IN THE SUPREME COURT OF BELIZE, A.D. 2008

CONSOLIDATED CLAIMS NOS 277 of 2008 and 334 of 2008

BETWEEN	**EMIL SERANO**	**CLAIMANT**
	and	
	JOSEPH PALACIO	**DEFENDANT**
BETWEEN	**JOSEPH PALACIO**	**CLAIMANT**
	and	
	EMIL SERANO	**DEFENDANT**

Keywords: Overriding Objective; Non-compliance with Court Order; Application order requiring the maker of witness statement to attend for cross-examination; Part 26.1(2)(l) of CPR 2005;Part 29.4 of CPR 2005: Part 29.8(1) of CPR 2005.

Judge: **ABEL J (Ag)**

Hearing Dates: 5th March 2013,
6th March 2013
7th March 2013
10th May 2013

Representation:

For the Claimant/Defendant Mr. Emile Serano: Mr. Hubert Elrington S.C.

For the Defendant/Claimant Mr. Joseph Palacio: Ms. Tricia Pitts-Anderson.

DECISION

Introduction

1. The application giving rise to the present decision arose after both parties had closed their case during the course of a trial, in this relatively old consolidated claim which is still working its way through the court system. The Claim form and Statement of Claim in Claim 227 of 2008 were both filed on the 9th May 2008 and the claims were consolidated on the 18th September 2009.

2. A case management order was made on the 11th day of February 2009. At the case management conference it was ordered that the Claimant be at liberty to call four witnesses and the Defendant three witnesses and, inter alia,:

"That witness statements do stand as examination-in-chief. All witnesses are to attend the hearing for cross-examination, unless the other side dispenses with such attendance by notice in writing."

3. The consolidated claims came on for trial hearing on 5th March 2013, 6th March 2013, 7th March 2013.

4. At the trial the Court took the evidence of Mr. Emil Serano and Ms. Marie Palacio Brown, both witnesses for the Claimant/Defendant. There was a third witness statement which had been filed and served on behalf of the Claimant/Defendant, but which witness was not called prior to the closing of his case.

5. The only witness called for the Defendant/Claimant prior to the close of his case was Mr. Joseph Palacio himself. Two other witnesses for the Defendant/Claimant, in relation to whom witness statements had been filed and served, were not called.

6. After the close of the case for the Defendant/Claimant Mr. Hubert Elrington S.C. on behalf of the Claimant/Defendant then made an application that the witnesses for Defendant/Claimant should attend court to be made available to be cross examined. The Court adjourned the action to 27th day of March 2013 at 9.00 am to allow Counsel for the parties to make written legal submissions to the Court in relation to the non-attendance of witnesses in the case (particularly after the close of each party's case) such submissions to be filed and served by Counsel for each party on or before 21st March 2013.

7. No Submissions were filed by either party as ordered by the 21st March 2013. On the 16th April 2013, when the matter was listed for continuation of the trial, Mr. Elington S.C.,did not appear and the Court, in his absence extended

time to both parties to make written submissions by the 30th day of April 2013 and the Court gave further directions for the completion of the action. Only Counsel for the Defendant/Claimant filed skeleton arguments which were filed on the 3rd May 2013 and for which the Court is much appreciative.

8. This decision is the court's ruling on the application by Mr. Erlington S.C. for the Claimant/Defendant.

The Issue

9. Counsel of the Defendant/Clamant rightly observed in her skeleton argument that the issue for decision is whether Counsel for the Claimant/ Defendant is entitled to insist on the Defendant/Claimant calling his witnesses who had filed witness statements but were not called to give evidence.

The Law

10. Part 1 of the Civil Procedure Rules 2005, sets out the "overriding objective" of the Rules which is to "deal with cases justly". The Court is required to give effect to the overriding objective when it exercises any discretion given to it by the Rules and in interpreting any rule. It is my view that the Court is required to similarly give effect to the overriding objectives in interpreting any order made under the Rules.

11. Dealing justly, pursuant to the Rules, includes ensuring, so far as practicable, that the parties are on an equal footing, saving expense, dealing with the case proportionately (taking into account the amount of money involved, importance of the case, the complexity of the case and the financial position of the parties), ensuring that the case is dealt with expeditiously and allotting to the case an appropriate share of the courts resources, while taking into account the need to allot resources to other cases[1].

12. Part 26.1(2) of CPR 2005 sets out the Court's case management powers and provides that except where the rules provides otherwise, the court may:

[1] Part 1, 1.1(2) of CPR 2005of the Civil Procedure Rules 2005.

"(l) require the maker of an affidavit or witness statement to attend for cross-examination"

13. Part 29.4 of CPR 2005 then provides that the court may order a party to serve on any other party a witness statement.

14. Part 29.8(1) of CPR 2005 provides:

" If a party –
(a) has served a Witness Statement or summary; and
(b) wishes to rely on the evidence of the witness who made the statement that party must call the witness to give evidence unless the Court orders otherwise."

