IN THE SUPREME COURT OF BELIZE

CLAIM NO. 1019 OF 2009

(BETWEEN
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(ZIPLINE ADVENTURES (BELIZE) LTD **CLAIMANT**
(
(AND
(
(TRAVELLERS REST LODGE (BELIZE) LTD **DEFENDANT**
(d.b.a. JAGUAR PAW RESORT

Before: Hon Justice Sir John Muria

10 May 2010

Counsel:

***Dr. E. Kaseke* for Applicant/Defendant**
***Ms Y. Lochan* for Respondent/Claimant**

J U D G M E N T

NOTICE OF APPLICATION *– application for setting aside – notice of hearing received by both parties specified time and date of hearing – hearing conducted at a time, other than that stated in the notice – claimant attended the hearing – defendant only knew of time specified in the notice of hearing issued by court and had no notice of change of time of hearing – defendant did not attend hearing – order made against defendant in its absence – whether order should be set aside – Rule 11.18(3) CPR not applicable – party to apply as of right to set aside order made against it where no notice of hearing given – order set aside*

Muria J.: This is an application by the applicant/defendant dated 22nd March 2010 to set aside the order made by His Lordship Awich J on 19 February 2010. As I indicated to both Counsel at the previous hearing, the normal practice is that an application to set aside an order of the Court is to

be made before the same judge who issued the order that is sought to be set aside. This case, however, has been re-assigned to my Court and I have to deal with the applicant/defendant's application in this case.

The orders sought by the applicant are:

(a) setting aside and discharging the Order of the Hon. Justice Awich dated 19th February, 2010; and

(b) directing that the application for Injunction filed by the Claimant in this case and the application by the Applicant/Defendant filed in this case to Strike Out the Claim or to Order a stay of the Claimant's claim and directing the parties to refer the dispute to arbitration be heard *de novo* and that all affidavits and exhibits filed by each of the parties in respect of the respective applications be used in the *de novo* hearing.

(c) that the cost of this application are costs in the cause.

The applicant relies on eight grounds to support its application. I need not deal with all the grounds since, in my view, only two grounds are material to the issue whether the order of 19 February 2010 should be set aside. In addition, the applicant relies on the affidavit filed by Godfrey Smith S.C.

Brief Background

On 25 January 2010 the defendants filed application dated 24 January 2010 to strike out the claimant's claim. The claimant had earlier, on 21 December 2009, filed an application without notice for injunction against the defendant. The claimant's application was later directed by the Court to be made on Notice. On 26 January 2010 the Notice of Hearing of the two applications was issued by the Court for 29 January 2010 at 2:00p.m.

It appears that the applications were not dealt with on that date and the hearing was adjourned to 19 February 2010. Formal Notice of Hearing was issued by the court on 8 February 2010 for the hearing of the two applications on 19 February at 2:00 p.m.

The Court's notes show that the applications were dealt with by the Court on 19 February at 9:00 a.m. At that hearing the claimant and its Attorneys-at-law were present. The defendant and its Attorneys were absent. The Court heard Counsel for the claimant and proceeded to make the orders dismissing the defendant's application dated 24 January 2010 for striking out the claimant's claim, and granting the claimant's application dated 21 December 2009 for interim injunction restraining the defendant from selling the real property and other assets used in the Zipline tour business.

At 2:00 p.m. on the same day 19 February 2010, the defendant's and their Attorneys attended at His Lordship's (Awich, J.) Court pursuant to the Notice of Hearing which stated that the hearing was for 2:00 p.m. on 19 February 2010. The defendants and their Counsel, Dr. Kaseke, were then advised by the Court Marshall that the matters had already been dealt with by the Court at 9:00 a.m. in the morning.

Objection to the Affidavit Evidence of Godfrey Smith S.C.

Before I proceed further in this matter, let me briefly deal with the Objections raised by Ms. Lochan to certain paragraphs of the affidavit of Godfrey Smith, SC. The paragraphs objected to are paragraphs 2, 3, 9, 11, 12 and 14.

The objection to paragraph 2 is that there is no interested party named in the claim and that Mr. Smith has no personal knowledge of the Notices of Hearing. Mr. Bret Wolfenbarger's affidavit filed on 30 April 2010 deposed in paragraph 17 that neither Dr. Kaseke nor Mr. Smith attended the First hearing of the two applications. Yet in paragraph 18 of his same affidavit, Mr. Wolfenbarger stated that he was present at the first hearing on 29

January 2010 and that Mr. Smith was also present, although he added that Mr. Smith was not an attorney-at-law representing any party at the hearing, and that he was not sitting at the Bar Table.

