

IN THE SUPREME COURT OF BELIZE, A.D. 2014

CLAIM NO: 259 of 2014

BETWEEN

THE ATTORNEY GENERAL OF BELIZE

CLAIMANT

AND

**NIGEL PETILLO on behalf of Belize Grassroots
(Youth Empowerment Association (BGYEA))**

1st DEFENDANT

SAM PATTON

2nd DEFENDANT

Keywords: The Supreme Court (Civil Procedure) (Amendment) Rules, 2013:
Mediation Rules.

Part 73.9 of the CPR 2005: Confidentiality; Confidentiality of Discussions
during mediation session;

Part 73.16 of the CPR 2005: Breach of Confidentiality in Relation to
Mediation Session; Application for breach of confidentiality; Sanctions for
breach of confidentiality.

Part 73.17 of the CPR 2005: Relief from Sanctions for Breach of
Confidentiality.

Before the Honourable Mr. Justice Courtney A. Abel

Hearing Dates: 6th July 2015
31st July 2015

Appearances:

Mr. Nigel Hawke and Mrs. Julie-Ann Ellis Bradley for the Claimant

Mrs. Audrey Matura Shepard for the Defendants

Mr. Godfrey Smith SC for Mrs. Audrey Matura Shepard

DECISION
Delivered on the 31st day of July 2015

Introduction

- [1] This application concerns the scope of the confidentiality provisions of the recently passed court-connected mediation rules and procedure.
- [2] It is alleged by the Claimant that Counsel for the 1st Defendant, Mrs. Matura Shepard, by her out- of- court conduct (involving television interviews and a newspaper publication), immediately following a mediation session, breached the mediation confidentiality provisions and should be sanctioned for such breach.
- [3] It has been submitted on behalf of Mrs. Matura Shepard that such provisions did not cover the conduct of which complaint has been made.

Issues

- [4] Did Counsel for the 1st Defendant, Mrs. Audrey Matura Shepard, breach the confidentiality of the court-connected mediation session held under Part 73 of the RSC on the 26th February 2015?
- [5] If she did what sanction, if any, should this court impose?

Background and the Court Proceedings

- [6] By an urgent Ex Parte Application for an interim Injunction filed on the 22nd May 2014 the Claimant, the Government of Belize (GOB), applied to this court against the Defendants for an injunction to restrain them from trespassing or otherwise doing anything with certain lands owed by the Government which are the subject of the present proceedings.
- [7] The lands in question, approximately 50 acres, was allegedly a reserve buffer zone at about mile 40 George Price Highway, in the area known as Harmonyville, a development which the GOB apparently surveyed and properly subdivided (into some 1000 lots) for distribution to the members of an Association called the Belize Grassroots Youth Empowerment Association ('BGYEA') an association

established to address the welfare of grassroots people, in particular the acquisition of title to land for and on behalf of its members.

- [8] The GOB alleged that the subdivision of lands to BGYEA was with the expressed understanding that there should be no interference with this buffer zone.
- [9] An ex parte injunction was granted by this court subject to certain undertakings given by GOB including to file and serve a Fixed Date Claim Form on the Defendants by the 30th May 2014, and also to serve a copy of the injunction order and supporting Affidavits.
- [10] The Claimant by way of the present claim, and in breach of the undertaking given to this court, filed a Fixed Dated Claim Form on 11th June 2014.
- [11] This Fixed Date claim form was filed on behalf of the GOB, by the Chief Executive Officer (CEO) of the Ministry of Natural Resources and Agriculture as the government department charged with the general administration of Land in Belize and the general enforcement of the National Lands Act of Belize.
- [12] The 1st Defendant, Nigel Petillo, is the President of BGYEA.
- [13] The 2nd Defendant, Sam Patton, was alleged to have been a businessman who had an arrangement with BGYEA for the clearing and cultivation of the portion of the said reserve buffer zone. This Defendant did not feature in the proceedings.
- [14] The present claim was supported by an Affidavit of the CEO who claimed that the lands in question, by a policy of GOB, was to form the reserve buffer zone for the purpose of the GOB's future development such as road or other national or public interest projects.
- [15] The GOB then claimed a declaration of title and for the Defendants not to enter, use, occupy or possess the buffer zone etc. and for damages for trespass.
- [16] The 1st Defendant, Nigel Petillo, filed an application on the 9th June 2014 to discharge the injunction and this application was heard on the 13th June 2014 and, because of the GOB's non-compliance with its undertaking, was not continued with costs of the application awarded to the Defendant in the sum of \$3,000.00

