IN THE COURT OF APPEAL OF BELIZE, A.D. 2010

CIVIL APPEAL NO. 11 of 2009

BETWEEN

HUBERT MARK **Appellant**

AND

BELIZE ELECTRICITY LIMITED **Respondent**

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BEFORE:

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

Mr. Jose A. Cardona for the appellant.
Mr. Darrell Bradley for the respondent.

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11, 19 March, 20 October 2010.

MOTTLEY P.

[1] On 2 August 2006, the claimant filed a Claim Form against the defendant that, in or around 1993 the defendant unlawfully and without the permission of the claimant, constructed electric works upon the lands of the claimant which have become a continuing trespass and a nuisance to the claimant and resulted in loss and damage to his property. The claimant claimed:

(i) the removal of the offending works pursuant to section 34 of the Electricity Act;

(ii) compensation in the sum of $100,000.00;

(iii) mesne profits.

[2] In its defence, the respondent, inter alia, alleged that the claimant's claim is fundamentally misconceived as it was not the defendant that entered into the claimant's land and, in the circumstances, the claim should be dismissed. The defendant also alleged that the claimant's right of action was barred under the Limitation Act Cap 170 as the action has been brought more than 6 years after the cause of action first arose.

[3] In a draft judgment dated 31 April 2009 Awich J stated:

> "21. My decision is that the electricity works of the defendant Belize Electricity Limited, conveyed over land belonging to the claimant Mr. Hubert Mark, and supported by posts affixed to the land, became a nuisance and cause loss to Mr. Mark. Accordingly, Belize Electricity Board Limited is liable under s: 34 of the Electricity Act to pay compensation to Mr. Mark. Permission is granted for proof of reasonable compensation to be by affidavits."

At paragraph 24 of the judgment the judge stated:

> "24. This judgment will remain undelivered because of the provision of s: 23 of the Electricity Act, which provides for arbitration. I prepared this judgment before I considered s: 36. I have made the appropriate orders based on s: 36."

[4] In a document also dated 21 April 2009 and entitled ORDER MADE the judge stated at paragraph 5:

"5. Further, in the course of writing draft judgment in which I dealt with all the issue raised, I came to the view that this claim should have been taken to arbitration first. ***Section 36 of the Electricity Act, Cap 221, Laws of Belize,*** provides as follows:

> "36. Where any dispute arises as to:-
> *(a)* whether any compensation is payable under subsection (2) or (3) of section 34 above;
> *(b)* the amount of any such compensation; or
> *(c)* the person to whom such compensation is payable;
>
> the dispute shall be referred for determination by a fit and proper person as arbitrator to be agreed upon by the parties, or failing such agreement by the parties, by arbitration in accordance with the provisions of the Arbitration Act:
>
> Provided that where an interest in land is acquired under the Land Acquisition Acts, any dispute referred to in this section shall be determined under those Acts, as may be appropriate."

6. No doubt, dispute has arisen in this claim under subsection (a) namely, as to whether any compensation is payable under subsection (2) or (3) of section 34, to Mr. Hubert Mark, a landowner. It is a question to be referred to arbitration. I am aware that in the earlier statute, ***the Belize Electricity Board Ordinance 1950,*** the question to be referred to arbitration was limited to the amount of compensation – **see s: 17(4) of the Ordinance.**"

The judge went on to dismiss the claims on the ground that it was brought to court prematurely. He held that:

> "the claim at this stage should be subject of arbitration under s: 36 of the Belize Electricity Act, Cap. 221."

[5] In his Grounds of Appeal, the appellant alleged that the judge erred in law in ordering that the claimant's claim be dismissed as it was brought prematurely.

He also alleged that the judge erred in applying the provisions of section 36 of the Electricity Act Cap 221 ("the Act").

[6.] By section 34 of the Act, Belize Electricity Limited being a licence holder under the Act, is permitted to execute electrical works in, over or upon the land of any land owner provide that BEL gives reasonable notice to the owner or occupier that it intends to execute such necessary electrical works. The section provides:

> "34.-(1) A licence holder may execute electrical works as may be necessary in, over or upon any land subject to-
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> *(a)* in the case of Government land, to the consent in writing of the Lands Commissioner or an officer of the Lands Department appointed by him for the purposes of this section;
> *(b)* in the case of any other land, after giving reasonable notice in that behalf to the owner or occupier thereof.
>
> (2) In the exercise of the powers given by this section, the licence holder shall not be deemed to acquire any right other than that of user only in or over the soil of any enclosed and other land whatsoever in, over or upon which he places any of his works; and should any of the works so carried on, over or upon any such land, become a nuisance or cause of loss to the owner of such land, the licence holder shall at his own expense, remove or alter such work or shall give such reasonable compensation as is provided under subsection (3) of this section.
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> (3) In the exercise of the powers given by this section, the licence holder shall do as little damage as possible and full compensation shall be paid by the licence holder to any owner or

occupier, or other person having a lawful interest in the land, who suffers damage as a result of the exercise of those powers:

Provided that, subject to section 17 of the Belize Constitution, no compensation shall be payable in respect of any right of user acquired under subsection (2) of this section."

[7] If the works carried out by the BEL becomes a nuisance or cause loss to the land owner, BEL is required, inter alia, to pay reasonable compensation to the land owner for any damaged caused. The compensation is to be assessed by an arbitrator to be agreed upon by the land owner and BEL or failing such agreement between the parties, the arbitrator is to be appointed in accordance with provisions of the Arbitration Act Cap 125.

