

COURT OF APPEAL SITTING

**SAINT LUCIA
26th February 2014**

APPLICATION AND APPEAL

Case Name:

[1] Cage St. Lucia Ltd.

v

[1] Treasure Bay (St. Lucia) Ltd.

[2] The Gaming Authority

[3] The Cabinet of St. Lucia

[4] National Lotteries Authority

**[5] The Minister for Social
Transformation Youth and Sports**

[SLUHCVAP2013/0031]

Coram:

**The Hon. Dame Janice M. Pereira, Chief Justice
The Hon. Mde. Louise E. Blenman, Justice of
Appeal
The Hon. Mr. Mario Michel, Justice of Appeal**

Appearances:

Appellant:

**Mr. Garth Patterson, QC (via telephone) with
him Ms. Eugenia Dixon**

Respondent:

**Mr. Peter Foster, QC with him Ms. Renee St.
Rose for the 1st respondent**

Ms. Petra Nelson for the 2nd respondent

Mr. Dwight Lay for the 3rd respondent

Mr. Vern Gill for the 4th respondent

No appearance of and for the 5th respondent

Issues:

**Civil appeal – Application to adduce further
evidence – Orders granting access – Whether
learned trial judge had jurisdiction to hear
application for correcting procedural errors –
Whether learned trial judge erred procedurally**

or failed to comply with a rule, order or practice direction

Result / Order:

[Oral delivery]

- 1. The application to adduce the affidavit evidence of Ms. Eugenia Dixon filed on 4th February 2014 is hereby granted.**
- 2. Permission to refer to the transcripts of proceedings before Carter J [Ag.] is granted.**
- 3. The access orders which flowed from the order of Wilkinson J dated 4th September 2013 are set aside in their entirety. The part of the order which has nothing to do with the access orders remains.**
- 4. The 1st respondent, Treasure Bay (St. Lucia) Ltd., shall pay to the appellant costs on the appeal and on the application before Carter J [Ag.] within 21 days to be assessed if not agreed.**
- 5. The 1st respondent shall pay to the appellant costs on the application to adduce further evidence within 21 days to be assessed if not agreed.**

Reason:

This is an appeal from a decision of Carter J [Ag.] where she refused to entertain an application brought under rule 26.9(3) of the Civil Procedure Rules 2000 (“CPR 2000”) in respect of an order made by Wilkinson J on 4th September 2013.

Wilkinson J had before her three applications, filed by the appellant, to strike out various portions of an expert report. On delivery of that decision, the learned trial judge proceeded to make access orders of her own volition in as much as there was no such application before her. In addition, she had not indicated that she was making the orders she purported to make. The learned trial judge had pointedly held that these orders were being made pursuant to the court’s case management powers under rule 26.1(2)(w) of the CPR 2000. The Court noted that Wilkinson J did address her mind to rule

32.12, which rule has the rubric, “Power of court to direct party to provide expert report”. The learned trial judge ought to have paid due regard to that specific rule as it is directly applicable to certain situations pertaining to expert reports and information sought in relation thereto. That rule provides however for an order to be made thereunder but only on application. CPR 26.1(2)(w) is a general case management rule.

Upon the learned judge reading of the orders, appellant counsel sought to bring to the learned trial judge’s attention that the appellant had been taken by surprise as no such order was applied for. However, the learned trial judge did not entertain counsel’s objection to the making of the orders and made plain that no discussion would be entertained thereon that day. Counsel thereafter accepted the orders after requesting the addition of a further term therein aimed at minimizing the prejudicial effect on the appellant, and otherwise, in effect, reserved his position in respect of the making of the said orders.

Subsequently, counsel for the appellant filed an application under rule 26.9(3) on 11th September 2013 requesting that the order of Wilkinson J be set aside or varied; essentially requesting that matters be put right as Wilkinson J allegedly made a procedural error. The issues were whether it was open to her to make such an order utilizing rule 26.1(2)(w) in light of the specific rule in 32.12, and if so, whether in any event she could do so in circumstances where, no notice had been given of the intention to make the orders and further not allowing the party to be affected by them (in this case the appellant) to be heard thereon. At the time of making the application, the access orders of Wilkinson J had not been perfected.