- [17] The Defendants eventually, on the 28th July 2014, defended the claim on the basis that the claimed buffer was contrary to the GOB's written policy and that BGYEA held an equitable interest in the area known as the buffer zone and also denied that it was indeed a 'reserved buffer zone' and that there was any trespass.
- [18] The claim was case managed and referred to mediation on the 28th July 2014 and witness statements were filed and eventually a mediation session was held under Part 73 of the RSC on the 26th February 2015.
- [19] Generally the mediation rules under Part 73 provides that discussions during the mediation and documents prepared solely for the purposes of the mediation are confidential and shall not be disclosed in any other proceedings.
- [20] At the mediation session, conducted in accordance with Part 73, the usual Confidentiality Agreement was signed by all the parties and their lawyers on terms which included the following terms:
- (a) Statements made and documents produced in the mediation session and not otherwise discoverable are not subject to disclosure through discovery or any other process are not admissible into evidence for any purpose, including impeaching credibility.
 - (b) The notes, records and recollections of the mediator conducting the session are confidential and protected from disclosure for all purposes; and
 - (c) At no time shall any party summon, subpoena or call the mediator as a witness to testify as to the fact of the mediation or as to any oral or written communication made at any stage of the mediation.
- [21] Following the mediation session, the Notice of Outcome of Mediation was signed by the Mediator and filed on the 27th March 2015, along with a rough draft of agreement which stated that the "Detail agreement will follow". The Mediator signed that "the parties settled some issues as a result of the mediation session".
- [22] It would appear that the question of costs remained outstanding and to be determined by the court.

- [23] On the 25th March 2015 the Claimant filed an application for an order in terms of a Mediated Settlement and for sanctions for breach of Confidentiality in which:
- (a) The terms of the Mediation Agreement, which had been fleshed out by Counsel for the parties, was attached, for the proceedings to be stayed except for the purpose of carrying into effect the terms of the agreement; and
 - (b) That Counsel for the 1st Defendant, Mrs. Audrey Matura Shepard face costs or other sanctions deemed appropriate by the Court for breach of confidentiality.
- [24] The application was supported by an Affidavit of the Commissioner of Lands, on behalf of GOB, in which it was alleged that after the conclusion of a good faith negotiation at a mediation session on 26th February 2015, Mrs. Matura Shepard proceeded to go live on television to disclose the terms of the settlement arrived at with BGYEA at the session, and disclosed to the media the nature and details of what was discussed during the session.
- [25] A copy of a verbatim written transcript of the Channel 5 news report, not in dispute, was exhibited in which it was reported Mrs. Matura Shepard stated that an agreement had been reached between BGYEA and GOB in which BGYEA was able to get seven out of its eight points with one pending about costs; and which purported to speak about the terms of the settlement and was also quoted in terms in which she was claiming a victory “a big win” and to spell out the terms and also quoted what took place within the mediation session point by point.
- [26] A copy of an alleged verbatim written transcript of the Channel 7 news report was similarly exhibited, again not disputed, in which Mrs. Matura Shepard was disparaging of the GOB and spoke positively about her clients and reported that an agreement had been reached between BGYEA and GOB in which she allegedly spoke about the respective positions of the parties and what concessions were made by GOB and what a “huge victory” her client obtained.

