IN THE SUPREME COURT OF BELIZE, A.D. 2005

ACTION NO. 420

IN THE MATTER of the Married Woman's Property Act Chapter 176 of the Laws of Belize Revised Edition 2000.

IN THE MATTER of the Supreme Court of Judicature (Amendment) Act 2001

	(ELENA USHER	**APPLICANT**
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BETWEEN	**(AND**	
	(	
	(OSBERT ORLANDO USHER	**RESPONDENT**

Coram: Hon Justice Sir John Muria

Hearing: 22 May 2007
Ruling: 28 May 2007

Advocates:
Ms Lois Young S.C. with Ms Magali M. Young for Applicant
Fred Lumor S.C. with Ms Roberta Magnus-Usher for Respondent

RULING

Injunction – ex parte order – whether appellable – Court of Appeal – Court of Appeal Act (cap 90) – power to hear appeal against ex parte order – procedure – whether proper to appeal before judge reviews his ex parte order – whether a party can renew application for injunctive order – Supreme Court's inherent jurisdiction

Muria J.: By a notice of dated 18 May 2007 and filed on 22 May 2007, the Respondent took a preliminary objection to the summons dated 4 May

2007 issued by the Applicant seeking an interlocutory injunction against the Respondent. The grounds for the objection are:

1. The Application of the Applicant for an interlocutory injunction having been refused, the Applicant ought to have lodged an appeal against the Order of the Court which discharged the ex parte injunction dated 4th day of May, 2007.
2. The Order which discharged the ex parte injunction is dated the 4th day of May, 2007. The summons for another interlocutory injunction is also dated 4th day of May 2007. There are no new or altered circumstances concerning the matters on which the Court made the ex parte Order dated 12th April, 2007.
3. The Summons dated 4th May, 2007 is an application made between the same parties; the Applicant seeks the same orders in the nature of Mareva Injunction as the orders contained in the ex parte order of the Court made on 12th April, 2007.

4. The Court granted an ex parte injunction on the application of Elena Usher, the Applicant, on 12th April, 2007. The Court granted an absolute ex parte Order which discharged the injunction. The discharge Order is dated 4th May, 2007. The Applicant ought to lodge an appeal in accordance with Section 14(3)(a)(ii) of the Court of Appeal Act, Chapter 90.

In support of his preliminary objection the Respondent relied on two affidavits sworn by himself and one by Roberta Magnus-Usher sworn to on 17 May 2007.

Brief Background

Briefly, the background circumstances giving rise to the objection relate to the previous orders of the court in the matter. The first order was made by the Court on 29 November 2005, *ex parte*, against the Respondent to restrain him from dealing with six (6) of the eleven (11) properties listed in the summons dated 22 November 2005. The *ex parte* injunction order also restrained the Defendant/Respondent from dealing with his account at the Holy Redeemer Credit Union. The Order was formally drawn up and dated

4 December 2005. At an *inter partes* hearing on 19 April 2006 the Court discharged the *ex parte* order of 4 December 2005 upon the undertaking by the Respondent not to deal with the six (6) properties listed in the *ex parte* injunction order.

On 12 April 2007, upon an *ex parte* application by the Applicant the Court granted an *ex parte* injunction and *freezing* order against the Respondent. That order, froze the Respondent's own account as well as accounts in the name of Gran's Farm at St. John's Credit Union, Holy Redeemer Credit Union, Atlantic Bank, Scotia Bank (Belize) Limited, Belize Bank Limited, First Caribbean International Bank, Provident Bank and Trust, and Atlantic Bank Limited. The respondent was also restrained by the same order from dealing with the properties described in the schedule to the order. There were eight (8) properties set out in the schedule.

On 23 April 2007, the respondent applied *ex parte* for the discharge of the Order of 12 April 2007. Having heard Counsel and upon reading the affidavit of Mr. Fred Lumor S.C. filed in support, the Court granted the order on the same day 23 April 2007 (the formal order was drawn up on 4 May 2007) discharging the Order of 12 April 2007. I shall refer to the

discharging order as "the order of 4 May 2007." The Court further ordered that all applications "*to be made in this Action*" be made *inter partes*.

Presently now before the Court is again an application by the Applicant for an injunction restraining the respondent from dealing with the properties set out in the schedule to the application. The application also seeks to restrain the respondent from dealing with any bank accounts or accounts in his personal name or in Gran's Farm in the financial institutions named in the previous Order of 12 April 2007 namely, St. John's Credit Union, Holy Redeemer Union, Alliance Bank of Belize Limited, Atlantic Bank Limited, Scotia Bank (Belize) Limited, Belize Bank Limited, First Caribbean International Bank, and Provident Bank and Trust. It is this application that gave rise to the respondent's objection now before the court.

