

**IN THE SUPREME COURT OF BELIZE A.D. 2015
(CIVIL)**

CLAIM NO. 336 of 2015

BETWEEN

THE ATTORNEY GENERAL

Claimant

AND

JAMES DUNCAN

Defendant

Before: The Honourable Madame Justice Griffith
Dates of Hearing: 28th September, 2015; 7th October, 2015
Appearances: Ms. Trena Young, Senior Crown Counsel with Ms. Agassi Finnegan, Crown Counsel for the Claimant; Mr. Richard Bradley Jr. for the Defendant.

Preliminary Issue – Second Action between same parties with same subject matter – Application to Strike Out - Abuse of Process – Factors to be considered

DECISION

Introduction:-

1. The Claimant, the Attorney General on behalf of the Government of Belize ('the Government'), brings this action against James Duncan, the proprietor of an establishment being run as a private primary school called Tree House Academy ('the school') in the area of Boston Village, Belize District. The Government's case, is that the Defendant established and continues to operate the school without the requisite licence from the Ministry of Education, Youth and Sport ('the Ministry'), to do so. The establishment and continued operation of the school is claimed to be in direct contravention of the provisions of the Education and Training Act, No. 3 of 2010, of the Laws of Belize, preceded by the Education Act, Cap. 36.

2. The Attorney General seeks declarations that the Defendant is and has been unlawfully operating his school and that the school be ordered closed. The Defendant resisted the claim in the first instance by alleging that the proceedings were an abuse of the Court's process, by virtue of the existence of incomplete proceedings of the same subject matter in a court of concurrent jurisdiction. That argument was unsuccessful and the Defendant's substantive answer to the claim was that as a member of the Mennonite Community of Belize, he was not required to obtain a licence to operate his school by virtue of an agreement between the said community and the Government. The Court finds the Attorney General's claim to be successful and sets forth its reasons as follows below.

Issues:-

3. The issues raised in this case consist of a preliminary issue, which was raised prior to trial by an Application to Strike Out Claim, and the substantive issues which followed upon determination of the preliminary issue.

Preliminary Issue

(i) Are the proceedings an abuse of the Court's process?

Substantive Issues

(ii) Does the Defendant require a licence to operate his school?

(iii) If yes to issue (ii), what relief should the Court grant to the Claimant?

Background:-

4. The Defendant contends that the history of this matter dates back to the year 2000 when he applied for a licence to open his school and was told (by whom, it was not said), that he did not require a licence to open the school, as he was part of the Mennonite Community. The Mennonite Community, by written agreement with the Government of Belize, is said to be entitled to a number of concessions, including, the right to run their own schools with their own teachers, in their own language and according to their own religion. The Defendant purchased land in the area of Boston Village on which was later established what he terms his Mennonite Community Boston Village and the Destiny Training Center (subsequently to be called the Tree House Academy) was opened. Thereafter, the matter moves forward to the year 2008, from which time the Claimant also begins its account of the relevant facts.
5. In September, 2008 the Tree House Academy in Boston Village, was visited by the Village's District Education Council and the Defendant was informed that he required a licence to operate the school, without which the school would be closed down. The Defendant applied for a licence (the school was allowed to remain open for a period) but the Ministry in May, 2009 refused approval for the licence and ordered the Defendant to close the school. The Defendant appealed the refusal for a licence and for the next several years the Ministry continued to direct the school to be closed. The Defendant appealed every such directive but no appeal was heard until April, 2014. Throughout all those years the Defendant kept the school open despite the Ministry's directives and continued its operations.
6. The appeal was heard by the National Education Council ('the Council') on the 24th April, 2014 and the refusal of the licence was upheld.

The Defendant was notified and in July, 2014 the Defendant filed proceedings for judicial review in the Supreme Court against the decision of the Council. The Defendant was refused permission for judicial review of the decision in January, 2015 by way of an oral decision. The Defendant's school remained open and in operation and in June, 2015, the present claim was filed.