- [27] It is also undisputed that Mrs. Matura Shepard also wrote about the matter in her column published in the Amandala newspapers on the 15th March 2015 in which she can be characterized as having personally identified and named in disparaging terms the Attorney appearing for the GOB and the possible legal fees they may be earning. I will not directly quote the offending passage as I do not consider it appropriate to further publicize the comments – it remains in the public records of the newspapers.
- [28] On the 22nd May 2015 the terms of the signed and filed Mediation Agreement was filed with the Court.
- [29] There was no Affidavit filed by Mrs. Matura Shepard in opposition to the evidence of the GOB, nor was there any application for relief from sanctions, but rather the application was later contested on legal grounds (the interpretation of the relevant provisions), and as a result it is to be taken that the factual basis of the application is uncontested.
- [30] At the hearing of the application on the 6th July 2015, and with the consent of the parties, this court granted the application in terms of the Order Subsequent to Mediation Agreement (that all proceedings in this matter as between the Claimant and the 1st Defendant be stayed except for the purpose of carrying into effect the terms of the said agreement and for that purpose the parties have permission to apply to the court), but otherwise made no order as to costs as between the parties.
- [31] In relation to the application which was made, that Counsel for the 1st Defendant, Mrs. Matura Shepard, having breached the obligation of confidentiality shall pay the costs of these proceedings to the Claimant, and with the consent of the parties, I heard that application in Chambers with Mrs. Matura Shepard being represented by Mr. Godfrey Smith SC and GOB being represented by Counsel Mrs. Julie-Ann Ellis Bradley.
- [32] In view of the newness of the court-connected mediation process, at the conclusion of the very full legal submissions I invited Counsel on both sides to submit to me any further relevant authorities which they could find which might assist the court in a decision, which was reserved.

[33] I received from Mrs. Julie-Ann Ellis Bradley by letter dated 13th July 2015 further material which I found helpful, and subsequently through my Marshal enquired whether such material had been shared with Counsel on the other side and invited both Counsel to address me further on the additional material if they so desired. No additional material was received from Counsel for Mrs. Matura Shepard and I have been informed that there was no further need to address me.

[34] Because of the general importance of this decision I indicated that I would be giving my decision in open court.

Did Mrs. Audrey Matura Shepard breach the mediation session?

[35] The Supreme Court (Civil Procedure) (Amendment) Rules, 2013 were published in the Gazette on the 6th November, 2013 and thereby became part of CPR 2005. The amended rules were passed to make provision for mediation services to be provided by the Supreme Court as a result of a referral by the court. The amendment provided for the selection of mediator, pre-mediation requirements being met, provision being made for the conduct of mediation sessions and their confidentiality, settlement of claims by mediation, costs of mediation and for matters incidental or relating to all such procedure and practice.

[36] This process is one of the most important recent advances in the administration of justice, within the Supreme Court, and involves the case management powers of the court as expressed by the overriding objectives of the court, to enable the court to deal with cases justly: including by saving expense, dealing with cases proportionately, expeditiously and allotting to the case an appropriate share of the court's resources. Under the rules the court is obliged to encourage the parties to use any appropriate form of dispute resolution, in particular, mediation, and facilitating the use of such procedure.

[37] The rules establish a whole administrative arrangement connected with and as part of the Supreme Court, and a procedure of discretionary referral of appropriate filed claims to an approved Roster of Mediators which is administered by a "Mediation Coordinator" being an officer of the court appointed by the Chief Justice, to

coordinate the development of this so called “court-connected” system of mediation in Belize¹.

[38] Mediation was defined by the rules as being a flexible dispute resolution procedure by and in which a neutral third party, the mediator, facilitates negotiations between the parties to help them settle their dispute² but is not permitted to decide the case.

[39] It is to be observed that, unlike some other court-connected systems, some of which, as in the case of Jamaica, where certain claims are all automatically referred to mediation, it is entirely within the discretion of the Judge whether to refer a filed claim to take part in the mediation; and so a party may effectively lose any and all control over any desire to have their case tried by the court; and instead the case may be diverted and could be settled with the assistance of a neutral third party, the mediator, there to facilitate negotiations between the parties and to help them settle their dispute.

[40] It is also to be noted that under this procedure a party is not allowed to opt out of an order for mediation made pursuant to Rule 73.3(1) except by order of a judge³.