Issues and argument

Mr. Fred Lumor S.C. with his usual acumen and candor, firmly but fairly pressed the Respondent's case on the four grounds mentioned earlier. I must say that Counsel's oral arguments supported by a well paginated bundle of authorities have helpfully assisted the Court in appreciating the Respondent's position in the matter. The Court is most grateful. I shall take

each of the grounds and consider it together with the issues presented in each of the grounds.

Grounds 1 and 4

The contention by Counsel for the respondent on these grounds is that the applicant, if she was not happy with the Order of 4 May 2007 discharging the *ex parte* order of 12 April 2007, she ought to have appealed to the Court of Appeal, rather than coming back to the Supreme Court for another application for injunction. This ground raises the issue of whether an appeal lies to the Court of Appeal against an *ex parte* injunction order granted by the Supreme Court. As expected, Ms Lois Young S.C. of Counsel for the applicant was firmed in her contention that where there is an *ex parte* order, one does not appeal but rather one must go back to the Court which granted the order, so that the Court has the opportunity to hear both sides. It is only after the Court makes an order having heard both sides, that an appeal lies to the Court of Appeal against such an order.

The principle as contended for by Counsel for Applicant is correct. So that if, following the *ex parte* order of 12 April 2007, an *inter partes* hearing was fixed in which both parties appeared before the Court for the purpose of

continuing or discharging the order, the Court would have been in the position to hear both sides before deciding whether to continue or discharge the order of 12 April 2007. However, that was not what happened in this case. Following the *ex parte* order of 12 April 2007, the Respondent applied *ex parte* on 23 April 2007 to discharge the order made on 12 April 2007. The Court, on the materials before it, was satisfied that the *ex parte* order of 12 April 2007 ought to be granted. Apart from its inherent power, the case law authorities are clear that the Court can, on an *ex parte* application, grant an order discharging an injunction order. See *London City Agency (JCD)Ltd –v- Lee* [1970] Ch. 597 referred to in *Ramkaise Manogeesingh –v- Airport Authority of Trinidad and Tobago* [1993] 42 WIR 301. David Bean in *Injunctions* (seventh Edition) at page 77 also reiterated the principle as stated by Megarry J in *Lee's* case.

The contention for the Respondent, however, is that since the Court discharged the *ex parte* injunction, the Applicant ought to have appealed to the Court of Appeal against the order of 4 May 2007 and not to bring another application for injunctions. Before I deal with that contention, I feel it would be necessary to deal first with the issue of whether an appeal lies to the Court of Appeal against an *ex parte* injunction order.

Counsel for the respondent, referred the Court to section 14(1) and (3) of the *Court of Appeal Act* (cap 90). That section provides:

> "14 (1) An Appeal shall lie to the Court in any cause or matter from any order of the Supreme Court or judge thereof where such order is -
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> ……………………………
>
> (f) an order upon appeal from any other court, tribunal, body or persons;
>
> (g) (i) a final order of a judge of Supreme Court made in Chambers;
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> ………………………………
>
> (3) No appeal shall lie from any order referred to in paragraph (g) or (h) of subsection (1)
>
> (a) except –
>
> ………………………..
>
> (ii) when an injunction or the appointment of a receiver is granted or refused."

Counsel for the Respondent submitted that the provisions referred to, entitle the applicant to appeal to the Court of Appeal if she was not happy with the order discharging the *ex parte* injunction. I must say that it is one thing for a party, to a litigation to be accorded his entitlement to appeal, but it is another thing whether he utilizes his entitlement or not if there is an alternative avenue available to him to vindicate his rights. In so far as the right of appeal provided under section 14(1) (f) and (g) of the *Court of Appeal Act* is concerned, my view is that the provision empowers the Court of Appeal to hear appeals even against an *ex parte* order of Supreme Court or a judge. However, as pointed out in *WEA Records Ltd –v- Visions Channel 4 Ltd* [1983] 1 WLR 721, an appeal against an *ex parte* order can only be properly brought to the Court of Appeal after the judge who made the *ex parte* order or another judge of the High Court has the opportunity of reviewing the *ex parte* order. In other words, the proper procedure is that following an *ex parte* order, the judge will, on the return date, consider what to do with the *ex parte* order having had the opportunity to hear both sides. If the applicant, at that *inter partes* hearing seeks to have the *ex parte* order continued and the judge refuses to grant continuation of the order, the applicant may appeal to the Court of Appeal against the refusal. On the other hand, if the respondent applies to have the *ex parte* order discharged

and the judge refuses to do so, the respondent may appeal to the Court of Appeal against the refusal. It is in those circumstances that an appeal against an *ex parte* order can properly be brought before the Court of Appeal. The bottom line is that, the judge making the *ex parte* order must still be given the opportunity to review his order before an appeal against it can be properly brought to the Court of Appeal.

