

IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

CLAIM No. CV177 of 2023

BETWEEN:

[1] SHAMAR FOSTER

Claimant

and

**[1] COMMISSIONER OF POLICE
[2] ATTORNEY GENERAL OF BELIZE**

Defendants

Appearances:

Ms. Leslie Mendez for the Claimant

Ms. Alea Gomez and Mr. Stanley Grinage for the Defendants

2023: February 15th;

2024: April 10th.

DECISION ON EVIDENCE

[1] **ALEXANDER, J.:** It is a small point on evidence that arose during the Pre-Trial Review process on 15th February 2024 which now engages this court's attention. It involves section 83 of the Evidence Act CAP. 95 R.E. 2020 ("the Evidence Act") and sections 6 and 7 of the Electronic Evidence Act No. 21 of 2021¹. It specifically raises the issue of whether two video exhibits, annexed to the first affidavits of the claimant and his witness, Eric Andrews, ought to be struck out.

¹ The Electronic Evidence Act No. 21 of 2021 repealed the Electronic Evidence Act, Cap. 95:01 of the Substantive Laws of Belize, R.E. 2011 and made provision for matters connected therewith or incidental thereto.

- [2] The two video recordings are allegedly of an incident that transpired on 1st April 2022, giving rise to the current proceedings. I shall refer to the exhibits as “the videos” or “the electronic recordings”.
- [3] The gravamen of the defendants’ objection is that the claimant has failed to comply with section 83 of the Evidence Act and sections 6 and 7 of the Electronic Evidence Act No. 21 of 2021 in seeking to adduce the videos.
- [4] I find in favour of allowing the videos into evidence. My reasons are as set out below.

The Videos

- [5] The video exhibited to the claimant’s affidavit was taken by him using his cell phone and is referred to in the pleadings of both parties. His evidence refers to it as being an accurate, unedited record of the incident. The video exhibited to the affidavit of Eric Andrews was taken by a Maya Air employee who was, allegedly, at the airport on the day of the incident and recorded the incident. Eric Andrews identifies himself as being in the video and states that it depicts his words and actions on the day of the incident. He attests to its accuracy and unedited nature.
- [6] For present purposes, I shall refer to the Electronic Evidence Act as “the EEA” or “the 2021 EEA”. Where necessary and for purpose of distinction, I shall refer to the previous Electronic Evidence Act as “the 2003 EEA”.

The Defendants’ Submissions

- [7] The defendants asked that the videos, in both witness statements, be struck out. They were not authenticated and are inadmissible under the Evidence Act.
- [8] The defendants argued that the attempt to get the videos into evidence is improper and runs afoul of the procedure for adducing electronic evidence. The videos do not comply with both the Evidence Act and the 2021 EEA, which set out clear requirements for

adducing electronic evidence. In oral submissions, Mr. Grinage for the defendants stated that both Acts must be read in conjunction, “the Evidence Act section 83 subsections (1) and (2) and the Electronic Evidence Act, in civil proceedings, has (sic) to be read in conjunction especially when it comes to the authenticity of electronic evidence or, in this case, electronic recordings.”

- [9] The main ground of contention is insufficiency of evidence, rendering the electronic recordings inadmissible in evidence. Mr. Grinage stated that the claimant simply failed to produce sufficient evidence to comply with both section 83(1) and (2) of the Evidence Act and sections 6 and 7 of the EEA.
- [10] Mr. Grinage stated further that for an electronic record to be admissible in evidence, *all* the requirements under section 83(1) & (2) must be satisfied. The section 83 (1) & (2) requirements must be construed conjunctively. The claimant did not provide all the information required under section 83(1) & (2) so the videos are inadmissible and should be struck out. Mr. Grinage pointed specifically to the claimant’s failure to provide certificates of authenticity of the annexed electronic record. This failure is fatal. In support of his position, Mr. Grinage relies on the Jamaican case of **Suzette McNamee v R**.²
- [11] Mr. Grinage advanced that all that the 2021 EEA did was to repeal the 2003 EEA. It did not repeal the substantive legislation (i.e. the Evidence Act) or replace the requirements to get electronic recordings into evidence. Without the expert’s certificate of authenticity, the requirements of the Evidence Act are not satisfied. Further, the burden of proving authenticity is on the claimant who wishes to admit the videos into evidence. The claimant has not only failed to provide the source, computer, cell phone or its model or type but has not stated if the device was working properly. Mr. Grinage decried the absence of the certificate of authenticity since without it, there was no way to prove authenticity or to show that the device was always working properly when it received, stored, or generated the videos. Since all conditions set out in the Evidence Act to get computer generated documents or electronic recordings into evidence must be satisfied, and the certificate of authenticity was not provided by the claimant, the videos are inadmissible.