[41] Rule 73.9 of the CPR 2005 expressly provided for the confidentiality of the mediation sessions in the following terms:

“(1) Discussions during the mediation and documents prepared solely for the purposes of the mediation are confidential and shall not be disclosed in any other proceedings.

(2) A party or attorney-at-law representing a party shall not, at any subsequent trial or hearing of the claim, refer to any matters disclosed at the mediation by any party or attorney-at-law.

(3) The mediator may not disclose to any other person or be required to give evidence about any matters disclosed by any party at the mediation.

¹ See Part 73.2 of the CPR 2005

² Part 73.2 of the CPR 2005.

³ Part 73.3(3) of CPR 2005

(4) The mediator shall not be required to provide consultation notes, evidence or an opinion, touching on the subject matter of the mediation in any proceedings.

(5) Nothing in this rule is intended to affect any duty to disclose under any other rule.”

[42] Part 73.16 also expressly made provision for sanctions by providing as follows:

“(1) Where a party, an attorney-at-law representing a party or a mediator fails to comply with any rule, order or direction under this Part or breach the confidentiality provisions of Rule 73.9, any other party, or the Mediation Coordinator, may apply to the court (supported by an affidavit) setting out the nature of the alleged failure or breach and serve a notice of the application and a copy of the affidavit on every other party.

(2) In determining any such application the court may make such order and impose such sanctions as may be appropriate including the removal of the mediator from the Roster of Mediators.”

[43] Part 73.17 additionally provides as follows:

(1) An application for relief from any sanction imposed for failure to comply with any such rule, order or direction under this Part or breach of the confidentiality provisions of Rule 73.9, must be –

- (a) made promptly; and*
- (b) supported by evidence on affidavit.*

(2) The court may grant relief from sanctions if satisfied that -

- (a) the failure to comply was not intentional;*
- (b) there is a good explanation for the failure; or*
- (c) the party in default has generally complied with all other relevant rules, orders and directions.*

[44] As I noted in a recent case, this court, as a superior court of record, in addition to the powers granted by the rules of court, undoubtedly does have powers (as distinguished from a discretion) which are necessary to enable it to act effectively within its jurisdiction under its ‘inherent jurisdiction’, to enforce its rules and prevent an abuse of its own process, which powers are exercisable by a summary process, without a plenary or full trial⁴. Such inherent powers may well be available to this court to supplement the provisions of Part 73 of CPR 2005; but as the parties did not come prepared to address me in relation to such inherent powers I will not decide this application by reference to them.

[45] It was submitted by Counsel on behalf of Mrs. Matura Shepard, that there was indeed no confidentiality of the court-connected mediation session held under Part 73 of the RSC on the 26th February 2015, as the rules only provide for confidentiality and non-disclosure of discussions in relation to other proceedings and that Mrs. Shepard was therefore at liberty to make any disclosures to the media in the way that she did as such disclosures were not part of confidentiality to which the rules referred.. Counsel for Mrs. Matura Shepard did not produce any specific authority in support of his proposition but relied on the clear terms of the stated rule which being penal would need to be clear to capture the conduct being impugned.

[46] Counsel for the GOB disagreed and submitted that the rules clearly provide for discussion during the mediation being confidential and that documents prepared solely for the purposes of the mediation are indeed also confidential and in addition prohibits a party or attorney-at-law representing a party from referring to or disclosing those discussions.

[47] I am grateful to Mrs. Bradley for the additional material which she provided and in particular I found the Jamaican case of **Margarette Macaulay v Harold Brady & Bruce Golding**⁵ helpful although the facts and the law were somewhat different to the facts, circumstances and applicable rules in the present case.

⁴ 485 OF 2013: SAMUEL KIM V M.E.L. INVESTMENTS LIMITED & RENDEZVOUS ISLANDS LIMITED. See paragraph 50.

⁵ 2010 HCV04850/2014.

