

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**(CHAMBER COURT)**

**Civ. App. No. PI97 of 2019**

**Tax Appeal No. I. 102 of 2015**

**BETWEEN**

**METHANEX TITAN (TRINIDAD) UNLIMITED**

**Appellant/Applicant**

**AND**

**THE BOARD OF INLAND REVENUE**

**Respondent**

**BEFORE THE HONOURABLE JUSTICE GILLIAN LUCKY, J.A.**

**APPEARANCES:**

Mr. Johnathon Walker instructed by Mr. Miguel Vasquez for the Appellant/Applicant

Dr. Claude Denbow S.C. and Mr. Dharmendra Punwasee instructed by Ms Allison Scott

**Date of delivery: 10<sup>th</sup> August, 2020**

**JUDGEMENT**

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1. The Notice of Application by the Applicant, Methanex Titan (Trinidad) Unlimited, before this Court, is for an Order that the hearing of the appeal in this matter, take place 'in-person' and not as a virtual or electronic hearing.
2. The Applicant further requests that the date fixed for the hearing of the appeal, that is, September 28<sup>th</sup>, 2020, be converted to a date for mention only of the matter.
3. The Respondent, The Board of Inland Revenue, objects to the application and asks that the matter be deemed fit for virtual hearing on the date as fixed.

### **BACKGROUND**

4. The Applicant is the owner of a methanol plant located at Pt. Lisas Trinidad. On the 21<sup>st</sup> January, 2019, the Tax Appeal Board delivered its judgement in which it ruled in favour of the Respondent, to assess the Applicant to additional withholding tax in the sum of \$28,382,495.79 TT for the income year 2007.
5. On the 11<sup>th</sup> February 2019, the Applicant requested a case stated which was transmitted to the Court of Appeal on the 27<sup>th</sup> May, 2019. The Respondent filed a Counter Notice on 10<sup>th</sup> June, 2019.
6. On the 10<sup>th</sup> February, 2020, the appeal was deemed urgent, consistent with applications for urgency filed by both parties. Directions were given for the filing of written submissions to facilitate the hearing of the appeal on 28<sup>th</sup> September, 2020.
7. The issue raised in the appeal and cross appeal, is the assessment by the Respondent for withholding tax for the income year 2007 of the Applicant. The Court of Appeal will have to determine the correct corporate structure that must be used by the Applicant to declare and pay dividends and the taxation of such dividends. The matter boils down to the interpretation of the CARICOM Treaty.

8. In light of the gravity of the matter, the Applicant retained a global specialist in this area of tax – Mr Alnasir Meghji. Mr. Meghji who is Canadian, has been admitted to practice in our courts in relation to the appeal and any other related causes or matters.
9. Both sides appreciate the need for the appeal to be heard expeditiously, as it impacts directly on the economics and profitability of the Applicant’s business. Further, the outcome of the appeal will directly affect other matters that are presently before the Tax Appeal Board.
10. In February 2020, there were no Public Health Ordinances, Regulations or Practice Directions in our country dealing with restrictions and changes in operations resulting directly from the COVID-19 pandemic. Counsel for both the Applicant and the Respondent would have expected that the appeal would be heard ‘in person’ in September and would have made arrangements accordingly.
11. However, after the matter was listed for hearing, circumstances changed drastically, and within the space of two months, there were Public Health Regulations that restricted movements and operations of the citizenry.
12. For instance, the borders of Trinidad and Tobago have been closed since March 2020 and there is no specific timeframe for that restriction to be lifted. Consequently, the Applicant’s senior litigator, Mr Meghji, resides in Canada and is unable to enter Trinidad and Tobago in time for the hearing of this appeal on 28<sup>th</sup> September, 2020.
13. The courts found themselves having to adjust in order to ensure their continued operation and their commitment to access to justice. The Honourable Chief Justice therefore issued a Practice Direction in March, and continued with appropriate updates, in which provisions were made for, inter alia, electronic filings and virtual hearings. Judicial officers were encouraged to conduct virtual hearings whenever possible, mindful of the rules of natural justice, due process and procedural fairness.