15. Rule 29.8(2) of CPR 2005 provides that:

"If a party –
(a) has served a witness statement or summary; and
(b) does not intend to call that witness at trial
that party must give notice to that effect to the other party not less than twenty-eight days before the trial."

16. Rule 29.10 of CPR 2005 provides that:

"Where a witness is called to give evidence at trial, he may be cross-examined on the witness statement, whether or not the statement or any part of it was referred to during the witness's evidence in chief."

Application of the law to the facts

17. It is the terms of this case management order which has created the condition of doubt and which has, in all probability, led Mr. Elrington S.C. to believe that he is entitled to insist on the Defendant/Claimant calling his witnesses who had filed witness statements, but who were not called to give evidence.

18. The case management order however, has to be put within the context of the Rules under which the order was made.

19. It seems to me that the provisions of Rule 29.8(1) of CPR 2005 make it clear that if a party has served a witness statement and "wishes to rely on the evidence of the witness who made the statement" that party must call the witness to give evidence unless the court orders otherwise.

20. This Rule 29.8(1) necessarily implies that, if the witness is not called, then the party cannot rely on the evidence of the witness, unless the court rules otherwise. It then vests in the Court a residual discretion, consistent with the rule in question and with the overriding objective, to do justice in the case.

21. I am grateful to Counsel for the Defendant/Claimant for bringing to my attention the dicta of Mitchell J in Millwood v Richards, Antigua & Barbuda Civil Suit No. ANUHCV 1997/0121, where his Lordship explained the position in relation to part 29 of OECS Civil Procedure Rule 1 (which is identical to Belize's CPR 29.8) thus :-

"Clearly, the Defendant in this case has been in breach of the requirement to have given the Claimant 28 days notice that he was not intending to call the witnesses whose statements had been filed. Our CPR 2000 does not, as compared to the position in the UK, provide any remedy or penalty for the breach in question. Unlike the position in the UK, there is no stated consequences that flows from this breach. It would seem that Part 29 of CPR 2000 does not contemplate the court looking at witness statements when those witnesses have not been produced to the court for cross examination. The result is that such witness statements must be completely ignored by the court in considering the evidence in the case…"

22. I agree with Counsel for the Defendant/Claimant that Rule 29.8(1) is concerned with the procedure to be followed if a party wants to rely on evidence of their witnesses. Such a party wishing to rely on the evidence

contained in a witness statement must actually call that witness to give evidence at trial[2].

23. I also accept, as submitted by Counsel for the Defendant/Claimant that the position in Belize is that in Civil cases generally, under the rules of court and as stated in her submissions, there is no obligation to call witnesses, even where an intention to call the witness is notified by disclosure of their evidence; and that where a party declines to call a witness in respect of whom he has served a witness statement, the Court cannot compel the party to call him as a witness but the Court may draw an adverse inference against a party who fails to call a witness to deal with certain evidence[3].

24. In this regard I accept that the quoted section of Phipson on Evidence[4] does set out the position of the law on the subject in so far as it relates to the Civil Procedure Rules. However I am not persuaded that where one party serves a witness statement but does not call the witness the other party may use the written evidence (and I do not decide one way or the other on this latter point as it does not arise for decision in the present action). It may be that the provision within the UK Civil Procedure Rules may be received into the procedural laws of Belize by Section 18 (1) and (2), and Section 22 of the Supreme Court of Judicature Act, Chapter 91, Revised Edition 2003 Laws of Belize but this has not been argued before me and I make no decision on the question.

25. Counsel for the Defendant/Claimant also submitted that CPR 29.8 (2), like Rule 29.8(1), is purely procedural dealing with the procedure to be followed where it is intended not to call a witness at trial and that neither CPR 29.8 (1) nor 29.8 (2) are directives that a party must call a witness after the service of a witness statement[5]. That instead, the procedure laid out in CPR 29.8 (2) anticipates the possibility that after a witness has filed and served witness

[2] See paragraph 5 of the Skeleton Argument on Behalf of Joseph Palacio.
[3] Ibid Paragraph 8 and Phipson on Evidence, Seventeenth Edition para 11-15
[4].
[5] Ibid paragraph 7.

statement that witness may not give evidence at trial and that the requirement for notice is thus to that effect.

26. This is generally true but the requirement for notice is also an attempt within the rules to make provision for the management of the case, in anticipation of trial, to ensure an orderly procedure for the attendance of witnesses in accordance with the parties intention; but does not attempt to deal with all the many difficulties, and the murky area which may arise, where there is an intention to call a witness and such a witness is expected to attend but fails to do so. It is to be noted that there is no stated penalty within the rule for failure to comply with the provision for the requisite notice.

27. The question, nevertheless in my view, can be reduced to the question whether the terms of the case management order that "All witnesses are to attend the hearing for cross-examination, unless the other side dispenses with such attendance by notice in writing" constitute a mandatory requirement for any such witness to attend trial for cross-examination Further, if it is the case that it is such a requirement, then the question has to be asked what would be the penalty for noncompliance with the order.