[48] **The Margarett Macaulay Case** and the instant case both concern a mediation process, but unlike the present case, **The Margarett Macaulay Case** concerned a strike-out application for failure to participate in good faith at the mediation and by which lack of good faith it was alleged, caused the mediation to breakdown; with the issue being whether evidence could be given of the mediation session. The confidentiality of the mediation process thus became a live issue.

[49] Under the Jamaican Rules, as earlier observed, mediation is automatic and mandatory with sanctions (including strike-out of the claim) and provided for non-compliance and provisions for relief from such sanctions. The provision relating to confidentiality in **the Margarett Macaulay Case** is in similar, though not identical, terms to the rules in the present case and state as follows:

“Statements made by any person, documents produced and any other forms of communication made or transmitted during any state of the mediation including pre-mediation are confidential. Any such statements, documents and communication shall not unless otherwise discoverable, be subject to disclosure or any process, or be admissible into evidence in any arbitration, administrative adjudication, civil action, or other non-criminal proceeding for any purpose, including impeaching credibility.”

[50] Specific exceptions are also expressly provided for by the rule.

[51] In the **Margarett Macaulay Case**, after reviewing some authorities, P. A. Williams, J had this to say, which I consider equally applicable to the mediation process in Belize:

“The mediation process remains undoubtedly an important part of new dispensation in the judicial system..... Parties must indeed be encouraged to be frank and free in their discussion with each other and the mediator. The need for the participants to trust that their discussion will not be used for any other purpose is what ensures that the process works. One must therefore be very mindful of not doing anything that would cause participants to feel restrained in

*their discussions. The removal of expectations of confidentiality privilege and non-disclosure of document must be done in exceptional circumstances.*⁶ ”

[52] Counsel for GOB also referred me to a USA case from the District Court of Appeal of Florida, Fourth District, **Paranzino v. Barnett Bank of South Florida**⁷ which was a case not unlike the present one where statements were made to the media about matters taking place within a court-ordered mediation process. The trial judge found that the Attorney and his client deliberately breached the confidentiality provision of statute and rule of civil procedure governing the mediation process by disclosing the settlement offer to the Miami Herald newspapers set forth in the Mediation, the appellate court determined that:

“If the trial court were to allow this willful and deliberate conduct to go unchecked, continued behavior in this vein could have a chilling effect upon the mediation process.”

[53] I must say that after careful review of the provisions dealing with confidentiality within the context of the new Part 73 of the RSC 2005, the argument that the rules only provide for confidentiality and non-disclosure of discussions in relation to other proceedings, although it had a superficial attractiveness or cogency about it, did not stand up to even a slight or more than cursory scrutiny; with the result that, to put it mildly, I found myself not persuaded by it. Even more frankly I found myself unable to accede to the submissions by Counsel for Mrs. Matura Shepard as it lacked cogency.

[54] What could be clearer than the words “*Discussions during the mediation and documents prepared solely for the purposes of the mediation are confidential*”? If there was a period immediately after the word “confidential” no possible question could arise about its meaning.

[55] But because those words are followed by the conjunction “and” and followed by the words “*shall not be disclosed in any other proceedings*” Counsel felt able to

⁶ Ibid paragraph 46.

⁷ 690 So.2d 725 (1977).

mount the argument which he suggests qualifies the earlier phrase such that he submitted that it was possible to mount the argument that it follows that the phrase following the “and” qualifies the phrase that went before and creates the condition for doubt as to the meaning the whole provision.

[56] I cannot accept this submission based on the plain meaning of the words used as in my view it cannot be said that the conjunction “and” is able to detract from the duty of confidentiality which had been clearly stated to exist and to have been established by the earlier words. The words following the conjunction “and” merely, in my view speak to a particular mischief with which the provision was highlighting and reinforcing, of a particular kind of non-disclosure in and the use of confidential matters in relation to other proceedings.

[57] I accept that the specific provision could have emphasized the confidential nature of the whole mediation process and could have been a little clearer, but I do not accept that when looked at as a whole the provisions was unclear or created any doubt about the confidentiality of the mediation process such that any person, particularly an attorney-at-law, would have been uncertain that the mediation process was a confidential one; and would not have realized the need for preserving the confidentiality and absolute sanctity of this process - as without such confidentiality the whole basis of the mediation session would have been undermined.

