IN THE COURT OF APPEAL OF BELIZE AD 2014
CIVIL APPEAL NO 4 OF 2011

THE ATTORNEY GENERAL OF BELIZE Appellant

v

BCB HOLDINGS LIMITED
and
THE BELIZE BANK LIMITED Respondents

___

BEFORE

The Hon Mr Justice Dennis Morrison	Justice of Appeal
The Hon Mr Justice Samuel Awich	Justice of Appeal
The Hon Mme Justice Minnet Hafiz-Bertram	Justice of Appeal

Eamon Courtenay SC for the respondents/applicants
Michael Young SC and Yohannseh Cave for the appellant/respondent

___

17 June and 7 November 2014

MORRISON JA

[1] By a notice of motion ('the motion') filed on 10 February 2014, the respondents/applicants ('the companies') seek orders (i) setting aside the ruling of the Taxing Officer made on 22 January 2014, dismissing their preliminary objection to the taxation of the costs of Civil Appeal No 4 of 2011 and Claim No 743 of 2009; (ii) directing the Taxing Officer to dismiss the application made by the appellant/respondent ('GOB') for the taxation of the costs of both sets of proceedings; and (iii) for the costs of

this application. The application, which is brought pursuant to Order II Rule 32(5) and (6) of the Court of Appeal Rules, comes before the court in unusual circumstances, which it is necessary to recount in some detail.

[2] The companies and GOB were parties to an agreement to submit their disputes to international arbitration. On 20 August 2009, as a result of arbitral proceedings brought before the London Court of International Arbitration ('the LCIA') by the companies against GOB, the LCIA issued a final award ('the final award') in favour of the companies. By the terms of the final award, GOB, which did not participate in the arbitral proceedings, was ordered to pay an amount totalling approximately $44 million for damages, fees and costs to the companies, together with interest at 3.38% per annum compounded annually.

[3] By a fixed date claim form filed on 21 August 2009 (Claim No 743 of 2009), the companies sought an order, pursuant to section 28 of the Arbitration Act ('the Act') for leave to enforce the final award in the same manner as a judgment of the Supreme Court. In their claim form, after reciting the history of the arbitral proceedings and setting out the details of the final award, the companies moved the court for the following orders:

> "(a) pursuant to section 28 of the Arbitration Act, Cap 125 the Claimants be at liberty to enforce in the same manner as a judgment or order to the same effect as the Final Award in LCIA Arbitration No. 81169 between BCB Holdings Limited, The Belize Bank Limited and the Attorney General of Belize dated 20 August 2009 (the Final Award);
>
> (b) the Defendant pay the costs of this claim and of any judgment which may be entered hereunder;
>
> (c) that the Claimants be at liberty to make any further applications to the Court in order to effect enforcement of the Final Award; and
>
> (d) such other reliefs as the Court deems just and equitable."

[4] The companies' claim was defended by GOB on three grounds:

1. That the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('the New York Convention'), did not apply to Belize and therefore Part IV of the Act was not applicable and the final award could not be enforced.

2. That the final award was in respect of matters not capable of settlement by arbitration and therefore enforcement of the award should be refused.

3. That it would be contrary to public policy to enforce the final award.

[5] The claim was heard by Muria J, who gave judgment in favour of the companies on 22 December 2010. The learned judge's order (which was perfected on 29 December 2010) was that (i) pursuant to section 29 of Act, the companies should be at liberty to enforce the final award in the same manner as a judgment or order to the same effect; (ii) GOB should pay the costs of the claim and of any judgment which may be entered thereunder; and (iii) the companies should be at liberty to make further application to the court in order to effect the enforcement of the final award.

[6] By notice of appeal filed on 5 January 2011, GOB appealed on a number of grounds (14 in all), some of which were overlapping. Principal among them were the contentions that Muria J erred in finding that (i) the New York Convention applied to Belize; (ii) the final award and its enforcement were not contrary to public policy; and (iii) the matters in dispute between the parties were capable of being settled by arbitration. GOB accordingly sought the following relief from this court:

"1. The setting aside of the Order that the Respondents are at liberty, pursuant to Section 28 of the Arbitration Act, to enforce the LCIA Final Award in the same manner as a judgment or order to the same effect as the Final Award.

