IN THE SUPREME COURT OF BELIZE, A.D. 2015

INFERIOR APPEAL NO. 66 of 2014

BELIZE MEDICAL ASSOCIATES	**APPELLANT**
AND	
ECKERT LEWIS	**RESPONDENT**

BEFORE the Honourable Madam Justice Sonya Young

Hearings
2015
3rd December
17th December

Written Submissions
2015
4th December- Respondent

Mr. Mark Williams for the Appellant.
Mr. Anthony Sylvestre for the Respondent.

Keywords: Inferior Court Appeal – Civil – Documentary Evidence – Referred to but not presented - Duty of Court to assist pro se litigant – Fair trial

JUDGMENT

1. This is an appeal against the decision of the learned trial Magistrate to dismiss a claim by the appellants for the sum of $10,975.00 being a debt

which they say was owed to them by the Respondent. The claimant was unrepresented. After their sole witness gave evidence, a no case submission made by Counsel for the Respondent, was upheld. The court found that there was no or no sufficient evidence presented to establish the claim that the Respondent had contracted services from the Claimant on behalf of the deceased.

2. The evidence which was presented is that the Respondent's son was brought to the Appellant and was admitted as a patient for some time. He eventually died there. The Respondent made a deposit and part payment towards the medical bill. Subsequently, by letter, he explained why payment had not been completed and by another, through his then attorney, he promised to pay the remainder in installments. Neither invoices evidencing the debt, nor the letter were produced in evidence by the claimant. A single invoice was referred to on the plaint itself but never during testimony. One letter was referred to on the plaint and two during testimony. Counsel for the Defendant successfully grounded his no case submission mainly on the absence of the documentary evidence.

3. On appeal, five grounds were stated:

1. Evidence was wrongly rejected, or inadmissible evidence was wrongly admitted, by the inferior court, and in the latter case there was not sufficient evidence to sustain the decision;

2. The decision was unreasonable or could not be supported having regard to the evidence;

3. The decision was erroneous in point of law;

4. The decision was based on a wrong principle or was such that the inferior court viewing the circumstances reasonably could not properly have so decided;

5. Some specific illegality, other than here before mentioned, substantially affecting the merits of the case, was committed in the course of the proceedings therein or in the decision;

4. Before the hearing began Counsel for the Appellants informed that he would address under three of the five grounds only. He seemingly abandoned grounds 3 and 4. The main and perhaps only thrust of the appellant's argument was that the Magistrate had a duty to assist pro se litigants in presenting their case. Where documents were referred to, (as they had been in the instant matter) the Magistrate was duty bound, at the very least, to enquire whether the documents were available and to have them tendered as evidence, where admissible. He urged that failure to do so was a procedural flaw and the court must now use its discretionary power under section 119(c) of the Supreme Court of Judicature Act to remit the matter for further evidence to be taken. This further evidence he contended, would be material which could have been and should have been called. Let us now consider each ground separately.

Evidence was wrongly rejected, or inadmissible evidence was wrongly admitted, by the inferior court, and in the latter case there was not sufficient evidence to sustain the decision:

5. The sole witness who testified, tendered no exhibits. I could find nothing in the record to prove that inadmissible evidence was admitted or evidence was wrongly rejected. Such a determination calls for a consideration and

consequential ruling by the Learned Magistrate. There was none. The ground invariably fails.

The decision was unreasonable or could not be supported having regard to the evidence:

6. Counsel for the appellant relied heavily on the submissions he made as to the Magistrate's duty. He submitted that the Magistrate having not taken into account all of the available material, made an uninformed and therefore unreasonable decision. The case could clearly not have been considered on its merits. I am uncertain on what foundation it must be accepted that the letters referred to were in fact available. There is nothing in the notes of evidence to indicate that the witness said anything whatsoever to indicate that the letters were available. So what counsel appears to be saying is if the evidence had been admitted then the decision arrived at would be patently unreasonable. But there is an obvious difficulty with, or a fallacy in, that argument. Had the evidence actually been tendered then perhaps this ground may have some potency. But the matter, standing as it is before this court, cannot support this ground. From the description of the contents of the letters given in evidence, the court could not fathom how they could have discharged the Claimant's duty to prove, to the required standard, the existence of the debt and that the defendant was legally bound to pay same.

