IN THE COURT OF APPEAL
CONCURRENT JURISDICTION

MISC. ACTION 39A OF 2011
(High Court HBJ 2 of 2010)

BETWEEN : **PROLINE BOATING COMPANY LIMITED**

Applicant/Appellant

AND : **THE DIRECTOR OF LANDS**

First Respondent

AND : **THE REGISTRAR OF TITLES**

Second Respondent

AND : **DOMINION FINANCE LIMITED**

Third Respondent

AND : **PROLINE MARKETING LIMITED (In Receivership)**

Fourth Respondent

Coram : **Calanchini AP**

Counsel : **Mr H Nagin for the Applicant/Appellant**
Ms N Karan for the First and Second Respondents
Mr D Sharma for the Third Respondent

Date of Hearing: 26 April 2013

Date of Decision: 17 May 2013

DECISION

[1]. This is an application for leave to appeal a decision of the High Court delivered on 6 August 2010 refusing an application for leave to apply for judicial review under Order 53 of the High Court Rules. The application to this Court is a renewed application of an application for leave to appeal which was refused by the learned Judge in the Court below.

[2]. The application was made by Notice of Motion dated 7 December 2011 and filed on the same day. The application was supported by an affidavit sworn on 7 December 2011 by Timoci Bose Bart. The parties have filed a number of affidavits since then and where necessary reference will be made to the material in those affidavits during the course of this decision.

[3]. Under section 20 of the Court of Appeal Act Cap 13 (the Act) a single judge of the Court of Appeal may exercise the power of the Court of Appeal to, amongst other things, give leave to appeal. The power of the Court of Appeal to give leave to appeal is found in section 12(2) (f) of the Act which provides that an appeal shall not lie to the Court of Appeal:

> *"without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge of the High Court _ _ _"*

[4]. It is not in dispute that a judgment given on an application for leave to apply for judicial review is an interlocutory judgment. Consequently it is clear that in the present case pursuant to section 12(2) (f) of the Act the Court of Appeal and the Court below exercise what is termed a concurrent jurisdiction in relation to, amongst others, an application for leave to appeal an interlocutory judgment of the High Court to the Court of Appeal. There is however a requirement in the Court of Appeal Rules (the Rules) as to how an appellant is to invoke this concurrent jurisdiction. Rule 26 (3) of the Rules states:

> *"Whenever under these Rules an application may be made either to the Court below or to the Court of Appeal it shall be made in the first instance to the Court below."*

[5]. Although the opening words of the sub-rule state *"under these Rules"* I am of the view that the same procedure should apply whenever whether under the Act or the Rules concurrent jurisdiction is given to the Court below and to the Court of Appeal. Therefore, whenever the Court of Appeal and the Court below have concurrent jurisdiction in relation to a particular application, such as an application for leave to appeal, that application must first be made to the judge in the court below (in this case the High Court).

[6]. In accordance with the requirement specified in Rule 26(3) the Applicant/Appellant (the Applicant) filed an application for leave to appeal in the High Court on 20 August 2010. The application was filed within 21 days being the time for appealing that is prescribed by Rule 16 of the Rules. In a written judgment dated 28 November 2011 the learned Judge in the Court below refused the application for leave to appeal and awarded costs to the First, Second and Third Respondents in respect of both the leave to apply for judicial review and the leave to appeal applications.

[7]. Therefore what I have before me now pursuant to section 20 of the Act is a renewed application under Rule 26(3) of the Rules for leave to appeal under section 12 (2) (f) of the Act the interlocutory judgment of the High Court refusing leave to apply for judicial review under Order 53 Rule 3 of the High Court Rules

[8]. By an application dated 6 May 2010 the Applicant sought leave to apply for judicial review of the decisions dated 8 February 2010 of the First Respondent (the Director of Lands) (1) to re-enter the Applicant's State Lease Nos. 11769, 17770 and 17771; (2) to issue new State Lease Nos. 18013, 18014 and 18015 in the name of Proline Marketing Limited; and (3) to grant consent to Mortgage Nos. 729939A, 729939B and 729939C in favour of Dominion Finance Limited. The Applicant also sought an order that the grant of leave operate as a stay of the said decisions and any proceedings related to the new State leases.