Preliminary Issue – The Defendant' Application to Strike Out for Abuse of Process

7. The Defendant applied for the claim to be struck out on the basis that it was an abuse of the Court's process. In ordinary circumstances, this application would have been heard as an interlocutory application, but given the subject matter being the operation of an educational undertaking, an expedited hearing deemed appropriate by the Court, which abbreviated the usual case management processes. The application was therefore dealt with as a preliminary issue at the substantive hearing of the claim.
8. The ground of the application was that the proceedings in which the Defendant sought judicial review of the Council's refusal to grant him a licence were not completed. More particularly, that as a written decision was outstanding in those proceedings, the Defendant had not been able to exercise his right of appeal. Further, the proceedings filed by the Claimant concerned the same issues and subject matter as the incomplete judicial review proceedings – viz, the question of the Defendant's operation of his school without a licence. The Defendant's submission therefore was that the current proceedings ought to be stayed or struck out as it was a re-litigation of an issue already before the court in the judicial review proceedings or alternatively that the current proceedings would frustrate the Defendant's pursuit of his right to appeal the judicial review action.

The Court's consideration – Issue I

9. The determination of the application to strike out required firstly examining the true import of the grounds of the application. It is submitted that the Defendant has been unable to consider whether to exercise his right of appeal because the reasons for the Court's refusal of permission have not been provided. In the first instance, the oral decision was delivered in January, 2015 and whilst the time limited for appeal would not yet have started to run as the oral decision had not been perfected, the absence of written reasons certainly could not have prevented the Defendant from filing a notice of appeal. This Court is in effect being asked to stop the proceedings before it whilst the Defendant continues to consider his options some nine months beyond the Court's decision in the judicial review proceedings.
10. Additionally, examining the true import of the ground of the application also requires the Court to consider the extent of overlap of the respective proceedings, given the argument of re-litigation of the same issue. The application for judicial review of the Council's proceedings could only by the very nature of judicial review, challenge the process by which the Council came to its decision to uphold the refusal of the licence for the Defendant to operate his school. Those proceedings at their most favourable result to the Defendant, could have resulted in no more than a quashing of the Council's decision and order for it to re-hear the Defendant's appeal against the refusal of his licence. There was actually no evidence submitted by the Defendant of the grounds of review advanced or the relief sought in the judicial review proceedings. Thus a true measure of the asserted re-litigation of the issue could not be taken.

11. With respect to the current proceedings, the issue before the Court is whether the Defendant is entitled to operate his school without a licence as it is a fact that no licence has been issued to the Defendant. The integrity of the administrative process and reasonableness of the Council's decision are not issues which concern the Court in these proceedings. It therefore cannot be asserted that the current proceedings involve a re-litigation of the same issues as in the judicial review proceedings.

12. The Court takes guidance in adopting this approach on the authority of several decisions. The first is the House of Lords decision in **Johnson v Gore Wood Co (a firm)**¹ where a statement of principle was made which would be later applied as a standard in abuse of process cases where the issue of secondary proceedings arose. The principle was stated thus (emphasis mine):-

"...that there was a public interest in the finality of litigation and in a defendant not being vexed twice in the same matter; but that whether an action was an abuse of process as offending against that public interest should be judged broadly on the merits taking account of all the public and private interests involved and all the facts of the case, the crucial question being whether the plaintiff was in all the circumstances misusing or abusing the process of the court.."

13. This decision was applied in **University of London v Tariquez Zaman**², which concerned an appeal from a decision of a Master refusing to grant an application to strike out a claim for damages as an abuse of process on the basis that the matter had already been litigated in two prior employment tribunals. Slade J therein commended the approach of the Master and firstly approved the finding that it was the applicant's burden of establishing that the claim for damages was an

¹ [2002] AC 1 (HL)

² [2010] EWHC 908

abuse of process. Slade J also acknowledged with approval³ *what he found to be the application of a broad based merit review of the different actions which went beyond the fact there was an overlap of factual issues and the parties*. The Master's decision was approved and upheld on the basis that the issues were fundamentally different from the earlier proceedings and in that regard the applicant had failed to prove the abuse of process.

