

**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**

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**BEFORE: Chief Justice Kenneth Benjamin.**

**October 5 & 9, 2012.**

**Appearances:** Mr. Nigel Hawke, Deputy Solicitor-General, for the Claimant.  
Mr. Edwin Flowers, SC for the 1<sup>st</sup> Defendant.  
Mr. Eamon Courtenay, SC for the 2<sup>nd</sup> Defendant.

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**RULING**

[1] Each of the two Defendants has filed a Notice of Application in similar terms seeking an order that the Claim be struck out with costs to be paid by the Claimant pursuant to Rule 28.13 of the Supreme Court (Civil Procedure) Rules 2005. The applications were both made on the ground that the Claimant has failed to comply with an order of the Court for specific disclosure made on the 14<sup>th</sup> and 21<sup>st</sup> February, 2012. The Defendants say that the Claimant has not fully complied with the order.

[2] The application by the 1<sup>st</sup> Defendant is supported by the affidavit of Magali Marin Young. It was deposed that the time for compliance with the order was extended from March 30, 2012 to May 4, 2012 at case management conference on April 17, 2012. It was stated that, by a letter of April 12, 2012 learned Senior Counsel for the 2<sup>nd</sup> Defendant wrote to the learned Deputy Solicitor-General, Mr. Hawke, and it was drawn to his attention that the list of documents received on April 5, 2012 did not list certain parcels which formed part of the area demarcated on the plan attached to the order for specific disclosure.

[3] The affidavit further averred that on May 11, 2012 a 'Further List of Disclosure' was disclosed on behalf of the Claimant. This list was said to fall short of full disclosure in that five lots from the demarcated area were not disclosed as set out more fully in her second affidavit filed on June 25, 2012. More specifically, the non-disclosed parcels were identified as Parcels 2770, 4771, 4773 and 4774 and Parcel 663.

[4] The Order of Court dated February 14 and 21, 2012 required the Claimant to disclose to the Defendants certified copies of the valuation sheets, transfer forms and purchase approval forms in respect of the lots delineated in the plan attached to the Order on or before March 30, 2012. There is no demur that this Order was not complied with, necessitating an order extending the time to May 4, 2012. The latter order was purportedly attended to on May 11, 2012; here again, the deadline was not met.

[5] Learned Senior Counsel for the 2<sup>nd</sup> Defendant adopted the submissions made on behalf of the 1<sup>st</sup> Defendant and went on to add that the disclosure relating to the lots not disclosed was essential to the Defendant's case and further that the Claimant was in breach of the Court's order. It was urged that the Court had no basis upon which to exercise any discretion as the only evidence before the Court was that presented on affidavit on behalf of the Defendants, which evidence stood uncontroverted.

[6] The learned Deputy Solicitor-General submits in answer that the Claimant was led to believe that the matter had reverted to case management when it was

adjourned on July 25, 2012. In this regard, it must be at once pointed out that notwithstanding this stance by the Court, the trial dates of October 5 and 6, 2012 had not been vacated. It was conceded that there was only partial non-compliance with the order for specific disclosure.

[7] It was argued on behalf of the Claimant that by virtue of Rule 28.13, the Court was vested with a discretion in deciding whether non-compliance warranted the striking out of the entire Claim. The Court was urged to refer to the Rules in their entirety and to have regard to the overriding objective. A final opportunity to meet compliance with the Order for specific performance was craved.

[8] The relevant Rule 28.13 reads:

- “(1) 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.
- (2) A party seeking to enforce an order for disclosure may apply to the Court for an order that the other party’s statement of case or some part of it be struck out.
- (3) An application under paragraph (2) relating to an order for specific disclosure may be made without notice but must be supported by evidence on affidavit that the other party has complied with the Order.
- (4) On an application under paragraph (2), the court may order that unless the party in default complies with the order for disclosure by a specific date, that party’s statement of case or some part of it be struck out.”

It is plain that sub-rule (1) of Rule 28.13 envisages a situation where a party fails to comply with an order or direction for disclosure by a specified date or has refused or neglected to allow for a document to be inspected. The stated sanction is that the

party may not rely on or be allowed to produce the non-disclosed document at trial. Such situation is dissimilar to the present application which arose from an order made for specific disclosure.

[9] The position relating to specific disclosure is specifically addressed by sub-rule (3) of Rule 28.13 and the prescribed procedure is for an application to be made without notice supported by the evidence of non-compliance. The sanction available for application by the Court is to be found in sub-rule (4) of Rule 28.13. The Court has a discretion to make an 'unless' order to the effect that in the event that the defaulting party does not comply with the order by a specific date, that party's statement of case or some part thereof be struck out.

[10] In the present case, the Claimant has been afforded two opportunities to fulfil the order for specific disclosure. Each deadline has not been met in a timely manner, and it has been conceded that the order remains partially not complied with. The Claimant now seeks yet another opportunity. Save for the learned Deputy Solicitor-General's protestation of a misunderstanding of the stage of the proceedings (which can in no way explain the non-compliance) and statements about efforts to secure full disclosure, the failure to comply with the order has not been satisfactorily explained.

[11] The Court is clothed with a discretion to either make an order striking out the statement or case in its entirety or a part of it on the one hand or make an 'unless' order specifying a date for compliance on pain of the statement of case being struck out on the other hand.

[12] As was stated in the reasons for making the order for specific disclosure, the aim of the order is to provide a comparative analysis of the purchase prices of lots sold in the area contiguous to those lots that are the subject-matter of the substantive claim. In the absence of total compliance with the order, the Court may be deprived of being able to conduct such an evidential exercise. This state of affairs impacts the case as a whole and the sanction can only be the striking out of the Claim in its entirety.

[13] The evidence, however, disclosed that of the several lots targeted for specific disclosure only five (5) lots are being complained of as not having been disclosed. It seems to me that this can be viewed as evidence of an effort by the Claimant to comply and on a proportional basis the order is just shy of complete compliance. On the evidence, the fulminations of learned Counsel notwithstanding, there is nothing to suggest an unwillingness to meet compliance. I am therefore prepared to offer the final opportunity sought by the Claimant subject to the ultimate sanction.

[14] Accordingly, it is ordered that the time for compliance with the order for specific disclosure dated February 14 and 21, 2012 be extended to 4:00 p.m. on Friday the 19<sup>th</sup> day of October, 2012. In the event of failure to comply by the said date and time, the Claim shall be struck out with costs to the Defendants to be assessed. The costs of this application shall be the Defendants' in the cause.

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**KENNETH A. BENJAMIN**  
**Chief Justice**