I do not accept the suggestion implicit in the defendant's argument that Mr. Smith, a Senior Counsel, Attorney-at-Law and an Officer of the Court would only be able to give affidavit evidence of what took place in Court on 29 January 2010 hearing if he was an attorney representing a party named in the claim and that he had to be sitting at the bar table. If any body who would be duty bound to give evidence whether by affidavit or ***viva voce*** on what happened in Court at which he was present, would be Mr. Smith S.C., an attorney-at-law and an Officer of the Court. It does not make him one less entitled to do so, simply because he was not sitting at the bar table.

Then there is the argument by Ms. Lochan of Counsel for the claimant that Mr. Smith S.C. has no personal knowledge of the Notices of Hearing sent to the defendant and so could not say that he knew of the notices of hearing issued by the Court. Mr. Smith S.C. had a watching brief, having been instructed by interested third parties (not named in the claim) in the matter. That fact had not been disputed. In that capacity, the Attorneys and Counsel

for defendant copied all notices of Court hearings to Mr. Smith S.C. To say that Mr. Smith S.C. had no personal knowledge of the notices for Court hearings and that he had no legal standings to depose to the existence of the said Notices of hearing is clearly disingenuous. The case of ***Rupert Martin – v – George Betson and Attorney General*** (20 June 2008) Court of Appeal of Belize Civil Appeal No. 26 and 28 of 2007 referred to by Ms. Lochan on implicit cause of action has no bearing whatsoever in the present application. The objections to paragraphs 2 and 3 of the Affidavit of Mr. Smith S.C. are without merit and are rejected.

The objection to paragraph 9 of Mr. Smith's affidavit is based on the argument that Mr. Smith was not present when Dr. Kaseke requested a copy of the Judge's Notes and a copy was given to Dr. Kaseke. So it is suggested that Mr. Smith cannot depose to that fact.

Again, in the Court's view, it is very disingenuous for Counsel for the claimant to advance such a contention in this case, when clearly both Dr. Kaseke and Mr. Smith S.C. attended Court at 2:00 p.m. on 19 February 2010 and about 2:30 p.m. both attended the Court Marshall for Awich J. to enquire about the case (paragraph 6 of Mr. Smith's affidavit). Having been

advised of what had happened with the matter, and having produced a copy of the Notice of Hearing for, 2:00 p.m. to the Marshall, (paragraph 8) Dr. Kaseke requested a copy of the Judge's Notes. Dr. Kaseke was given a copy and Mr. Smith was also given a copy. They then left together and had audience with the Chief Justice about what had happened. The objection to paragraph 9 of Mr. Smith's affidavit is without merit and is rejected.

Paragraphs 11 and 12 of Mr. Smith's affidavit objected to by the claimant; deal with the complaint made to the Chief Justice. This is an administrative matter, and although it has no bearing on the Order complained of, Mr. Smith is deposing to the fact of that complaint being made as a consequence of what had happened on 19 February 2010 in the instant case. In that regard paragraphs 11 and 12 are relevant.

The objection on paragraphs 14 of Mr. Smith's affidavit, must also follow the same fate as the others already dealt with. Paragraph 14 might not have been expressed as ***Rule 30.3(1) CPR*** provides. However, even in the absence of paragraph 14, the Court is bound to take note of the documents filed in the pleadings (Acknowledgment of Service) and other documents filed, as well as the Order of the Court dated 19th February 2010.

On the record, it is not disputed that the Order of 19 February 2010 against the defendant was made in its absence. In fact it is the very reason why we are here in these proceedings. The objection to paragraph 14 therefore bears very little or no help to the claimant.

Determinant Issue

As far as the Court is concerned, the determinant issue in this case is whether or not the order made on 19 February 2010 should be set side. The factual circumstances relevant to that issue have already been rehearsed. I need not repeat them save to say that the Notice of Hearing dated 8 February 2010 issued by the Court which both parties received, was for the hearing on 19 February 2010 at 2:00 p.m. A copy of the Notice of Hearing is annexed to the affidavit of Mr. Smith S.C. and marked "GS 1".

There was no dispute about that Notice of Hearing dated 8 February 2010. There is also no dispute that the two applications, one by the claimant and the other by the defendant, were dealt with by the Court at 9:00 a.m. on 19 February 2010 instead of at 2:00 p.m. as the Notice stated. There is, however, some suggestion in the affidavit evidence of Mr. Wolfenbarger

that the Court Calendar at the Court showed that the case was listed for 9:00 a.m. on 19 February 2010. Mr. Wolfenbarger did not exhibit a copy of the Court Calendar.

Accepting, for argument's sake, that the Court calendar listed the matter for 9:00 a.m. on 19 February 2010, two questions arise. First, why was the matter listed for 9:00 a.m. when the Notice of hearing which both parties received stated 2:00 p.m. on 19 February 2010?