This is the situation envisaged in section 14(1)(g) and (3)(a)(ii) of the *Court of Appeal Act*. An Appeal against the *ex parte* order without giving the judge an opportunity to review his order would be an abuse of process. In this regard, it is worth noting what Sir John Donaldson MR said in *WEA Records Ltd –v- Visions Channel 4* at P. 727:

> "In terms of jurisdiction, there can be no doubt that this court can hear an appeal from an order made by the High court upon an ex parte application. This jurisdiction is conferred by Section 16(1) of the Supreme Court Act 1981. Equally there is no doubt that the High Court has power to review and to discharge or vary any order which has been made ex parte. This jurisdiction is inherent in the provisional nature of any order made ex parte and is reflected in

R.S.C. Ord. 32, r. 6. Whilst on the subject of jurisdiction, it should also be said that there is no power enabling a judge of the High Court to adjourn a dispute to the Court of Appeal, which, in effect, is what Peter Gibson J. seems to have done. The Court of Appeal hears appeals from orders and judgments. It does not hear original applications save to the extent that these are ancillary to an appeal, and save in respect of an entirely anomalous form of proceeding in relation to the grant of leave to apply to the Divisional Court for judicial review.

As I have said, ex parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists his application, this is no basis for making a definitive order and every judge knows this. He expects at a later stage to be given an opportunity to review his provisional order in the light of evidence and argument adduced by the other side and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order.

> This being the case it is difficult, if not impossible, to think of circumstances in which it would be proper to appeal to this court against an ex parte order without first giving the judge who made it or, if he was not available, another High court judge an opportunity of reviewing it in the light of argument from the defendant and reaching a decision. This is the appropriate procedure even when an order is not provisional, but is made at the trial in the absence of one party: see R.S.C, Ord. 35, r. 2(1), and *Vint v. Hudspith* (1885) 29 Ch.D. 322 to which Mr. Tager very helpfully referred us this morning."

The *WEA Ltd's* case was followed by the Court of Appeal of Jamaica in *The Junior Doctors Association and The Central Executive of The Junior Doctors Association –v- The Attorney General for Jamaica* (12th July 2000) Court of Appeal Motion No. 21/2000, Suit No. E127/2000.

Mr. Lumor S.C. has helpfully taken the Court through the various authorities contained in the bundle of authorities submitted to the Court. All the authorities demonstrated the position which I referred to earlier namely the appeals were from the decisions made by judges who had the opportunities to reconsider their orders made on *ex parte* applications. In the present case,

the situation as described did not present itself and so the necessity for appeal did not arise. Thus in the light of the manner in which the orders of 12 April 2007 and 4 May 2007 were obtained, it would not be proper for the applicant to appeal against the order of 4 May 2007. This leads me to what I feel is the real issue here.

Grounds 2 and 3

These two grounds contain what I see as the real issue here, that is, whether the Applicant should be allowed to bring another application for injunction against the Respondent. The case for the Respondent is that on the same day that the discharge Order was made, the Applicant issued a summons for another interlocutory injunction. There are no new or altered circumstances concerning the matters on which the Court made the *ex parte* injunction order dated 12th April, 2007. The parties are the same; the Applicant seeks the same orders in the nature of *Mareva* Injunction as the orders contained in the *ex parte* order of 12th April, 2007. Thus the Applicant ought not to be permitted to have another go at obtaining an injunctive relief against the Respondent.

The issue of whether a party may be allowed to bring a renewed application for an injunction was raised in the High Court of Jersey in *Walters and 28 others –v- Bingham* [1985-86] JLR 439 where it was held that under its inherent jurisdiction, the Court has power to impose new injunctions even in identical terms as those previously imposed.

It would appear that the case law maintains the position that the Court retains its inherent jurisdiction to grant fresh injunction even based on identical terms as those imposed previously. There is nothing in the Statute or Rules which limits the number of times a Court may grant interim relief such as an *ex parte* injunction. See the cases of *Williams v Homestake Australia Ltd* [2002] NSWLEC 5; *Williams v Homestake Australia Ltd* [2002] NSWLEC 43. The first application failed for lack of sufficient evidence and succeeded in the second application when sufficient evidence was available. Even the case law in America appears to endorse the position that applications for interim injunctive relief can be renewed. See *Karluk M. Mayweathers and Others -v- Anthony C. Newland and Others*, U.S. Court of Appeal (Ninth Circuit) Nos. 00-16708 and 01-15170 August 2, 2001.

Conclusion and order

Although the Court of Appeal has power to hear an appeal against an *ex parte order*, in the present case it would not be proper to bring such an appeal to the Court of Appeal, unless the judge in the first instance first had the opportunity to review his order at the *inter partes* hearing. Secondly, the Court has power to grant fresh injunction and so the Applicant in the present case may still bring an application for a re-issue of an interim injunction against the Respondent.

In the circumstances, the Respondent's objection cannot stand and so, it must fail.

Order accordingly

Hon Justice Sir John Muria