IN THE COURT OF APPEAL OF BELIZE, A.D. 2003

CIVIL APPEAL NO. 10 OF 2003

	(	**MICHAEL FEINSTEIN**	
	(	**BELIZE TOURISM**	
	(	**VILLAGE LIMITED**	**APPELLANTS**
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BETWEEN	(	**AND**	
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	(	**CARLOS ROMERO**	
	(	**LAURA THOMPSON**	**RESPONDENTS**

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BEFORE:

The Hon. Mr. Justice Mottley	-	**President (Ag.)**
The Hon. Mr. Justice Sosa	-	**Justice of Appeal**
The Hon. Mr. Justice Carey	-	**Justice of Appeal**

Mr. E. Andrew Marshalleck for the Appellants.
Mr. Fred Lumor, S.C. for the Respondents.

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October 10, 2003 & March 12, 2004.

MOTTLEY P (Ag.)

1. Belize Tourism Village Limited is a company incorporated under the law of Belize and has its registered office at 8 Fort Street, Belize City. The company is the owner of the Belize Tourism Village (B.T.V) which is

situate at Fort Street. B.T.V which has a boundary along the shoreline of the Haulover Creek, is used for accommodating cruise ship passengers.

2. B.T.V recently entered a Lease Purchase Agreement (L.P.A) with the Government of Belize and the Belize City Council to lease the property known as the Old Vegetable Market Site (O.V.M) which is situate at North Front Street. B.T.V plans to construct a Terminal building at the OVM Site in order to improve the facilities for the Cruise Line Tourism Industry.

3. Under the L.P.A, B.T.V undertook to build at least four finger piers between the front of the Tourism Village and the property of a company known as Hofius. These piers are to be use for accommodating at least 6 to 8 charter/taxi boats.

4. The respondent, Carlos Romero, is the "legal and beneficial owner" of the property situate at 1 Fort Street, Belize City. This property is bounded on one side by Haulover Creek. Along with Laura Thompson, the respondent is the owner of the Wet Lizard Restaurant which carried on at the same premises. In addition to the Restaurant, they own and operate a gift shop. Some of the customers who use the Restaurant approach the premises by way of boat on the Haulover Creek.

5. In September 2002 the B.T.V built a wall to the height of 10 feet on the common boundary with the property of the respondent. This wall obstructed the use of the boardwalk which B.T.V had constructed from the Wet Lizard to the Tourism Village.

6. It appears that Mr. Romero has had discussions with investors who were interested in constructing a boardwalk and mariner along the shoreline of Haulover Creek abutting the Wet Lizard. It was intended that the premises should serve as "land and sea tour facility". Consequent upon

this, Mr. Romero approached the Belize City Council (B.C.C) and the Belize Port Authority for permission or licence to construct the boardwalk and mariner. It was also intended that Mr. Romero should approach the Ministry of Natural Resources.

7. In November 2002, it came to the attention of the respondent that the appellants either intended to build a boardwalk “along and across the shoreline of our property without our consent or permission” or alternative “at some distance on Haulover Creek but across from and adjacent to the shoreline” of his property.

8. By letter dated 27 November 2002 Lois Young Barrow & Co., attorneys-at-law for the respondents, wrote to Mr. Michael Feinstein concerning the erection of the boardwalk. The letter stated that it had come to the attention of their clients that B.T.V intended to build a “large cement barrier/fence directly where their property borders the waterfront thereby blocking their access to the boardwalk and the water”. It was alleged that the construction is likely to result in some damage to their property and would be a “great detriment to their business”. The attorneys asserted that their clients, as owners of the real property which abuts the water had a legal right and entitlement, as riparian owner, to access and regress from the water. They maintained that the respondents as riparian owner has a right “to land or to pass over the shore or bed of water and to moor vessel adjacent to their land”. While the respondent were “not at all against the boardwalk”, they objected to any infringements of their rights and offered to work with the appellant so that their objectives could be achieved amicably.

9. On 2 December 2002, Barrow & Co., on behalf of the appellants, by letter confirmed to Lois Young Barrow & Co. that their clients were “indeed in the process of planning construction of a boardwalk connecting the

existing Tourism Village to the Old Market". The attorneys conceded that the appellants were mindful of the respondents' rights and that the proposed boardwalk "will not unreasonably affect" the respondents' "access to the river nor their ability to moor any vessels adjacent to their land that is ca[able of now being so moored".

