

IN THE SUPREME COURT OF BELIZE, A.D. 2009

CLAIM NO. 41 OF 2009

BETWEEN:

THE ATTORNEY GENERAL OF BELIZE

Claimant

AND

**FLORENCIO MARIN
JOSE COYE**

Defendants

BEFORE: Hon. Chief Justice Kenneth Benjamin.

February 18 and 20, 2013.

Appearances: Mr. Nigel Hawke, Deputy Solicitor-General, and Ms. Iliana Swift, Crown Counsel, for the Claimant.
Mr. Edwin Flowers, SC for the 1st Defendant.
Mr. Eamon Courtenay, SC for the 2nd Defendant.

RULING

[1] The trial of the substantive claim between these parties is set for today's date. The first case management conference was held on May 28, 2009 before the Registrar and yielded an order for standard disclosure to be made on or before June 11, 2009 and for witness statements to be filed and served on or before July 9, 2009. These orders were subsequently varied and witness statements were filed on behalf of both Defendants on May 31, 2012 and on behalf of the Claimant on July 17, 2012.

[2] On January 31, 2013, each Defendant filed a separate Notice of Application seeking an order for the witness statements of Rolando Villas, Talbert Brackett and P. Noreen Fairweather to be struck out in their entirety or alternatively, that certain paragraphs and exhibits to these witness statements be struck out as being inadmissible pursuant to the Supreme Court (Civil Procedure) Rules, 2005 (“CPR”) and the Evidence Act, Chapter 95. In addition, the second Defendant sought an order that the witness statement of Martin Alegria be struck out in its entirety. The Notices of Application each set out the specific orders being sought and the grounds upon which the individual witness statements are being objected to.

[3] The Court’s power to order the service of witness statements is provided for in Rule 29.4(1) of the Civil Procedure Rules. The form and contents of the witness statement are prescribed in Rule 29.5(1). The sub-rule that is relevant to the present applications is Rule 29.5(2) which reads:

“The Court may order that any inadmissible, scandalous, irrelevant or otherwise oppressive matter be struck out of any witness statement.”

By and large, the Defendants have objected to paragraphs in the witness statements of Rolando Villas, Talbert Brackett, Martin Alegria and Noreen Fairweather as being inadmissible and irrelevant.

[4] The substantive claim brought by the Attorney General has been against the Defendants for damages for loss to the Government of Belize occasioned by their misfeasance in public office as Ministers of Government during the period December 2007 to February 6, 2008. The Statement of Claim avers that the Defendants wrongly and unlawfully arranged for and procured the transfer of 56 parcels of National Land owned by the Government of Belize at a price which they knew was less than the value of the said Land and with knowledge that, or reckless that the disposal of the said land at that price would cause damage to the Government of Belize.

[5] Having regard to the basis of the cause of action, namely, the sale of the subject matter at an undervalue, the valuation ascribed to the said lands is of central

importance to the litigation. It is against this background that the objections taken by the Defendants must be considered.

ROLANDO VILLAS

[6] The witness statement of Rolando Villas relates what he did in his capacity as the acting Chief Valuer in the Valuation Department in the Ministry of Natural Resources after a request for a valuation of the parcels of land which comprise the subject-matter of the Claim was made by the Deputy Prime Minister and Minister of Natural Resources, Mr. Gaspar Vega. The statement ultimately exhibits a chart prepared by this witness reflecting the product of his valuation of each parcel of land sold.

[7] There is no dispute that the chart was never disclosed by the Claimant as a part of standard disclosure nor was it included in the order of specific disclosure. The Defendants jointly contended that the witness statement amounts to the introduction of opinion evidence and that such opinion is being offered as expert evidence as to the true values of the parcels of land at the time of sale; therefore, the Claimant ought to have sought the permission of the Court pursuant to Rule 32.6(1) of the CPR, which states:

- “32.6(1) No party may call an expert witness or put in an expert’s report without the court’s permission.
- (2) The general rule is that the court’s permission is to be given at a case management conference.
- (3) When a party applies for permission under this Rule –
 - (a) that party must name the expert and identify the nature of the expert’s expertise; and
 - (b) any permission granted shall be in relation to that expert only.