[9]. The substantive relief claimed by the Applicant was:

> *"(a)* ***AN ORDER OF CERTIORARI*** *to remove the said decision made by the First Respondent on or about the*

8th day of February, 2010 into this Honourable Court and that the same be quashed.

(b) ***A DECLARATION*** *(in any event) that the First Respondent has acted unfairly and/or against the Rules of Natural Justice and/or abused their discretion and/or arbitrarily and/or unreasonably and/or acted in breach of the Applicant's Legitimate Expectations and/or made errors of law and/or exceeded his jurisdiction in purporting to re-enter the Applicant's Crown Lease Nos: 11769, 17770 and 17771 and purporting to issue new Crown Lease Nos. 18013, 18014 and 18015 in the name of the PROLINE MARKETING LIMITED and purporting to grant consent to Mortgage Nos. 729939A, 729939B and 729939C in favour of DOMINION FINANCE LIMITED.*

(c) ***AN ORDER*** *that the execution of Crown Lease Nos. 18013, 18014 and 18015 by the purported Receiver in the name of the* ***PROLINE MARKETING LIMITED*** *is unlawful and null and void.*

(d) ***AN ORDER*** *that that the Mortgage Nos 729939A, 729939B and 729939C are unlawful and null and void.*

(e) ***AN ORDER*** *that that the registration by the Second Respondent of the following documents is unlawful, wrongful and null and void:-*

(i) Re-entry Nos. 729937, 729938 and 729939.
(ii) Crown Lease Nos. 18013, 18014 and 18015.
(iii) Mortgage Nos 729939A, 729939B and 729939C.

(d) Damages"

[10]. The grounds relied upon by the Applicant were stated as:

"(a) The First Respondent has acted unfairly and in breach of the Rules of Natural Justice in purporting to re-enter the Applicants' Crown Lease Nos. 11769, 17770 and 17771 and purporting to issue new Crown Lease Nos. 18013, 18014 and 18015 in the name of the ***PROLINE MARKETING LIMITED*** *and purporting to grant consent to Mortgage Nos. 729939A, 729939B and 729939C in favour of* ***DOMINION FINANCE LIMITED*** *without giving the Applicant an opportunity to be heard.*

(b) The First Respondent abused his discretion in that he did not take into consideration the following relevant matter:-

(i) The Crown Lease Nos. 11769, 17770 and 17771 had been properly issued to the Applicant.

(ii) There were proper procedures to be followed if the First Respondent wished to re-enter any Crown Leases issued by it.

(iii) Once the Crown Lease Nos. 11769, 17770 and 17771 were validly registered he should not execute new Leases over the same land and should not grant consent to mortgage over the same land to parties other than the registered lessee.

(iv) The Applicant had not breached any conditions of the Crown Lease Nos. 11769, 17770 and 17771.

(v) High Court Action HBC 212 of 2009 was pending in relation to the same land.

(c) The First Respondent abused his discretion in that they took into consideration the following irrelevant matters:-

(i) Wrongful representations made by the Third Respondent.

(ii) Relying on hearsay that the Applicant was in material breach of the Lease conditions when that was not the case.

(iii) The Applicant had committed a breach on 1st January, 2009 when that was not the case and the Lease had not been issued at that time.

