IN THE COURT OF APPEAL OF BELIZE AD 2020

CIVIL APPEAL NO 7 OF 2020

(1) GAS TOMZA LTD

(2) WESTERN GAS COMPANY LTD

(3) SOUTHERN CHOICE BUTANE LTD

(4) BELIZE WESTERN ENERGY LTD Appellants

v

(1) CONTROLLER OF SUPPLIES

(2) MINISTER OF ECONOMIC DEVELOPMENT,

PETROLEUM, INVESTMENT, TRADE AND COMMERCE

(3) THE ATTORNEY GENERAL OF BELIZE Respondents

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BEFORE

The Hon. Sir Manuel Sosa	President
The Hon. Madam Justice Minnet Hafiz Bertram	Justice of Appeal
The Hon. Mr. Justice Murrio Ducille	Justice of Appeal

A B Matura for the appellants.
S Matute Tucker and A Finnegan crown counsel for the respondents.

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3 November 2020 (On Submissions in Writing).

SIR MANUEL SOSA P

[1] I am of opinion that this appeal should be dismissed. I have read the judgment of Ducille JA, in draft, and concur in the reasons for judgment given and, save to the extent

indicated below, the orders proposed therein. With regard to the costs order, I am unable to agree that, not having heard the parties on costs, it is appropriate to make an order which immediately takes effect as a final order. In my respectful opinion, the costs order should be provisional in the first instance and only become a final order if no party applies for a different order. I consider that the parties should be given 10 days from the date of their receipt of this judgment in electronic form within which to make such application, by letter to the Registrar copied to all other parties. I further consider that it should be ordered that, in the event of such an application, (a) each party should have 7 days from the date of such application within which to file and deliver to the other parties his or its written submissions on costs and (b) such application should be determined on the basis of the written submissions filed and delivered as ordered.

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SIR MANUEL SOSA P

HAFIZ BERTRAM JA

[2] I have read in draft the judgment prepared by my learned brother Ducille, JA and I agree that the appeal should be dismissed for the reasons given.

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HAFIZ-BERTRAM JA

DUCILLE JA

[3] This is an appeal of the 24th April, 2020 oral decision of Arana, CJ refusing the Appellants' application for an urgent interim injunction made pursuant to *Rules 56.1 (1)(4) and Part 17 of the Supreme Court Civil Procedure Rules* for a series of Orders restraining the Respondents from :

a. refusing to approve and/or issue after 30th April, 2020 the required import license for the importation of Liquefied Petroleum Gas ("***LPG***") of the Claimants so the Claimants are able to carry on their business and trade as importers of LPG;

b. unlawfully harassing, coercing, arbitrary arresting, intimidating and/or in any other manner whatsoever interfering or disrupting the business operations of the Applicants, their employees, servants and/or agents in the course of importing, operating, selling, disposing and/or dealing with LPG in reliance of Statutory Instrument No. 80 of 2019.

[4] The Appellants are all independent companies conducting trade and business as importers of LPG. On the 5th September, 2019 the *National Liquefied Petroleum Gas Act* ("***the Act"***) was published in the Gazette. Section 5 of the Act provides that the National Gas Company, as Developer "shall have the exclusive right to import wholesale LPG into Belize until the expiration of the term of the Definitive Agreement".

[5] On the 5th December, 2019, *Statutory Instrument No. 80 of 2019 – Regulations for Supplies Control under Supplies Control Act, Chapter 293* were published in the Gazette ("***the Regulations***"). Pursuant to the Regulations the Appellants were notified by the Controller of Supplies via letter dated 28th February, 2020 that, with effect from 1st May, 2020, the National Liquified Petroleum Gas Terminal ("***NLPGT***") would commence operations. The Appellants were further advised that as a result of the commencement of operations licenses for the import of LPG will only be issued up to the 30th April, 2020.

