IN THE SUPREME COURT OF BELIZE 2007

ACTION NO. 467 OF 2007

BETWEEN:	WORLDWIDE PROPERTY MANAGEMENT LIMITED	CLAIMANT-APPLICANT
	AND	
	BELIZE OFFSHORE CENTER LTD.	DEFENDANT-RESPONDENT
	1. CITY HOLDING LIMITED	INTERESTED PARTY
	2. IT SOLUTION LIMITED	INTERESTED PARTY

Mr. W. Elrington S.C., replaced by Mr. Aamon Courtenay S.C., for the claimant-applicant.
Mr. Aldo Reyes, for the defendant-respondent and the first interested party.
Mr. Michael Peyrefitte, for the second interested party.

AWICH J.

18.3.2009 D E C I S I O N

1. *Notes: An application for an order to set aside an earlier order dismissing a fixed date claim, made when the claimant did not attend the first hearing of the fixed date claim. Whether RR. 11.17 and 11.18, or R 39.5 or any other rule applies; inherent power of court to control its process. That the applicant had a reasonable ground for bringing the claim is not necessarily a ground for making the application under R. 11.17 and R. 11.18, to set aside an earlier order.*

2. This is decision in an application for an order to set aside the order made by this court on 23.10.2008, dismissing the fixed date claim dated 16.10.2007, filed the same day. The statement of claim in the fixed date claim dismissed, alleged that transfer of some 13,500 shares belonging to the claimant-applicant, Worldwide Property Limited, in the defendant-respondent company, Belize Offshore Center Limited, were transferred fraudulently to the first interested party, City Holding Limited, and in breach of Articles of Association of Belize Offshore Center Limited. This application seeks to restore the fixed date claim in court.

3. At the filing of the fixed date claim on 16.10.2007, the Registrar assigned 7.12.2007, as the date of first hearing as is required by ***R. 27.2(1) of the Supreme Court (Civil Procedure) Rules, 2005***. Obviously the Registrar allowed 14 days as required by ***R. 27.2(4),*** and allowed for time for service of the claim form, and for filing defence or affidavit in lieu. There had been no order directing shorter time. Service must have delayed. When the matter came up for hearing in chambers on 7.12.2007, the general time for filing defence or affidavit in lieu, that is 28 days, had not expired. The court

adjourned the first hearing to a date to be obtained from the Registrar. Then the defendant, not the claimant, requested the Registrar to list the matter for hearing on 28.10.2008. Notice was sent for that date. It seems a new date was requested, or the Registrar on his own for the convenience of court, brought forward the hearing date. There is a later notice for hearing on 23.10.2008, an earlier date by five days.

4. On 23.10.2008, the matter came up in chambers for the adjourned first hearing. The defendant-respondent and the two interested parties attended by their learned attorneys, Mr. A. Reyes and Mr. M. Peyrefitte. The claimant-applicant or its attorney did not attend. Attorneys on record for the applicant were Pitts & Elrington. On application by Mr. Reyes for the defendant and the first interested party, the court dismissed the claim and ordered costs to the defendant and interested parties, to be agreed or taxed.

5. ***Determination.***

It was submitted by learned senior counsel Mr. A. Courtenay, for the applicant, that the application for an order to set aside the order made on 23.10.2008, was made under R39.5 of the Supreme Court (Civil

Procedure) Rules, 2005. With due respect, that rule is about setting aside a judgment or order made at the final trial of a claim, in the absence of a party. The entire Part 39 in which R. 39.5 is, bears the heading, ***"TRIAL".*** Rule 39.5 in particular states:

> *"39.5 (1) A party who was not present at a trial at which judgment was given or an order made in his absence may apply to set aside that judgment or order.*
>
> *(2) The application must be made within 14 days after the date on which the judgment or order was served on the applicant.*
>
> *(3) The application to set aside the judgment or order must be supported by evidence on affidavit showing-*
>
> *(a) a good reason for failing to attend the hearing; and*
>
> *(b) that it is likely that had the applicant attended, some other judgment or order might have been given or made.*

6. The attendance in chambers on 23.10.2008, was for the first hearing of the fixed date claim. First hearing is in the nature of a case management conference – see ***R 27.2 of the Supreme Court (Civil Procedure) Rules, 2005***. Parties were notified to attend on 23.10.2008 not for trial; and the dismissal of the claim was not at a trial. The dismissal was on an application by the defendant at the first hearing of the fixed date claim.

