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

CLAIM NO. 41 OF 2009

BETWEEN:

THE ATTORNEY GENERAL OF BELIZE	**Applicant/Claimant**
AND	
FLORENCIO MARIN	**First Respondent/Defendant**
JOSE COYE	**Second Respondent/Defendant**

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BEFORE: Chief Justice Kenneth Benjamin.

July 3 and 12, 2012.

Appearances: Mr. Nigel Hawke, Deputy Solicitor-general, for the Applicant/Claimant.
Mr. Edwin Flowers SC, Ms. Magali Marin Young with him, for the First Respondent/Defendant.
Mr. Eamon Courtenay SC for the Second Respondent/Defendant.

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JUDGMENT

[1] The substantive claim was brought by the Attorney General of Belize ("the Applicant") against former Ministers of the Government ("the Respondents") for having committed the tort of misfeasance in public office in relation to the sale and transfer of 56 parcels of land belonging to the Government of Belize. However, the proceeding before the Court is grounded in procedural law under the Supreme Court (Civil Procedure) Rules, 2005 ("CPR").

[2] At case management conference on April 17, 2012 it was ordered that witness statements be exchanged and filed by the parties on or before May 31, 2012. The Respondents complied with the order. The Applicant has not done so. This triggered the filing of a Notice of Application by the Applicant with an affidavit in support on June 8, 2012. It is this application that the Court is being called upon to rule on at this hearing. The said Notice of Application seeks, pursuant to Rule 26.2(c) (sic) and Rule 26.8(1) of CPR, the following orders:

> "(a) An Order for an Extension of time to file and serve a Witness Statements (sic) on the Respondents;
>
> (b) An Order pursuant to Rule 26.8(1) of the Supreme Court (Civil Procedure) Rules, 2005 for relief from sanction for failure to comply with Case Management orders made on 17th April, 2012 …
>
> (c) An Order pursuant to the inherent jurisdiction of this Honourable Court for granting an extension of time to comply with the case management orders."

The stated grounds of the application set out the factual matters deposed to in the affidavit of Iliana Swift filed in support of the application and also iterated the basis of the arguments urged on behalf of the Applicant. These matters set out in extenso are:

> "(e) That the Defendants would not be severely prejudice (sic) in this case because a Trial date has not yet been fixed and the matter is set down for a pre-trial review on the 3rd July, 2012;
>
> (f) That the Applicant has acted with promptitude in filing his application and has not unduly delayed in seeking the Court's intervene (sic) for relief from sanction;

(g) That it is in the interest of Justice that the Witness Statements and Disclosure should be allowed to be filed and in accordance with the Overriding Objective of the Supreme Court (Civil Procedure) Rules, 2005."

The application is, in the first instance, seeking to invoke the Court's general power pursuant to Rule 26.1(2)(c) to "extend or shorten the time for compliance with any Rule, practice direction, order or direction of the court even if the application for an extension or shortening of the time is made after the time for compliance has passed or before it has commenced." This is premised upon the obvious mistake in making reference to the non-existent Rule 26.2(c) in the opening sentence of the Notice of Application. However, this power, along with the other powers listed in Rule 26.1(2) is qualified by the words 'except where these Rules provide otherwise'. Accordingly, the Rules must be perused to establish whether there are any other relevant Rules.

[3] The Application is opposed by the Respondents. They contend that the applicable rules are the more specific Rules 27.8(3) and 27.8(4) of CPR, which read:

"27.8(3) A party seeking to vary any other date in the timetable without the agreement of the other parties must apply to the Court, and the general rule is that the party must do so before that date.

(4) A party who applies after that date must apply –

(a) for relief from any sanction to which the party has become subject under these Rules or any other court order; and
(b) for an extension of time."

[4] There is no demur that the Applicant has not obtained the consent of Counsel for either Respondent to vary the timetable set at case management conference on April 17, 2012. This is confirmed by para. 14 of the affidavit of the Second Respondent and by Mr. Hawke in the course of argument. Further, given that the application is being made after the deadline of May 31, 2012, the application must

satisfy the requirements of Rule 27.8(4) and by extension, Rule 26.8 as to relief from sanctions.