2. The setting aside of the Order that the Appellant pay the costs of the claim and of any judgement which may be entered thereunder.

3. The setting aside of the Order that the Respondents have leave to make further applications to the Court in order to effect the enforcement of the Final Award.

4. An Order refusing the enforcement of the Final Award on the ground that the enforcement thereof would be contrary to public policy.

5. An Order refusing the enforcement of the Final Award on the ground that the Final Award arose out of matters not capable of settlement by arbitration.

6. Costs."

[7] On 8 March 2011, Awich CJ (Ag), as he then was, granted GOB's application for a stay of execution of Muria J's judgment, pending the hearing of the appeal. A subsequent application by the companies to this court for a discharge of Awich CJ (Ag)'s order was dismissed by the court on 23 March 2012.

[8] Ultimately, GOB's appeal to this court succeeded and on 8 August 2012, the court made the following orders:

"1. The Appeal is allowed.

2. The Order of the Supreme Court dated the 29th day of December, 2010 that:

   (i) the Respondents are at liberty to enforce the LCIA Final Award in the same manner as a judgment or order to the same effect as the Final Award

   (ii) the Appellant pay the costs of the claim and of any judgment which may be entered hereunder

   (iii) The Respondents are at liberty to make applications to Court in order to effect the enforcement of the Final Award

   is set aside.

3. The Respondents shall pay the Appellants [sic] costs of the appeal and the Supreme Court proceedings fit for two Counsels [sic] to be agreed or taxed."

[9] This court determined GOB's appeal (by a majority) on the sole basis that the relevant provisions of the Act were invalid and that enforcement of the final award under its provisions had therefore to be refused. Accordingly, the court expressed no view on the other issues, viz, whether the subject-matter of the arbitration was arbitrable and whether it would be contrary to public policy to enforce the final award.

[10] Dissatisfied with this decision, the companies appealed to the Caribbean Court of Justice ('the CCJ'). In their notice of appeal filed on 14 November 2012, they sought an order from the CCJ setting aside this court's order, and granting permission to enforce the final award as a judgment of the Supreme Court.

[11] The judgment of the CCJ was given on 26 July 2013. In the leading judgment delivered by Saunders JCCJ, the central issues arising on the appeal were identified (at para [16]) as, first, whether the Act is valid; second, if the Act is valid, whether the CCJ should remit the case to the Court of Appeal for consideration of the question whether the final award should not be enforced because of the non-arbitrability of its subject-matter and/or because it would be contrary to public policy; and third, if the Act is valid, but the case was not remitted, whether the application to enforce the final award should be refused on either the public policy point or the non-arbitrability point.

[12] On the first issue, the CCJ held, contrary to the decision of this court, that the Act is valid. On the second issue, it was held that the remaining issues in the case should not be remitted to the Court of Appeal, but should be determined by the CCJ in the interest of settling the litigation "with expedition and finality" (per Anderson JCCJ, at para [82]). And on the third issue, the CCJ concluded, on the public policy point, that "the balance here undoubtedly lies in favour of not enforcing this Award" (per Saunders JCCJ, at para [59]). Because the court's decision on this point was dispositive of the appeal, it was considered unnecessary to consider the non-arbitrability point.

[13] On the question of costs, the CCJ said this (at para [87]):

> "[87] The award of costs in this case is complicated by a number of factors. The Respondent has prevailed on the central issue that enforcement of the Convention Award would be contrary to the public policy of Belize. However, the Respondent had sought to have this Court defer decision on the public policy issue and instead to remit the matter to the Court of Appeal. The Appellants succeeded on the primary ground of appeal arising from the decision of the Court of Appeal, namely, that the Arbitration Act of 1980 was constitutional and saved as existing law under the Independence Constitution. A further factor that complicates the issue was the non-participation by the Respondent in arbitration proceedings despite numerous invitations and opportunities to do so. It is not beyond the realm of possibility that had the Respondent mounted vigorous and comprehensive arguments before the arbitral tribunal as it did before us the tribunal might have been persuaded to decline to adjudicate upon the matter thereby saving considerable expense. It is also the case that this court has and must encourage the greatest respect for international commercial arbitration under the Arbitration Ordinance and by extension as well the New York Convention. In the circumstances we consider that the most appropriate award would be for each party to bear its own costs."

