

IN THE SUPREME COURT OF BELIZE A.D.2008

CLAIM NO. 333 OF 2008

BETWEEN: CARIBBEAN CONSULTANTS &  
MANAGEMENT LTD CLAIMANT

AND

1. ATTORNEY GENERAL )  
2. HON. DEAN BARROW )  
MINISTER OF FINANCE )  
3. THE HON GASPAR VEGA)  
MINISTER OF NATURAL)  
RESOURCES DEFENDANTS

Mr. Andrew Marshalleck S.C., for the claimants.  
Ms. Lois Young Barrow S.C., for the defendants.

AWICH J.

2.6.2010

R U L I N G

1. *Notes: Civil Case Procedure – Affidavit in proceedings must not be sworn by attorney representing a party in the court proceedings; contents of affidavit must be factual, not argumentative and not submissions – Part 30 of the Supreme Court (Civil Procedure) Rules 2005. Deponent must*

*declare on whose behalf she swears the affidavit – R 30.2 (e) (i). It is good practice to file a copy of a resolution of a company authorizing court proceedings, failure sometimes results in a case being struck out.*

2. When this claim No. 333 of 2008, came up for hearing yesterday, learned counsel Ms. Lois Young S.C., for all the three defendants raised three preliminary issues which had to be decided straightaway. The issues were: (1) that this claim had not been authorized by the claimant, Caribbean Consultants Management Ltd., there was no company resolution authorizing the claim; (2) there was no evidence in support of the fixed date claim; the three affidavits of Ms. Naima Badillo supporting the claim, did not declare that she was authorized by the claimant to swear the affidavits on its behalf, or that she swore the affidavits on behalf of the claimants; (3) that Ms. Badillo was an attorney who was counsel in the matter, it was improper for her to swear affidavit in the matter.

3. ***Determination.***

In the circumstances of this claim, the first preliminary point can be cured by the court ordering that a resolution of the claimant company be filed forthwith or by a certain date. I so order that a resolution of the board of directors of Caribbean Consultants & Management

Limited, authorizing these proceedings be filed within seven days. The point is not merely a technical one. I have had cases in this court where it could not be said for sure whether the corporation claimants wished to proceed with the claims, sometimes because directors had disagreed, changed, or left the country, or because of some other reasons. A claim or defence by a corporation may be struck out for want of a resolution of the corporation in such circumstances. In some jurisdiction it is a requirement that a copy of a resolution of a company authorizing court proceeding must be filed with the claim or defence at the outset.

4. The omission of the standard declaration from the affidavits of Ms. Naima Badillo that, she had been authorized by and swore the affidavits on behalf of the claimant is, in my respectful view, due to inexperience. The declaration is not a mere matter of form, it serves an important purpose – see *R 30.2 (e) (c) of the Supreme Court (Civil Procedure) Rules 2005*. I note that Ms. Badillo has also included in her affidavits several submissions and mere arguments on questions of facts and law, matters that are not materials for affidavit. An affidavit is about facts, although some of the facts may be hearsay – see *R 30*

*of the Supreme Court (Civil Procedure) Rules, 2005.* I accept the undertaking of learned counsel Mr. Andrew Marshalleck S.C., that he will file an affidavit from the claimant deposing that Ms. Badillo was authorized to file affidavit for and on behalf of the claimant.

5. The question of whether Ms. Badillo, an attorney, could swear affidavits in this claim was not a matter that I could simply brush aside, I had to consider it more carefully. Ms. Badillo stated in all the three affidavits that she and Mr. Marshalleck had conduct of a related claim, No. 228 of 2006. Judgment was entered by Arana J in that claim, ordering that, certain 43 acres of land be returned to the claimant, and certain sums of money be paid to the claimant. Several discussions and arrangements between the claimant and representatives of the Government of Belize followed. In the end the claimant considered that the Government failed to satisfy the judgment of Arana J, and as the consequence the claimant filed this claim. It asked for the following reliefs: (1) a declaration that the failure of the Government of Belize to pay on an agreement made pursuant to the judgment of Arana J was a breach of s: 3 (d) of the Constitution, regarding arbitrary deprivation of property; (2) an order

of mandamus compelling the defendants to perform the agreement regarding the satisfaction of the judgment of Arana J; and (3) in the alternative, damages for breach of the claimant's constitutional right.