7. The businesses at a first hearing of a fixed date claim are generally in the nature of applications for direction orders for the purpose of expediting the final trial, except for businesses such as an application for an order to strike out a statement of case and have the claim dismissed or judgment entered, and an application to have the claim decided *in limine,* on a preliminary point of law, or question of jurisdiction. When holding a first hearing, the court shall have in addition to its other powers, all the powers at a case management conference – see ***R27.2(2).***

8. There are no specific rules in Parts 26 and 27, the parts of the Rules that provide for first hearing and case management conference, that

direct that a claim may be dismissed for failure of the claimant to attend a first hearing of a fixed date claim, or a case management conference, but there is ***R 26.1(2) (u)*** which authorizes the court to *"take any other step, give any other direction, or make any other, order, for the purpose of managing the case and furthering the overriding objective",* of the Rules. It is my view, that the power to dismiss a claim for non attendance by a claimant is one of the powers authorized by R 26.1 (2)(u). In any case, the power to dismiss a claim for non attendance by the claimant is one of the inherent powers that the court, including the Registrar's court, exercises to control its own process.

9. Likewise, there are no specific rules in Parts 26 and 27 that direct the court to set aside an order made when a party has not attended a first hearing of a fixed date claim, or a case management conference. Again it is my view, that the power to set aside an earlier order made in the absence of one party, is one of the powers in R26.1(2)(u), and is also one of the inherent powers of the court. It is also my view, that since the businesses at a first hearing of a fixed date claim are generally in the nature of applications for direction orders, an

application for an order to set aside an earlier order made at a first hearing of a fixed date claim in the absence of a party can and should be made under ***RR.11.17 and 11.18,*** or may be based on inherent powers of the court to control its process.

10. It does not make much of a difference that R 39.5 was cited. The provisions in RR. 11.17 and 11.18 are identical to the provisions in R 39.5 which I have quoted above. Rules 11.17 and 11.18 state the following:

> *"11.17 Where the applicant or any person on whom notice of application has been served fails to attend the hearing of the application, the court may proceed in the absence of that party.*
>
> *11.18.(1) A party who was not present when an order was made may apply to set aside that order.*
>
> *(2) The application must be made not more than 14 days after the date on which the order was served on the applicant.*

(3) the application to set aside the order must be supported by evidence on affidavit showing –

(a) a good reason for failing to attend the hearing; and

(b) that it is likely that had the applicant attended some other order might have been made".

11. The applicant gave the following grounds for his application for an order setting aside the order made on 23.10.2008, dismissing his fixed date claim:

> "1. The order was granted in the absence of the claimant;
>
> 2. The claimant believes that if it was represented at the hearing some other order might have been made; and
>
> 3. The claimant has a good cause of action".

12. None of those are the grounds required under ***R. 11:18(3)(a) and (b)(or 39.5(3) (a) and (b).*** That the applicant was not present when the order of 23.10.2008 was made, is merely a precondition for making the application; it is not one of the two grounds stated in ***R. 11.18(3) (a) and (b)(or R.39.5(3)(a) and (b).***

13. That the applicant has a good cause of action against the respondent is also not one of the two grounds that the rule requires. However, it could be an additional persuasion that may make the difference in favour of the applicant, where there has been no clear answer after the two required grounds have been considered. With much stretching reason, it may be argued that where a fixed date claim has come for first hearing and the claimant or defendant has not attended, and the claim or defence has been dismissed, a different order intended to expedite the trial, based on reasonable prospects for the claim, or for defending it succeeding might have been made, had the party attended the hearing. That is of course stretching the ground in 11.18(3)(b).