14. In applying this approach to the instant case, the Court considers the following factors:-

- (i) All things being equal, there is a possibility that the Defendant's appeal could be successful and he thereafter be allowed to conduct his judicial review proceedings – this possibility however, is one which will take some time with no certainty of outcome in favour of the Defendant. Such a factor was viewed unfavourably by then Chief Justice Conteh in **Gilbert Smith v Belize Telecommunications Ltd & The Attorney General**⁴ in an application to strike out a claim in similar circumstances of a related appeal being in progress;
- (ii) The relative strength of the Defendant's position in the judicial review proceedings could not be assessed as the Defendant submitted no evidence of what that position was (as per Slade J in **University of London v Tarique Zaman**⁵ it is for the applicant to prove the abuse of process);
- (iii) Whilst accepted that the processing of the appeal would have required the Defendant to be provided with the Court's written reasons, the Defendant has been content to sit to date, in his words, considering his options with respect to the appeal, without

³ Ibid paras [36] – [39]

⁴ Belize HC Claim No. 116 of 2005

⁵ Supra

even filing a notice of appeal as evidence of the seriousness of his intention;

(iv) Given the nature of judicial review proceedings, it cannot be said that the issues which arise in the two claims are the same or that a favourable conclusion of the judicial review proceedings would dispose of the claim before this Court;

(v) There is an adverse outcome that may arise as a result of these proceedings in the form of displacement of students from the school, however that potential outcome has to be weight against all circumstances which fall to be considered.

15. In considering the matter in the round, the Court finds that the Defendant has failed to establish that he has pursued the appeal in the judicial review proceedings from his end, with any meaningful intent. The Defendant has instead continued to operate his school without a licence apparently without any concern that the issue of his contravening the law is a serious one, which ought to be settled, before he continues to jeopardize the lives of children by operating an unauthorized educational institution. Additionally, the Defendant has failed to establish to the Court, that the judicial review proceedings present the same legal issues currently before the Court in the instant claim. Instead, the Defendant has failed to adduce evidence of what grounds of review and relief sought were advanced and albeit to his detriment, the Defendant's Counsel candidly accepted that he was not in a position to assist the Court with respect to that information.

16. Even with the Court taking the possible outcome of successful judicial review proceedings at its highest, those proceedings could not conclude with the Defendant being found as entitled to be granted licence or to operate his school without a licence.

Those proceedings could only possibly conclude with a re-hearing of the Defendant's appeal against the refusal of his licence. Such a conclusion is quite far removed in length of time, from the outcome of these proceedings. This fact is coupled with the Defendant's equivocal advancement of his own position of the appeal and his deliberate and almost reckless persistence in operating his school without a licence, contrary to the Ministry's sustained position that he was operating unlawfully.

17. When the factors are considered in this light, the only factor which might be said to be in the Defendant's favour, is rendered ineffective. Particularly said, the adverse effect of the possible outcome of the current proceedings in the form of displacement to the students, does not begin to outweigh the remaining factors described above, which are unfavourable to the Defendant. In the circumstances, it is ruled that the Defendant's preliminary application to strike out the claim is without merit and is accordingly dismissed.

Does the Defendant require a licence to operate his school?

18. The Defendant did not at any stage of the proceedings deny that he does not possess a licence to operate his school. The Defendant's answer to the claim is instead that he did not require a licence as he is a member of the Mennonite Community of Belize and entitled to the benefit of an Agreement between the Mennonite Community and the Government of Belize (at the time British Honduras). This Agreement bestowed upon the former group, various privileges including the right to run schools according to their cultural and religious practices and beliefs.

19. In considering this issue, the Court must firstly refer to the Agreement and determine whether the Defendant is a person to whom the Agreement applies and thereby accordingly entitled to its benefit. If the Defendant's entitlement to the benefit of the Agreement is affirmed, the Court must also determine whether the Agreement has the legal effect of exempting the Defendant from the application of the law of obtaining a licence to operate his school. The Claimant's position is that the Defendant failed to prove that he was a person to whom the agreement applied.

(i) The Agreement:-

20. The Agreement was entered into in December, 1957 between the Government of then British Honduras of the one part and Representatives of the Kleingemeinde Mennonite Church of Mexico ('the Church') of the other part. The Agreement set forth the desire of the members of the said Church to settle in then British Honduras and the acknowledgment of the Government that the settlements would be to the mutual advantage of the Government and the members of the Church. These members were thereafter referred to for the purposes of the Agreement, as 'the Mennonites'. The Agreement then sets out what is referred to as 'in general terms, the conditions under which 'the Mennonites' will be permitted to settle in British Honduras.