- (4) No oral or written expert's evidence may be called or put in unless the party wishing to call or put in that evidence has served a report of the evidence which the expert intends to give.
- (5) The court must direct by what date such report must be served.
- (6) The court may direct that part only of the expert's report be disclosed."

Accordingly, the main objection of the Defendants is that the Claimant did not seek permission from the Court at case management conference or at pre-trial review to put in an expert report or call an expert witness.

[8] The Claimant's response was that the Court had a discretion under Rule 28.13 and such discretion ought to be exercised in the light of the overriding objective set out in Rule 1.1. Alternatively, it was argued that the Court had the inherent power to exercise a discretion and allow the admission of the chart exhibited and the content of the witness statement of Rolando Villas.

[9] The consequence of a failure to disclose any document pursuant to an order for disclosure is set out in Rule 28.13(1) as follows:

"A party who fails to give disclosure by the date ordered or to permit inspection may not rely on or produce any document not so disclosed or made available for inspection at the trial."

Rule 28.13(2) goes on to confer on a party seeking to enforce an order for disclosure the option of applying to the court for an order that the other party's pleadings be struck out in whole or in part. By Rule 28.13(4), the court can make an 'unless' order conditional upon compliance with the order for disclosure by a specific date.

[10] The witness statement plainly seeks to tender an expert opinion embodied in the chart prepared by Mr. Villas. That chart was neither disclosed nor was permission sought for the same to be put in as an expert's report. These matters are not disputed by the Claimant.

[11] It would be manifestly unfair for the Claimant to be permitted to tender an expert report in circumstances where the Defendants have not been afforded the protection of the regime set out in Part 32. The procedure governing expert witnesses has undergone a metamorphosis under the CPR, which has curtailed the ability of parties to adduce expert evidence. The failure to seek the permission of the Court has deprived the Defendants of the opportunity to put questions to this witness and/or to procure their own expert witness or witnesses. This is grossly unfair to the Defendants and operates to put them at a disadvantage in the presentation of their defence. Further, this untidy state of affairs defeats the whole purpose of Part 32 which is to promote the impartiality of expert witnesses and limit the expense of such witnesses in the trial process. The new regime provides for expert evidence by way of written report and the opportunity for the opposing party to put written questions to and receive answers by the expert ahead of the hearing, thus in normal circumstances obviating the attendance of the witness for cross-examination save with the permission of the Court. This entire process has been disrupted by the Claimant's failure to comply with Rule 32.6(1).

[12] The purport of Rule 28.13(1) is to prohibit the production of or the reliance by a party at trial upon any document that was not disclosed. The use of the word 'may' at first blush appears to admit of a discretion residing in the court. However, as I see it, the proper interpretation is that the Rule is to be applied as being mandatory rather than permissive, otherwise the word 'not' would not have been included or the Rule would have been differently drafted to allow for a discretion. It seems to me that, in the absence of mutual agreement, the chart cannot be relied upon or produced by the Claimant at trial. Accordingly, I rule that the chart be excluded and therefore that para. 7 be struck out from the witness statement. Having regard to the disallowance of expert opinion evidence by Rolando Villas, the last sentence of para. 6 is also struck from his witness statement.

TALBERT BRACKETT

[13] The Defendants object to the witness statement of Talbert Brackett on the ground that the content is in the first instance irrelevant and secondly, it contains documentary hearsay.

[14] Mr. Brackett's witness statement narrates events of January 8, 2008 and the day following. In addition, there is exhibited to the witness statement a list of sales which is stated to be the results of his research into parcels of land in the Caribbean Shores area which were sold by the Ministry of Natural Resources in the years 2001 and 2002.

[15] It should at once be stated that I am not prepared at this stage to deem this evidence irrelevant solely on the basis that the sales of parcels of land in the years 2001 and 2002 are too remote relative to the dates set out in the Statement of Claim. I am more inclined to resolve this matter as part of the trial process itself. It is acknowledged that section 66(1) of the Evidence Act requires that the evidence "must relate to facts in issue or relevant thereto". However, a ruling on relevance, to my mind, may be premature ahead of the trial.