² RMCA No. 18/2007 delivered on 31st July 2008 by Jamaican COA

[12] Mr. Grinage raised several other pertinent issues, including that the Eric Andrews' video is not being introduced by the maker of that video. He stated that Eric Andrews has admitted that he did not record it himself but was given the video by an employee of the establishment who did not provide a certificate of authenticity. Mr. Grinage took angst with this scenario, arguing that there was no way in the absence of the maker of the video giving a certificate of authenticity, for the claimant or Eric Andrews to prove the authenticity of the video recordings. In fact, Eric Andrews did not even provide the name of the employee who gave him the video. They would not be able to prove that the cell phone or video recorder was, at all times, working properly or even its model and type.

[13] In a frontal address of the suggestion of Ms. Mendez that as regards admissibility of electronic recording, the EEA has somehow replaced the substantive law, he asked that her argument be disregarded as bogus. Mr. Grinage asserted that nowhere in the EEA is it stated that section 83(1) & (2) of the Evidence Act was repealed. It remains the substantive law of Belize, which the claimant must satisfy to get the videos admitted into evidence. In fact, when it comes to the *authenticity* of electronic recordings, both the Evidence Act and the EEA must be read conjunctively.

The Claimant's Submissions

[14] In response, Ms. Mendez, counsel for the claimant, stated that Mr. Grinage's argument is flawed, and designed to mislead the court. Regarding the admissibility of electronic evidence, the relevant statutory instrument is the 2021 EEA and not the Evidence Act. The court ought to be cautious in applying the approach suggested by Mr. Grinage.

[15] Ms. Mendez argued that the 2021 EEA effectively and by implication modified the rules of admissibility of electronic recordings. By the 2021 EEA, Parliament did not modify all rules relating to admissibility. She invited the court, when making its determination, to look carefully at Parliament's intention in modifying *certain* and not all common law or statutory rules in the previous 2003 EEA. A look at what Parliament did in passing the 2021 EEA makes its intention clear.

[16] Regarding the issue of the authenticity of the videos, Ms. Mendez stated that for several reasons the videos are authentic, and the court can safely find so. First, they accurately depict what happened during the incident. Secondly, they are being adduced by persons who were witnesses or participants at the scene of the incident now complained about. These reasons, she argues, are enough to prove the authenticity of the videos.

[17] Ms. Mendez refutes the argument of Mr. Grinage on the failure to have an expert give a certificate of authenticity. This, she claims, is not a requirement in the present circumstances where the pertinent Act governing authenticity and admissibility of electronic recordings is the 2021 EEA. The evidence of the witnesses to the incident would suffice to attest to and/or prove the video's authenticity.

[18] Ms. Mendez also argues that the law requires the defendants who take issue with the authenticity of any electronic recording to point to the evidence giving rise to such doubts: section 4 of the 2021 EEA. She stated that the defendants have adduced no evidence that raises any doubts as to the presumption that the devices used produced anything but accurate electronic recordings. The defendants have raised a mere technical objection that puts the claimant to proof. Their objection is not enough to rebut the presumption or even raise doubts as to the presumption. The defendants' objections ought to be dismissed.

Issues

[19] The dispute in this case is one of statutory interpretation. The main issue, as the court finds it, is whether the Evidence Act or the 2021 EEA governs the admissibility of electronic recordings such as that the video exhibits ought to be struck out?

The Law

[20] It is convenient, at this stage, to set out the relevant sections in the governing legislation and the 2021 EEA that give rise to opposing interpretations. I do so in full.