[14] In the result, the companies' appeal was dismissed, with no order as to costs.

[15] By a summons dated 11 September 2013, GOB applied to the Taxing Officer for the taxation of its costs of the proceedings before this court and the Supreme Court.

[16] By letter dated 9 October 2013, the companies' attorneys-at-law, Messrs Courtenay Coye LLP, wrote to GOB's attorneys-at-law, Young's Law Firm, to advise them of the companies' position on GOB's claim for costs:

> "The taxation of costs in respect of the captioned matters has been adjourned by the Honourable Registrar to Thursday, 17th October 2013.
>
> However, as you are aware, our clients had appealed to the Caribbean Court of Justice ('CCJ') against the costs order made by the Court of Appeal. The issue of costs was specifically addressed by the CCJ at paragraph 87 of its decision and, after considering that our client had succeeded on its primary ground of appeal, and that substantial costs had been incurred as a direct consequence of the Government's failure to participate in the arbitral proceedings, the CCJ determined that *'the most appropriate award would be for each party to bear its own costs.'* No order was therefore made in respect of costs.

> The effect of the CCJ's Order was not to leave the Court of Appeal's Order in place, but to set it aside so that each party must bear its own costs.
>
> In view of the above, it is our client's position that the claim by the Attorney General for costs in the Court of Appeal and the Supreme Court is misconceived."

[17] By letter dated 16 October 2013, Young's Law Firm responded. After setting out the various orders made by Muria J, the Court of Appeal and the CCJ, GOB's position was stated as follows:

> "Thus the CCJ did not allow the appeal at all (or to put it another way – dismissed the appeal entirely). If the CCJ wished to allow the Appeal only in relation to the issue of costs awarded in the Court of Appeal it would have done so. It did not. Thus the Court of Appeal Order allowing the appeal from the Supreme Court and awarding costs to the Appellant remains standing, final and enforceable. The costs are to be agreed or taxed and there is no agreement (indeed no offer of quantum from the Claimants/Respondents). It is trite that the party in whose favour a judgement is made is immediately entitled to have that Judgement Order enforced. The Judgement of the Appeal Court was handed down on the 8th of August 2012 and perfected on the 18th of September, 2012. We will contend before the Registrar that the taxation, determination of the award of costs should be proceeded with and not delayed." (Emphasis in the original)

[18] The summons for taxation of costs was heard by the Taxing Officer on 18 October. At the hearing, counsel for the companies raised a preliminary objection to the taxation, along the lines adumbrated in the previous correspondence between the parties. It was submitted that the effect of the CCJ's order was to substitute for the order of the Court of Appeal an order that there should be "no order as to costs". Having heard arguments from counsel on both sides, the Taxing Officer reserved her decision.

[19] There matters remained until 3 December 2013, when Young's Law Firm wrote to the Acting Registrar and Chief Marshal of the CCJ to, as regards the costs, "request confirmation of the intent and effect of the CCJ's decision of 26th July 2013". This letter,

which was copied to Messrs Courtenay Coye LLP, drew an immediate protest from that firm in a letter to the acting Registrar and Chief Marshal dated 5 December 2013:

> "We are unaware of any statutory provision that informs this remarkable course adopted by the Attorney General. We would invite their Honours to allow the Registrar to make her decision as is always done, and to refrain from issuing an advisory opinion."

[20] But in a further letter to the acting Registrar and Chief Marshal dated 13 December 2013, no doubt considering it prudent to state the companies' position for the record, Messrs Courtenay Coye LLP reiterated some of the points they had previously made in their letter dated 9 October 2013 to Young's Law Firm.