10. Mr. Michael Feinstein in his affidavit stated that it was an expressed term of the lease purchase agreement between B.T.V and the Government of Belize (G.O.B) and B.C.C that B.T.V had agreed to construct at least four finger piers between "the front of the Tourism Village situate on Fort Street, Belize City, and the land belonging to Hofius Limited (Hofius) for the purpose of accommodating at least 6 to 8 charter/taxi boats at a time.

11. Mr. Feinstein stated that, in order to access to the piers it is necessary to build a boardwalk connecting the piers and running the entire length of the river frontage between the Tourism Village and land belonging to Hofius. He expressed the view that construction of the boardwalk would not affect the respondents' right to navigate the Belize River or to moor vessels adjacent to their land. He asserted that the boardwalk would not "unreasonably affect their rights of access not their ability to moor vessels against their land".

12. The appellants contended that, as a result of the concerns of the respondents they devised a plan whereby the boardwalk would be constructed "away from the respondents property and more than four feet over the water to allow vessels to pass under the boardwalk and dock alongside" the property of the respondents. The height of the boardwalk over the water would be the same height of the Belize City swing bridge. It was intended that a draw bridge was to be constructed in the boardwalk to facilitate navigation by vessels that are unable to pass under the boardwalk in front of the respondents' property. Mr. Feinstein insisted that

the boardwalk would not obstruct the access to the respondents' property by any vessel which is now capable of docking along the property.

13. In his judgment, the judge stated that there was no dispute as to the facts as set out in the supporting affidavits. Counsel for appellants contended that there was no serious issue to be tried as there will be no interference with any private right of the respondents, riparian owners. He submitted that the respondent rights, as riparian owners, were restricted to the right to access to the water and the right of regress from it. He explained that the appellants intended to erect a boardwalk 4 feet high above the water away from the property of the respondent, with a draw bridge to allow access by boat to their property. Counsel for the respondents contended there will be interference with the respondents' right of access and regress.

14. In his judgment the judge made it clear that he was not required, at that stage, to make a definitive determination of the facts. He pointed out that he had to be satisfied that, after considering the affidavits which were filed, a tenable case for the respondents had been disclosed and "that there has been and will continue to be interference" by the appellants with the riparian right of the respondents.

15. The judge held that the evidence showed that vessels which are higher than 4 feet will not be able to access the property of the respondents at all times. In order for such boats to pass, it will be necessary to have the bridge opened. He held that the erection of the draw bridge could be a curtailment of the right to access and regress at all times. He indicated that it was not clear that "there will be access outside the 30 feet" parts of the respondents land. In view of these statements, the judge concluded that evidence showed that there was a serious question to be determined

between the parties. In his view, damages would not be adequate to redress their complaint if the respondents were to succeed in their action.

16. At the hearing of the appellant, the respondents sought leave under section 20 (a) of the Court of Appeal Act Cap. 90 to have the Court order, the production of an affidavit, with annexed documents, filed by Mr. Romero subsequent to the hearing before the judge. Section 20 (a) provides:

> "On hearing of an appeal from any order of the Supreme Court or of a judge thereof in any civil cause or matter, the Court may if it thinks fit:-
>
> (a) order the production of any document, exhibit or other think connected with the proceedings, the production of which appears to be necessary for the determination of the case, provided that no person shall be compelled to produce under any such order any writing or other documents which he could not have been compelled to produced at the hearing or trial;

It was pointed out to Counsel that this section empowered the Court to order the production of any document which appears to the Court to be necessary for the determinations of the case. The Court did not consider that the production of any other documents were required having regard to the evidence and the nature of the appeal.

17. Counsel for the appellants sought and obtained leave to amend the grounds of appeal. The four grounds of appeal which were argued were:

Ground 1

The Appellants in their Ground 1 alleged that the learned trial judge erred in finding that the evidence supported a serious question to be determined.

The short answer to the Appellants' ground one is that on the incomplete evidence untested by oral cross-examination the question of whether the boardwalk and draw-bridge would interfere with the Applicants/Respondents' right to access to and regress from the creek was not frivolous and vexation, but a serious question to be determined at trial.

Grounds 2 and 3

The Appellants in their Grounds 2 and 3 alleged that the learned trial judge erred in holding that the rights of a riparian proprietor is to access and regress from the water at all times <u>and</u> (Appellants' emphasis) to the use if the water itself in connection with his riparian right and that the latter is a private right.

It is submitted that even if the trial judge was wrong in holding that the Respondents' riparian rights included use of the water itself in connection with his riparian tenement and that this is a private right, that this holding did not at all prejudices the exercise of the trial judge's discretion in granting the interlocutory injunction.