14. The ground stated by the applicant that some other order might have been made, "if the applicant was represented", might be mistaken for

ground (b) in R. 11.18 (3)(b). However, careful reading of the ground stated by the applicant does show that it is in fact different from what is stated in R. 11.18 (3)(b). Ground (b) supposes "attendance" by the applicant, whereas the applicants' ground supposes "representation", that is that, had the applicant been "represented", a different order might have been made.

15. I do not overlook the fact that representation of a party by his attorney is attendance by the party. It is, however, significant in my view, that the applicant chooses to use the expression, "if the applicant was represented", other than, "if the applicant attended". It might mean that representation by attorney was not possible for good reason, but on the facts the same could not be said about attendance by an officer of the applicant, if only to apply for adjournment on the ground of change of attorneys. The applicant's Mr. Brown had collected the case file from its former attorneys, and indeed was called on 23.10.2008, by the attorneys and informed, if he did not know, that his case would be in court that day. Despite the reminder, the applicant did not attend even without his new attorneys, at least to inform court that it had changed attorneys.

16. I do not see proof in the affidavit of Mr. Gomez that, there was good reason for the applicant failing to attend the first hearing on 23.10.2008, either by its chairman or secretary, or even by its new attorneys. I see disregard of notification. Mr. Gomez does not commit himself to a date on which it instructed its new attorneys, although he was frank enough to say that failure by the new attorneys to file notice of change of attorneys was "an oversight" by the attorneys. The applicant must bear the consequence of having changed attorneys without ensuring that the new attorneys were promptly put on record at court, and for their oversight, whatever that may mean. It would appear that Pitts & Elrington who were still on record despite having been dismissed by the applicant, called Mr. Brown to advise him of the appointment at court, as a matter of professional courtesy. I commend them for that.

17. The question must also be asked why Mr. Brown, one of the directors of the applicant and the person who dismissed Pitts and Elrington Attorneys and took away the applicant's case file, did not swear affidavit to give first hand good reason for failure by the applicant or its attorneys to attend court on 23.10.2008.

18. I accept that had the applicant attended on 23.10.2008, it was likely that some other order might have been made. The order or orders were likely to be in the nature of case management orders, since the hearing on 23.10.2008, was a first hearing of a fixed date claim – see ***R 27.2(2) and (3).*** However, for the applicant to succeed, in its application to set aside the order made on 23.10.2008, it must prove both the grounds in ***R11.18(3) (a) and (b),*** namely: a good reason for failing to attend the hearing; and that it was likely that had the applicant attended, some other order might have been made.

19. I dismiss the application dated 31.12.2008, for the reason that the applicant had no good reason for failing to attend the hearing on 23.10.2008. The order made on 23.10.2008, remains unaffected. The applicant will pay costs of the application to the defendant and interested parties, to be agreed or taxed.

20. The contention that the applicant had filed Supreme Court Claim No. 545 of 2006, against one of the interested parties in the instant claim and discontinued it, is not a ground for refusing an order to set aside the order made on 23.10.2008, dismissing the claim. Had I granted

this application and restored the fixed date claim, the contention that the transaction in the discontinued claim was the same as in this claim could be a good ground for an application for dismissal of the claim on the basis of abuse of process. Indeed an application for dismissal on the ground of abuse of process could have been made at the first hearing of the fixed date claim on 23.10.2008.

21. I have examined the case authorities provided by learned counsel Mr. Reyes. I commend his usual professional effort. I considered the cases useful, however, for the purpose of this application, the reasons I have given are sufficient to decide it.

22. Delivered this Wednesday the 18th day of March 2009
At the Supreme Court
Belize City

Sam L. Awich
Judge, Supreme Court.