[5] For completeness, it must be pointed out that the sanction to which the Applicant has become subject is that encompassed by Rule 29.11 which specifies the consequence of the failure by a party to serve a witness statement or witness summary. Rule 29.11 states:

> "29.11(1) If a witness statement or witness summary is not served in respect of an intended witness within the time specified by the Court, then the witness may not be called unless the court permits.
>
> (2) The court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under Rule 26.8."

It is plain that the Applicant cannot advance its case without calling witnesses in support thereof. The foregoing analysis of the interlocking Rules impacting the non-compliance of the Applicant with the order of court of April 17, 2012 was put thus by Edwards, JA in **David Golgar et al v Wycliffe Baird** – Civil Appeal No. 13 of 2007 (St. Christopher and Nevis) (at para. 43):

> "[43] The specific provisions under our rules which govern the extension of time of all cases where the time limit to serve witness statement under a Court Order has expired, and the Claimant or defendant wishes to have a variation of the case management timetable in the absence of an agreement by the parties are CPR 27.8(4) and CPR 26.8. CRP 27.8(4) sets out what the claimant or defendant must do in order to obtain an extension of time: he/she must apply for an extension of time AND also make an application for relief from sanctions. The rules do not seem to specifically set any criteria for dealing with applications for extension of time, where the court order or rules do not provide a sanction, and the date sought to be

varied is not governed by CPR 27.8(1) and (2) save that the Court must seek to give effect to the overriding objective when exercising its discretion under the rules."

The present application fulfils the imperative of CPR Rule 27.8(4) although that rule is not specified in the body of the application.

[6] The case management order of April 17, 2012 did not provide for any sanction to be imposed for non-compliance with the directions contained in it. Faced with the prospect of not being able to lead witness at trial as mandated by Rule 29.11(1), the Applicant now seeks an extension of time and relief from sanctions; this is the only recourse available under CPR.

[7] In applying for relief from sanctions, Rule 26.8 must be followed. It provides:

"(1) An application for relief from any sanction imposed for a failure to comply with any Rule, order or direction must be -

(a) made promptly; and

(b) supported by evidence on affidavit.

(2) The Court may grant relief only if it is satisfied that -

(a) the failure to comply was not intentional;

(b) there is good explanation for the failure; and

(c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.

(3) In considering whether to grant relief the court must have regard to –

(a) the interests of the administration of justice;

(b) whether the failure to comply has been or can be remedied within a reasonable time;

(c) whether the failure to comply has been or can be remedied within a reasonable time;

(d) whether the trial date or any likely trial date can still be met if relief is granted; and

(e) the effect which the granting of relief or not would have on each party."

The effect is that the discretion of the judge is to be exercised in conformity with Rule 26.8 and not in a general way as might be the case under Rule 26.1(2)(c) to which the Applicant referred.

[8] The Court can look for guidance as to the interpretation and application of Rule 26.8 to the dicta of Barrow, JA in **Nevis Island Administration v La Coppreprete du Navire** – Civil Appeal No. 7 of 2005 (St. Christopher and Nevis. His Lordship stated as follows (at para. 17):

> "There are mandatory conditions imposed by this rule. It is stated in sub-rule (1) that the application must be made promptly and it must be supported by an affidavit. … In sub-rule (2) a strict fetter is imposed upon the court's discretion – the court may grant relief **only** if it is satisfied that the failure to comply was not intentioned, that there is a great explanation for the failure and the party in default has generally been complaint. This means that the court must conduct an examination of the evidence before it (normally the applicant's affidavit) to decide if that evidence satisfied the court that the failure to comply

was not intentional that there is a good explanation for the failure and the applicant has been generally compliant …"

In the present case, the application is supported by affidavit evidence. The application, having been made some eight days after the expiration of the date of the filing of witness statements, there is no challenge to Mr. Hawke's assertion that the application was made with promptitude.

[9] The Respondents' opposition to the application was directed at the conditions precedent set out in sub-rule (2), all of which must be satisfied before the court can exercise its discretion to grant relief. The overall thesis was that none of the three conditions had been satisfied on the evidence provided by the affidavit of Iliana Swift, Crown Counsel in the Attorney General's Ministry.