[21] By letter dated 19 December 2013, addressed to the Taxing Officer, the acting Registrar and Chief Marshal advised that the CCJ, "having delivered its judgment on the 26th day of July 2013, is now *functus* and it would not be advisable to express an opinion on the matter". However, by a subsequent letter dated 21 December 2013, the acting Registrar and Chief Marshal sought to withdraw this 'advice", and to substitute it with the following:

> "As Registrar, I bring to your attention that it is the practice of this Court, if it is reversing an order for costs of the courts below, to explicitly say so. I note that the lack of awareness of this practice may have led to the present confusion."

[22] On 22 January 2014, the Taxing Officer delivered an oral ruling dismissing the companies' preliminary objection. The parties were therefore advised that the taxation would proceed. The motion filed by the companies is therefore in direct response to this ruling. The questions which it raises is whether the order of this court made on 8 August 2013, that the companies "shall pay [GOB's] costs of the appeal and the Supreme Court proceedings", remains extant; or whether that order has, in effect, been superseded by the subsequent order of the CCJ, in dismissing the companies' appeal, that there should be "no order as to costs". Put another way, was the CCJ's order as to costs

intended, as the companies contend, to dispose of the question of the costs at all stages of the proceedings, or was it intended, as GOB contends, to deal with the question of the costs of the appeal to the CCJ only?

[23] During the course of the hearing of the motion, we were advised by counsel that the Taxing Officer has since proceeded, in accordance with her dismissal of the preliminary objection, to tax GOB's bills of costs for the proceedings in this court and in the Supreme Court. The bills were taxed in the total sum of $522,565.34, being $186,215.59 on the appeal and $336,349.75 in the Supreme Court. The companies have since filed an objection (pursuant to Order II Rule 32(3)) to several of the items allowed in the taxation, but the Taxing Officer's review of the taxation which should follow (pursuant to Order II Rule 32(4)) has been postponed pending the outcome of this motion.

[24] In support of the motion, Mr Courtenay SC submitted that the effect in law of the CCJ's decision was to entirely wipe away the decision of the Court of Appeal, including the order for costs in favour of GOB, and to replace it with the decision of the CCJ. The rationale underlying the Court of Appeal's order for costs, it was submitted, must have been that, since GOB prevailed on the issue of the validity of the Act, costs should, on long established principle, follow the event. The companies having succeeded when the decision of the Court of Appeal on the validity of the Act was reversed by the CCJ, it was further submitted, it followed that the effect of the decision of the CCJ was "to completely displace the Court of Appeal's decision in toto".

[25] In support of these submissions, Mr Courtenay placed great reliance on the decision of the Court of Appeal of England and Wales in **P & O Nedlloyd BV v Arab Metals Co et al (No 2) [2007] 1 WLR 2288**. One of the questions that arose in that case was whether, an interlocutory appeal from the decision of a judge at first instance (Colman J) having been allowed on a different basis from that relied on by the judge, aspects of the judge's decision (having to do with the question of limitation), which were neither endorsed nor disapproved on appeal, could nevertheless found an issue

estoppel at a later stage of the same proceedings. In giving a negative answer to this question, Moore-Bick LJ, who delivered the only substantive judgment in the Court of Appeal, said this (at paras 28-29):

> "28 Mr Rainey was quite right in saying that this court did not overturn the judge's decision on limitation, but despite that I am unable to accept that his judgment is any longer capable of giving rise to an estoppel in relation to that issue. The effect of the order made on appeal is to avoid entirely the order made by the court below. In *Spencer Bower, Turner & Handley*, at para 60, the matter is put as follows:
>
> 'When a tribunal with original jurisdiction has granted, or refused, the relief claimed and an appellate tribunal reverses the judgment or order at first instance, the former decision, until then conclusive, is avoided ab initio and replaced by the appellate decision, which becomes the res judicata between the parties.'
>
> 29 The authority cited in support of that proposition is Comr for Railways (New South Wales) v Cavanough (1935) 53 CLR 220, a decision of the High Court of Australia. During his employment by the commissioner the respondent was convicted of theft and was suspended from duty with a consequent loss of salary. After his conviction was set aside on appeal he was reinstated and sued the commissioner for arrears of salary in respect of the period of his suspension. The commissioner sought to rely in his defence on a section of the Government Railways Act 1912 (NSW) which provided that an officer convicted of felony should be deemed to have vacated his office. The court held that the respondent was entitled to succeed on the grounds that a conviction once quashed is avoided ab initio. Mr Rainey submitted that the case is different from that with which we are concerned because it deals with the effect of a successful appeal against a conviction, but in its essentials I do not think it is. As a matter of principle, when an appellate court sets aside the order of a lower court that order ceases to have any effect and the decision of the appellate court alone is determinative of the issue between the parties. That is sufficient to determine the present case. Although the decision of Colman J was originally capable of giving rise to an issue estoppel, it could no longer do so once it had been set aside on appeal, regardless of the grounds on which this court made its order. Issue estoppel is a form of estoppel by record and depends, as the cases mentioned earlier demonstrate, on a decision of the court disposing of a substantive dispute between the parties. On a purely formal level it may be said that the setting aside of the order below expunges the only record from which an estoppel was capable of deriving its force. At a substantive level the setting aside of the order means that there is no longer any disposal to

