

IN THE HIGH COURT OF BELIZE A.D. 2023

CLAIM No. 405 of 2021

BETWEEN

ERNESTO LEWIS

CLAIMANT

AND

RAFAEL JOHAN SERVANDO

JAMID ESPAT d.b.a. J.E.S. FREIGHT LINE

DEFENDANTS

BEFORE THE HONOURABLE MADAM JUSTICE MARTHA ALEXANDER

Submissions Date: May 09, 2023

APPEARANCES:

Mrs. E.A. Anderson for the Claimant

Mr. N.V. Dujon SC for the Defendants

DECISION ON EXPERT REPORT

INTRODUCTION

1. At the hearing of the evidential objections in this matter, counsel for the defendants made an application to exclude the expert report of Dr. Andre Sosa. The defendants' objection was that the expert report did not comply with the requirements of Rule 32.13(3) of the Civil Procedure Rules of Belize (CPR) and should be excluded from the evidence at trial. This rule

deals with the attachment of original and supplemental written instructions to the report as well as a note of any oral instructions given to the expert.

2. Dr. Sosa was a court appointed expert witness who would have received his instructions to prepare the report from the claimant. The matter involved a claim in negligence arising from a motor vehicle accident where serious multiple injuries were sustained by the claimant. Dr. Sosa's report, therefore, was critical for the resolution of the claim.
3. Counsel for the parties made submissions, both oral and written, and I concluded that the expert report, which did not attach instructions given to the expert, failed to satisfy the requirements for having it introduced into evidence. I, therefore, excluded it from being tendered at the trial.
4. The reasons for my decision are set out in the following paragraphs.

THE LAW

5. Rule 32.13 of the CPR sets out the requirements to be met when a litigant is to present a report of an expert, for its use and consideration by the court. Rule 32.13(3) provides:

*[3] There **must** be also attached to an expert's report copies of –*

- (a) all written instructions given to the expert;*
- (b) any supplemental instructions given to the expert since the original instructions were given; and*
- (c) a note of any oral instructions given to the expert,*

*and the expert **must** certify that no other instructions than those disclosed have been received by him or her from the party instructing the expert, the party's legal practitioner or any other person acting on behalf of the party.*

SUBMISSIONS

6. Mrs. Anderson submitted that the expert report ought not to be excluded because of a simple procedural error, which could be cured by further court orders or by way of costs, if necessary. She relies on the case of *Eagle Merchant Bank of Jamaica Ltd. v Paul Chen-Young*¹ where an expert report, with procedural failures and other issues, was allowed to be tendered into evidence after orders for corrections were made.
7. The expert in *Eagle Merchant Bank* did not include the statement to his report indicating that he understands and has complied with his duty to the court. The report also did not attach instructions received and was not addressed to the court. It also failed to comply with other requirements under Rule 32 of Jamaica's CPR (which is similar to Rule 32 of the Belize CPR). Anderson J found the procedural errors were not fatal, but could be cured, and on a balance did not justify excluding the evidence. Anderson J stated that procedural errors in expert evidence can be corrected by use of appropriate addendum or court orders including "*special cost orders.*" In the process of arriving at his decision, he observed that, "*The rules provide a number of conditions designed to ensure that the court has the benefit of independent expert advice in the pursuit of truth.*" The defendants were given time to submit written questions on the report.
8. Mr. Dujon argued against the inclusion of the expert report into evidence. He submitted that the failure to attach the instructions for its preparation was "*egregious*" and affected the "*integrity of the process.*" Mr. Dujon submitted that the rules requiring instructions to be attached were couched in mandatory terms. The word "*must*" in the context of the rule is absolute. It places on the claimant a strict and unqualified duty to adhere to the rule and non-compliance offends not only the rule but potentially the integrity of the entire process for receiving such evidence. Mr. Dujon also argued that the safeguards implemented by the rules for receiving expert evidence are inserted for the purpose of protecting the integrity in

¹ C.L. 1998/E.095

the process. He relied on two cases to support his position: ***Josephine Gabriel & Co. Ltd. v Dominica Brewery & Beverages Ltd***² and (ii) ***Dorothy Vendryes v Dr. Richard Keane***.³

9. In ***Josephine Gabriel***, the expert's statement of duty was left out and the instructions given to him were not disclosed. Barrow J described the breaches of the rules for receiving expert evidence as "egregious" and that, "*it would have been proportionate to the scale of violations, for the judge to refuse the evidence of both expert witnesses.*"⁴ He cautioned that the rules were designed to facilitate the evidence of experts in assisting the court whilst protecting the court against "*the danger of deception by apparently credible expertise that conceals its true intent of promoting the interests of its purchaser.*"

10. In ***Dorothy Vendryes***, the failure to attach the requisite forms that must accompany a claim form was deemed an irregularity. The breach was of a mandatory provision and it resulted in the setting aside of a judgment in default. That court noted that whilst judicial discretion allows for errors of procedure to be made right by court orders, "*A judge can only apply a rule so far as he is permitted. The claim form was a nullity. It cannot be restored by an order of the court. The service of the requisite documents accompanying the claim form is a mandatory requirement. The amended pleadings must be served before any further steps can be taken in the proceedings.*"

11. Whilst ***Dorothy Vendryes*** does not deal with expert evidence, and for that purpose can be distinguished, the learning is apposite as regards to mandatory rules. The language of Rule 32.13(3) is plain and clear about the need for the instructions, given to an expert, to be attached. The imperative nature of the rule, which sets out the need for original and supplemental instructions and a note on any oral instructions received to prepare the report, points to the importance of compliance with it.