[8] Section 36 of the Act provides:

"36. Where any dispute arises as to:-

(a) whether any compensation is payable under subsection (2) or (3) of section 34 above;

(b) the amount of any such compensation; or

(c) the person to whom such compensation is payable;

the dispute shall be referred for determination by a fit and proper person as arbitrator to be agreed upon by the parties, or failing such agreement by the parties, by arbitration in accordance with the provisions of the Arbitration Act:

Provided that where an interest in land is acquired under the Land Acquisition Acts, any dispute referred to in this section shall be determined under those Acts, as may be appropriate.

[9] It is apparent from the Order made that the judge became aware of the provisions of section 36 of the Act only when he was writing the judgment. The section was not pleaded by the respondent.

[10] The appellant submitted that he was entitled to demand that the respondent remove their electricity works from his land. He said that the judge having found that the appellant was entitled to demand that BEL remove the works or pay compensation he should have made a determination whether the works should be removed or whether the BEL should pay compensation to the appellant. It was further submitted that the evidence did not show that there was any dispute regarding compensation. It was argued on behalf of the appellant that the fact that BEL refused or neglected to pay the compensation to the appellant "does not show that there was a dispute as to whether any compensation was payable, or the amount payable or to whom payable". It was stated that in the Statement of Claim it was averred that there was no dispute as to compensation and "this was not refuted by the respondent".

[11] The respondent submitted that the provisions of section 36 are mandatory. It was said that the word "shall" in section 36 is imperative. The respondent contended that in the circumstances the appellant ought not to have brought the action to court at this stage.

[12] The effect of the provisions of section 36 of the Act is to oust the jurisdiction of the court where there is dispute as to whether compensation is payable and if so, the amount in respect of electrical works carried out under the provisions of section 34 of the Act on the land of a landowner.

[13] The judge in deciding whether the respondent is entitled to rely on the provisions of section 36 of the Act ought to have had regard to the provisions of Part 9 of the Supreme Court (Civil Procedure) Rules 2005 (the Rules) which deals with Acknowledgment of Service and Notice of Intention to Defend. Rule 9.2(1) provides:

"9.2 (1) A defendant who wishes –

(a) …….

(b) to dispute the court's jurisdiction, must file at the court office an acknowledgement of service in Form 4 or 4A containing a notice of intention to defend."

[14] Rule 9.7 provides a procedure where a defendant wishes to dispute the jurisdiction of the court. The Rule provides:

"9.7 (1) A defendant who –

(a) disputes the court's jurisdiction to try the claim may apply to the court for a declaration to that effect.

[15] This Rule goes on to lay down the procedure which must be followed. Under Rule 9.7 (3) an application for a declaration that the court has no jurisdiction to hear the matter must be made within the period for filing a defence. Under Rule 9.7 (5) if a defendant does not make an application for a declaration within the time specified he is to be treated as having accepted that the court has jurisdiction.

[16] The defendant did not avail itself of the provisions of Part 9 of the Rules and consequently must be taken to have accepted the court's jurisdiction. In these circumstances, it was not, in my view, open to the judge to invoke the provision of section 36 and hold that the matter should have been submitted to arbitration.

[17] In any event, the respondent did not plead that the action should be stayed under section 36 of the Act as there was a dispute as to whether compensation was payable and if so the level of the compensation. Had the respondent raised the provisions of section 36 in the Act, there is no doubt that the judge would have been required to stay the action pending the determination of the arbitration.

Counsel on behalf of the respondent submitted that the respondent had pleaded sufficient facts to raise the issue of arbitrations.

[18] In **Joseph v Clico International General Insurance Co. Lt. W.I.R. 30**, Sir David Simmons, Chief Justice, in an observation in which he sought to remind judges of their responsibility insofar as pleadings are concerned stated:

> "……that as far as practicable, they (judges) must endeavor to hold parties to their pleadings and not allow cases to be conducted outside of the issues raised on the pleading."

[19] In **Ward v New India Assurance Co. (Trinidad and Tobago) Ltd. W.I.R 48,** the Court of Appeal in Barbados took the opportunity to re-emphasize the importance of pleadings. Connell J.A. in giving the judgment of the Court at paragraph 11 stated:

> "Pleadings govern a civil action from trial to appeal. In **Pelter v University of the West Indies (1994) 30, Barbados LR 175**, the Court of Appeal cited with approval a passage from an article by Sir Jack Jacob in (1960) **Current Legal Problems** at p. 176 and 177:
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> > [The} very nature and character of pleadings demonstrate their significant an overwhelming importance; for the attention of the parties as well as the court is naturally focused on and riveted to the pleadings as being the nucleus around which the whole resolves through all its stages. The respective cases of the parties can only be considered in the light of and on the basis of the pleading which acts as fetters upon them, binding and circumscribing them closely and strictly to their own cases as pleaded."

[20] The cases demonstrate that the parties are bound by their pleading and ought not to be allowed to go outside of their pleaded case. It was the judge on his own motion and without notifying the parties who decided to invoke the provisions of section 36 of the Act. As stated the respondent did not plead or reply on the provisions of section 36. This is contrary to his duty as set out above "to hold the parties to their pleading and not allow cases to be conducted outside of the issue raised on the pleading". The judge exceeded his jurisdiction and descended into the arena taking a point of pleading which it was opened to the respondent to take and which the respondent did not in fact raise.

[21] For these reasons, I concluded that the appeal should be allowed.
Carey JA (ret) who is not able to be present directs me to say that he has read the reasons for judgment and agrees entirely.

SOSA JA

[22] I concur in the reasons for judgment stated, and the orders proposed, in the judgment of the President, which I have read.

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SOSA JA