[58] Indeed I consider the conduct of Mrs. Matura Shepard without any redeeming quality; and upon looking at the uncontested evidence presented I also consider Mrs. Matura Shepard’s conduct suggests that she could not have looked at or have had any regard to the rules, as her conduct suggest a wanton disregard to any notion of confidentiality.

[59] By going live on television to disclose to the media that an agreement had been arrived at between the parties, to disclose the terms of settlement arrived at, the nature and details of what was discussed during the session, that BGYEA was able to get seven out of its eight points with one pending about costs, and Mrs. Matura Shepard could claim on behalf of her client a victory while spelling out the terms

and what took place point by point, shows total disregard for any concept of confidentiality of what took place during the mediation session.

[60] Worst yet, if Mrs. Matura Shepard was aware of or had any appreciation for such mediation rules of confidentiality such conduct even suggest a deliberate and flagrant, even contumacious flouting of such rules by such a breach of its confidentiality provision as to be unimaginable by a responsible Counsel, and an officer of the court, of the rule of confidentiality, as it borders on contempt of this court's connected mediation process.

[61] I have even closely examined such conduct with a view of attempting to find some possible benefit that could result or be gained from making the subject disclosures to the press by the way described; and have concluded that the only possible benefit that could be gained from it, as far as I could discern, very unhappily, was self-publicity for the Defendant's Counsel, as the content and circumstances of such disclosure, it seems to me, tended to undermine even her client's own interest in satisfactorily concluding a final agreement with the GOB which was still being worked out at the time of such publication.

[62] The television disclosures were, in my view compounded by the publication in the newspaper article which in my view publicly displayed bad faith by an attorney-at-law still in the process of mediating a civil court dispute in a court-connected mediation which had not yet been concluded, by attempting to score public points, by making blatant personal and even veiled 'political' aspersions against the opposing attorneys in a way which was designed to undermine the integrity of the process. This cannot be sanctioned by this court of its process.

[63] It follows from what I have found above that I consider that Mrs. Audrey Matura Shepard did indeed breach the confidentiality provision of the mediation session by her public disclosure in the television interviews and by her newspaper article. As already noted there has been no application for relief from sanctions and in any event the evidence does disclose that the failure to comply may have been intentional, there is no good explanation or redeeming feature to the disclosure except the newness of the rules.

[64] Because these rules are new and there has been no ruling in this jurisdiction I have decided not to assume the absolute worst and will consider in mitigation the general tenor of the defence raised, and that such conduct may have resulted from lack of familiarity with the mediation rules under Part 73 and the serious consequence of such breach.

[65] Such mitigation cannot be prayed in aid of the singular bad faith displayed by Mrs. Matura Shepard toward the Attorney appearing for the GOB in relation to the mediation process which resulted in breach of the mediation rules. Such conduct cannot and ought not to be sanctioned by this court, and in relation to this aspect of the case this court considers that it is appropriate to impose a sanction of \$3,000.00 against Mrs. Matura Shepard being the same sum by way of cost order which had been ordered against the GOB on the 13th June 2014.

[66] No Counsel can now claim such ignorance given the present decision and ruling and can therefore expect no such leniency in the future.

Should any sanction be imposed against Mrs. Audrey Matura Shepard?

[67] For the reason given above I find that Counsel for the 1st Defendant, Mrs. Audrey Matura Shepard, did indeed breach the confidentiality of the court-connected mediation session held under Part 73.16(2) of the RSC on the 26th February 2015, and is ordered to pay, by way of sanction, for such conduct, the sum of \$3,000.00 imposed by this court.

Costs

[68] No order as to costs for the present application.

Disposition

[69] It is ordered that Counsel for the 1st Defendant, Mrs. Audrey Matura Shepard, by way of sanction, for breach of confidentiality, pays a fine of \$3,000.00 imposed by this court.

The Hon Mr. Justice Courtney A. Abel