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

CLAIM NO. 1019 OF 2009

(ZIPLINE ADVENTURES (BELIZE) LIMITED APPLICANT/CLAIMANT

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BETWEEN (AND

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(TRAVELLERS REST LODGE (BELIZE) LIMITEDRESPONDENT/DEFENDANT

(d.b.a. JAGUAR PAW RESORT

BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA

Mrs. Yogini Lochan-Cave of Vernon and Lochan for the Applicant/Claimant

Mrs. Agnes Segura-Gillett of Arnold and Company for the Respondent/Defendant

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D E C I S I O N

1. This is an application by the Applicant/Claimant Company to have one of the witness statements of the Respondent/Defendant Company struck out on the basis that no application was made at the time of case management for the admission of expert evidence. The application also seeks to prevent the Respondent/Defendant from relying on additional documents which the Applicant/Claimant says are documentary hearsay and do not comply with the Evidence Act Cap 95. In response, the Respondent/Defendant asserts that the witness statement should be allowed

because the witness is not an expert witness but merely a witness of fact who happens to be a professional. In relation to the additional documents, those fall within an exception to the hearsay rule and should be allowed to stand. These matters arose at a pre-trial hearing and the parties were asked to make written submissions. The court now reviews those submissions and gives its decision.

The Issues

2. i. Whether the witness statement of Reynaldo Magana should be struck out for non-compliance with Rule 32 of the Civil Procedure Rules.

ii. Whether the Respondent/Defendant can rely on or produce at trial the documents referred to in the additional list of documents dated the 17th day of September, 2015.

Submissions of the Claimant/Applicant on whether Reynaldo Magana's Statement should be struck out for non-compliance with CPR rules on Expert Witnesses

3. Mrs. Lochan-Cave on behalf of the Applicant/Claimant submits that the witness statement of Reynaldo Magana should be struck out for non-compliance with Parts 28 and 30 of the Civil Procedure Rules (CPR) 2005. She submits that the evidence of this witness amounts to expert evidence and that the Respondent/Defendant did not obtain permission of the Court to call an expert witness. Citing paragraphs from the witness statement of Reynaldo Magana, Mrs. Lochan Cave argues that Mr. Magana is seeking to provide his opinion on documents which he has been privy to in his capacity as an auditor. He sets out his qualifications in paragraphs 1 to 4, and then states that he is in possession of Jaguar Paw's Quickbooks Accounting

Software and some of their records taken into his custody during an audit. He then goes on to state at paragraphs 9 and 11 his opinions on those records as follows:

> *"9) I have reviewed the Claimant's Aging Summary purportedly setting out transactions between ZABL and Jaguar Paw Resort and note that payments from Jaguar Paw Resorts were not credited towards its account with ZABL.*
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> *It is clear that the Claimant's Accounting System is not an accurate summary of the transactions between the Claimant and the Defendant.*
>
> *11) From the information in my possession, it would appear that ZABL is the one that owes Jaguar Paw moneys."*

4. Learned Counsel for the Applicant/Claimant submits that Mr. Magana presents himself as an impartial third party witness and wishes the court to rely on his opinion having regard to his years of experience as outlined in his witness statement; his opinion is only admissible if he is an expert. Mrs. Lochan-Cave submits that Mr. Magana is not merely providing evidence as an ordinary witness as to information he obtained while working as the Respondent/Defendant's Accountant or Auditor as contended by Donna Young in her affidavit. Learned Counsel submits that the Respondent/Defendant is not being forthcoming with the court in that Mr. Magana is seeking to give an opinion on documents he acquired from the Respondent/Defendant as well as on those documents disclosed by the Applicant/Claimant. His opinions are only admissible if he is an expert. Mrs. Lochan

Cave refers to the procedure to be adopted when eliciting expert evidence under the Civil Procedure Rules. She submits that Rule 32 governs the procedure:

> *"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."*

5. The Applicant/Claimant submits that permission required by Rule 32 should have been sought before the witness statement of Mr. Magana was filed. The evidence of Mr. Magana is therefore inadmissible and should be struck out.