28. In is interesting to observe that Mr. Elrington S. C., in my view quite correctly, did not in his oral arguments suggest that the terms of the case management order does create a mandatory requirement for the attendance of a witness on whose behalf a witness statement has been served but who has not been called to give evidence. No doubt, that quite apart from the fact that Mr. Elrington S. C., had filed a witness statement on behalf of someone who he did not call, it is clear that the terms of the case management order in question is a little (to say the least) equivocal; and is certainly not explicitly mandatory in its terms. The case management order in question wisely does not say that" all witnesses <u>shall</u> attend the hearing for cross-examination", and the presence of a penalty is notably absent, thereby depriving it of being unarguably mandatory in its terms.

29. It is therefore clear, in my view, that any such mandatory requirement for the attendance of a witness who has served a witness statement, in a case management order, without the judicial officer presiding at the case management conference being aware of the specific terms of the evidence to which the witness will testify in his/her witness statement, and of its importance to the defaulting party's case, would be clearly impracticable at best and disproportionate at worst.

30. It is also my view that much of the other submissions of Counsel for the Defendant/Claimant are inapplicable to the present case as it deals with the situation which ensues under the English civil procedure rules on a subject which is markedly different to the Civil Procedure Rules 2005, which obtains within Belize. As was observed in the submissions by Counsel for the Defendant/Claimant, in England the Civil Evidence Act 1995 coupled with specific rules of Court (which the Eastern Caribbean Supreme Court Belize do not have) provide that the statement of a witness not called can be put into evidence as a hearsay document by either party and treated as such[6]. It may be that this provision may be received under Section 18 (1) and (2), and Section 22 of the Supreme Court of Judicature Act, Chapter 91, Revised Edition 2003 Laws of Belize to fill the gaps in the procedure within the Civil Procedure Rules 2005 which are in operation within Belize. But that is a question which does not arise for determination in this particular case and I make no ruling thereon or further comment on it.

31. Mr. Elrington S.C. has however, accepted that it is a matter for the Court's discretion whether to grant the order which he seeks, he argues, in line with Part 29.8(1) of CPR 2005. However even here it seem to me that that is a misinterpretation on his part of the rule, as it appears to me implicit in this rule, and I so read it, that it may be in the discretion of the court to rule that a party who has served a witness statement but not called its maker for cross-examination may, in the discretion of the court, nonetheless rely on the

[6] See paragraph 13b of the Skeleton Argument on Behalf of Joseph Palacio.

contents of the witness statement. But, again this interpretation does not arise in this case as Counsel for the Defendant/Claimant has not made such an application to this court and I do not have to make any such ruling.

32. I have been called upon to rule that the two other witnesses for the Defendant/Claimant, in relation to whom witness statements had been filed and served, should be made to attend court and be available to be cross-examined. But, I ask, rhetorically, even if the Court were minded to make such an order what would be the penalty of noncompliance?

33. I have therefore come to the conclusion that the Defendant/Claimant cannot rely on the evidence of the witnesses who had filed witness statements but who were not called to give evidence; but that the Court may draw an adverse inference against any party who fails to call a witness to deal with certain matters in issue. I am prepared to hear both Counsel on the question of drawing an adverse inference for the failure to call a witness who has filed and served witness statements pursuant to the case management order.

34. I have carefully considered all of the factors contained in the overriding objective particularly in ensuring, so far as practicable, that the parties are on an equal footing, saving expense, dealing with the case proportionately (taking into account the amount of money involved, the importance of the case, the complexity of the issues and the financial position of the parties), ensuring that the case is dealt with expeditiously and allotting to the case an appropriate share of the courts resources, while taking into account the need to allot resources to other cases.

35. Having taken them into account I am not prepared to rule that the two other witnesses for the Defendant/Claimant, in relation to whom witness statements had been filed and served, should be made to attend court and be available to be cross-examined.

36. I am particularly influenced by the fact that the parties would not be put on an equal footing given that there was a third witness in relation to whom witness statements had been filed and served by the Claimant/Defendant, who was not called as a witness nor had the requisite notice been given by or on his behalf.

37. Also, that the application was made after the close of the case for the Defendant/Claimant and after notice had been given by Counsel for Defendant/Claimant at the close of his client's case, that the Defendant/Claimant would be the only witness, to which there was no objection.

38. Further, that this is a relatively simple case, not involving a large amount of money and it is clear that the financial position of the parties would not warrant further delaying this case any longer for any marginal benefit which would result from the time, trouble and expense that would be involved in the requested witnesses to attend.

39. Indeed Counsel for Defendant/Claimant has never informed the court of the purpose of the witnesses' attendance and what is the importance of the witness to his claim.

Conclusion

40. In view of the above reasons I dismiss the application on behalf of Mr. Emil Serano for Mr. Joseph Palacio to call the witnesses or any of them for cross-examination who had filed witness statements but were not called to give evidence.

41. I reserve the question of costs of this application until the conclusion of this trial.

COURTNEY A. ABEL
SUPREME COURT JUDGE (Ag)
10th May 2013