

IN THE SUPREME COURT OF BELIZE A.D. 2009

CLAIM NO. 811 OF 2009

BETWEEN

NEWCO LIMITED

CLAIMANT/RESPONDENT

AND

1.	ERIC EUSEY	1ST DEFENDANT/APPLICANT
2.	MARILYN ORDONEZ	2ND DEFENDANT/APPLICANT
3.	ATTORNEY GENERAL	3RD DEFENDANT/APPLICANT

Mr. Aldo Reyes for the respondent/claimant.
Miss Magali Perdomo for all three applicants/defendants.

AWICH J

3.12.2010

DECISION

- Notes: An application for an order to strike out a claim on the ground of abuse of court process - repetition of subject matters of the first claim in a subsequent claim by the defendant in the first claim; when repetition results in costs and stress twice and is harassment - fighting the same battle twice.*
- This decision is in the application dated 18.10.2010, by the three defendants/applicants, for a court order to strike out the claim of the claimant/respondent, NEWCO. The claimant/respondent is a limited company registered in Belize on 16.10.2002. The first

defendant/applicant, Eric Eusey, was the Commissioner of Taxes, in the service of the Government of Belize when the transactions in issue in the substantive claim commenced. The second defendant/respondent, Marilyn Ordonez, succeeded the first applicant. The third defendant/applicant, the Attorney General of Belize, is cited as a representative of the Government of Belize. The claim against the Attorney General is based on vicarious liability for the acts or omissions of the first two respondents, who were servants of the Government of Belize. For convenience, I shall refer to all three applicants as the Attorney General.

3. The substantive claim of NEWCO, Claim No. 811 of 2009, out of which this application is made was brought by a general claim form on 25.9.2009. It was said to be a claim in “misfeasance” on the part of the two officers. NEWCO gave the particulars as: (1) “unlawfully assessing the claimant for business tax” when knowing that the claimant had not received any revenue; and (2) “serving a garnishee order on the financial secretary”, demanding deduction (payment) of BZ \$5,477,805.00 from payment due from the financial secretary to the claimant as an arbitration award against the Government of Belize. NEWCO described the tax assessments made as, “fraudulent assessments”. The reliefs claimed were: US \$2,773,572.15 special damages; exemplary damages; interest; and costs.

4. The applicants filed a joint memorandum of defence in the claim, No. 811 of 2009, on 22.10.2009, in which they denied making fraudulent assessments, and pleaded that the Commissioner of Income Tax made, “best judgment assessments”, authorised by law in the event a taxpayer failed to furnish tax return and records. They also pleaded that the garnishee order was lawfully issued against the financial secretary for the payment of tax assessed.

5. In addition to the above two heads of defence, the applicants pleaded that the claim of NEWCO was an abuse of process and should be dismissed in limine, because the “underlying issue” in the claim had been raised in an earlier claim, Supreme Court Claim No. 880 of 2008, by the Attorney General against NEWCO, a claim which was still proceeding in court. That seems to be the most important head of defence to the Attorney General. It has now been used as the ground in this application for a court order to strike out Claim No. 811 of 2009 of NEWCO.

6. At case management conference in Claim No. 811 of 2009, Attorney General objected to the claim of NEWCO. Both parties then asked for time so that they could prepare written submissions on the objection. Court granted the adjournment and directed that a written application pursuing the objection be filed and served on NEWCO.

7. Pursuant to the court order, Attorney General filed this application on 18.10.2010. The application asked for court order to strike out the claim, No. 811 of 2009, of NEWCO on the grounds that the subject matters, tax assessments and garnishee order, were already the subject of Claim No. 880 of 2008 in the Supreme Court; and the tax assessments alone were also the subjects of an appeal at the Income Tax Appeal Board. In other words, the ground was that Claim No. 811 of 2009, was an abuse of court process because it repeated Claim No. 880 of 2008.

8. In Claim No. 880 of 2008, Attorney General was the claimant; NEWCO was the defendant. Attorney General claimed several court declarations, namely: (1) that an arbitration award made in Miami, Florida, USA, on 23.6.2008, in the sum of US \$4,259,832.81 in favour of NEWCO against the Government was payable in Belize dollars in Belize; (2) that interest on the arbitration award could not be charged until the defendant provided to the Government authorized instruction to pay the award sum in Belize dollars in Belize; (3) that under s: 58 of the Income and Business Tax Act, and because a garnishee order issued on 8.10.2008, the Financial Secretary was bound to deduct tax in the sum of BZ \$5,477,805.00 from the arbitration award sum. Attorney General also claimed a court injunction order enjoining NEWCO not to prosecute or continue Court Case No. 1:08-CV-0210 in the District Court for the District of Columbia, USA, for enforcing the arbitration award, and not to pursue arbitration in respect to any matter in the concession agreement

of 27.11.2002, out of which the arbitration award of 23.6.2008, was made.