Mrs. Lochan Cave relies on ***The Attorney General of Belize v. Florencio Marin et. al.*** Claim No. 41 of 2009 where the Claimant in that matter was seeking to rely on a witness statement which plainly sought to tender an expert opinion embodied in a chart prepared by the witness. Permission of the court had not been sought. His Lordship Benjamin CJ in disallowing the evidence stated thus:

> *"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 …"*

6. Mrs. Lochan Cave goes on to address the contention raised by the Respondent/Defendant that if Mr. Magana is not allowed to testify on behalf of the Defendant, then Mr. Sheffield Eck should also be prevented from testifying on behalf of the Applicant/Claimant since both men are in the same capacity. Mrs. Lochan Cave argues that unlike Mr. Magana, Mr. Eck is not trying to give his opinion on any matter. He is merely indicating to the court what he has done personally on behalf of the Claimant/Applicant as its accountant. He indicates the programmes which he created in order to produce its accounting, states what payments he has received on behalf of the Applicant /Claimant and basically provides information to the Court of which he has personal knowledge. By contrast, all Mr. Magana is providing are opinions on documents created by a third party. As Mr. Eck is a witness of fact who is a professional giving evidence as to his actions, no permission is required. Mrs. Lochan Cave relies on *Blackstones Civil Practice 2012* as support for this contention:

> *"As a matter of practice, witnesses who are qualified to be experts are frequently called as witnesses of fact where they were personally involved in the matters relating to litigation. As factual witnesses, they are not subject to CPR Part 35,*
> *And there is no requirement that permission be sought. It is both inevitable and appropriate that a witness who happens to be a professional will give evidence of his actions …"*

Mrs. Lochan Cave also urges the court to strike out the statement of Mr. Magana on the basis that the Respondent/Defendant had only sought permission at case management for the filing of six witness statements but filing witness statement of

Mr. Magana raises the number of witness statements filed to seven.

Submissions on behalf of The Respondent/Defendant opposing the application to strike out Mr. Magana's Statement for non-compliance with Civil Procedure Rules on Expert Witnesses

7. Mrs. Segura-Gillett on behalf of the Respondent/Defendant submits that the evidence of Reynaldo Magana does not amount to expert evidence. She concedes that while the experience and qualifications of the witness would allow for him to act in the capacity of an expert if so required, the witness has not been brought before the court to render expert testimony. She contends that the witness was retained by the Respondent/Defendant to act in the capacity of an accountant and to act as an auditor. It was not contemplated that the information that the witness gained and the assessment the witness made of the Respondent/Defendant's accounts would be used in any litigation. The assessment was done in compliance with the law, i.e., the Companies' Act, which required that the finances of the company be audited annually. Consequently, the information which the witness obtained, based on records examined by him, permits him to give evidence about said records and findings.

8. Mrs. Segura-Gillett submits that the case of the ***Attorney General of Belize v. Florencio Marin et.al*** Claim No. 41 of 2009 must be distinguished from the instant case. The evidence in that case was done with the intention of using same in ongoing litigation, while the evidence in the case at bar was generated prior to the institution of the claim in that it resulted from standard accounting and auditing

processes undertaken by the Respondent/Defendant. Mr. Magana was employed by the Respondent/Defendant to do a job on its behalf prior to any litigation being conceived. He did what the Applicant/Claimant's accountant has done for the purposes of the business of the Applicant/Claimant. His evidence is simply an account of what he did in relation to the Respondent/Defendant's accounts and his findings at that point in time in relation thereto; it is a reflection of the Respondent/Defendant's accounts in 2009, prior to the institution of these proceedings. By contrast, the chart which was sought to be tendered in the Florencio Marin case was created by the witness for the purpose of litigation and not in the ordinary course of work.

9. Mrs. Segura Gillett further argues that at all material times, the ledgers and the information contained therein were the property of the Respondent/Defendant and were created for its own internal use. Therefore the ledgers could not be considered an expert's report by Reynaldo Magana. In addition, the cheques are the property of the Respondent/Defendant and created by Jose Garbutt and Donna Young, witnesses through whom the evidence can be tendered at trial.

10. Mrs. Segura Gillett further submits that Reynaldo Magana having had these documents in his possession for an extended period of time, for the purpose of conducting accounting and auditing functions for the Respondent/Defendant has personal knowledge of the documents before the court. Therefore his evidence would not have come within the confines of Rule 32 of the Supreme Court Civil Procedure Rules which states as follows:

"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."