7. The witness explains in her testimony that payments had been made in the amount of $13,234.00. There is no evidence as to who made those payments and under what arrangements those payments had been made. Subsequently, the Claimant made efforts to recover the debt through Mr. Eckert Lewis - "we received a letter from Mr. Lewis with his position on why the bill has

not been cleared." She does not indicate on what basis efforts were made to recover the debt from Mr. Lewis. She then describes the second letter as "enclosing a cheque of $500.00 as first payment towards this balance. It also states that monthly payments of $1,000 with effect from February 15, 2013 will continue." Nowhere in that statement is it expressed that the defendant acknowledged the amount of the debt or acknowledged that he was the person responsible for the debt. His offer to pay (which is what her testimony demonstrates at best) does not place upon him a legal obligation to pay.

8. In fact, in her submissions in rebuttal, the same witness stated "(n)o arrangements was (sic) ever made with Belize Medical Associates or any family member apart from Mr. Eckert Lewis that in itself would say Mr. Lewis is responsible as he was the one all arrangements were made with." Now, evidence of whatever arrangement had been made with Eckert Lewis is what ought to have been placed before the court. Likewise some proof of the existence and amount of the debt. That is the evidence which would have proved the salient ingredients in the claimant's case. That to me is where the claim fell, not simply on the omission to present the letters as evidence. He who asserts must prove, that rule does not change. I find that the learned Magistrate considered the case on its merits (what was properly before her) and I also agree with her reasoning that no evidence was presented "to show that the defendant had contracted services from Belize Medical Associates on behalf of his son Dorian Lewis." This ground of appeal is likewise rejected.

Some specific illegality, other than herein before mentioned, substantially affecting the merits of the case, was committed in the course of the proceedings therein or in the decision:

9. Counsel's submission here was that this ground was an all encompassing ground and he reiterated the unfortunate and unequal position in which the Claimant had been placed as a pro se litigant. In support he submitted ***Simms v Moore (DC) [1970] 2 QB 327***. Here, the prosecution was not legally represented, the Defendant was. The prosecutor passed the witness statements to the Clerk of Court who proceeded to examine the witnesses. The Defendant counsel objected to this procedure citing the Magistrates' Court Rules 1968 which he urged mandated that the "prosecutor shall call the evidence for the prosecution." His objection was overruled, the Defendant was found guilty and appealed.

10. On Appeal, the court was of the view that the Rules were directory only and in any event the Magistrate had an inherent duty to regulate proceedings in his court in the interest of justice, fairness and expediency. The circumstances of each case would determine the exercise of his discretion. The judgment ends with some observations on the procedure which ought to be adopted by the Magistrate. The first was that in general neither the court nor the Justice's clerk should actively participate in the proceedings except to clear up ambiguities in the evidence. Where the party is unrepresented and seems in need through lack of knowledge of court procedure or Rules, then the court could (not must) allow its clerk to help. However, the exercise of the discretion to allow the clerk to assist should only be permitted where *"there are reasonable grounds for thinking the interests of justice would be best promoted, care being taken to see that nothing is done which conflicts with the rules of*

natural justice or the principle that justice must manifestly be seen to be done." (PJ Parker CJ pg 333)

11. I found this case to be more harmful than helpful to the Appellant. When one considers the basis on which Counsel postured that the unrepresented litigant ought to have been assisted he rests basically on two facts – 1. The fact of being unrepresented and 2. The fact that the evidence was not presented for admission. However, there is nothing in the notes of evidence or anything else before the court which could raise the belief that the litigant was in need of assistance. It is my view that more is required to establish that there was a clear need for the Magistrate to enter the arena in this way.