9. It is obvious that the one very important fact and subject matter in both Claim No. 880 of 2008 and Claim No. 811 of 2009, is the arbitration award sum of US \$4,259,832.81 made on 23.6.2008, in Miami, Florida, USA. In Claim No. 880 of 2008, Attorney General claimed court orders that will allow the Government to deduct tax out of the award, and to pay the balance of the award in Belize dollars in Belize. In Claim No. 811 of 2009, NEWCO claimed court orders based on “fraudulent assessments” of tax, that will stop the Government demanding tax from NEWCO, and collecting the tax out of the arbitration award sum. NEWCO also made a claim for damages on the ground of “misfeasance”. So, the same subject matters, namely, the arbitration award and the tax assessments permeate both claims. The difference between the two claims is merely that the Government, and on the other hand NEWCO, raise different grounds of law to support their request to court to make different court orders.

10. Payment in Belize dollars and the garnishee order in Claim No. 880 of 2008, are also connected to the fraud pleaded in Claim No. 811 of 2009. They may also be subject matters in respect to the misfeasance pleaded.

11. In my view, NEWCO could have raised those grounds of fraud and misfeasance which are the grounds of its Claim No. 811 of 2009, as defence and counterclaim to Claim No. 880 of 2008, made earlier by Attorney General. It would be impossible to argue that the grounds of the defence and counterclaim were irrelevant to the claim of the Attorney General. It is also my view that, Attorney General would not have been able to apply for court order to strike out the defence and counterclaim on the ground of abuse of court process. I doubt that Attorney General could have applied for court order to strike out the defence and counterclaim on the ground that the defence did not disclose reasonable ground for defending the claim of the Attorney General, or on the ground that the counterclaim did not raise reasonable ground for making the counterclaim.
12. Instead of raising the allegations of “fraudulent assessments” and “misfeasance” as defence and counterclaim in the earlier claim, No. 880 of 2008, NEWCO decided to raise them in a separate later claim, No. 811 of 2009. It certainly caused repetition of the question of the tax assessments in the later claim. The misfeasance also seems to be in regard to the tax assessments, and to that extent, it would also be a repetition.
13. The law is that, it is an abuse of process to bring two or more claims in respect of the same subject matter, it amounts to harassment of the other party, in that it makes him fight the same battle more than once,

with the attendant multiplication of costs, time and stress – see **Attorney General v Barker [2000] 1 F.L.R. 759**, judgment of Lord Bingham of Cornhill. The general rule was established long ago in **Henderson v Henderson (1843) 3 Hare 1000** that, parties to a litigation, should bring forward the whole of their case.

14. A repetition of the subject matters in Claim No. 880 of 2008, has occurred by the making of Claim No. 811 of 2009. As a relief, the Attorney General asked for court order to strike out the second claim in order to rid the court process of abuse by repetition. It is not automatic that where abuse of process has occurred the court makes an order to strike out the claim altogether. The question must be ask: is this an appropriate occasion on which to strike out the second claim?

15. The usual occasion on which the court may make an order to strike out a claim regarded as an abuse of process is when the abuse of process creates circumstances that are inconsistent with the overriding objectives of the Rules of Court, that is, inconsistent with enabling the Court to deal with cases justly. The circumstances created by this claim will cause the Attorney General to fight battle over the same subject matters twice, and incur costs twice. Court will also have to find time twice to consider the same subject matters. Therefore, proceeding with the second claim will not be consistent with the overriding objective at **RI. 1(1)(b) and (e)**. For convenience, I set out the rule here:

“R.1(1) The overriding objective of these rules is to enable the court to deal with cases justly.

(2) Dealing justly with cases includes -

...

(b) saving expense

...

(e) allotting to the case an appropriate share of the courts resources, while taking into account the need to allot resources to other cases.”

16. It is not the law that once there has been an abuse of process the court must strike out the claim. Striking out claim is usually the last resort. This point was made in, **Reckitt Benkiser (UK) Ltd v Home Parifume Ltd [2004] EWHC 302**, and in **Taylor v Nugent Care Society [2004] 1 WLR 1129**.

17. I am certain that it is just for this court to make an order which will avoid the double costs and double time that proceeding with Claim No. 811 of 2009 will occasion. I have considered ordering that the grounds of claim in Claim No. 811 of 2009 be incorporated in Claim No. 880 of 2008 as defence and counterclaim. I concluded, however, that it will give the respondent unfair advantage of filing his defence and counterclaim late, or of amending the memorandum of defence without making the appropriate application. Still, I think that striking out Claim

No, 911 of 2009 is not the only way out of the abuse of process. An order staying the claim until Claim No. 880 of 2008 has been determined or otherwise concluded has the effect of avoiding the consequence of the abuse of process in the circumstances, and without putting NEWCO or the Attorney General in a position of advantage over the other.

18. The orders that I make are:

18.1. The application dated 18.10.2010, of the Attorney General and the other two defendants/applicants is allowed.

18.2. Claim No. 811 of 2009 dated 24.9.2009, and filed on 25.9.2009, is stayed until Claim No. 880 of 2008 dated and filed on 31.12.2008, has been determined or otherwise concluded.

17.2. costs of this application to the applicants in any event.

19. **Delivered this Tuesday the 7th day of December 2010**

At the Supreme Court

Belize City

SAM LUNGOLE AWICH
Judge
Supreme Court