

**IN THE SUPREME COURT OF BELIZE A.D. 2011**

**Claim No: 386**

**BETWEEN** ( **NINA SOMKHISHVILI** **Claimant/Respondent**  
(  
( **AND**  
(  
( **NIGG, CHRISTINGER & PARTNER** **Defendants/Applicants**  
( **YOSIF SHALOLASHVILI**  
( **PALOR COMPANY LTD.**

**BEFORE:** Honourable Madam Justice Minnet Hafiz - Bertram

Appearances: Eamon Courtenay S.C. along with Ashanti Arthurs-Martin for  
Claimant/Respondent  
Rodwell Williams, S.C. for Defendants/Applicants.

**DECISION**

**Introduction**

1. This is an application for an order by the Defendants that all further proceedings herein be stayed pending the hearing of the appeal of the Order of this court dated 22<sup>nd</sup> February, 2012. The court in its Order refused the Defendants application to set aside, discharge and vacate ex-parte orders dated July 5<sup>th</sup>, 2011.
2. The grounds of the application are that:
  1. The court has power to stay the whole or part of these proceedings pending the determination of the appeal by virtue of its inherent jurisdiction and CPR 26.1 (2) (e).

2. The grounds of the appeal goes to the jurisdiction of the Court over the Defendants and so if the stay is not granted, there is an inherent risk that the determination of the appeal would be rendered nugatory should the Defendants be successful or the Defendants would suffer serious loss which would not be adequately compensated for in damages;
  3. There is no risk to the Claimant were the court to grant the stay as the relief sought being primarily declaratory in nature and that the restraining order is in place in the meanwhile, the status quo is maintained and its rights are preserved;
  4. To refuse a stay would effectively stifle the appeal as there is no injustice to the Claimant given the effect of the injunction against the Defendants;
  5. The order appealed against is not coercive nor does it involve payment of money and so there is no prejudice to the Claimant in staying the proceedings;
  6. The questions and issues of law for consideration on appeal are of substantial importance to the public and the proper development of the law;
  7. If a stay is granted and the appeal fails, there is no risk that the Claimant will be robbed of any judgment and there is no judgment at this time;
  8. Whereas if a stay is refused and the appeal succeeds, the Defendants risk irreparable damage and harm to their rights and interest;
  9. It is necessary, just and convenient for the whole proceedings be stayed until the appeal is finally and conclusively determined.
3. The application is supported by the affidavit of Nigel Ebanks, Attorney-at-law. At paragraph 5 through 7 of his affidavit he deposed as follows:
5. *The Defendants by Notice of Appeal dated March 10<sup>th</sup>, 2012 duly appealed as of right against the order refusing to set aside the ex-parte injunction on the grounds therein specified.*

6. *A copy of the Notice of Appeal specifying the grounds of appeal is now produced and shown to me marked "NE 1".*
  
7. *I have read the grounds of appeal and consider that the in personam jurisdiction of the Court was not invoked and or properly invoked, that there is no risk to the Claimant were the proceedings to be stayed and to refuse a stay would stifle the appeal.*

### **Background**

4. On July 4, 2011 this court made two ex-parte orders both of which are dated 5<sup>th</sup> July, 2011. The first order is for Fixed Date Claim Form in this matter and affidavits filed in support of the claim and all other applications and their supporting affidavits be served on the Defendants outside of the jurisdiction. In the second order, the Defendants were restrained from taking and acting on instructions from any person in relation to Palor Company and to part with possession of any assets of the Company until trial or further order of the court.
  
5. On 4<sup>th</sup> October, 2011 the Applicants/Defendants applied to set aside those orders challenging the jurisdiction of the court to grant the interim injunction and order service of the Fixed Date Claim Form on the Defendants. The court gave a written decision on 9<sup>th</sup> February, 2012 in which it refused to set aside the orders made for the following reasons:
  - (1) There was no failure by the Claimant to disclose material facts.
  - (2) The Claimant has established that she has a cause of action in Belize for several reasons, namely:

- (a) Palor is an International Business Company registered in Belize and as such Belize has jurisdiction to determine the ownership of the shares;
- (b) The circumstances of the case justify declaratory relief which is a substantive form of relief;
- (c) There is uncertainty as to the ownership of the shares in Palor and this issue has to be resolved by the court;
- (d) The Claimant has *locus standi* to bring the claim as she says she is the owner of bearer shares in Palor and she has in her possession bearer share certificates, No. 2 and 3;
- (e) The first Defendant, Nigg is a proper party to the claim as their firm was involved in cancelling bearer share certificates, No. 2 and 3 and issuing the new Bearer share certificate, No. 4 to the second Defendant. The claim against them is on the ground of mistake or fraud;
- (f) The second Defendant is a proper party to the claim as he is the holder of bearer share certificate No. 4, and as such his interest lies in opposing the application;
- (g) Pursuant to **section 140 of the International Business Companies Act** the *situs* of the ownership of the bearer shares is in Belize.