(d) The Respondents have acted arbitrarily and/or unreasonably;

(e) The Respondents have made errors of law;

*(f) The First and Second Respondents have exceeded their jurisdiction in purporting to re-enter the Applicant's Crown Lease Nos. 11769, 17770 and 17771 and purporting to issue new Crown Lease Nos. 18013, 18014 and 18015 in the name of the **PROLINE MARKETING LIMITED** and purporting to grant consent to Mortgage*

Nos. 729939A, 729939B and 729939C in favour of ***DOMINION FINANCE LIMITED*** *and in purporting to register such documents.*

(g) The First and Second Respondents have acted contrary to the legitimate expectations of the Applicant."

[11]. The application for leave to apply for judicial review was opposed by all the Respondents upon grounds that were stated in their filed notices of opposition.

[12]. Having carefully considered the affidavit material and the submissions of Counsel, the learned Judge stated her conclusions in paragraph 83 and 84 of her written judgment:

"[83] I do not find that there was procedural impropriety in the cancellation of the applicant's leases and issuance of the new leases. Although the new leases and mortgages were executed before re-entry and possession, the registration and issuance of the same was not until after the re-entry and possession had taken place.

[84] Having considered the material before me I am not satisfied that the applicant has shown any proper basis on which leave to apply for judicial review should be granted. Nothing has emerged from the applicant's application which can be said to have raised any arguable questions adversely affecting or tainting the decision of the Director of Lands in cancelling the applicant's leases and granting the leases to PML."

[13]. The learned Judge refused the application for leave to apply for judicial review. It is against that decision that the Applicant now seeks leave to appeal. The learned Judge in the Court below has refused leave to appeal. In its proposed Notice and Grounds of Appeal annexed to the affidavit of Timoci Bose Bart sworn on 7 December 2011, the Applicant seeks an order that it be granted leave to apply for judicial review and that the grant of leave operate as a stay pending the determination of the application.

[14]. The Appellant relies on 25 grounds of appeal. To a large extent they are repetitive and overlapping. It is certainly not necessary to delve into the grounds of appeal in considering whether leave to appeal should be granted. This is even more so the case when the appeal procedure has been commenced within the time prescribed by the

Rules. Leave to appeal is required because the decision refusing to grant leave to apply for judicial review is an interlocutory decision. Generally the Courts are reluctant to interfere with interlocutory decisions. However leave will be more readily granted when legal rights as distinct from matters of practice and procedure are involved and some injustice may be caused: See **In re the Will of F B Gilbert (deceased)** (1946) 46 S R NSW 318 at 323 and **Kelton Investments Limited and Tappoo Limited –v- Civil Aviation Authority of Fiji and Another** (unreported ABU 34 of 1995 delivered 18 July 1995). The question to be resolved in this application is should the Applicant be given leave to appeal.

[15]. There are two preliminary comments that should be made at this stage. The first is that, assuming the Order 53 procedure is appropriate in this case, its purpose has been frustrated in these proceedings. The application did not proceed under the expedited procedure for which provision is made in Order 53 Rule 3 (9). Here the application for leave to issue judicial proceedings was the subject of full argument before the learned Judge in the Court below culminating in a reserved judgment in which leave was refused. There then followed full argument on whether the learned Judge should give leave to the Applicant to appeal to this Court and order a stay. In another reserved decision delivered some time later the learned Judge refused leave to appeal. A renewed application for leave to appeal has now been made to this Court with once again substantial argument. Counsel conceded before me that a number of matters had been argued at the leave application which had required the learned Judge to consider in greater detail matters that would otherwise have been more appropriately considered in the substantive hearing. This Court has expressed its disapproval of the manner in which judicial review proceedings have in the past been unnecessarily prolonged: See **Nivis Motors and Machinery Company Limited –v- Minister for Lands** (unreported ABU 17 of 1998 delivered 13 November 1998).