The question of the extent of the Respondents' riparian rights and whether or not they are private or public rights are questions properly to be determined at the substantive trial. There was no need for the trial judge to attempt to resolves such questions at the interlocutory hearing.

Ground 4

The Appellants in their Ground 4 alleged that the learned trial erred in holding that the presence of the draw-bridge would curtail the right to access and regress at all times.

The short answer to that appellants' Ground 4 is that the learned trial judge did not hold that the presence of the draw-bridge would curtail the Respondents' rights, he held that it <u>could</u> curtail it, and, quite properly, left the final determination for the substantive trial.

Counsel intimated that in reality, grounds 2, 3 and 4 were consumed by ground 1 and that he intended to argue all 4 grounds together.

18. Counsel for the appellant submitted that any interference which may be created by the erection of the boardwalk may constitute an interference with the public right of navigation only as while it may conceivably render access more difficult it does not render access impossible. He contended that the respondents failed to alleged, much less prove special damages, and as such there was no serious question to be determined having regard to the evidence.

19. Counsel further submitted that judge was wrong in holding that the right of a riparian owner was to access and regress from the water at all times and to the use of the water itself in connection with his riparian tenement. He stated that the respondents sought a declaration that "as riparian owners are entitled to the use and enjoyment of the Haulover Creek which abuts their property through access and regress and the right freely to use and navigate the Creek and its shoreline without obstruction". He submitted that the respondents did not claim any special damages.

20. In **David Bell v. The Corporation of Quebec** (1879) 5 App. Cas. 84 at p98, the Judicial Committee of the Privy Council said:

> *"These principles appear to be applicable to the position of riparian properties upon a navigable river. There may be "droit d'accès et de sortie" belonging to riparian land, which if interfered with, would at once give the proprietor a right of action, but this right appears to be confined to what it is expressed to be, "accès", or the power of getting from the water-way to and upon the land (and the converse) in a free and uninterrupted manner. Their Lordships think that this right has not, in fact, been violated in this case; and that, supposing the bridge to cause some obstruction to the navigation, the Courts below are right in holding that the Plaintiff is not entitled to maintain the action in respect of it without proof of actual and special damage."*

This clearly sets out the rights of the respondents as riparian owners.

21. In para. 17 of the affidavit of Mr. Romero, he stated that if the appellants were allowed to drive concrete piles into the river bed of the Haulover Creek next to the shoreline of our property, it would permanently obstruct the access to and from their property by the sea and also obstruct the free navigation of the Creek to and from their property. It was also stated that customers use the shoreline to approach their property by boats to have lunch and dinner.

22. Counsel for the respondents asserted that their claim is not limited to protecting their private rights as riparian owners but also the right to navigate the river in common with the public. It is for this reason that they will be claiming special damages. It is unfortunate at this stage that no statement of claim has been filed. He stated that a declaration is being sought that in addition to the right through access and regress the

respondents has "the right freely to use and navigate" the Creek and its shoreline without navigation.

23. From the evidence, it appears that the issue which arises between the appellant and the respondent is whether the construction of the boardwalk 4 feet above the sea with a draw bridge amounts to an obstruction and as such as interference with the access to the respondents premises. The Privy Council held in Bell's case that:

> *"Whether an obstruction amounts to an interference with the access to the frontage (a riparian owner) would be a question of fact to be determined by the circumstances of each case."*

24. In his affidavit, Mr. Feinstein stated that he was of the belief that "the construction of the boardwalk as planned will not affect" the respondents right to navigate the Belize River or to moor vessels adjacent to their land. He adverted to the letter dated 2 December 2002 from the attorneys-at-law for the appellants which informed the respondents that the board walk contemplated, will not unreasonably affect their rights to access the Creek not their ability to moor vessels against their land. The appellant did not deny that the respondents' right of access or their ability to moor vessels against their land was affected. From this statement it may reasonably be inferred that the rights of the respondent are likely to be affected.

25. The function of a judge when hearing an application for interlocution injunction has been stated by **Lord Diplock in American Cyanaid v. Ethicon Ltd.** (1975) 2W.L.R 316, at p.32, where he stated:

> *"When an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made*

upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. The court must weigh one need again another and determine where 'the balance of convenience' lies.

In those cases where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete."