[21] Section 83(1) & (2) of the Evidence Act reads:

83.–(1) In any civil proceedings, a statement contained in a document produced by a computer is admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, **if it is shown**–

- (a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store and process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any person;
- (b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;
- (c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and
- (d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

(2) In any civil proceedings where it is desired to give a statement in evidence by virtue of this section, **a certificate**–

- (a) identifying the document containing the statement and describing the manner in which it was produced; and
- (b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer; and
- (c) dealing with any of the matters to which the conditions mentioned in sub-section (1) relate, and purporting to be signed by a person occupying a responsible position with relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate),

shall be evidence of any matter stated therein; and for the purpose of this sub-section it is sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

[22] Sections 6 and 7 of the 2021 EEA read:

[6.] The person seeking to introduce an electronic record in any legal proceeding has the burden of proving its authenticity **by evidence capable of supporting a finding that the electronic record is what the person claims to be.**

[7.] Where it is intended to prove the authenticity of an electronic record as evidence, **it is permissible to have the evidence of the expert relating to the authenticity** of an electronic record presented in the form of a certificate. [My emphasis.]

Analysis

[23] The modern approach to statutory interpretation is that the language of a provision, in the context of the enactment, reveals the meaning intended by Parliament. Whilst external aids can be used to understand the background or wider context in which the enactment is made, they cannot displace the meaning (which does not lead to an absurdity) conveyed by the language of the provision in the context of the Act as a whole.³ This position is not in dispute, and regarding section 83, the meaning is clear and the language does not lend itself to more than one construction. It allows for the admissibility into evidence of an electronic recording, upon satisfying all the requirements set out in the section, through the provision of a certificate of authenticity. The language of the 2021 EEA relaxes some of the requirements for authenticity of electronic recordings, making it permissible to have expert evidence of authenticity by a certificate.

[24] Mr. Grinage has ably argued in reliance on **McNamee** that satisfaction of the section 83 requirements is the **only** way that an electronic recording can be admitted into evidence. The 2021 EEA must be read conjunctively with the Evidence Act, which was not repealed by the EEA and remains the substantive law.

[25] In **McNamee**, the Court of Appeal in Jamaica, when dealing with section 31G(a)-(d) of its Evidence Act (which is similar to section 83(1) and (2) of Belize's Evidence Act), held that these requirements must be construed conjunctively. The Court of Appeal in **McNamee** was dealing with the decision of a magistrate where the central issue revolved around the workings of two computers, in a case where computer evidence was introduced to form

³ Jeffery Sersland MD v St Matthews University School of Medicine [2022] CCJ 16 (AJ).

the basis for proof of guilt; and the evidence provided by the prosecution was found inadequate to satisfy all the provisions of section 31G(a)-(d) of their Evidence Act.

[26] Relying on **McNamee**, Mr. Grinage was adamant that in civil proceedings, when it comes to the admissibility of electronic recordings, the Evidence Act and the EEA must be read conjunctively. If the claimant could not satisfy any one of the requirements of section 83(1) & (2), as well as those in sections 6 & 7 of the EEA, then he could not get the video into evidence.

[27] I do not agree that the interpretation garnered by Mr. Grinage from **McNamee** supports his contention of a conjunctive reading of both Acts i.e. the Evidence Act and the 2021 EEA. **McNamee** is authority for the conjunctive reading of the requirements set out in section 31G(a)-(d) of the Evidence Act of Jamaica i.e. or similarly, the conditions in section 83(1) & (2) of the Evidence Act of Belize. **McNamee** does not address the situation in Belize, where a specific and new piece of legislation, which targets electronic evidence and its admissibility, is introduced. It is unhelpful in this regard.

[28] In Belize, the EEA was introduced by Parliament to deal specifically with the issue of electronic evidence and its admissibility. I agree with Mr. Grinage that the EEA did not repeal the Evidence Act. The EEA was enacted specifically to address and clarify rules of *admissibility* and *authenticity* of electronic evidence. In interpreting this Act, the maxim *lex specialis derogate generali* becomes relevant. I considered whether it was Parliament's intention in passing the 2021 EEA to increase the burden on the person seeking to get the electronic evidence in or to relax the constraints. Mr. Grinage's position of a conjunctive reading of both Acts supports a doubling of the requirements to adduce electronic evidence whilst Ms. Mendez states that it is the 2021 EEA that applies.

[29] It is important at this stage to carefully examine the intention of Parliament in introducing the 2021 EEA in the face of the existence of the Evidence Act that deals comprehensively with getting computer generated records into evidence. In my view, the two Acts are not inconsistent with each other.