Mrs. Segura Gillett argues that the ledgers and cheques exhibited to Mr. Magana's witness statement are those of the Respondent/Defendant. She submits that these documents are therefore relevant to this case. The documents can also be corroborated by the evidence of two other witnesses for the Respondent/Defendant. There is no expert report per se being tendered by Reynaldo Magana. The witness statement merely encapsulates the professional experience that Reynaldo Magana possessed while retained by the Respondent/Defendant to deal with its accounts. Mrs. Segura Gillett relies on the case of ***ES v. Chesterfield and North Derbyshire Royal Hospital NHS Trust*** (2003) EWCA Civ 1284 where Lord Justice Holman said at Paragraph 31:

"Before the master, the application for two experts in the field of obstetrics seems largely to have been based on the argument of 'equality of arms'. The master rejected that argument since he drew a sharp distinction between witnesses of fact and expert witnesses. Of course that distinction does exist. It is an important one, and underpins the scheme of Part 35 of the CPR. But in my view it should not obscure the realities of a case such as this. As the master himself recognized, 'It is inevitable that a witness who happens to be a professional will give evidence of his actions based upon his or her professional experience and expertise…' It is, in my view, not only inevitable but appropriate, for no professional person can explain or justify his or her actions and decisions save by reference to his or her training and experience."

11. Learned Counsel submits that the fact that a person holds the qualifications and experience to act as an expert does not automatically make a person an expert but rather merely a professional who is a witness of fact. Where it is that the witness is merely speaking of facts as he knew them, he is not an expert witness. The fact that the witness's evidence may not be independent since he is a witness for the Respondent/Defendant goes to the weight and not the admissibility of the evidence of the witness.

Ruling on Issue 1

12. The witness statement in dispute is not long so I reproduce it in its entirety as follows:

"I, Reynaldo Magaña, Certified Public Accountant (CPA) and Senior Partner of Moore Stephens Magaña LLP, of 31/2 Miles Phillip S W Goldson Highway, Belize say as follows:

1. *I have sixteen years' experience in audit, accounting, tax and consulting in Belize. I hold an MBA in Finance and Accounting from the Regis University, a Certified Public Accountant Practicing License from the State of Michigan*

USA, and a Practicing License from the Institute of Chartered Accountants of Belize.

2. *Prior to becoming a Senior Partner in Moore Stephens Magaña LLP, I operated under the name R. F. Magaña & Associates. I have been working as a CPA since 2005 and during this time I have done in excess of 200 audits.*

3. *In late 2007, I was retained by the Defendant Company to conduct an audit of its business, the Jaguar Paw Resort, for the period 1996 to 2006. I was subsequently retained by the Defendant to do audits for the Jaguar Paw Resort for the years 2007 and 2008 and a compilation for the period January to June 2009.*

4. *When I first visited Jaguar Paw Resort in late 2007, they had a QuickBooks Accounting system in place that they used to record, process and summarize financial transactions of the business. Their bank reconciliation process was working effectively for our audit purposes.*

5. *I am in possession of Jaguar Paw's QuickBooks Accounting Software and some of their records which were taken into my custody during the Audit process for the years previously mentioned.*

6. *Based on the information in Jaguar Paw's QuickBooks Accounting System, I can confirm to the Court that payments were made by the Jaguar Paw Resort to ZABL in the sum of BZ$2,345,447.23 for the period February 2005 to August 2008. Of these sums, $30,000.00 was paid out of the Defendant's Atlantic Bank Account No. 100178745; $43,000.75 was paid out of the Defendant's Scotiabank (Bmp) Account No. 1930668; and $2,272,446.48 was paid out of the Defendant's Scotiabank (Bze) Account No. 520 19. Attached hereto and marked Annex RM1, RM2 and RM3 are printouts from the Defendant's General Ledger (QuickBooks) showing all payments made to ZABL during the period in question from the Defendant's Atlantic Bank Account No. 100178745, Scotiabank (Bmp) Account No. 1930668, and Scotiabank (Bze) Account No. 520 19 respectively.*

7. *I was able to peruse the Audit files in my office belonging to the Defendant Company, and located three cheques made out to ZABL by Jaguar Paw Resort in the sum of $10,000.00 each. These cheques evidence the $30,000.00 paid out of the Defendants Atlantic Bank Account No. 100178745 to ZABL. Attached hereto and marked annex RM4, RM5 and RM6 are copies of cheques Nos. 4, 17 and 33 issued by Jaguar Paw Resort to ZABL.*

8. *From the reverse side of the aforementioned cheques, it is clear that they were deposited to the credit of the payee via its First Caribbean International Bank.*

9. *I have reviewed the Claimant's Aging Summary purportedly setting out transactions between ZABL and Jaguar Paw Resort and note that payments from Jaguar Paw Resorts were not credited toward its account with ZABL.*

10. *It is clear that the Claimant's Accounting System is not an accurate summary of the transactions between the Claimant and the Defendant. While the Claimant's Accounting shows only US$284,713.36 in credits to Jaguar Paw's Account, inclusive of a US$100,000.00 ZABL dividend credit, Jaguar Paw Resort's QuickBooks Accounting System shows BZ$2,345,447.23 in payments from Jaguar Paw Resort to ZABL, excluding the US$100,000 dividend credit.*

11. *From the information in my possession, it would appear that ZABL is the one that owes Jaguar Paw moneys.*

The statements contained herein are made from my own knowledge and I believe that the facts stated in this witness statement are true.