21. The relevant clause of the Agreement reads as follows:-

"1. The Government of British Honduras will grant to the Mennonites -

(a) The right to run their own Churches and schools, with their own teachers, in their own German language, according to their own religion...."

The Agreement also set out a number of other 'rights' bestowed by the Government and thereafter, set out obligations of the Mennonites in clause 2. The Agreement concluded with clause 3 which provided -

"3. It is understood and agreed that the privileges granted by the Government shall be enjoyed by the Mennonites and their descendants for all time so long as the Mennonites observe and fulfil the conditions imposed upon them by this Agreement."

(ii) The Defendant and Mennonite Status

22. The Defendant's evidence was that in the year 2000, he applied for a licence to open a private school at his church then situated in Ladyville. The Defendant says he was told that he did not require a licence to open his school as he had Mennonite status and by the Privilegium (the Agreement as referred to above), the Mennonite community did not require licences to operate private schools. No evidence was provided as to whether it was a Ministry official who told the Defendant that he did not require a licence or some other person. Thereafter, in January, 2001 the Defendant purchased the land in which his Mennonite Community is now situated, in Boston Village.
23. As part of that purchase he was required to submit a development plan as the property comprised more than 10 acres of land. A plan of that intended community development was submitted to the Court. The Defendant says in June, 2009 he registered the name of his community – New Testament Mennonite Community, Boston Gardens with the Belize Companies and Corporate Affairs. The Defendant also claimed that a statement on their Community had been furnished by several residents of the Community as part of that registration process. The certificate of registration was submitted into evidence.

(iii) The submissions-

24. Counsel for the Claimants asserts that the Agreement applies to Mennonites of the group 'Kleingemeinde' and as the Defendant himself volunteered under cross examination, he was not a member of the Kleingemeinde group of Mennonites. In the circumstances says Counsel for the Claimant, the Defendant has admitted that the Agreement was not applicable to him. On the other hand, Counsel for the Defendant submitted that the class of beneficiaries created by the Agreement ought not to be interpreted in the sense of biological descendants limited to offspring, but rather in the sense of persons following the teachings and beliefs of the religion, hence 'disciples'.
25. If the definition were to be based on the former, Counsel for the Defendant submitted that it would be impossible for the Defendant to establish that he was a descendant. In the circumstances, it was urged that the interpretation of descendant should be the latter meaning, i.e. a follower of the teachings of the Mennonite Church. With respect to this latter interpretation, Counsel for the Claimants submitted that in any event the Defendant had failed to establish even that he was a follower of the Mennonite Church. Counsel for the Claimant further submitted, that the Defendant's community was not a community as it did not fall within the definition of such, under the Village Councils Act Cap. 88 of the Laws of Belize.
26. This Act provides that a community is an area not falling within any city, town or village, which is designated as a community by the relevant Minister by order published in the Gazette. It was submitted that there was no Mennonite or other community known as Boston Gardens, but that the area where the Defendant operated his school was a part of the legally recognized village known as Boston Village and as such was not a community.

The Claimant provided evidence in support of this contention in the form of maps of the relevant areas showing the Claimant's school located within Boston Village. The location of the claimant's school within Boston Village was neither denied nor contradicted by other evidence by the Defendant.

(iv) The Court's consideration – Issue II

27. The first determination to be made is with respect to what the Agreement provides. Does the Agreement create a special class of persons to whom it is to apply? On consideration of the plain language of the Agreement it does create a special class of persons to whom it applies. The Agreement was made with a Representative of the Kleingemeinde Mennonite Church for the benefit of the members of the said Church. As is done in almost all legal documents, the class of persons identified from the inception, was thereafter simplified by reference to a single word and that single word within the Agreement was 'Mennonites'. That the Agreement was entered into by and created for the benefit of the members of the Kleingemeinde Mennonite Church is clear and in the Court's view unequivocal. If it is that the term Kleingemeinde is descriptive of all persons who are of the Mennonite Church, this was for the Defendant to establish and he has not done so.
28. In order to claim the benefit of the Agreement therefore, a person has to establish that he or she is a descendant of the Kleingemeinde Mennonite Church as distinct from being only Mennonite. The Defendant volunteered under cross examination that he was not a member of the Kleingemeinde Mennonite Church. However, even if the Court was required to consider the argument put forward by the Defendant's Counsel that the Court ought to have chosen the interpretation of 'descendant' most favourable to the Defendant, the Court's position

would have been that as a matter of law, 'descendant' is legally defined with reference to bloodline – either directly or lineally, or collaterally⁶.