14. At the time of the hearing of this application, the applicable Practice Direction (PD) which dealt with court operations during the COVID- 19 pandemic is dated Sunday 14<sup>th</sup> June, 2020 and took effect from June 16<sup>th</sup>, 2020.
15. According to paragraph 8 of the PD, certain categories of matters are to be conducted by electronic means only. These categories are as follows-
- a. Case Management Conferences;
  - b. Directions Hearings;
  - c. Status Hearings;
  - d. Cause List Hearings;
  - e. Pre-Trial Reviews;
  - f. Initial Hearings;
  - g. Intake Hearings;
  - h. Bail Applications;
  - i. Delivery of Judgments;
  - j. Applications including applications for detention of cash; and
  - k. Any other category of hearing which the assigned Judge or judicial officer deems appropriate for hearing by electronic means having regard to the need to maintain appropriate health and safety requirements and the room capacity standards set by the Judiciary.
16. It is agreed between the parties that in the case of appeals, it is left for the judicial officer(s) to exercise a discretion as to whether the matter will proceed by electronic means or 'in person'.
17. According to paragraph 9 of the PD-“**Only in cases in which the interest of justice is compromised by an electronic hearings should it be conducted in person.**” (Emphasis mine.)

18. The Applicant is asking this Court to exercise its discretion and make an Order that the appeal take place 'in person' and not as a virtual or electronic hearing and further, that the date fixed for the hearing of the appeal be vacated and replaced as a date 'for mention only' of the matter.

### **OBJECTIONS TO VIRTUAL HEARING**

19. The Applicant's reasons for an 'in person' rather than a virtual hearing for the appeal can be found in the Notice of Application and the Affidavit in Support of same, both dated 26<sup>th</sup> June, 2020. Further, on the day of the hearing of this application, Counsel fleshed out some of the reasons in the oral submissions. The Court summarises the reasons as follows-

- i. A virtual hearing is less engaging than an in-person hearing.
- ii. A virtual hearing is plagued with technical difficulties, which adversely affects the quality and understanding of presentations.
- iii. An 'in person' hearing allows a meaningful, better adjudication of the issues.
- iv. The interest of justice is undermined with a virtual hearing of an appeal in which the issues are serious and significant.
- v. A virtual hearing will lead to an inequality of arms between the parties. Senior Counsel for the Applicant, Mr Meghji was not involved in the matter before the Tax Appeal Board and so there will be heavy reliance on Junior Counsel, who will not be in the physical space with Senior Counsel, thereby making meaningful interaction virtually impossible.

20. The Respondent objects to the application for the appeal to be heard 'in person' and the reasons for the objection are stated in written submissions dated 5<sup>th</sup> August, 2020 and were amplified orally on the day of the hearing of this application. The reasons for the Respondent's objections can be summarised as follows-

- i. The appeal will determine matters that are important in the assessment of taxes by the Respondent and guidance from the Court of Appeal should not be delayed.
- ii. No prejudice will be suffered by the Applicant if both parties appear virtually.
- iii. The appeal does not involve disputed findings of fact but deals with the interpretation of a treaty. There are no special or extraordinary features of the appeal that warrant it to be heard 'in-person.'
- iv. The effect of setting the appeal 'for mention only' on the date it has been fixed for hearing, will result in the appeal (which both sides agree is urgent) being indefinitely delayed because of the unpredictability of the impact of the COVID- 19 pandemic.

### **TEST**

21. The phrase 'interest of justice' means adherence to the principles that promote accessibility to justice and procedural fairness. The practical application of the phrase involves an assessment of several factors which are best contextualized, in this case, within the framework of the overriding objective of the **Consolidated Civil Procedure Rules** (CPR) 2016. Rule 1.1 of the CPR states that the overriding objective of the CPR is to enable the court to deal with cases justly. Rule 1.1(1)(2) states that dealing with the case justly includes—

- a) ensuring, so far as is practicable, that the parties are on an equal footing;
- b) saving expense;
- c) dealing with cases in ways which are proportionate to—
  - i. the amount of money involved;
  - ii. the importance of the case;
  - iii. the complexity of the issues; and
  - iv. the financial position of each party.
- d) ensuring that it is dealt with expeditiously; and

- e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

22. The test therefore as stated in the Practice Direction (see paragraph 17 herein), is for the judicial officer exercising their discretion, to ensure that there is no undermining of any of the principles related to the interest of justice, which, when taken individually or in any combination, makes the proceedings unfair or unjust to any user of the court, including the court itself.