[6] The Appellants subsequently filed an application for an urgent interim injunction in the terms described at paragraph 1 above. That application was heard and dismissed by Arana, CJ on the 24th April, 2020, on the basis that while the matter presented serious issues to be tried the balance of convenience fell in favour of the Respondents as the Appellants would not suffer irreparable harm and damages were an adequate remedy for the losses claimed by the Appellant.

[7] The Appellants in turn filed an Urgent Notice of Appeal on the 27th April, 2020, challenging the decision of the learned Chief Justice on the following 14 grounds:

(i) The Applicants stand a real prospect of success based on the grounds set out in the Urgent Notice of Appeal and the supporting documents filed therein.

(ii) There would be total ruination of the Appellants LPG importation businesses and the total investment they have each made over the past thirty years if the Appellants are unable to continue to import LPG after 30th April, 2020.

(iii) A decision in favour of the Appellants in the Substantive Claim would be nugatory if the injunction is not granted since the Appellants' business would have already been ruined and their goodwill and reputation damaged as a result.

(iv) Prima face, the Arana CJ (Ag) acknowledges that there is a serious issue to be tried, but has refused an early date for trial.

(v) The learned trial judge erred in law and fact in finding that the Appellants will not suffer irreparable harm if they are not allowed to continue working as LPG Importers, since they have no right to operate as importers of LPG in Belize, but instead are afforded a privilege granted by way of approved license applications to import LPG, now being denied solely because of the creation of a monopoly.

(vi) The learned Trial Judge erred in law in finding that the Court's discretion not to grant the application will be exercised against the Appellants because they were delayed in making the application for an interim injunction after the decision of the Respondents to not issue import licenses to them was already made since August, 2019, without consideration of the fact of when the decision to deny them import license was finally made and communicated to them.

(vii) The learned trial judge erred in law and fact in finding that the decision of the Government to pass the Act is one of policy designed to modernize and stabilize the LPG market in Belize, which was not a relevant consideration and was an issue to be determined at the substantive hearing given that the constitutionality of the Act formed the basis of the issues to be tried.

(viii) The learned trial judge erred inn law and fact in finding that the balance of convenience lies in favour of the Defendants because of the hearsay statement by Mr. Jose Trejo, Controller of Supplies who said at para 23 of his Affidavit that the "total investment into the terminal facility is to the tune of US sixty-million dollars ($60M) without any proof of this investment and failing to consider that the continued operation of the Appellants in

no way stops the Government from allowing the National Gas Company to continue any purported investment.

(ix) The learned Trial Judge erred in law and fact in finding that the balance of convenience lies in favour of the Defendants because the Appellants could have applied through a tendering process to be suppliers of LPG to the National Gas Company thereby disregarding the fact that the Appellants would only be suppliers, not importers and that only one person or company can win the bid in the tendering process with no guarantee that any of the Appellants would be successful. The only guarantee was that the Appellants will no long be importers of LPG under the LPG importation monopoly given to the National Gas Company Limited ("NGCL").

(x) The Learned Trial Judge erred in fact in finding that the Appellants in participating in a tendering process would still be able to be LPG importers, when that is not true, since, in fact, the monopoly was created in favour of NGCL as Developer, who shall have the exclusive right to import wholesale LPG into Belize until the expiration of the term of the Definitive Agreement" as stated at section 5 of Act No. 12 of 2019.

(xi) The learned trial judge erred in law and fact in finding that because damages is a portion of the relief sought under the substantive Constitutional Claim, that it will therefore mean that damages will suffice and as such did not grant the interim injunction sought.

(xii) The learned trial judge in applying the three-partite test for an injunction, failed to consider the evidence of Aureliano Rafael Bautista Cifuentes regarding the irreparable harm that would be caused by the closure of the importation business of the Appellants and failed to address the prejudice caused to the business and good will and reputation of the Appellants that cannot be regained after the uncertain date of the trial, thus the need to maintain the status quo.