[16]. The second comment concerns whether the Order 53 procedure was appropriate for the dispute raised by the Applicant. The Applicant's complaint starts with the purported re-entry by the First Respondent of the three leases initially granted to and registered in the name of the Applicant by the First Respondent. The leases were granted to the Applicant by the First Respondent as lessor (see section 11 of the State Lands Act). The Applicant was the lessee. Any right of re-entry or forfeiture, even in

respect of a breach of section 16 of the State Lands Act, that was acquired by the First Respondent as lessor was a private law right to be exercised in accordance with the statute law and the common law relating to landlord and tenant. An alleged failure by the First Respondent as lessor to comply with section 105 of the Property Law Act is a private law issue which should be the subject of proceedings commenced by writ or originating summons. Furthermore, in respect of the Second Respondent's registration under section 57 of the Land Transfer Act of the cancellation of the three leases; there is authority for the proposition that a challenge to action taken by the Registrar of Titles may proceed under section 168 of the Land Transfer Act enabling the High Court to exercise its ordinary jurisdiction to protect property rights. (see **Central Rentals Limited –v- Patton and Storck Limited** (1996) 42 FLR 137 at page 140).

[17]. The point is that if Order 53 proceedings are not appropriate, then there is a discretion under Order 53 Rule 9(5) given to the Court below to proceed on the basis that the proceedings had been commenced by writ. It is on this basis, if none other, that I am inclined to grant leave to appeal so that the Court of Appeal could, if it considered it appropriate, consider the possibility of giving the necessary directions for the Court below to proceed on that basis. However it must be noted that Order 53 Rule 9(5) can only be invoked when the relief sought is a declaration, injunction or damages. As a result in the event that the relief claimed is otherwise and relates to a private law dispute between lessor and lessees, then the Order 53 procedure was not appropriate and there would be no jurisdiction for the Court to proceed under Order 53. In my view whether Order 53 was the appropriate procedure is a matter for the Court of Appeal to determine as a preliminary issue.

[18]. Although the only decisions and/or actions under challenge were those of the First Respondent dated 8 February 2010, the Applicant seeks relief against the other Respondents. Relief (c) is for an order that the execution of State leases by the Receiver of the fourth Respondent was unlawful, null and void. That relief does not relate directly to the decision of a public officer in a public law matter. Relief (d) relates to mortgages between the third and forth Respondents and is not a public law matter. In my view relief (c) and (d) fall outside the scope of judicial review proceedings.

[19]. On the other hand, in the event that the issues raised are in the realm of public law and involve the exercise of a statutory discretion by a public officer or official then the issue of leave to apply for judicial review remains alive. The question for the Court of Appeal would be whether the Applicant should be given leave to apply for judicial review. Of course, if leave to apply for judicial review is granted, then the matter goes back to the Court below for a substantive hearing with the possibility of an appeal as of right to this Court after that. This unfortunate scenario gives further weight to the view that I expressed earlier in this decision that the parties have frustrated the purpose of Order 53 proceedings.

[20]. It is well settled that at the leave stage of the judicial review procedure provided by Order 53 Rule 3 of the High Court Rules there are essentially only three issues that need to be considered. The first matter to be determined is whether the Applicant has a sufficient interest in the matter to which the application relates. This is required under Order 53 Rule 3 (5). The second issue is the question of delay. Delay at the leave stage is to be considered in accordance with the guidance provided by the decision of the Supreme Court in **Public Service Commission –v- Brian Singh and the Public Service Appeals Board** (unreported CBV 11 of 2008 delivered 27 August 2010). The third matter is whether the Applicant has established on the affidavit material before the Court that it has an arguable case to obtain leave to apply for judicial review.

[21]. It appears not to be in dispute that the Applicant has a sufficient interest in the subject matter of the application and that there has not been delay in bringing the application for leave. The issue in contention is whether the Applicant has an arguable case. At the outset it should be stated that the requirement of an arguable case is a low threshold. The applicant need only establish that his application is not frivolous nor vexatious in the sense that it is not a hopeless case.