23. If there is no compromise to the interest of justice, then the case should proceed by electronic means. It is only when the interest of justice is compromised, that the case should be conducted 'in person'.

## **ANALYSIS**

24. Counsel must recognise that we are well in the year 2020 and the challenges presented by the COVID-19 pandemic have catalysed change in all aspects of life and the manner in which services are provided. There are persons who believe that it is just a matter of time before life reverts to normalcy. There are others who recognise that we are living in a whole new world in which changes to our lifestyle and the provision of services are the 'new normal.'

25. Courts around the world have had to quickly grasp the impact of the changed environment in which they operate and to institute measures to protect accessibility to justice and procedural fairness. Most of the jurisdictions that initially hoped that there would be a restoration to normalcy, have come to understand that time is better spent in adjustment than in abeyance.

26. Our courts were already in the phase of digital transformation when the COVID-19 outbreak occurred. Our administration of justice is founded on a firm understanding of the relevance and importance of technology as a tool to promote access to justice and enhance service delivery.
27. At the opening of the Law Term 2019, one of the messages of the learned Chief Justice, was that we had entered the digital age for some time and all needed to get on board and not be left behind. The commitment of the Chief Justice to boldly take the judiciary, which includes all of its services, into the technological ecosystem, proved well timed, for within 6 months of the transition process, COVID-19 created worldwide havoc.
28. One of the measures implemented to ensure that there is no backlog of cases during the COVID -19 pandemic is the use of virtual hearings. Judiciaries worldwide are now focussed on upgrading their technology and increasing their bandwidths to accommodate the volume of matters being conducted on the virtual platform. The approach is that matters will be heard virtually except in exceptional cases and so the threshold is set high for the justification of an 'in person' hearing. It is for the Applicant, who in this case is the Appellant, to show that the interest of justice will be compromised if the appeal is heard electronically.
29. In order to determine whether the appeal in this matter, which is set for the 28<sup>th</sup> September ought to be downgraded 'for mention only' and adjourned until an 'in person' hearing can be arranged, as requested by the Applicant, calls for the Court to address each of the issues raised by the Applicant to support its request for an 'in person' hearing.

**I. The Engagement Process.**

30. Counsel for the Applicant submitted that virtual hearings lack court atmosphere which enables judicial officers to build a rapport with parties to the proceedings. In the virtual space, there is an inevitable separation that goes beyond social distancing.



31. Counsel seemed concerned that the inability of the court to interact with parties in a spontaneous and shared space would somehow adversely affect the performance of the court and perhaps the parties themselves in the execution of their specific and independent roles. This submission represents the view of some practitioners who, quite candidly, miss the cut and thrust of the court arena.
32. Some Counsel literally count down the days for their court appearance when they hope to impress the court with their advocacy skills and strategic interventions. For some, 'in person' court is their 'go to' theatre, whether there is an audience or not in the premises.
33. The reality is that appearing in the virtual space has the disadvantage of not having 'live, interpersonal action.' It calls for the development of new skills and techniques in advocacy, not traditionally taught in law schools. Virtual hearings test the abilities of judicial officers to transform the 'in person' hearing experience to an equivalently engaging session in a virtual space. It is an art that requires training and quick adaptation. It is for this reason that electronic hearings have protocols which include parties having their videos on at all times while the audio should only be on when a party is speaking.
34. Of course in a Courtroom, interruptions by opposing Counsel are sometimes untimed outbursts but in the virtual hearing, it is unlikely that an outburst will be as spirited as it is timed.
35. In a virtual hearing, judicial officers are forced to focus on the presenter only and not on any Courtroom antics which sometimes are deliberately meant to distract. There is no exhaustive list of the differences in court atmosphere and environment when comparing 'in person' with electronic hearings. The hearings occur on fundamentally different platforms, which require the use of particular tools of advocacy.