(xiii) That the learned trial judge erred in law and fact in not considering that the application for an urgent injunction did not seek to prevent the NGCL from operating, but rather to prevent the Defendants from refusing to grant them the usual LPG importation license that goes to the essence of their right to work as LPG operators.

(xiv) That the learned trial judge erred in law and fact in denying an injunction against the implementation of SI 80 of 2020 and gave no reason for such denial despite the Respondents making no counter-submission on this portion of the application for an interim injunction.

[8] Before considering the merits of the appeal it must be noted that as a result of the oral and urgent nature of the hearing and the current measures in place to address the Covid 19 public health emergency, this court has not had the benefit of reading a transcript of the proceedings below or the notes of the learned Chief Justice setting out her reasons for holding in the manner in which she did. In light of this I accept the Respondents' position that in the present circumstances there are two broad issues before the court namely: 1. whether the learned Chief Justice erred when she held that the balance of convenience lies in favour of the Respondents and 2. whether the learned Chief Justice erred when she held that damages would be an adequate remedy. In my view issue 2 is determinative of the present matter.

[9] It is well established that the grant of an injunction is a discretionary remedy and as such an appellate court reviewing the decision of a lower court to either grant or deny an injunction will only overturn such a decision where that decision was plainly wrong.

[10] Similarly the test a court must apply on applications for interim injunctions in constitutional matters is also well established. The test was first set out in the Canadian Supreme Court case of *RJR Macdonald Inc v Canada (Attorney General) 1 SCR 311,* approved by the Privy Council in *Seepersad (a minor) v Ayres-Caesar et al, [2019] UKPC*

7 and adopted by the Supreme Court of Belize in *Michael Espat et al v Prime Minister of Belize et al Claim No. 151 of 2019.* There Kenneth Benjamin, CJ stated,

> "*The test to be applied in applications for the grant of interim relief in cases involving constitutional rights has been that applied by the Supreme Court in Canada and approved by the Judicial Committee of the Privy Council ("JCPC") in Seepersad (a minor) v Ayers-Caesar et al. The dictum of the JCPC reads as follows:*
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> *'12. In Summary, the appellant argues that the Court of Appeal should have adopted the tri-partite test to the grant of interim relief in cases involving constitutional rights applied by the Supreme Court of Canada in Manitoba (Attorney General) v Metropolitan Stores Ltd [1987] 1 SCR 110 and RJR Macdonald Inc v Canada (Attorney General) 1 SCR 311: first, there should be a preliminary assessment of the merits to see whether there was a serious issue to be tries (adopting the less stringent merits test laid down by the House of Lords in American Cyanamid Co v Ethicon Ltd [1975] AC 396); second it must be determined whether the applicant would suffer irreparable harm if the application were refused; and third, an assessment must be made as to which of the parties would suffer the greater harm from the granting or refusal of the remedy pending a decisions on the merits …*
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> *15. The Board agrees that the tri-partite test in RJR-MacDonald is appropriate when considering interim relief in constitutional cases.'*
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> *I am content to adopt the three-pronged test and indeed, the arguments on both sides followed the said test."*

[11] I approve the decision of Justice Benjamin in adopting the tri-partite test established in *RJR-MacDonald* and approve Arana, CJ's adoption and application of the same in the present proceedings.

[12] At its core the Appellants' claim is a claim for loss of earning and future loss of earnings derived from the business of importation both of which are heads of damages well known to the law and quantifiable. Similarly the Appellants' claim for reputational damage if successful is also not unknown to the law or unquantifiable. The Appellants' claim for damages is indicative of this fact. This position does not maintain for the Respondents who clearly set out at paragraphs 54-60 the probably significant rippling macroeconomic effects that may result if the injunction as requested was granted. In these circumstances it is clear that the balance of convenience lies in favour of the Respondents and as such I find no fault in Arana, CJ's decision to refuse the Appellants' application for an interim injunction.

[13] In the premises I propose (1) that appeal be dismissed and (2) that the costs of the appeal be the Respondents' to be taxed if not agreed.

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DUCILLE JA