respondents' actions as unlawful and sought relief.

(b) <u>Respondents' Submissions</u>

9. Mr. Anuar Flores, a director of the respondents, stated that Toledo Enterprises Limited (the first respondent) operates and manages the Big Creek Port, which provides port services to the applicant, whilst Banana Enterprises (the second respondent) is the owner of the real property adjacent to it. The applicant used the Big Creek Port to export its crude oil and related commodities to international markets, for which the respondents were paid a throughput fee per barrel and an annual throughput fee.

10. The parties entered two agreements, a Port Services Agreement dated January 13, 2008 (effective date January 01, 2007 until December 31, 2010) for a period of three years, for the specific purpose of the applicant operating an oil tank farm, dock and berthing and mooring facility as well as to ship its oil and related commodities through the Big Creek Port. Parties also entered a three year Lease on January 31, 2008, with an effective commencement date of January 01, 2007 for three years until December 31, 2010. Thereafter, the terms of both

Agreements were extended, by consent, but by December 2018, both Agreements had expired. Mr. Flores exhibited various documents to his affidavit to substantiate his statements including the expired Lease.

11. The applicant was, therefore, a legal tenant of the respondents until December 31, 2018 when its Lease expired. Since January, 2019, it has been in unlawful possession of the respondents' property. Despite the applicant being allowed 17 months and 13 days to sign a new agreement, it has steadfastly refused to comply. Consequently, the respondents served a notice to vacate but the applicant refused to leave or to remove its property from the premises, despite being given ample opportunities to do so. On April 13, 2023, the respondents re-entered and took possession of their property.

12. Mr. Smith argues that two Agreements govern the contractual relations between the parties, both of which have expired. Despite the respondents' request for renewal and a proposed increase in the throughput fee to be negotiated, the applicant has refused to sign while remaining on the leased land. Counsel pointed to the affidavit of Mr. Flores, where he stated that this was the first throughput fee increase ever proposed since the inception of the parties' business relationship 10 years ago in 2008.

13. Mr. Flores stated that the minimum throughput fee increase was proposed because the applicants' exports through the Big Creek Port were declining, which consequently impacted the respondents' earnings comparable to other tenants. The applicant agreed only to the increased Admin Fee of US$4.00 per ton and throughput fee of US$0.50 per barrel but not the minimum throughput fee of US$250,000 per annum. Mr. Flores stated that revenues were only earned from exports but the applicant had made one export in 2020, one in 2021, none in 2022 and none to date in 2023.

14. It was argued that although the applicant had rejected the minimum throughput fee increase allegedly because of low production, this argument was misleading because the applicant was selling more barrels of crude oil on the local market rather than exporting

internationally. By so doing, it was depriving the respondents of its revenues from exports being shipped through their port. Essentially, the applicant was enjoying the best of both worlds - declining exports through the respondents' port and refusal to pay an increased minimum throughput fee per annum, whilst continuing to occupy the respondents' property. The respondents were suffering a loss of revenue of approximately $1.5M since 2017.

15. Mr. Smith argued that it is not as if the applicant was taken by surprise, as it was apprised of the respondents' position throughout; and it was given several lease extensions and ample opportunities to re-negotiate or vacate the premises. A request was made on January 31, 2023, for the surrender of the premises by March 05, 2023, and removal of all modular fixtures or for a payment of BZ$10,000 per month. On March 01, 2023 a final reminder was given to the applicant of the effective surrender date and it was informed of the unlawfulness of the Minister's Order.

16. The respondents acted on their Notice to Quit and took possession of the premises, approximately 72 days after giving of such notice. Mr. Smith advanced that given the expired Lease, and service of a proper Notice to Quit, the respondents were entitled to retake possession. Any holding over by the applicant was on a month-to-month basis for which proper Notice to Quit had been issued. Further, the respondents have always provided controlled access to the Applicant's personnel to carry out safety procedures, and formalized this approval in a correspondence dated April 20, 2023.

DISCUSSION

17. To get the order for urgent interim relief, the applicant needed to show that it satisfied the governing principles for such an order. These well-rehearsed principles are set out in ***American Cyanamid*** v ***Ethicon***.[1]

[1] [1975] 1 All E.R. page 504

Serious Question to be Tried

18. Mr. Zuniga submitted that there was a serious question to be tried, as the applicant was authorized by the Minister's Order to remain in possession to carry out petroleum operations until September 2024. By blocking access to the premises, the applicant could not secure the dangerous substances stored there, which elevated the seriousness of the matter. He argued that the applicant had a valid cause of action in trespass against the respondents and relied on the case of ***Wan – I Huang*** v ***Attorney General***,[2] where a Minister's Order over private property was held to be valid.

19. Mr. Smith dismissed the applicant's argument as baseless and stated that there was no serious question to be tried. The respondents are not trespassers but lawfully in possession of their premises given the expired Lease, the validly issued Notice to Quit and an invalid Minister's Order, issued in circumstances where the Minister had no power to do so as no minerals are under the property. Further, the respondents were required to be consulted before such an Order is issued and they were not. Moreover, no specific land is identified in the Order so it was void for uncertainty.