36. In any event, in electronic hearings, there is greater weight placed on the persuasive power of the written as opposed to the spoken words. Therefore, having less physical but more focussed interaction with parties is actually a benefit and not a detriment to the administration of justice.

## **II. The Technology Challenge**

37. Counsel for the Applicant submitted that there is a real risk of unfairness in the determination of the matter because technical glitches frequently occur in virtual hearings and these interruptions adversely affect the quality of the submissions.

38. While Counsel for the Applicant accepted that technology offers a platform for the matter to be heard as opposed to be delayed, that quality should not be sacrificed at the altar of expediency.

39. I have presided in matters since April when the first Appellate matter was heard electronically, and there has been no instance in which the proceedings had to be adjourned to another day because of technical glitches. While that has been my experience, colleagues have indicated that there were a few situations in which matters had to be 'stood down' or granted short adjournments because of poor reception, freezing and dropping. These problems on the virtual platform are to be expected and judicial officers hearing a matter will have to determine whether the problems that arise can be resolved during a 'standing down' of the matter or whether the matter has to be adjourned.

40. No one is suggesting that parties must be made uncomfortable by having to repeat aspects of their submissions or to be constantly inquiring as to whether they are being heard and /or seen by the panel and Counsel for the other side. Such bombardment of questions about being heard and seen on the platform will lead to discomfort, agitation and distress for all parties in the electronic hearing.

41. The simple point is that since virtual hearings have become the norm rather than the exception, more attention has been paid to the reliability and functionality of the technology used to host the proceedings. The courts use Microsoft Teams and all counsel are given the opportunity before the hearing commences to ensure that all systems are up and running.
42. For those matters which are deemed urgent and perhaps complex, it is strongly suggested that a dry run can be done to ensure that the technology of all the parties in the proceedings is compatible and operational. It is this kind of initiative and practical approach to a changed paradigm that assists in making things work at the requisite standard.
43. For the record, this Court allowed Mr. Meghji to be present during the application and in the spirit of practical and respectful flexibility, invited him to address the Court if he wished.
44. Mr. Meghji did not address the Court and appeared courteous and attentive throughout the proceedings. This application was heard in Chambers and there were no technical glitches. In fact, the administrator of the platform was not even in the building and Counsel appeared remotely. This is the manner in which Chamber matters are being heard and will continue to be heard even when the pandemic crisis is over. Matters are scheduled for specific times and if there are delays in the schedule, Counsel in those matters are given ample notice so that they can adjust their schedules accordingly. The virtual platform has promoted efficiency and proper time management. While there is still room for improvement, the system is operating above average and all is being done to tweak it to nearest perfection.

45. Therefore, while I understand the concern of Counsel for the Applicant about the technical glitches that may occur during any hearing, I am confident that there will be adequate technical support in place to ensure that the appeal moves along swimmingly. No judicial officer will allow a matter to proceed if technical problems impact adversely on the quality of submissions.
46. As a Court that is mindful of the precautions that can be taken by all parties to prevent a technological disaster on the day of the hearing, I see no reason to presume that things will go wrong, even with consideration given to Murphy's law.

### **III. Quality of Submissions and Decision**

47. Counsel for the Applicant stated that the quality of the submissions in the matter will be adversely affected in an electronic hearing because of the overall format and structure of these types of proceedings. I have already dealt with the concern about poor submissions being made in the face of technological glitches. This reason for the application for an 'in person' hearing is based on the premise that a virtual hearing can impact on the ability of the panel to properly determine the matter. The suggestion made was that an 'in person' hearing allows a meaningful and better adjudication of the issues.
48. There are many courts around the world that might raise eyebrows at such a bold proposition especially since courts in various jurisdictions have been using the virtual platform to hear, determine and impose sentences and decisions that affect a person's life, limb and liberty.
49. Judicial officers in our courts have been receiving ongoing training about the use of the technology and the best practices when hearing matters electronically. While no judicial officer may have the equivalent qualifications of a technical expert, there has been training that deals specifically with navigating and operating on the virtual platform.

50. As this Court stated earlier in its ruling, the quality of the submission will lie primarily in the writing and less on the speaking. It is for that reason, counsel for parties will have to focus on crafting their respective submissions in an intellectually palatable form that is mixed with the right proportions of critical thinking and analytical skills. The ingredients for a successful hearing on the virtual space however, remain thorough preparation and insightful oration.