> which the decision on the issue in question can be regarded as fundamental."

[26] (And see now the 4th edition of Spencer, Bower and Handley's *Res Judicata*, para 2.33, where **P & O Nedlloyd BV** is cited as authority for the identical passage quoted by Moore-Bick LJ at para 28 of his judgment.)

[27] The application of the principle expressed in **P & O Nedlloyd BV** and other cases (eg **Commissioner for Railways (New South Wales) v Cavanough (1935) 53 CLR 220**) to this case, Mr Courtenay submitted, was that "nothing and, in particular, no costs order of the Court of Appeal exists in law on which the Attorney General can rely to ground his application for his costs to be taxed by the Taxing Officer".

[28] Mr Young SC submitted, to the contrary, that the effect of the CCJ's statement in disposing of the companies' appeal that, "The appeal is dismissed", "ineluctably means that none of the Reliefs sought in the appeal by [the companies] was given". It followed that the Court of Appeal's order for costs in favour of GOB was not disturbed by the CCJ's decision and was therefore left intact and in full force. The CCJ's statement that there should be "no order as to costs" cannot be taken to refer to anything other than the costs of the appeal to the CCJ itself, since any intention to disturb the Court of Appeal's order for costs would have necessitated the appeal being allowed on that point. Unlike in **P & O Nedlloyd BV**, the CCJ did not set aside the order of the Court of Appeal. In essence, Mr Young contended, the Court of Appeal ordered costs in favour of GOB and the companies' appeal to the CCJ was dismissed, with no order as to the costs of the appeal. The result of this, it was submitted, is that the Court of Appeal's order for costs stands.

[29] In my view, resolution of the issue raised on this motion turns on a proper understanding of, firstly, the nature of the claim brought by the companies; secondly, the vagaries of litigation to which it was subject as it proceeded through the various

stages of the judicial hierarchy; and, thirdly, the manner of its final disposition by the CCJ.

[30] Claim No 743 of 2009 was, in essence, if not in form, an action brought by the companies, as beneficiaries of the final award in the LCIA arbitration, to recover the fruits of that award. "Stripped of its clothing", as Mr Young put it graphically in his written submissions, this was "a claim [by the companies] to recover money from [GOB]". As it was, of course, fully entitled to do, GOB resisted the claim on all the bases it considered to be properly open to it. At the hearing before Muria J, all of GOB's defences were rejected and the companies were accordingly given the relief which they sought, that is, leave to enforce the final award as a judgment of the Supreme Court, which in turn cleared the way for them to recover the fruits of the award. Indeed, as Mr Young pointed out, had GOB not succeeded in obtaining a stay of execution of, and all further proceedings under, Muria J's order pending appeal, the companies would have been fully at liberty to proceed. Naturally, in keeping with the principle that costs should follow the event, GOB was ordered to pay the companies' costs of the proceedings before the judge.