12. Moreover, I observed that the witness has worked as an accounts clerk at the Belize Medical Associates for the past six years. She has two stated duties - preparing invoices and the collection of debts. From the way she gives her testimony and the content of her rebuttal I am hard pressed to accept that she is a novice who has absolutely no knowledge of court procedure. In fact, a company like Belize Medical Associates choose to send her unrepresented when they ought to have been aware that the Respondent (an individual) was represented. That was their choice, legally, to make but it is also significant. Counsel urged that it was obvious that although the documents were mentioned they were not admitted. It is more obvious in my view that the omission was in the testimony presented by the witness rather than any procedural flaw at the magistrate's behest. The Claimants cannot in those circumstances have another bite of the cherry.

Conclusion:

13. This court could find no duty, as a matter of law, where the magistrate is obligated to help a pro se litigant in the way counsel has postulated. Nothing in support was presented to the court either. Under the adversarial common law system it is really the parties and not the judge who are in charge of litigation. In order to preserve the appearance of impartiality and perhaps to keep from falling into error, the court is expected to, and most times do, remain passive. This often means that they do not intervene in the proceedings unless invited in. They strictly apply the procedural and evidentiary rules to all litigants equally.

14. There really are no clear principles that define the duty of the court to ensure a fair trial for those who come before it. But there is a constitutional right to a fair trial and a consequential duty on the judicial officer to ensure that there is a fair hearing. According to Sir John Donaldson in ***Davies v Eli Lilley & Co [1987] 1 WLR 428 (EWCA)*** this duty requires that all relevant and admissible information is before the court. American authors such as Russell Engler in his article **'And Justice for All - Including the Unrepresented Poor**: **Revisiting the Roles of Judges**, **Mediators and Clerks' Fordham Law Rev. 1987, 2029 (1999)** urged that judges should consider one of their roles to be the assistance of *"the unrepresented litigant in developing a full, factual record, and to help the litigant with matters of procedure and substantive law."* This of course calls for a more interventionist style from judicial officers which many are understandably reluctant to adopt without proper rules, guidelines and training. That reluctance stems from concerns about bias - showing favour to one party over another and being perceived as unfair. It is a

difficult position to be in and an even more difficult balance to strike where one side is represented and the other is not.

15. The question which remains is how far should a judicial officer go in rendering assistance in adducing supporting evidence without seeming to trample on the rights of those litigants who have employed a legal representative. To my mind asking a pro se litigant whether they would like a particular piece of evidence introduced into the record and guiding them through the procedure is certainly acceptable in the interest of fairness. Perhaps we could call that a 'nudge' from the bench. However, the witness ought, at the very least, to have presented it in some way – A mere "and I have the letters right here" would certainly have been sufficient for an appropriate 'nudge' from the court. For a judicial officer to ask whether a particular piece of evidence is even in existence or present in court, simply goes too far and is an unreasonable expectation. Especially when one considers the number of cases that go before a Magistrates' Court and that most are prose litigants.

16. One is compelled to consider how easily this issue could be solved if litigants were exposed to some form of pretrial orientation on court guidelines. Simply explaining before trial what is expected, informs and educates and ensures that unrepresented litigants are not on a seemingly less than equal footing with their represented adversary. It also eases the burden on the judicial officer once he ascertains that the party or witness has had the benefit of such a program. As in the Supreme Court where the overriding objective, found in explicit rules of court, guides the judge, the magistrates should

similarly be guided. They should be given clear authority to provide a reasonable level of assistance to pro se litigants in presenting their case.

17. I can therefore find no reason to disturb the decision of the Learned Magistrate and I decline the invitation to remit the matter for further evidence to be taken.

18. **IT IS HEREBY ORDERED:**

1. Appeal is dismissed.
2. Costs to be taxed if not agreed.

SONYA YOUNG
JUDGE OF THE SUPREME COURT