20. The question of the validity of the Minister's Order can be determined at trial but the lack of consultation before its issue was noted. The Minister's Order was issued under section 26 of the Petroleum Act for petroleum operations. The Act defines petroleum operations as involving, "*exploration, development, extraction, production, field separation, transportation, storage, sale or disposal of petroleum.*" It is arguable that the defined activities must be read in the context of petroleum operations taking place on the lands. However, there are no mining activities or oil exploration taking place at the Big Creek Port. The premises were being used for shipping crude oil and related commodities.

21. I accepted that under the Petroleum Act, the Minister has authority to issue an Order over lands containing minerals or is being used for mining activities, even over private property. The Big Creek Port was not being used for mining or oil exploration purposes but for export

[2] Civil Appeal No 1 of 2008

related activities. Shipping or exporting oil is distinctively different from mining it. Further, there was no evidence provided that the Minister consulted with the respondents as required under the Act. Without the necessary consultation or the existence of circumstances supporting petroleum operations, reliance on breach of the Minister's Order seems misplaced. I accepted also that the Minister's Order was unclear since it did not identify which of the many pieces of lands owned by the respondents was targeted.

22. In the circumstances, I find that there was no serious issue to be tried. The Lease was expired. The Port Services Agreement was expired. A Notice to Quit was issued to surrender the premises. I was not satisfied, on the evidence before me that an urgent order for interim relief ought to be granted.

Damages as a Sufficient Remedy

23. Generally, an injunction may not be granted where an award of damages would suffice to compensate the applicant for any damage or loss it might suffer. The applicant did not provide evidence of irremediable harm or prejudice likely to be suffered should the injunction be refused. The applicant alleged that it was without access to dangerous substances on the premises and that there was a real possibility of catastrophic events unfolding but this was not supported by the evidence.

24. In my view, in the event it is shown that the refusal of the injunction caused harm to the applicant or that the respondents had trespassed on the applicant's property, the remedy of damages is available and will likely be sufficient to compensate for any wrong done.

Balance of Convenience

25. I considered if the balance of the risk of doing injustice lies in favour of granting or not granting the injunction. In deciding this issue, the overarching consideration would be to take a course that appears to carry the lower risk of injustice. This is determined by looking

at the practical consequences of granting or refusing the injunction: see ***National Commercial Bank Jamaica Ltd*** v ***Olint Corpn Ltd***.[3]

26. The applicant's allegation of "no access" to the flammable substances on the respondents' premises was not supported by any evidence. On the opposing side, Mr. Flores exhibited copies of the logbook showing controlled access was given, with the last recorded one being on May 09, 2023. Mr. Zuniga made heavy weather over whether the applicant's personnel had signed the logbook or their signatures were authenticated. At this stage, the court is in no position to conclude on the basis of affidavit evidence as to the authenticity of signatures nor is it viewed as necessary. Moreover, conducting a mini-trial on the signatures would not be in keeping with the overarching principle to deal with matters expeditiously. The logbook was accepted as evidence of controlled access to the premises, post the retaking of possession, contrary to Mr. Zuniga's assertion of no access. Further, the respondents' evidence is that they are prepared to facilitate access for removal of the tank of crude oil, at any point pending the determination of these proceedings.

27. Further, it was accepted that the respondents' business model was designed for temporary storage and to facilitate continuous loading at the time of export to international markets. Their revenues are generated from use of their port for exports, not permanent storage. The respondents would likely suffer the greater risk of prejudice by the use of their facility as "permanent" storage for which the applicant is not billed.

28. The evidence of the applicant fell far short of convincing me that it would be prejudiced or was likely to suffer irremediable harm should the injunction be refused.

<u>Undertaking in Damages</u>

29. Mr. Smith raised the issue of the form of the applicant's undertaking in damages. Mr. Avila states that the applicant "*is willing to give the usual undertaking in damages.*" Counsel flagged this as improper, since the ability to pay was not demonstrated.

[3] [2009] UKPC 16

30. In ***Jamaican Pelican Resorts Ltd*** v ***Seanic Investments (Cayman) Ltd and Garth 'Gary' Scott***[4], an undertaking given in general terms by counsel for the applicant fell short of what would constitute a satisfactory undertaking. The court stated, "*That, therefore, does not constitute an undertaking given by the applicant. In any event, the mere providing of an undertaking would not have been enough, since the applicant should have gone on* ***to show that they have the means to satisfy that undertaking***." [Emphasis added]

31. I accepted counsel's submission that the applicant has not provided a proper undertaking. The applicant does not show how it would be able to satisfy an award in damages should an injunction be found subsequently to be unlawfully issued.

32. The applicant has failed to satisfy the threshold requirements for the grant of an interim injunction. I am not prepared to grant the relief in all the circumstances.

DISPOSITION

33. It is ordered that the application for urgent interim relief is refused with costs in the cause.

Dated May 29, 2023

Justice Martha Alexander
Judge of the High Court of Belize

[4] Claim No. 2015 HCV 03695 paragraph 13