[22]. The limited nature of the requirement to show an arguable case was stated by Lord Diplock in **Inland Revenue Commissioners –v- National Federation of Self-Employed and Small Business Ltd** [1981] 2 All ER 93 at page 106:

> *"The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief."*

[23]. The Court of Appeal in **The National Farmers Union –v- Sugar Industry Tribunal and Others** (unreported ABU 8 of 1990 delivered 7 June 1990) at page 8 expressed the position in similar terms when it observed:

> *"We accept that at the leave stage of an application for judicial review the Court is not required to do more than decide whether the applicant (leaving aside the questions of locus standi and delay which are not in issue here) has shown prima facie an arguable case on the merits on each ground for relief. _ _ _*
>
> *A ready test for deciding (whether the grounds were on their face arguable on the merits and fit to be considered in the substantive hearing) is whether any particular ground could properly and reasonably be characterised as frivolous, vexatious or hopeless in the sense of being patently devoid of merit."*

[24]. It was not unreasonable for the Applicant to proceed to the leave application on the basis that it was required to establish to the court's satisfaction that the material disclosed an arguable case. If leave was granted then full argument on the substantive relief would be presented at the later substantive hearing. In my view it is apparent that the learned Judge has proceeded to determine the issues as if the Court was hearing the substantive application.

[25]. Furthermore, the relevance of section 105 of the Property Law Act to the present case and the meaning and effect to the present case of section 16 of the State Lands Act are arguable matters which required consideration in a substantive hearing for judicial review. In the event that section 105 does apply, the failure to serve copies of the Notices of re-entry on the Applicant prior to re-entry raises issues of jurisdiction and natural justice.

[26]. Section 57 of the Land Transfer Act is concerned with registration by the Registrar of the cancellation of a lease when the Registrar is satisfied that re-entry and recovery of possession was lawful. Proviso (b) to section 57 requires notice of the application to cancel a lease to be served on all persons interested under the lease. The decision of this Court in **Central Rentals Limited –v- Patton and Storck Limited** (1996) 42 FLR 137 is authority for the proposition that such notice must be served on the lessee to give the lessee a reasonable opportunity to make submissions to the Registrar against the cancellation of the lease. In addition, the decision of this Court in **Forum Hotels Limited –v- Native Land Trust Board and Others** (unreported ABU 46 of 2010 delivered 13 March 2013) is authority for the proposition that a notice must be served on a lessee under section 57 even if there is already served on the lessee a notice under section 105. In my view there was a requirement to serve a Notice under section 57 in this case. Whether there was proper service of the notices under section 57 to the Applicant and whether the Applicant had reasonable time to make submissions are matters which raise an arguable case.

[27]. In conclusion then, I am satisfied that the Applicant has raised issues in the material that indicate that leave to appeal should be granted. In particular the issues include whether the First Respondent and/or Second Respondent exceeded their jurisdiction by proceeding before giving notice or ensuring that notice was given to the Applicant and as a result whether the Applicant was denied natural justice. Furthermore the material raises issues as to whether the First Respondent and Second Respondent have acted in error of law (under sections 105 and 57) and whether the First and/or Second Respondent have acted unreasonably in accordance with what is termed the "*Wednesbury test*" (see **Associated Provincial Picture Houses Ltd –v- Wednesbury Corporation** [1948] 1 KB 223).

[28]. Furthermore, for the reasons stated, leave to appeal is limited to the decision refusing leave to apply for judicial review that relates only to the decisions under challenge of the First Respondent and the Second Respondent. The parties are given leave to argue whether an Order 53 judicial review proceeding was appropriate.

[29]. The procedures prescribed by the Court of Appeal Rules for appealing will take effect from the date of this decision.

[30]. There is no appeal against the decision of the learned Judge in her judgment dated 28 November 2011 concerning costs. Therefore, I will not make any orders concerning those costs. The costs of the renewed application before me are to be costs in the appeal.

Orders:

1. *Leave to appeal is granted to the Applicant.*
2. *Costs in the Appeal.*

HON. MR JUSTICE W. CALANCHINI AP