29. Counsel for the Defendant however, further submitted that the manner in which the Agreement has been executed and continues to be executed by the Government is that it applies to all Mennonites and the Defendant is a Mennonite. The Court accepts as submitted by Counsel, that as a matter of general knowledge, the term 'Mennonite', applies to Christians of a particular following and can encompass a cross section of ethnicities or nationalities, in which case it is open for the Defendant to submit to the Court that he is a follower of the Mennonite religion. As it pertains to the application of the Agreement by the Government however, the Court accepts Counsel for the Claimant's position that it would have been for the Defendant to provide evidence to the Court as to how widely the Government has interpreted and applied the Agreement as it pertains to a group of persons who may be Mennonite but not of the Kleingemeinde Church. The Defendant provided no evidence to the Court of the extent to which Government extends the benefit of the Agreement.

30. Even if it were open to the Court to find that the Agreement extended to any person who identified as Mennonite (as claimed by the Defendant), the evidence before the Court was not of such to enable to find the Defendant a member of that wider class. The Defendant's evidence in this respect was that he registered his Mennonite Community by name of the New Testament Mennonite Community, Boston Gardens and this was evidenced by a certificate of registration. The certificate supplied by the Defendant was for registration by him and other named persons, of 'Boston Garden' as a business name pursuant to the Business Names Act, Cap. 247 of the Laws of Belize.

⁶ Black's Law Dictionary, 10th Ed. pg 510

31. This Certificate in no way evidenced any establishment or connection to a Mennonite community. The certificate was evidence of the registration of a business name 'Boston Gardens' by the proprietors of a business. Additionally, the development plan submitted by the Defendant when purchasing his property in 2002 was also of no assistance for the Court to find that the Defendant was establishing a Mennonite community. The plan identified a number of services including residential, business center, medical clinic, school, church and more, which was intended to be open to the public at large. Such a plan is not consistent with a Mennonite Community. Further, the Defendant's initial application for a licence to operate his school identified himself as a citizen of the United States with experience operating a religious private school, desirous of establishing a similar school to serve the needs of the area within Ladyville in which he then was situated. There was no evidence provided by the Defendant which supported his contention that he had established and lived within a Mennonite community.

Conclusion

32. After consideration of all the substantive issues, the Court finds that the Agreement of 1957 was an agreement specifically entered into between the Government of Belize (then British Honduras) and group known as the 'Kleingemeinde Church of Mexico, for the benefit of the members of that group and their descendants. With respect to the term descendants, given the existence of a cross section of persons who by religious practice as opposed to ethnic or other qualification can be considered Mennonite, the reference to 'Kleingemeinde' is found to refer to a particular group and benefit of the Agreement would have to be restricted to descendants who can be classified as such.

33. If it is the case however that the Government has by its application of the Agreement extended the benefit to other groups of persons of Mennonite persuasion it was for the Defendant to establish that practice as a matter of evidence, so that he could claim that it was elevated to a right. This was not done by the Defendant by way of evidence introduced to support the manner in which the agreement was applied by Government. In any event the Defendant failed to make any counterclaim seeking the benefit of the agreement thus it would not have been open to the Court to make any positive finding in that regard. In the circumstances, it is considered unnecessary to enquire further into the issue of the status of the agreement as the Defendant has not shown himself to be entitled to the benefit thereof.

Final Disposition

34. The Defendant has not provided any defence to the claim that he requires a licence to operate his school. The Court's orders are as follows:-

- (i) It is declared that the Defendant is required to obtain a licence to operate his school 'Treehouse Christian Academy';
- (ii) The operation of the said school without a licence is in breach of the provisions of the Education and Training Act of Belize;
- (iii) An order is granted that the school be closed by 31st December, 2015;
- (iv) The Claimant is awarded costs to be assessed if not agreed.

Dated the day of November, 2015.

Shona O. Griffith
Supreme Court Judge