Dated this 17th day of September, 2015

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Reynaldo Magaña"

13. I agree with the submissions of Mrs. Segura Gillett that a witness who holds qualifications and experience is not necessarily an expert but a professional who is a witness of fact. Mr. Magana is not producing a report. He is attesting to certain facts which are within his knowledge at a time long before litigation between these parties was even contemplated. I do not see why his evidence should be excluded at this point. The test of admissibility is relevance, and since the substantive issue the court is called upon to decide is who owes what to whom and in what amount, I find that Mr. Magana's report is highly relevant and therefore admissible. I also agree with Mrs. Segura Gillett's submission that the fact that this witness is a witness for the Defendant (and not an impartial witness) is one which goes to the weight of his evidence and not to its admissibility. I fully agree with the distinction drawn between the case of *Attorney General of Belize v. Florencio Marin et.al.* and the case at bar. The report or chart sought to be tendered in the Marin case was created with the intention of using it at trial, whereas in the case at bar, this evidence is based on facts which came to the knowledge of Mr. Magana in 1996 to 2006 in the course of conducting standard accounting and auditing practices. I therefore find that the Rules on expert witness in the CPR are not applicable as this is a witness who happens to be a professional as opposed to an expert witness tendering a report. I agree that the offending paragraph 11 where he gives his opinion can be struck out, and the rest of the evidence be allowed to stand.

Submissions on behalf of the Applicant/Claimant on application to strike out Respondent/Defendant's additional disclosure for non-compliance with the rules of disclosure under Civil Procedure Rules and as hearsay

14. Mrs. Lochan-Cave contends on behalf of the Applicant/Claimant that the Respondent/Defendant should not be allowed to rely on or to produce at trial the documents referred to in the additional list of documents dated the 17th September, 2015, also exhibited to the Witness Statement of Reynaldo Magana. The ground for this objection is that the documents listed were not properly disclosed pursuant to Rule 28.13(1) of the CPR and therefore the list of documents was filed in a manner that is an abuse of the process of the court. As the Applicant/Claimant is of the view that the Respondent/Defendant was aware of or should have been aware of the existence of the said documents and therefore should have included same in its Standard Disclosure filed on July 30th, 2015. Learned Counsel relies on the dicta of Benjamin CJ in ***Attorney General v. Florencio Marin et. al*.** Claim No. 41 of 2000 as follows:

> *"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."*

15. Mrs. Lochan Cave submits that Rule 28.12 of the CPR only applies to documents which come to the knowledge of the party after the date of disclosure. Even if a

document is lost or destroyed once that document was in the control, possession or knowledge of the party, that party has a duty to disclose said document. Learned Counsel cites ***The Caribbean Civil Court Practice*** 2011 Note 24.12 as follows:

> *"Each party is required to identify those documents which are no longer in the party's control and to say what has happened to them. A statement and explanation is therefore required as to documents which have been lost or destroyed. In the 'run of the mill' case a general statement may suffice but where the contents of the missing documents are of apparent importance they should be itemized and their disappearance explained."*

Mrs. Lochan Cave argues that Schedule 2 of the Disclosure Form required the Respondent/Defendant to list all documents which it does not have possession of and state what happened to them. The Respondent/Defendant stated "*None*". The Defendant/Respondent also stated that neither itself or any of its witnesses nor anyone else on its behalf "… *had physical possession of…or the right to take copies of any documents which should be disclosed and inspected under the Court's order other than those listed in the List of Documents*". The Respondent/Defendant clearly would have had knowledge and previous possession of the documents listed in the supplementary list and as such if it intended to rely on those documents then they should have been properly disclosed.

16. In conclusion, Mrs. Lochan Cave further submits that the documents should be struck out from the witness statements since the documents were not created or compiled by Mr. Magana nor are the contents within his personal knowledge. No evidence has been led as to who created the documents. The documents are

therefore documentary hearsay and inadmissible as per Section 82(1) of the Evidence Act.