Second, did the defendant know of the hearing at 9:00 a.m. instead of at 2:00 p.m. as stated in the Notice? The answer to the second question is clearly a "No". The defendant did not attend the 9:00 a.m. hearing but attended at the Court at 2:00 p.m. as per the Notice which both parties received. There is absolutely no evidence to even suggest that the defendant knew of the 9:00 a.m. hearing and that it chose not to attend. That leads us to find out the answer to the second question. No evidence was led to explain why the Notice of hearing stated 2:00 p.m. and the Court calendar listed the matter for 9:00 a.m. and hence, the hearing at 9:00 a.m. on 19 February 2010.

In my view it is unnecessary to search for the answer to the second question because the evidence is obvious that the defendant had no Notice of the 9:00 a.m. hearing and so it did not attend nor its Counsel. In those circumstances, it would be difficult to justify the continuation of any order made against the defendant.

However, despite the fact that orders were made against the defendant at the hearing which it did not attend, and which it had no notice of, Ms. Lochan sought to impress upon the Court a proposition of law that the order can only be set aside if the defendant establishes that it had a good reason for not attending the hearing and that had it attended some other order might have been made. These conjunctive requirements must be met, says Counsel, before the order complained of by the defendant can be set aside. Ms. Lochan relied on ***Rule 11.18 (3) CPR,*** the Jamaican Case of ***Adolphus Sylvester Roger – v – Kingston Hub Distributors limited et'al*** (18 February 2005) Supreme Court, Suit No. CL 1994 R 166, and the English case of ***Shocked and Another – v – Goldschmidt and Another*** Times Law Report, 4th November 1994.

To make it abundantly clear what I will shortly say on argument advanced by Counsel for the respondent/claimant, let me first set out the provisions of the Rules referred to by Counsel. ***Rule 11.18*** provides as follows:-

> 11.18(1) *A party who was not present when an order was made may apply to set aside that order.*
>
> *(2) The application must be made not more than 14 days after the date on which the order was served on the applicant.*
>
> *(3) The application to set aside the order must be supported by evidence on affidavit showing –*
>
> *(a) a good reason for failing to attend the hearing; and*
>
> *(b) that it is likely that had the applicant attended some other order might have been made.*

It must be noted that this Rule follows on from ***Rule 11.17*** which provides:

> 11.17 *Where the applicant or any person on whom the notice of application has been served fails to attend the hearing of the application, the court may proceed in the absence of that party.*

It is plainly obvious that that Rule 11.18 (3) relied on by Ms. Lochan applies where a party, having had notice of the hearing, fails to attend. In such a case, the applicant must satisfy the requirements of Rule 11.18 (3) which are cumulative. The ***Adolphus*** and ***Shocked Cases*** are clear authorities for the principles set out in Rule 11.18(3). In ***Adolphus*** the second defendant, against whom an order was made in his absence, was served with Notice of trial. Both he and his Attorneys-at-law were served but did not attend trial. In ***Shocked*** the defendants, against whom an order was made in their absence, were served with Notice of trial but they deliberately did not attend trial. The present case is totally different. In my view ***Rule 11.18*** and the cases cited by Ms. Lochan have no application in the present case.

The applicable rule in this case, in my view, is ***Rule 11.16 (1) CPR*** which provides as follows:

> 11.16 (1) *A respondent to whom notice of an application was not given may apply to the court for any order made on the application to be set aside or varied and for the application to be dealt with again.*

There was no notice for the hearing at 9:00 a.m. on 19th February 2010 given to the defendant who is the respondent in the claimant's application. The defendant only had notice of the hearing for 2:00 p.m. on 19 February 2010 which it attended, only to be met with an order already made against it at 9:00 a.m. that day. The Rule clearly grants the defendant the right to apply to aside or vary an order given in such a case.

There is, I feel, one other reason why the order should be set aside. The defendant challenges the Court's jurisdiction to deal with the dispute between the parties in this case. In the circumstances of this case, the defendant must be given the opportunity to advance that challenge.

To insist that the defendant proves the cumulative requirements of Rule 11.18 (3) before the Court can set aside the order made against it, in its absence, when it had no Notice of the hearing, in my view, defies both legal and common sense. In such a situation the Court must surely retain the power to revoke the exercise of its coercive power in making such order until the merit of the case is considered or at least the opportunity is given to the defendants to be heard.

The application to set aside the order made on 19 February 2010 is therefore granted with the orders sought therein, namely:

1. The Order dated 19 February 2010 is set aside
2. The applications by Claimant dated 21 December 2009 and by defendant dated 24 January 2010 are to be set for hearing at a date to be fixed by the Court with Notices to the parties.
3. Costs of application be costs in the cause.

Order accordingly

Hon. Justice Sir John Muria
Justice of Supreme Court

Kaseke & Co, Attorneys-at Law for Applicant/Defendant
M.H Chebat & Co, Attorneys-at Law for Respondent/Claimant