The application was served on the 1st respondent, Treasure Bay (St. Lucia) Ltd., on 18th September 2013. On 20th September 2013

the application came before Carter J [Ag.] instead of Wilkinson J whereby the 1st respondent, Treasure Bay (St. Lucia) Ltd. applied for an adjournment of the matter. The adjournment was granted and the matter later came up for hearing before Carter J [Ag.] on 9th October 2013. Notwithstanding the pending application before the court, Wilkinson J's order was perfected on 25th September 2013.

Carter J [Ag.], in her order dated 29th November 2013, held that, Wilkinson J's order having been perfected, the court had no jurisdiction to set aside or alter that decision. She further held that the proper recourse for the appellant would be by way of an appeal.

The appellant thereafter appealed and subsequently filed an application to adduce further evidence.

APPLICATION

Counsel for the respondent, Treasure Bay (St. Lucia) Ltd., conceded that the appellant did reserve his right to challenge the disclosure/access orders. Counsel further indicated that he had no objection to the application to adduce affidavit evidence of Ms. Eugenia Dixon being granted.

The Court was of the opinion that the transcript was clear that appellant counsel reserved his right to later challenge the orders, and at the same time seeking to ensure that the orders, such as they were, were not too detrimental to his client. This, the Court held, was not an agreement to the order being made.

APPEAL

The Court was of the opinion that the learned trial judge erred when she purported to grant such orders under rule 26.1(2)(w), pursuant to her case management powers. The CPR, more particularly rule 32.12, provides for the granting

of such orders, only on the application of a party. There was no such application by any party. Further, rule 26.1 is applicable only where the rules do not expressly provide otherwise.

The learned trial judge, after making a decision to invoke rule 26.1 in preference to rule 32.12, fell further into error when she failed to observe rule 26.2. Rule 26.2 confers power on a court to make orders of its own initiative. Specifically, rule 26.2(2) states that if the court proposes to make an order of its own initiative, it must give any party likely to be affected a reasonable opportunity to make representations.

The Court noted that the learned trial judge effectively made an order of her own initiative despite the rules expressly providing for the making of such orders. After invoking her case management powers under rule 26.1 she further compounded her error when she failed to allow the appellant to make any representations whatsoever or to be heard. This was a fatal procedural error. On that basis, a court of similar jurisdiction, under rule 26.9(3) could have put matters right. Notwithstanding the order was perfected, by the time the application came on for hearing, this did not take away from Carter J's [Ag.] jurisdiction. Carter J [Ag.] would have been with jurisdiction as judge of the High Court to determine whether or not the complaints of procedural errors made by the appellant were valid complaints in relation to the making of the orders. It could not be doubted that the appellant would have been entitled to apply to Wilkinson J and draw her attention to the procedural errors occurring in the making of the orders having not been allowed to address the orders on the day they were read out and having reserved his position to challenge them.

The Court opined that the common thread running throughout the CPR relates to an observance of the rules of natural justice. The

Court considered that the learned trial judge breached a fundamental tenet of natural justice, that is, the right to be heard.

The orders the trial judge purported to make were in the form of disclosure orders. Such orders by their nature are very intrusive. The appellant, being the affected party and having been given no opportunity to be heard or make representations, was particularly disadvantaged. The Court was not satisfied that justice was done in this case.

Owing to the peculiar circumstances of this case, where (1) the rules expressly provide for the granting of such orders; (2) there was no application before the court for the granting of such orders; (3) the learned trial judge erred in invoking her case management powers under rule 26.1; (4) the court gave no notice that she was going to grant such orders; (5) the appellant, the affected party, was given no opportunity to be heard; and further that (6) the appellant having filed an application, under rule 26.9(3), to put matters right before the order was perfected; (7) the error made by the learned trial judge was a procedural error, the Court concluded that the access orders could not stand. The Court considered the cases of *Steel v Mooney and others* [2005] All ER 256; *Trans-world Metals SA (Bahamas) et al v Bluzwed Metals Limited (BVI) et al, Territory of the British Virgin Islands BVIHCV2003/0179*, delivered 22nd March 2005 unreported; and *Belize Electricity Limited v Public Utilities Commission, Belize BZ 2010 CA 22*, delivered 8th October 2010.