51. Technology is a tool and it comes in many forms. Counsel can use visual aids, shared documents and even power points to enhance submissions made in electronic hearings. In fact, a variety of pedagogies may be very effective when counsel is making submissions, thereby enabling the court to fully appreciate the points which Counsel submits. It cannot be overstated that these times call for thinking outside of the proverbial box and using methods and strategies to ensure that the virtual space is used to the maximum benefit of the parties who appear in it.

#### **IV. Interest of Justice**

52. Counsel for the Applicant submitted that a virtual hearing should not be the preferred choice when an appeal such as this, involves serious and significant issues. This Court spent some time researching the approach of courts on the various continents when confronted with hearing matters involving complex issues, several witnesses (some being in very remote or completely different jurisdictions) and voluminous documentation.

53. The golden thread that runs through all the cases is that although an electronic hearing is not per se the ideal platform, there are sufficient safeguards and technological tools available that can make the proceeding fair, efficient, effective and in line with all the tenets of procedural fairness.

54. Counsel for the Respondent, in his oral submission, stated that The Privy Council and the Caribbean Court of Justice (CCJ), two courts which hold the highest positions in our Region, have been using virtual hearings for some time and it would be absurd to suggest that the matters they determine are anything less than serious and significant. Counsel for the Respondent used by way of example, the determination of the Guyana election matters by the CCJ, stressing that virtual hearings were used by the Court to deal with these cases that touched and concerned the Guyanese Constitution and the operation of democracy.

55. This Court finds that the hearing of this appeal in an electronic hearing will in no way undermine the interest of justice as submitted by Counsel for the Applicant.

#### **V. Inequality of Arms**

56. Counsel for the Applicant submitted that there would be an inequality of arms because Mr. Meghji, was not counsel when the matter was heard before the Tax Appeal Board.

57. Counsel for the Applicant stated that senior and junior counsel for the Respondent, appeared in the matter before the Tax Appeal Board and are therefore familiar with the case and will be appearing in similar fashion for the appeal. Both counsel for the Respondent can be in the same place once socially distanced and can interact with each other as senior and junior counsel often do when a matter is being heard.

58. This will not be the position for Mr. Meghji, who will not be in the same place or even the same jurisdiction as his junior counsel in the matter.

59. Counsel for the Applicant submits that the inequality lies in the inability of Mr. Meghji to have the same degree of reliance on his junior counsel as that of Senior Counsel for the Respondent.

The point was made that the Tax Appeal Board has not furnished either party with a transcript of the proceedings and so, Mr. Meghji is even more disadvantaged as he will have to depend even more on his junior counsel to apprise him of all relevant matters from those proceedings.

60. Bearing in mind that the appeal, as agreed by both parties, involves the interpretation of the CARICOM treaty and does not involve contested facts or the calling of witnesses, this reason for the application for an 'in person' hearing is difficult to support.

61. Gone are the days for juniors to be pulling and tugging at the robes of seniors to get their attention or whisper in their ears some significant point, case or reference. Technology enables parties to be in constant communication using any of the digital platforms including WhatsApp and Share Chat.

62. Judicial officers when sitting on panels of more than one, have had to find means of communication as suggested above when they are sitting in a matter but are at different locations. If the judicial officers can adjust, so can the persons who appear before them. The adjustment calls for patience, practice and precision. No one is suggesting that the change in operation and rules of engagement will be easy, but familiarity with technology breeds comfort and not contempt. The message is that we all have to enter the technological eco system and settle in our spaces. This does not happen overnight but it must not take decades.

63. The Court alerted Counsel to two Canadian authorities from the Ontario Superior Court of Justice. The first, the case of **Arconti et al and Smith et al [2020] ONSC 2782** which was heard on May 1<sup>st</sup> 2020 and the second, the case of **Anne Miller and FSD Pharma Inc. [2020] ONSC 3291** which was heard on May 27<sup>th</sup> 2020. Both cases dealt with applications for an 'in person' hearings for reasons similar to those in this application, and both applications were dismissed.