- (3) Leave is not required under the Belize CPR **for issue** of a Claim Form out of the jurisdiction.
- (4) The case before the court falls under **Rule 7.3** and as such the court has the power to order service out of the jurisdiction.
- (5) Alternative Service by post pursuant to **Rule 7.8 (1)** was done in accordance with the laws of Switzerland and Israel.
- (6) Belize is the appropriate forum for the determination of the claim.
- (7) Damages is not an adequate remedy for the Claimant.

#### **Waiver of rights**

6. Learned Senior Counsel, Mr. Williams during arguments for the proceedings to be stayed raised the issue that if the stay is not granted, the Defendants would not be able to participate in the proceedings without waiving their rights to challenge the jurisdiction of the Court to hear the claim. Learned Counsel was invited by the court to research this issue since no authority was provided for that argument and make written submissions on the same. Learned Counsel did provide further written submissions but provided no authority. The Claimant urged this court to reject this submission on waiver.
7. In their written submissions, the Defendants say that if they file defence and witness statements pending appeal, this would be construed that they accepted the court's jurisdiction. I disagree with this submission. The Defendants have objected to this court's jurisdiction in accordance with the **Supreme Court (Civil Procedure) Rules 2005 (CPR)** and filed an acknowledgment of service within the period for filing the defence. In my view, if the Defendants had

not objected to the court's jurisdiction to hear this claim but, instead contested the case on its merits then it could be assumed that they had submitted to the jurisdiction of the court. But having done so, if the stay is not granted and they contest the case on its merits, it cannot be deemed that they have waived their rights to challenge the jurisdiction of the court.

#### **Further written submissions**

8. The Claimant submitted that it was improper for the Defendants to make further written submissions when they were asked to address only one issue and as such the court should have no regard to same. The Claimant however, did respond to the submissions not knowing whether their request would be granted. In the interest of justice, I intend to consider the further written submissions since the Claimants were able to respond to same. If the Claimant had not responded to the submissions, the court would have invited her to do so.

#### **Jurisdiction of court to grant stay**

9. The issue before the court is whether the proceedings should be stayed pending the determination of the appeal on the grounds as stated by the applicant. There is no dispute that the court does have power to grant a stay on the whole or part of these proceedings pending the determination of an appeal pursuant to CPR 26.1 (2) (e) and also the inherent jurisdiction of the court. However, the applicant must show that there are good reasons for doing so. In the case of **Michael Antonio Smith Jr. v Linton Wheatley Civil Appeal No. 4 of 2005 (British Virgin Islands)**, cited by Learned Counsel for the Claimant, the following principle was stated by Rawlins J.A. at para 4 of his judgment:

*The court is likely to grant a stay where the judgment or order would be rendered nugatory or the Appellant would suffer loss, which could not easily be recovered from the Respondent, if the stay is not granted. The person who applies for the stay must satisfy the court that it is just to grant it.*

10. Further, in the case of **Rt Hon. Dr. Kennedy Alphonse Simmonds v. Randolph Williams et al, Civil Appeal Nos. 4, 5 and 6 of 1998 (St. Christopher)**, also cited by Learned Counsel for the Claimant, Satrohan Singh JA stated at page 4 of his decision that:

*The court ought not to grant a stay unless there are good reasons for so doing. It is recognized that the court does not make a practice of depriving a successful litigant of the fruits of his litigation. This applies not merely to execution but to the prosecutor of proceedings under the judgment or order appealed from e.g. inquiries into the accounts of a company ... But, a court is likely to grant a stay where the appeal would otherwise be rendered nugatory ..or where the appellant would suffer loss which could not be compensated in damages. If the special circumstances of the case so require, the stay should be granted. If there are prima facie, no arguable grounds of appeal the stay should be refused. It is therefore always most prudent to decide the issue first.*

11. Learned Senior Counsel, Mr. Williams accepts that the law in granting a stay is rightly stated by the Claimants. The court also accepts the principles as stated by the Learned Judges. It must be noted however, that the case before the court is not one for a stay of execution pending appeal. This is not a case where the Claimant would be deprived of the fruits of a judgment in the event that a stay is granted. This is a stay of proceedings before this court pending an interlocutory appeal which challenges the jurisdiction of the court over the Defendants who reside out of the jurisdiction and the subject matter of the claim.