The Evidence

[10] It was stated that the claim was filed by private Senior Counsel who had full conduct of the case until she unfortunately fell ill and was unable to retain such conduct. This arose subsequent to February 21, 2012. Indeed, the Court's record does reflect appearances by Senior Counsel up to that stage of the case when an application for specific disclosure was heard and an order made on February 22, 2012. The file was returned on or about February 28, 2012. At the same time, the Solicitor General was informed by letter of the said order for specific disclosure and its deadline of March 30, 2012.

[11] In the affidavit, Iliana Swift stated that the file is "very bulky" and the first order of business was to address the fulfilling of the order for specific disclosure. In my view, this is quite understandable considering that the order necessitated the disclosure of certified copies of several documents including valuation sheets, transfer of land forms and purchase approval forms in respect of a large number of residential lots. There can be no doubt that this was more than an ordinary undertaking and it required the direct assistance of public officers. It is not surprising that an extension of time was sought and obtained by agreement for compliance with the order. In addition, there was the further complication of the map attached to the

draft order being inaccurate for incompleteness. The Court was made aware of this matter while sitting in chambers on April 17, 2012. Among the orders made at that sitting was an order extending the time for specific disclosure to on or before May 4, 2012. The record shows and the affidavit of Magali Marin Young states that disclosure was in face made in two tranches on May 11, 2012.

[12] The Respondents have complained in the affidavit of Magali Marin Young that there remain documents outstanding not disclosed by the Applicant. Mr. Hawke expressed surprise and intimated that he had only then become aware of this state of affairs. It is to be observed that the affidavit was filed on June 25, 2012 and presumably served on that date or in any event before the date of this hearing. There was no indication that this omission or incomplete compliance with the Order for specific disclosure was brought to the attention of the Applicant by letter or otherwise before the matter was addressed by affidavit.

[13] The Applicant said that the file contains a large volume of documents with which the Attorney General's Ministry had to familiarize itself and to digest the facts of the case. The affidavit stated that this exercise took time but did not specify how long it took or who was involved in the exercise as pointed out by Mr. Courtenay. In this regard, the affidavit lacked specific details to fully assess the purport of the deponent's assertion.

[14] Specific to the preparation of the witness statements, the affidavit swore that there were difficulties in contacting two witnesses (presumably two of the four witnesses for whom witness statements were sought to be filed). One of the two elusive witnesses was identified and apart from stating that the difficulty was with that witness being no longer in the Government Service, no further details were offered as to the difficulties with the other witness or even his name. The affidavit was woefully short of specific information that would have allowed for the Court to better assess the challenges to be surmounted by the Applicant. Be that as it may, the Applicant deposed that it was in a position as at the date of swearing of the affidavit, June 8, 2012, to file the witness statements within one week.

[15] Simply for the purpose of addressing all matters relied upon in the affidavit of Iliana Swift, attention is drawn to para. 13 which reads:

> "We were also protracted in our preparation in this matter because of other trials in the Supreme Court and as a result we were unable to comply with the orders made by the learned Chief Justice and for which we sincerely regret."

This omnibus statement provides little comfort to the Applicant. Apart from being devoid of information as to 'the other trials', it appears to rely on the erroneous belief that Counsel being busy is an excuse for failing to comply with orders of Court. As recognized by des Vignes J in **Maharaj v Attorney-General of Trinidad and Tobago** – Claim No. C.V. 2009-00077, the Court can take cognisance of the realities of practice in the Courts. However, the Applicant has not invoked any specific reality of which the Court can take cognisance.

Was the failure to comply not intentional?

[16] From a practical perspective, there is substance in the assertion that the Applicant's case was being fully conducted by private Counsel prior to the file being handed over around the end of February 2012. It was urged in the affidavits filed on behalf of the Respondents and reinforced in argument that Senior Counsel was habitually accompanied by Crown Counsel and at the Caribbean Court of Justice by Mr. Hawke himself. Ideally, Junior Counsel ought to be fully au fait with the case. However, given the assertions to the contrary, it cannot be definitively accepted that this state of affairs prevailed. In point of fact, the record indicates that the Applicant was not represented when the order for specific disclosure was made. Accordingly, steps towards compliance with that order only commenced when the Solicitor General was alerted by letter with the draft order.