² Civil Appeal 110/2004

³ Court of Appeal 101/2009

⁴ Supra note 2, para 9

ANALYSIS

12. In the present case, Dr. Sosa states, “*I have done my report on the basis of only those written instructions provided to me and which are attached to this document.*” During the Evidential Objections’ hearing, however, Mrs. Anderson expressed that it was the court’s duty, and not counsel’s, to provide instructions to the expert. It is the practice that counsel drafts those instructions and seeks the court’s endorsement. Counsel’s perspective on her duty, having called the expert evidence,⁵ leads this court to question whether the expert’s statement that he was provided with “*written instructions*” is in fact accurate. Moreover, the fact that the instructions were not attached had the effect of denying the court a proper context for his report.

13. Dr. Sosa provided answers to follow-up questions that were submitted to him solely by the party who advanced the substantive report. The rules provide for joint written questions, for clarification, to be posed by the parties but, instead, only the claimant posed same. Rule 32.8(1) & (2) of the CPR reads:

[1] A party may put written questions to an expert instructed by another party or jointly about his report.

[2] Written questions under paragraph (1)

(a) may be put once only;

(b) must only be in order to clarify the report; and

(c) must be put within 28 days of service of that expert’s report, ...

14. Mr. Dujon, rightly, raised this as a major concern since without the benefit of the original or supplemental instructions, the defendants were not given the opportunity to submit written questions, seek elucidation or probe the veracity of the opinion advanced in the report. Rule

⁵ Notice of Application dated February 18, 2022; Order dated April 22, 2022 granted permission to call the expert

32.8(2)(a) allows for written questions to be put once only to the expert and, within a fixed timeline. This is not a situation that allowed Mr. Dujon to ask for missing instructions, get a response, reflect and then submit questions for clarification. In effect, the defendants were deprived from asking follow-up questions, since without the original or supplemental instructions, the true remit of the report was unknown to the defendants.

15. In my view, having the instructions that informed the preparation of the report was important, not merely for context but to determine if there was any need for follow-up steps. The failure to disclose the instructions would have disadvantaged the defendants in seeking clarification. A mere statement to the effect that the report was in compliance with instructions received, but not disclosed, does not take the matter further and the court is not helped. The imperative nature of the rule ought to have telegraphed its importance to the claimant in ensuring that procedural compliance is observed.
16. On the issue, both counsel relied on cases that took different approaches on whether to exclude an expert report for procedural failures. Mrs. Anderson's position was that procedural errors could be cured with an addendum or cost order as held in ***Eagle Merchant Bank***. In that case, the rationale of Anderson J for not excluding the report was that the errors could be cured by the exercise of judicial discretion under the overriding objective of the rules. Mr. Dujon countered with the argument that whilst judicial discretion must always be preserved, in the context of mandatory rules a court must operate within its confines. He maintained that the procedural failures are egregious and the report ought to be excluded.
17. I agree with the argument advanced by Mr. Dujon that judicial discretion is always to be preserved but in the context of mandatory rules, the court must operate within its confines especially where the breach is egregious. I agree too that the defendants are disadvantaged in not being provided with the instructions. This is evident by the fact that only the claimant could have posed follow-up questions, as counsel is the only one with the knowledge of the instructions and/or context in which the expert would have done his report. In my view, it furthers the overriding objective of the rules for both parties to have the instructions.

18. Expert evidence is a special category of evidence called for the benefit of the court. It is independent evidence that is not skewed or coloured by the stance of the instructing party. The procedures for its introduction are crafted to ensure independence and fairness so a court can rely on the expertise of the witness. The attachment of instructions to the report facilitates transparency and makes known the factual plank on which the expert has prepared his report. The failure to provide the terms of reference has a down side that impacts the defendants and the court.

19. Where expert evidence is reasonably required for the just disposal of a case, the party calling the expert, and issuing the instructions, to define the context in which the expert opinion should be given, must make sure that the instructions are available to the other side and the court to facilitate the taking of the evidence. It cannot be that the claimant alone knows the instructions or has the right to ask follow-up questions for clarification. The mandatory rules are to facilitate the integrity of the process for the benefit of the court and parties.

20. In my view, the failure of the expert to abide by the provision of Rule 32.13(3) justifies the exclusion of the report. The report is excluded for failure to adhere to the rule.

DISPOSITION

21. It is ordered that the expert report of Dr. Sosa is excluded from being tendered into evidence at the trial with costs to be in the cause.

Dated May 22, 2023

Justice Martha Alexander, Judge of the High Court of Belize