26. On an appeal from the grant of an interlocution injunction the function of the Court of Appeal was set out by Lord Diplock in **Hadmor Production Ltd. & Others v. Hamilton & Another** (1983) A.C. 191, at p. 220. In reminding the Law Lords of the limited function of an appellate Court in such an appeal he said:

"…..it is I think appropriate to remind your Lordships of the limited function of an appellate court in an appeal of this kind. An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law

or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own."

27. Having regard to the dicta we are satisfied that the judge was correct in making his decision that there is a serious issue to be tried. It was for these reasons that the appeal was dismissed and the order of the judge was confirmed. The appellant was ordered to pay the costs of the respondents, such costs to be taxed if not sooner agreed.

CAREY JA

28. The respondents who are plaintiffs in an action filed in the Supreme Court against the appellants, the defendants, claimed:

    (i) A declaration that the plaintiffs as riparian owners are entitled to the use and enjoyment of the Haulover Creek which abuts their property through access and regress and the right freely to use and navigate the said Creek and its shoreline without obstruction.

    (ii) An injunction to restrain the defendants and each of them whether by themselves by their servants or agents or otherwise whosoever from driving piles into the * of the Haulover Creek and construction thereon a broad walk or works along or as a bridge over the said Creek adjacent to the plaintiffs' property situated between Fort Street and Haulover Creek, Fort George Area, Belize City, Belize.

    (iii) Damages.

29. Awich J granted an interim injunction pending an inter parties hearing at which he maintained the order until trial. That order is the subject of the appeal before us.

30. The appellants' first ground was formulated in this way:

"The learned trial judge erred in finding that the evidence supported a serious question to be determined"

Mr. Marshalleck for the appellants strenuously argued that there was no dispute of fact to be tried but rather a question of law to be determined. I was not altogether clear what was the point of law which fell to be resolved. It turns out however, that the real point being made, was that there was no conflict of fact. The facts, he said, were plain for all to see. The fact he had in mind in this regard, was that the activity of the appellants did not constitute any interference with the rights of the respondents as riparian owners. All one had to do, was to look at the plan submitted by the respondents and that would demonstrate that there was no obstruction. Shortly put, the respondents were presenting what was contrary to their premise viz, that the appellants' construction of the board walk constituted an obstruction.

31. The respondents' retort was that the appellants' acts constituted an obstruction and therefore infringed their rights as riparian owners of the property adjacent to the Creek.

32. When the rival contentions are thus juxtaposed, it is as plain as plain can be, that there is a serious issue to be tried at a hearing at which all the facts are before the Court and the pleadings in. It is to be noted that neither a statement of claim nor a defence have been filed and the judge would only have been entitled to make preliminary findings at the interlocutory stage of the proceedings.

33. It is trite law that at the inter parties hearing, the plaintiff must satisfy the court that there is a serious question to be tried. However, it is no part of the court's function at this interlocutory stage to attempt to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. See per Lord

Diplock in *American Cyanamid Co. v. Ethican Ltd. [1975] AC 396 at pp 406 – 407.*

34. The respondents alleged in their affidavit supporting the application for the interlocutory injunction that the respondents plan to "drive concrete piles into the bed of the Haulover Creek next to the shoreline of (their) property thereby permanently obstructing the access to and from (their) property by the sea and also obstruct the free navigation of the Haulover Creek to and from (their) property." The appellants in their affidavit depose that they have devised a plan which they believe will not affect the respondents' rights to navigate the Belize River or to moor vessels adjacent to their land. I would doubt very much that this reply addresses the concerns of the respondents as respect a threatened obstruction to their restaurant.

35. Howsoever that might be, the respondents' case cannot be dismissed as trivial nor that there are no disputes of fact. And it cannot be doubted that the issue of a riparian owner, falls to be considered. This will require detailed argument and mature consideration. The hearing before Awich J was not a hearing on the merits, but essentially one to determine whether the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at trial. Was there a serious issue to be tried, was the real issue before the court.

36. The judge had a discretion to be exercised and if we are to interfere, it must be shown that its exercise was based upon a misunderstanding of the law or of the evidence. With all respect to the strong arguments of Mr. Marshalleck, I cannot agree that the trial judge fell into error in either respect.

37. It is for the foregoing reasons which were promised at the conclusion of the hearing that I concurred in the decision that the appeal be dismissed with costs.

SOSA JA

38. On 10 October 2003 I agreed that the appeal should be dismissed with costs to the respondents to be agreed or taxed. I have read, in draft, the reasons for judgment delivered by Mottley P (Ag.) and by Carey JA and I concur in those reasons.