[16] Mr. Talbert Brackett presented his witness statement in his former capacity as Deputy Registrar of Lands and Surveys of the Ministry of Natural Resources during January 2008. Objection is being taken to a handwritten document headed "Comparable Sales of Lands in University Heights" and attached to the witness statement. The content of the document is stated to be the 'research' of the maker of the document showing "the average price of a parcel of land in that area (excluding sales to Bryan Neal, Jose Coye and Warren Coye) sold by Government of Belize in 2001 and 2002". The source documents of the so-called 'list of sales' were never disclosed as part of the Claimant's disclosure of documents or otherwise.

[17] Documentary evidence as to facts in issue is admissible pursuant to section 82(1) of the Evidence Act, which enacts:

“82.(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied –

(a) if the maker of the statement either –

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(iii) if the maker of the statement is called as a witness in the proceedings.”

In **H v Schering Chemicals Ltd [1983] 1 All ER 849** Bingham J dealing with section 4(1) of the Civil Evidence Act (UK) offered this description of documents which were objected to as not being records within the meaning of the section:

“... the documents in this case, I think, are not records and are not primary or original sources. They are a digest or analysis of records which must exist or have existed, but they are not themselves those records.”

This is an apt description of the state of affairs presented by the witness statement of Mr. Brackett. The original documents to substantiate the research results exhibited have not been produced rendering the chart a hearsay document. Accordingly, paragraph 20 together with the list of comparable sales must be struck out and I so order.

P. NOREEN FAIRWEATHER

[18] Mrs. Fairweather is presently the National Emergency Coordinator at NEMO. She held the post of Commissioner of Lands and Surveys in the Ministry of Natural Resources from 2006 to 2008. In her witness statement, she recounts events relating to the issues before the Court. The Defendants have objected to this witness being used to prove certain public documents, to wit, Transfer of Land Forms and Land Rent Statements, as well as certain corporate documents relating to CHEOP Enterprises Limited. Over and above the undisputed fact of these documents not having been disclosed, the Defendants say that Mrs. Fairweather is no longer the Commissioner of Lands, and presumably, cannot be regarded as having custody of these public documents. In addition, she is not the Registrar of Companies or a designated officer of CHEOP Enterprises Ltd. and is thus not competent to tender records of that company which, in any event, have not been certified.

[19] The said documents are plainly not properly admissible through Mrs. Fairweather and must therefore be excised from her witness statement. Accordingly, the second sentence of para. 7, the 2nd, 3rd and 4th sentences of para. 12, paras, 13, 34, 35, 36, 41 and 42 together with the documents marked “NF 2”, “NF 3”, “NF 4”, “NF 6”, “NF 7” and “NF 8” are struck out from the witness statement of Noreen Fairweather.

MARTIN ALEGRIA

[20] The witness statement of Martin Alegria attributes certain statements to the 2nd Defendant while purporting to chronicle the steps taken towards the purchase of a parcel of land in the Caribbean Shores area. The simple objection taken by the 2nd

Defendant is that the conversations with an unidentified person in the Valuation Department at the Ministry of Natural Resources and with one Yvonne Coye, who is not a party to the claim, offend the rule against hearsay statements and are therefore inadmissible. This contention is fundamental and unassailable. Accordingly, I rule that all references to what Mr. Alegria was told at the Valuation Department and by Mrs. Yvonne Coye be expunged from his witness statement.

[21] In summary, the order of the Court is as follows:

- (a) As to the witness statement of Rolando Villas, the last sentence of para. 6, para. 7 and the chart attached thereto be struck out;
- (b) As to the witness statement of Talbert Brackett, para. 20 and the list of comparable sales be struck out;
- (c) As to the witness statement of P. Noreen Fairweather, the second sentence of para. 7, the 2nd, 3rd and 4th sentences of para. 12, paras, 13, 34, 35, 36, 41 and 42 together with the documents marked “NF 2”, “NF 3”, “NF 4”, “NF 6”, “NF 7” and “NF 8” be struck out.
- (d) As to the witness statement of Martin Alegria the said witness statement shall be edited to expunge any reference to responses from the Valuation Department and from Mrs. Yvonne Coye.

The costs of this application shall be the Defendants' in the cause.

KENNETH A. BENJAMIN
Chief Justice