Submissions by the Respondent/Defendant resisting the application to strike out additional disclosure for non-compliance with Civil Procedure Rules 28.13 and with the Evidence Act Cap. 95 of the Laws of Belize

17. Mrs. Segura Gillett on behalf of the Respondent/Defendant strenuously resists the application by the Applicant/Claimant to strike out the documents attached as additional disclosure to Mr. Magana's witness statement. Learned Counsel argues that the additional disclosure does not fall within the ambit of Rule 28.13 of the Civil Procedure Rules but rather falls within section 28.12 which reads as follows:

> *"28.12 (1) The duty of disclosure in accordance with any order for standard disclosure or specific disclosure continues until the proceedings are concluded.*
>
> *(2) If the documents to which this duty extends comes to a party's notice at any time during the proceedings, that party must immediately notify every other party and serve a list of those documents.*
>
> *(3) The supplemental list must be served not more than 14 days after the new documents have come to the notice of the party required to serve it."*

18. Learned Counsel further submits that the case of ***Attorney General v Florencio Marin et. al.*** Claim No. 41 of 2009 relied on by the Applicant/Claimant can be distinguished from that of the case before the court. She argues that it would be unreasonable for the officers and employees of the Respondent/Defendant company to be expected to remember each and every cheque ever written by them, especially since those documents were no longer in their possession. Rule 28.13

applies where both case management and pre-trial review has passed as in the Florencio Marin case, where the documents were sought to be tendered at trial. It is a rule designed to prevent ambush of one party by the other at trial. Secondly, once the documents were in the possession of the Defendant/Respondent, it immediately notified the Applicant/Claimant. To date, there has been no request by the Applicant/Claimant to inspect these documents.

19. On the question of hearsay, Mrs. Segura Gillett argues that the additional disclosure falls within an exception to the Hearsay Rule. She cites section 82 of the Evidence Act as follows:

> "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
>
> (b) if the maker of the statement is called as a witness in the proceedings:
>
> Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is outside Belize and it is not

reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

(2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case, it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence –

(a) notwithstanding that the maker of the statement is available but is not called as a witness;

(b) notwithstanding that the original document is not produced, if in lieu thereof, there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.

(3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

(4) For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognised by him in writing as one for the accuracy of which he is responsible.

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of subsections (1) to (4), the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner, and where the proceedings are with a jury, the court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason it

appears to it to be inexpedient in the interests of justice that the statement should be admitted."

20. Learned Counsel submits that the additional documents disclosed fall within Section 82 of the Evidence Act as Reynaldo Magana had personal knowledge of the documents sought to be tendered, as his firm was retained by the Respondent/Defendant as their accountant. Mr. Magana personally verified the information contained in the documents during an audit he conducted. In addition, the QuickBooks ledger form part of a continuous record prepared by Mr. Magana and remained in his possession until handed over to the Respondent/Defendant's counsel during these proceedings. The documents are addressed by Section 83(1) of the Evidence Act as follows:

> *"83(1) In any civil proceedings, a statement contained in a document produced by a computer is admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown –*
>
> *(a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store and process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any person;*
>
> *(b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;*
>
> *(c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and*

(d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities."

The documents attached as additional disclosure to Mr. Magana's witness statement are QuickBooks ledgers which fall within section 83 of the Evidence Act and are therefore admissible.

Ruling on Issue 2

21. I agree with the submissions of the Respondent/Defendant on this issue. This trial of this matter has not yet begun. There is not even a trial date set as we are still at the pretrial stage. Clearly, the additional documents disclosed do not offend against section 28.13 as they fall within Section 28.12 of the CPR. The duty of disclosure continues up to the conclusion of proceedings. I do not believe the suggestion by the Applicant/Claimant that the Respondent/Defendant deliberately sat on these documents and hid them until they had seen the documents disclosed by the Applicant/Claimant. There are significant sums of money at stake, so one would think that the Respondent/Defendant would be quite anxious to prove to the Applicant/Claimant that it does not owe the amount claimed. In addition, as rightly pointed out by Mrs. Segura Gillett, the persons who made the cheques will be called at the trial. The Applicant/Claimant will be given the opportunity to cross-examine these witnesses so there is no prejudice to the Applicant/Claimant. Most importantly, in my view, the court must have all the evidence before it in order to come to a just decision, hence the rule of continuing disclosure under the CPR which

ensures that this is done. The documents as computer generated records fall within Section 83 of the Evidence Act as an exception to the rule against hearsay. I therefore rule that the application to strike out the documents is denied.

22. Costs of this Application awarded to the Respondent/Defendant to be paid by the Applicant/Claimant to be taxed or agreed.

Dated this 11th day of April, 2017

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Michelle Arana
Supreme Court Judge