64. The Canadian judges who heard the matters referred to the Australian case of **Capic v Ford Company of Australia Limited [2020] FCA 486**, in which the judge in **Capic** also dismissed an application for the matter to be adjourned and ordered that it proceed virtually.
65. All the cases emphasise the need for communication and cooperation amongst the parties to ensure that there is easy navigation and operation on the virtual platform. Opposing Counsel basically have to lay down their proverbial swords and shine their technological armour as they prepare for battle in the virtual Court arena.
66. The courts have an overriding duty to ensure that matters are adjudicated justly and there is nothing submitted by Counsel for the Respondent on this ground that suggests any risk of procedural unfairness or an inequality of arms.

#### **DELAY**

67. Delay is an area raised by the Respondent in its submissions and in turn addressed by the Applicant. The Court finds it prudent to address this issue.
68. Counsel for the Applicant, in its written submissions, suggested that the claim by the Respondent that the latter would be disadvantaged by any delay in the hearing of the appeal, was overstated. Counsel for the Applicant indicated that the matters before the Tax Appeal Board which will be impacted by the ruling of the Court of Appeal, have not been paused by the Respondent in anticipation of the final outcome of the appeal. In any event, the Respondent enjoys the benefit of the ruling of the Tax Appeal Board as it relates to the tax assessments of other entities until the substantive issue of the appeal is determined.
69. Counsel for the Applicant also submitted that it was the Respondent that took 6 years to raise the assessment and the maximum of 2 years to determine the objection.



Counsel for the Applicant argued that the Respondent, having contributed to the delay in the commencement of the case, should not now complain of any “short delay to the hearing of the appeal”. (Para. 23 Applicant’s Submission electronically filed 05.08.2020.)

70. This Court must examine all the circumstances of this case, including the impact of the current COVID -19 pandemic which, as indicated throughout this ruling, has fundamentally changed the rules of engagement without shifting the pillars of access to justice and procedural fairness.

71. The Tax Appeal Board delivered its decision in this matter in January 2019 and both sides agreed that the appeal should be heard as a matter of urgency. The urgent state of the determination of the appeal has not changed. What has changed is the platform that will be used to determine the appeal.

72. This Court does not have a crystal ball that can assist with the time when the impact of COVID-19 will be reduced to a minimum. Nor can the Court predict, with any degree of accuracy, when an ‘in person’ hearing will be available to determine this appeal.

73. One should appreciate, that it is this very unpredictable environment created by COVID 19, which has resulted in the issuance of Practice Directions that guide the exercise of the Court’s discretion in this application.

74. To grant the application of the Applicant means that the appeal will have to be adjourned indefinitely until such time as an ‘in person’ hearing can be facilitated. That would delay this appeal for a time that may become ill-conceived and inordinate. Such an approach to an adjournment, flies in the face of the interest of justice. The blow to justice is made worse by the fact that both sides agree that the determination of the matter remains urgent and most importantly, there is an available platform to have the appeal proceed on the 28<sup>th</sup> September, 2020.

75. There is sufficient time for all parties to make the requisite upgrades to the technology and the techniques that will ensure a fair hearing of the matter. There is nothing before this Court that suggests that there is a clear and present danger, or the real or apparent risk, of a technological blowout, on the date when the matter will be heard.

## **DECISION**

76. In light of all the matters raised by Counsel and addressed by the Court, I can find no reason to allow the application of the Applicant to vary the date fixed for the hearing of the appeal and instead fix the appeal for mention only.

77. Consistent with the overriding objective of the CPR, and in accordance with the Practice Direction dated 14<sup>th</sup> June 2020, this Court is satisfied that the interest of justice will not be compromised by an electronic hearing of the appeal.

78. The application of the Applicant is therefore dismissed.

79. Further, this Court finds that the issue raised in this application was reasonable and understandable and so makes no order as to costs.

80. The matter will proceed by way of electronic hearing and the Submissions in Reply for each party will be limited to no more than seven pages (fourteen sides) and both sides to file and serve their Submissions in Reply on or before 11<sup>th</sup> day of September, 2020.

**Gillian Lucky**  
**Justice of Appeal**