6. The factual parts of the affidavits of Ms. Badillo were about obtaining judgment in Claim No. 228 of 2006, making demands for payment, discussions with government officials, and generally about satisfaction of the judgment. This claim, No. 333 of 2008, has been brought to enforce the judgment in Claim No. 228 of 2006. It is my view that, Ms. Badillo was competent to swear affidavits in this claim, regarding obtaining the judgment in claim No. 228 of 2006, making demands, and having discussions about satisfaction of the judgment, provided she would not act as counsel presenting this claim, No. 333 of 2008, in Court.
  
7. That view was expressed by Lewis C.J. in the Court of Appeal of the West Indies Associated States in 1967, in the case given to this court by Mr. Marshalleck this morning. The case is *Casimir v Shillingford and Pinard 10 WIR 269*. It was an application for leave to appeal out of time. The application filed was supported by affidavit

sworn by an attorney who later presented the application in court. In his affidavit the attorney deposed that the delay to appeal was due to pressure of work on him. Lewis CJ who read the judgment of the court stated that, it was improper for a barrister who would appear in court in the cause to swear affidavit in the same cause, and that it put the court which had to pronounce upon the acceptability of the affidavit in an embarrassing position when the person who made the affidavit was counsel who appeared in the cause.

8. The application was refused anyway, for the reason that pressure of work on attorney was not, “*good and substantial reason*”, for enlarging time, and that the application would not be granted as a matter of indulgence because it would be doing away with the rule, and would lead to a flood of applications.
  
9. In this jurisdiction the point was made by the Court of Appeal in 1996, in a rather bizarre case, *Criminal Appeal No. 5 of 1996, Rupert Burk Najarro v the Queen*. The facts were these. The defendant was represented by no less than a senior counsel of this court. In the course of the trial he requested a *voir dire* to determine the

admissibility of what the prosecution said was a confession statement made by the appellant- accused. After counsel had crossexamined witnesses for the prosecution, and having presented the testimony of the accused in the *voir dire*, counsel took the stand and testified as a witness in the *voir dire*. The trial judge allowed him to testify, and said he treated the testimony of counsel with caution. In the end the judge admitted the confession statement. At the time, the matter of attorney giving evidence was governed by ***Statutory Instrument No. 42 of 1991***, made under *the Legal Profession Act*.

10. The Court of Appeal in a joint judgment said that, it was a matter of considerable surprise that a practitioner of that experience was, “*unaware of the fundamental rule that an attorney should not appear on behalf of a client in any case in which the attorney intended to give evidence, unless the evidence is purely formal;*”. The court went on to hold that it was a breach of, “*this fundamental rule of professional conduct designed to ensure proper representation of an accused person*”, and that, “*the breach compromised the fair trial of the appellant ... the trial judge should have declared a mistrial*”. The appeal was allowed. An order was not made for a retrial. Any

attorney who has read the judgment in *Rupert Burk Najarro* cannot even begin to swear affidavit on behalf of a party he will represent in court

11. Today *RR 30.2(c) and 30.5(3) of the Supreme Court (Civil Procedure) Rules 2005*, assume that S. I. 42 of 1991 is still in force. The rules state as follows:

*“30.2 Every affidavit must –*

*(c) state if any deponent is employed by a party to the proceedings.*

...

*30.5 (3) “No affidavit may be admitted into evidence if sworn or affirmed before the legal practitioner of the party on whose behalf it is to be used or before any agent, partner employee or associate of such legal practitioner”.*

12. In this claim, I have been assured by Mr. Marshalleck that Ms. Badillo will not take part in the proceedings of this claim No. 333 of 2008.



On that assurance I admit the three affidavits of Ms. Badillo to be used as evidence in support of this fixed date claim.

13. Dated this Wednesday the 2<sup>nd</sup> day of June 2010  
At the Supreme Court  
Belize City Belize

Sam. L. Awich  
Judge  
Supreme Court