[17] In terms of time, the Applicant's Crown Counsel had a period of approximately seven weeks to become conversant with the case and make specific disclosure. The efforts at disclosure fell short of the dates ordered or agreed, although the said disclosure appears to be still incomplete. Seven weeks is, in my view, an adequate

amount of time. I recall that the learned Deputy Solicitor-General made specific requests towards the orders made on April 17, 2012 as to the number of witnesses and the intended deadline for filing of witness statements. There is evidence of conversations with opposing Counsel as to a possible extension of time, albeit futile.

[18] On the evidence however, I can discern nothing to suggest that the non-compliance with the order of April 17, 2012 was intentional.

Is there a good explanation for the failure?

[19] The Applicant relied upon successive events as its explanation for the breach of the order requiring the filing of witness statements on or before May 31, 2012. The first event was the precipitous return of the file occasioned by the illness of the then lead Counsel. As earlier iterated, I consider this to be a quite valid and understandable circumstance sufficient to account for delay in moving the case forward. Simultaneously, there arose the immediate necessity to comply with the specific disclosure order. Before that order could be fulfilled, the matter came on for case management conference. Considering that specific disclosure was eventually made on May 11, 2012, there remained less than three weeks to file and exchange witness statements.

[20] It may be that the tasks involved in making specific disclosure could have overlapped with the interviewing of witnesses and preparing the witness statements. However, the Applicant did allude to difficulties in contacting two of its witnesses. I am persuaded by the events, the most important being the unavailability of lead Counsel, that the Applicant has provided a good explanation for its failure to comply with the Court's deadlines.

Has the Applicant been in general compliance?

[21] The focus was on the orders relating to specific disclosure which I have previously chronicled in paras. 11 – 13 above. There is clear evidence of the Applicant, through the Deputy Solicitor-General making assiduous efforts at specific disclosure. The Rules were complied with to the extent that extensions were sought

by agreement and order of court. However, the Applicant was delinquent by seven days in finally complying with the order of February 22, 2012.

[22] I do not consider this lapse to be sufficient to draw a conclusion as to absence of general compliance with the Rules and/or orders of the Court. That there has been non-compliance is indisputable but to conclude that such non-compliance has been general cannot be supported. I make no comment on nor do I take into account the complaint that there may be gaps in the specific disclosure. It did not escape me that the matter may not have been brought to the attention of the Applicant's legal representative outside of the affidavit evidence.

General Considerations

[23] The Second Respondent in his affidavit complained about being prejudiced given that the Applicant would have the benefit of having seen the witness statements already filed. This is a civil trial and ambush is eschewed. It seems to me that the Respondents can apply to lead oral evidence at trial to expand on the existing witness statements. The ability to cure such prejudice is available to the Respondents.

[24] It is further appreciated that the Respondents are anxious to have the matter resolved given its protracted chronology dating back to the filing of the claim on January 14, 2009. Be that as it may, a trial date can be set imminently.

[25] In furtherance of the interests of the administration of justice, it is desirable that the Applicant be allowed to take the steps necessary to prosecute the claim, the protraction of which is not attributable to the Applicant.

[26] The affidavit of Iliana Swift has deposed that the witness statements would have been available for filing in mid-June 2012. Also, from the representation of Mr. Hawke, the witness statements are prepared and ready for filing. The term is drawing to a close but the availability of a trial date in the new term is assured. There has been no disruption of any trial window.

Orders

[27] In the premises, I am satisfied that I ought to exercise my discretion in favour of granting the application sought by the Applicant. It is ordered that the time for the filing of witness statements by the Applicant/claimant be extended until the 2oth day of July, 2012. In the event that the Claimant fails to file the said witness statements by the said date, the Claim shall stand dismissed. The costs of this application shall be the Respondents' in the cause.

KENNETH A. BENJAMIN
Chief Justice