

IN THE SUPREME COURT OF BELIZE, A.D. 2012

CLAIM NO. 873 of 2010

MARSHALL'S COMPANY LIMITED	1st CLAIMANT
KINEA INTERNATIONAL S.A.	2nd CLAIMANT
AND	
KARINA ENTERPRISES LIMITED	1st DEFENDANT
MIKE HOTCHANDANI	2nd DEFENDANT
AMIT HOTCHANDANI	3rd DEFENDANT
(a.k.a. DANISH HOTCHANDANI)	
THE ATTORNEY GENERAL OF BELIZE	4th DEFENDANT

CLAIM NO. 896 of 2010

CHINA TOBACCO ZHEJIANG INDUSTRIAL CO. LTD.	1st CLAIMANT
KINEA INTERNATIONAL S.A.	2nd CLAIMANT
KEVAL INTERNACIONAL S.A.	3rd CLAIMANT
B & C INTERNATIONAL LTD.	4th CLAIMANT
AND	
KARINA ENTERPRISES LIMITED	1st DEFENDANT
THE ATTORNEY GENERAL OF BELIZE	2nd DEFENDANT

Hearings

2012

12th June

27th July

Mr. Godfrey Smith SC for the claimants in both matters.

Mrs. Melissa Balderamos-Mahler for the defendant/applicant Karina Enterprises Limited.

Mr. Nigel Hawke and Mr. Andrew Bennett for the Attorney General.

JUDGMENT

1. The first defendant in both claims made an application dated 21st February, 2012 for leave to appeal a written decision of this court dated 8th November, 2011; orders in which decision were entered and perfected on 2nd February, 2012. In that decision, the court considered two main issues: whether a registered trade mark granted to the said first defendant by the Deputy Registrar under the Trade Marks Act chapter 257 was valid; and whether an amendment to the claim in this matter, granted by consent of the parties, asking for certiorari against the decision of the Deputy Registrar, should be struck out on procedural grounds. For reasons given in the decision, the court made orders that struck out the amendment, and also ordered that the Deputy Registrar failed to comply with section 37(4)(a) of the Trade Marks Act and erred in registering the trade mark of the first defendant which registration is therefore not valid. The first defendant filed a notice of appeal dated 21st February, 2012 against those orders. The notice of appeal contained several grounds of appeal which are given as item (1) in the appendix to this judgment.

2. Before considering the grounds of appeal, it ought to be mentioned that several well known authorities establish the principles to be applied by the court when considering an application for leave to appeal. “Leave to appeal will be granted if the court is of the view that the appeal has a realistic prospect of succeeding.” See *Addari v. Addari No. 21 of 2005 C.A. Virgin Islands, unreported, per Rawlins*

JA at page 5. Other principles are (1) where there is a prima facie case that an error has been made; (2) where the question is one of general principle decided the first time; and (3) where the question is one of importance upon which further argument and a decision of the Court of Appeal would be to the public advantage: see *Belize Telemedia v. Belize Telecom Ltd. No. 23 of 2008 Court of Appeal Belize (unreported) per Carey JA at page 3 & 4, quoting Sosa J, as his Lordship then was in Wang v. Atlantic Insurance Co. Ltd. Supreme Court Belize 21st July 1998 unreported.*

3. The court has a discretion whether or not to grant leave to appeal, and the applicant for leave to appeal has the burden to show prima facie that an error has been made. For instance, such an error would include, where the judge in the exercise of his discretion, “made a mistake in law, disregarded principle, misapprehended the facts, took into account irrelevant material, ignored relevant material or failed to exercise his discretion”: see *Addari v. Addari above at page 5.* The burden is on the applicant for leave to appeal to satisfy anyone of the principles or categories mentioned in *Belize Telemedia Limited v. Belize Telecoms and Wang v. Atlantic Insurance Co. Ltd.* above.
4. I will take grounds (1), (2) and (4) of the grounds of appeal together. The essence of these grounds is that the court, having struck out the amendment, then proceeded to grant the same amendment by ordering that the registration of the trade mark is invalid. In fact, the order of the court was that the “registration is not valid,” because the Deputy Registrar failed to comply with section 37(4)(a) of the Act. Since, in

the view of the court, the Deputy Registrar failed in that respect, the registration could not be valid. The court is entitled to make that order under section 28 of the Supreme Court of Judicature Act; under the Supreme Court (Civil Procedure) Rules, 2005; (the Rules) and under the unlimited original jurisdiction of the court. Section 28 is as follows:

“Subject to any law, the court may in any cause or matter make any order as to the procedure to be followed or otherwise which the court considers necessary for doing justice in the cause or matter, whether that order has been expressly asked for by the party entitled to the benefit thereof or not.”