[31] Upon GOB's appeal to this court, all the defences which they had deployed unsuccessfully before Muria J were again in play. However, one of GOB's points in particular, that is, the contention that, because the Act was invalid, the final award could not therefore be enforced by the companies in accordance with its provisions, attracted the attention and, ultimately, the approbation of a majority of the court. This point, which went to the root of the jurisdiction of the Supreme Court to grant leave for the enforcement of a New York Convention award as a final judgment of the court, was sufficient, as the court held, to dispose of the appeal in GOB's favour. Muria J's order in favour of the companies, including the order for costs, was set aside and GOB had therefore succeeded, albeit belatedly, in resisting the companies' attempt to recover the fruits of the final award. So again, costs followed the event and the companies were ordered to pay GOB's costs in the Supreme Court and in this court.

[32] The further appeal to the CCJ was therefore the companies' appeal, by which they sought orders setting aside the Court of Appeal's decisions (including the order for costs in GOB's favour) and restoring Muria J's order granting them permission to enforce the final award as a judgment of the court. On the companies' appeal to the CCJ, as we have seen, all the points which had been relied on by GOB before Muria J and the Court of Appeal were again deployed. However, unlike the Court of Appeal, the CCJ considered that GOB could not succeed in its contention that the Act was invalid. But matters did not remain there. The CCJ, considering that it was more convenient to deal with and dispose of GOB's other points itself, rather than remitting them to the Court of Appeal, proceeded to do so. And on the public policy point, it was decided that GOB was entitled to resist the companies' claim for leave to enforce the final award.

[33] At the end of the day, therefore, GOB achieved the same result that it had done before the Court of Appeal, and had contended for before Muria J, albeit by a different route. It is for this reason, it seems clear to me, that the CCJ determined that the companies' appeal from the Court of Appeal should be dismissed. It follows from this, it further seems to me, that the Court of Appeal's order for costs in favour of GOB remains in place. The companies not having succeeded in obtaining what they had first sought to achieve, that is, an order of the court to enable them to recover the fruits of the final award from GOB, costs have yet again followed the event.

[34] The decision in **P & O Nedlloyd BV**, premised as it was on the order made by the court below having been set aside by the Court of Appeal, is therefore clearly distinguishable from, and as such inapplicable to, the instant case.

[35] This is the context in which the CCJ's only remarks on costs (see para [13] above) must be viewed. The court identified three factors which "complicated" the determination of the appropriate award for costs of the appeal. The first was that, despite the fact that GOB had sought to have the court defer decision on the public policy issue (described by the CCJ as "the central issue"), GOB had in fact prevailed on this issue. The second was that the companies nevertheless succeeded on what the

court described as “the primary ground of appeal arising from the decision of the Court of Appeal”, that is, the question of the validity of the Act. The third factor was GOB’s non-participation in the arbitral proceedings, which could have contributed to the matter not having resolved in its favour at that level.

[36] It is against this background of factors, militating for and against the award of the costs of the appeal to one side or the other, in my view, that the CCJ determined that “the most appropriate award would be for each party to bear its own costs”. For the reasons which I have attempted to state, I cannot in all the circumstances read this as an order relating to anything but the costs of the appeal to the CCJ.

[37] In arriving at this conclusion, I have neither prayed in aid nor relied on the two items of correspondence which were sent to the Taxing Officer by the Acting Registrar and Chief Marshal of the CCJ. In his submissions before us, Mr Courtenay complained bitterly about the Acting Registrar and Chief Marshal’s intervention, in particular the apparent modification of the CCJ’s stance conveyed by the second letter. In the circumstances, I find it unnecessary to enter into this particular controversy, if such it is, and I would therefore decline to do so.

[38] I would therefore dismiss the motion, with costs to GOB, certified fit for senior counsel and a junior on each side, to be taxed if not agreed. I propose that the order for costs should be provisional only, but should stand confirmed at the expiration of 14 days of the decision in this matter, unless within that time either party makes an application to the court for a different order.

_____

MORRISON JA

AWICH JA

[39] I concur totally in the judgment prepared by Morrison JA, which is remarkably clear. I also concur in the orders that he proposed for adoption by the court.

_____
AWICH JA

HAFIZ-BERTRAM JA

[40] I too have read the judgment prepared by Morrison JA in draft. I agree with his reasons for dismissing the motion and I also agree with the orders proposed by him.

_____
HAFIZ-BERTRAM JA