[30] The 2021 EEA deals specifically with electronic recordings and has effectively and by implication modified the rules of admissibility and authenticity regarding electronic evidence.⁴ I think it will be helpful in resolving the dispute if I were to examine the initial 2003 EEA (now repealed) and then the 2021 EEA (quoted above), whilst considering the rules on admissibility as set out in the Evidence Act. This approach is to fix context, not to rely on the repealed 2003 EEA.

The 2003 EEA

[31] The first modification of the rules of admissibility was done by the introduction of the 2003 EEA. The 2003 EEA did not repeal or replace the Evidence Act but recognized the general admissibility of electronic records in evidence.

[32] The purpose of the 2003 EEA was set out clearly in its scope. It aimed to modify *rules of authentication* and *best evidence* regarding admissibility of electronic records. It made it expressly clear that the intention of the 2003 EEA was not to modify common law or statutory rules of admissibility of electronic recordings: see section 4 of the 2003 EEA. In so doing, the 2003 EEA simply provided for “the best evidence rule” and “the presumption of integrity” of recordings, limiting the applicability of the latter to three defined scenarios.

[33] I find it convenient to set out here sections 6 and 7 in the 2003 EEA. A reading of these sections showcases what Parliament was intentionally seeking to address, when it subsequently removed them and introduced the 2021 EEA (above).

[34] Sections 6 and 7 in the 2003 EEA (now repealed) read:

6.–(1) In any legal proceeding, subject to subsection (2) of this section, where the best evidence rule is applicable in respect of electronic record, **the rule is satisfied on proof of the integrity of the electronic records system in or by which data was recorded or stored.**

⁴ *Bergan v Evans* [2019] UKPC 33. Here, the Board discussed the sea-change in the approach to expert evidence in civil proceedings brought on by the CPR, by subjecting the entirety of the deployment of expert evidence to active judicial control by way of case management. It was held that the admissibility question under s. 163 of the Evidence Act did not override the requirement of permission for its deployment under rule 32.6.

(2) In any legal proceeding, where an electronic record in the form of a printout has been manifestly or consistently acted on, relied upon, or used as the record of the information recorded or stored on the printout, the printout is the record for the purpose of the best evidence rule.

7. In the absence of evidence to the contrary, **the integrity of the electronic records system** in which an electronic record is recorded or stored **is presumed** in any legal proceeding,

(a) where evidence is adduced that supports a finding that at all material times the computer system or other similar **device was operating properly, or if not**, that in any respect in which it was **not operating properly or out of operation, the integrity of the record was not affected by such circumstances**, and there are no other reasonable grounds to doubt the integrity of the record;

(b) where it is established that the electronic record was recorded or stored by **a party to the proceedings who is adverse in interest to the party seeking to introduce it**; or

(c) where it is established that the electronic record was recorded or stored in the usual and ordinary course of business **by a person who is not a party to the proceedings and who did not record or store it under the control of the party seeking to introduce the record**. (My emphasis).

[35] Section 7 (a) and (c) of the 2003 EEA above are similar to what obtained in section 83 (1) of the Evidence Act. In the now repealed 2003 EEA, the presumption of the integrity of electronic recordings applied only in these defined three scenarios. By the 2021 EEA, all three scenarios were removed, clearing the way for an unqualified presumption as to the integrity of electronic recordings. This is significant in deciphering the intention of Parliament. I assume that Parliament, by repealing the three scenarios, was not acting whimsically or in a vacuum but did so to relax the legal constraints and facilitate the admissibility of electronic recordings.

[36] The current position is that unless evidence is adduced that is sufficient to raise doubts as to the accuracy of the electronic recordings, there is a presumption of integrity that applies to make the recordings admissible. I think it best here to quote section 4 of the 2021 EEA to wit:

4. Unless evidence sufficient to raise doubt about the presumption is adduced, where a device or process is one that, or is of a kind that, ordinarily produces or accurately communicates an electronic record, the court shall presume that in producing or communicating that electronic record on the occasion in question, the device or process produced or accurately communicated the electronic record.

[37] In my judgment, by introducing the 2021 EEA, Parliament intended to be facilitative of the admissibility of electronic evidence. This was done by relaxing and/or removing the several constraints that impeded the admissibility of electronic recordings in civil proceedings. This does not mean that a party who is seeking to adduce electronic evidence has no requirements to satisfy in doing so. Section 6 of the 2021 EEA provides that the party seeking to adduce the recording needs to provide evidence capable of supporting a finding that the electronic record is what that person claims it to be. This may be done through the certificate of an expert: see section 7 of the 2021 EEA. If doubts are raised about the presumption of authenticity of the electronic recording, then the EEA sets out a clear procedure to address the issue. The party seeking to rebut the section 4 presumption of the authenticity of the electronic recording must adduce sufficient evidence if it is to be rebutted: see section 4 of the 2021 EEA. I find it necessary to look closer at this issue.