5. It was argued by learned counsel for the applicant that the ejusdem generis rule applied to the interpretation of the above section; and therefore the words “or otherwise” that follow the phrase “procedure to be followed,” has to be related or connected to procedure and not substantive matters, such as the order made in the decision. But that construction by learned counsel for the applicant would seem to be repetitious or senseless, for it would mean, if that construction is correct, that the section would be saying “procedure to be followed” or other procedure. This would be a ridiculous interpretation of the section which could not be attributable to the legislature. The Oxford dictionary defines “otherwise” as meaning “in different circumstance; or else; in other respects; in a different way, alternatively in a different state or situation.” The dictionary goes on to state that the phrase “or”

or “and otherwise” indicates the “opposite of something stated.” I think section 28 gives the power to make any order as to the procedure to be followed, or make any order otherwise, that is to say make any order in other respects or in different circumstances or in any other way. In *Packwood v. Union Castle Mail SS Co. Ltd., 1903 TLR 59*, a ship owner was exempted from liability from damage caused while providing, dispatching, navigating a vessel or otherwise. A passenger’s dog was lost, but not in providing, dispatching or navigating the vessel ,but by negligence of servants of the ship owner which the court held fell under the phrase “or otherwise.” The court held that the phrase “or otherwise” meant “in any other way”: per Walton J at page 60. I have come to the conclusion that under section 28 the court may make any order in any cause or matter argued before it which the court considers necessary for doing justice whether or not that order has been expressly claimed.

6. Order 26(1) (1)(u) of the Rules gives the court the discretion to make any order for the purpose of furthering the overriding objective of the Rules; that is to say deal with cases justly including saving expense and dealing with the case expeditiously. In this matter before me, the parties were fully heard on the issue of whether the registration of the trade mark was valid. Therefore, it seems to me that the court would be neglecting in its duty, if it did not rule on the issue argued; but instead turned the parties away without any such ruling, simply because the issue was not specifically claimed or mentioned in the claim or application. Where the court neglects in such circumstances to make a ruling, it is not unreasonable to expect a newt claim or

application to the court for such a ruling, which would involve a repetition of the arguments resulting in further expense and contrary to the overriding of objectives of the Rules. Moreover, the court in the exercise of its unlimited original jurisdiction conferred by section 95 of the Constitution is, in my view, able to make decisions on issues or matters, fully argued before it, even though those matters or issues were not specifically claimed by either of the parties. For all the above reasons I do not see any prospect of success in relation to grounds 1, 2 and 4.

7. In relation to grounds 3, 5, 7, and 8, I do not see a prospect of success on these grounds. The Deputy Registrar in carrying out her duties, in relation to the registration of a trade mark is bound to consider section 37(4)(a) of the Trade Marks Act as follows:

“(4) A trade mark shall not be registered if, or to the extent that, its use in Belize is liable to be prevented:-
(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade.”

8. Had she considered the said section, and the claim and other pleadings served on her, as mentioned in the decision dated 8th November, 2011, it is not unreasonable to say she could not have properly registered the

trade mark. The fact that the opposition to the registration was abandoned, did not preclude the Deputy Registrar from discharging her duty, and complying with section 37(4) (a) of the Act before registering the trade mark. The burden is on the first defendant to prove its submission that the registration was proper and legal; and had the Deputy Registrar considered and applied that section, she should have, in order to satisfy that burden, produced sworn or other evidence, that she did consider the section; but this was not done. I do not see a realistic prospect of success on these grounds.

9. As shown above, the applicant has failed, in my view, to prove that there is a prima facie case that an error has been made so as to satisfy the first category of *Wang*. As to the second category, section 28 above has been interpreted in *Corozal Timber Company Limited v. Daniel Moreno No. 280 of 2009*. The above principles are widely known having been considered previously by the courts and therefore further litigation of them could not be to the public advantage. Therefore the third category of *Wang* has not been satisfied.
10. At the conclusion of the hearing of the application for leave to appeal, the court refused the application and promised to give reasons for the refusal at a later date. The above are my reasons for refusing the application. No arguments were advanced in relation to a stay. Case management orders were made after the refusal and a date was set agreeable to the parties for pretrial review.
11. I therefore make the following orders:

- (1) The application for leave to appeal is refused.
- (2) The first defendant/applicant in both matters shall pay costs to the claimant in the sum of \$1,500.00 on each claim.

Oswell Legall
JUDGE OF THE SUPREME COURT
27th July, 2012

APPENDIX

ITEM 1
Grounds of Appeal