### **Arguable grounds of appeal**

12. The court will first determine whether there are arguable grounds of appeal. To be clear, the court is not required to address the merits of the appeal. I have considered the said grounds and the arguments on both sides, oral and written, and it is my considered view that grounds one to three which challenges the jurisdiction of the court are arguable. The grounds can be conveniently dealt with together.
13. The court had granted restraining orders against the Defendants who reside out of the jurisdiction from disposing of Palor assets, an IBC Company which is registered in Belize. The reason for doing so is that pursuant to **CPR 7.3 (2) (b)**, a claim form may be served out of the jurisdiction where a claim is made for an injunction ordering the defendant from doing some act within the jurisdiction.
14. The argument by Learned Senior Counsel, Mr. Williams is that the judge misconstrued the material before the court by erroneously referring to the shares of the company Palor as the assets of Palor when the shares are not the assets of Palor and that it is the house in London which is the asset of Palor. Learned Senior Counsel further argued that this resulted in an erroneous determination that the claim for the injunction against the Defendants dealing with the assets of Palor was a proper and substantive cause of action within **CPR 7.3**. Learned Senior Counsel further contended that the error that the shares were the property of the company, and since Palor was not a party to the claim, further compounded the error and resulted in a fundamentally incorrect conclusion that a cause of action subsisted against the Defendants.
15. The Claimant in their reply submitted *that the injunction restrained the Defendants from dealing with assets in Palor - the shares. The infelicitous expression chosen by the Judge is nothing more than that.*



16. Learned Senior Counsel, Mr. Williams rightly stated that when the order was made by this court, Palor was not a party to the claim. The house which belongs to Palor, which is the asset of Palor, is located in London. The bearer shares certificates of Palor are not within the jurisdiction though the Company is incorporated in Belize. Pursuant to section 140 of the International Business Companies Act, the *situs* of the bearer shares is in Belize. It is therefore arguable whether the house in London is the asset of Palor or the bearer shares are the assets of Palor, thus giving the court jurisdiction to grant the injunction. As such, I find that it is arguable whether the court had jurisdiction to grant the injunction against the Defendants pursuant to Rule 7.3 (2) (b) which provides:

*A claim form may be served out of the jurisdiction where a claim is made for an injunction ordering the defendant to do or refrain from doing some act within the jurisdiction.*

### **Whether the appeal would be rendered nugatory**

17. Learned Senior Counsel, Mr. Williams submitted that if the stay is not granted and should they be successful on appeal, the said appeal may be rendered nugatory as they would have defended the claim despite the challenge to the jurisdiction of the court. Mr. Ebanks in his affidavit evidence which supports the application for a stay deposed that *the in personam jurisdiction of the Court was not properly invoked and that there is no risk to the Claimant were the proceedings to be stayed and to refuse a stay would stifle the appeal.* Mrs. Martin submitted that the evidence of Mr. Ebanks does not show that if the stay is not granted the appeal would be rendered nugatory.

18. The question for the court is whether the appeal would be rendered nugatory if the stay is not granted. Mr. Ebanks in his affidavit did not spell out in his affidavit why the appeal would be rendered nugatory. Mr. Williams in his submissions however, contended that if the stay is not granted and the appeal is successful, the said appeal may be rendered nugatory as they would have defended the claim despite the challenge to the jurisdiction of the court. Learned Counsel for the Claimant urged the court to refuse the stay and proceed with the trial.
  
19. A lot of time will be lost if the stay is granted and the appeal is unsuccessful as the parties cannot proceed to Case Management so as to secure an early trial date. On the other hand, I agree with Learned Senior Counsel, Mr. Williams that if the appeal is successful, it may be rendered nugatory if the stay was not granted as the Defendants would have defended a claim in which there was a challenge to the court's jurisdiction. It is without doubt that a lot of time and resources would have been expended in defending the claim. The parties would have had to proceed to case management and thereafter, spend time and resources for the preparation of the trial and to do the trial itself. The parties who reside out of this jurisdiction would have had to come to Belize for trial of the claim. It is my respectful view, if the appeal is successful and no stay is granted it would be rendered nugatory by the waste of the court's and the parties' time and resources to prepare and have a trial which should not have taken place.
  
20. Further, the injunction granted by this court restrained the Defendants from taking and acting on instructions from any person in relation to Palor Company and to part with possession of any assets of the Company until trial or further order of the court. The Claimant is therefore protected by the injunction and the evidence shows that

she is residing in the London property. It is therefore, just and convenient for the proceedings to be stayed until the appeal is finally determined. As such, the court in the exercise of its discretion grants the application to stay the proceedings pending the hearing of the appeal of the order of this court dated 22<sup>nd</sup> day of February, 2012.

**Order**

21. All further proceedings in this matter is stayed pending the hearing of the appeal of the Order of this court dated the 22<sup>nd</sup> day of February, 2012 by the Court of Appeal.

The costs of this application shall be costs in the appeal.

Dated this 5th day of July, 2012

Minnet Hafiz  
Supreme Court Judge