Were doubts raised about the presumption of authenticity?

[38] In their evidence, the defendants have not raised any “doubts about the presumption” that the devices produced inaccurate electronic records. The defendants’ objection, as taken by their counsel, Mr. Grinage, was strictly technical. It merely puts the claimant to proof. It does not raise doubts about the presumption as to the authenticity of the videos, through some *sufficient* evidence, to shift the burden to the claimant. Mr. Grinage points to or introduces no evidence that questions the presumed accuracy of the video recordings under section 4 of the 2021 EEA. He does not say that the videos are anything but a true representation of the incident that occurred between the claimant and the police officers. He calls only for a certificate of authenticity, stating that without the expert’s evidence the videos cannot be established as authentic. He conveniently seems to have forgotten the defendants’ case, which pleaded that the claimant was recording the events with his cell phone.

[39] In my view, as it stands, the objection is insufficient to rebut the presumption of the integrity of the videos. Nevertheless, I will still proceed to address the section 6 requirement, as Mr. Grinage maintains that the claimant has not proven the authenticity of the records.

Did the claimant provide evidence capable of proving the videos' authenticity?

[40] By section 6 of the 2021 EEA, the claimant has the burden of proving "authenticity by evidence capable of supporting a finding that the electronic record is what the person claims to be." I find no failure by the claimant in this respect.

[41] In the claimant's evidence (both his witness and he), the authenticity of the videos is addressed frontally. Both the claimant and Eric Andrews state that they were witnesses/present at the scene and/or involved in the incident. The videos are an accurate, unedited depiction of what happened. The claimant is the maker of his video and Eric Andrews identified himself as the person/a participant in the video he has exhibited.

[42] I do not agree with Mr. Grinage that authenticity of the videos is required *only* to be proved by a certificate of an expert pursuant to section 7 of the 2021 EEA. From the clear language of sections 6 & 7, a claimant is required to advance evidence that can show that the electronic records or the videos in this case are what he claims them to be. He may use expert evidence to do so, as permitted by section 7 of the 2021 EEA. The 2021 EEA makes it permissible, not mandatory, to have an expert's certificate. I agree with Ms. Mendez that the claimant has discharged his burden.

[43] This does not mean that an expert certificate is never required to prove authenticity. In fact, there are clear instances where an expert's certificate of authenticity will be required. Where there are recordings where there are no witnesses who can speak to their authenticity is one such case. In this case, however, the claimant is the author of one of the videos and Eric Andrews identifies himself in the other video, vouching to the accuracy

and unedited nature of their contents. I do not read the 2021 EEA as disallowing situations as in the present case, where both the claimant and Eric Andrews were present at the scene and are capable of substantiating and/or authenticating that the videos are what they claim to be. Both affiants have stated that the videos accurately recorded the interaction between the claimant and the police officers on 1st April 2022. They set out the foundation as to how they came upon the videos and stated that the videos are accurate, unedited depictions of the incident. In my view, they have satisfied the section 4 requirement in the 2021 EEA that stipulates that the starting point is to presume that the electronic recording is accurate unless there is some evidence that is sufficient to raise doubts as to the presumption of the integrity of the videos. As noted above, no such evidence has been tabled. They have also satisfied the requirement of section 6 of the 2021 EEA.

[44] The 2021 EEA is a specific Act dealing with electronic evidence, which follows the Evidence Act. I agree that it does not repeal the Evidence Act. What it does is to speak specifically to both authentication and admissibility of electronic recordings, and how videos such as the ones in issue are to be adduced. The maxim that the specific trumps the general is applicable here and is applied.

Disposition

[45] I hereby order as follows:

- i. The defendants' objections are overruled and exhibits "SF1" and "EA1" are not struck out.
- ii. The Core Trial Bundle is to be filed on or before 16th April 2024.
- iii. The Trial date is confirmed for the 24th April 2024 at 10 am, in-person in courtroom 6.

Martha Alexander
High Court Judge