

**IN THE COURT OF APPEAL OF BELIZE, A.D. 2008**

**CIVIL APPEAL NO. 19 OF 2007**

**BETWEEN:**

**DAVID NOVELO  
ANTONIO NOVELO**

**Appellants**

**AND**

**MARK HULSE  
THE ATTORNEY GENERAL**

**Respondents**

**BEFORE:**

<b>The Hon. Mr. Justice Mottley</b>	<b>-</b>	<b>President</b>
<b>The Hon. Mr. Justice Carey</b>	<b>-</b>	<b>Justice of Appeal</b>
<b>The Hon. Mr. Justice Morrison</b>	<b>-</b>	<b>Justice of Appeal</b>

**Dr. Elson Kaseke for the appellant.  
Ms. Lois Young, S.C. for Mark Hulse.  
Mr. Edwin Flowers, S.C., Solicitor General for the Attorney General.**

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**23, 24 October 2007 & 13 March 2008**

**CAREY, JA**

1. The point at issue in this appeal is a very narrow one indeed. We are asked to consider whether the Chief Justice was right to refuse declaratory relief sought by the appellants although he held that their rights to fairness and to be heard had been breached in a report produced by the first respondent, a Forensic Auditor appointed in respect of an

inquiry into the Development Finance Corporation (DFC) a statutory corporation.

## THE BACKGROUND OF APPEAL

2. The Prime Minister, responding to public agitation especially by the Trade Unions, set up a Commission of Inquiry under the Commissions of Inquiry Act, Cap. 127 of the Laws of Belize to investigate as far as is material the DFC, to review the report of the forensic investigation when complete, and make appropriate recommendations. By statutory Instrument No. 24 of 2005 dated 9 March 2005, he appointed a Commission of Inquiry of three persons. The Government of Belize appointed the first respondent. Mr. Mark Hulse as a Forensic Auditor to work under the supervision of the Commission and to comply with any instructions which may be given to him by the Commission from time to time. The appellants had challenged the validity of his appointment before the Chief Justice, and when it was upheld had sought to maintain it before this court. Dr. Kaseke has resiled from that position and thus, so far as these proceedings are concerned, Mr. Hulse was validly appointed. The purpose of his appointment was to carry out a forensic accounting investigation to determine if any financial malfeasance occurred at the Corporation. The Forensic Auditor was to pursue the following objectives:

“Determine whether there was financial wrong doing at the DFC and/or whether the DFC was used as a vehicle through which to perpetrate financial wrong doing and the perpetrators thereof.

Determine whether there were deficiencies in the DFC’s lending policies, procedures, and internal controls.”

3. The Forensic Auditor was required to report to the Government of Belize, the Commission of Inquiry, The National Trade Union Congress of Belize,

the DFC, the office of the Director of Public Prosecutions and any other relevant authorities. The report would also set out findings and recommendations based on the scope of the investigations. On 2 March 2007, the Forensic Auditor submitted his final Forensic Audit Report in which the appellants complained that they were adversely affected by his findings, and as legitimate businessmen, the Report affected their business interests. The declaration which the appellants sought in the light of the adverse comments alleged against them was in the following form:

“A Declaration that the Report of Mark C. Hulse, Forensic Auditor into the Development Finance Corporation is null and void as against the Claimants since the said Mark C. Hulse failed to afford the Claimants their right to natural justice (right to be heard and to fairness) in the production of the Report when the said Mark C. Hulse made observations, recommendations and comments in the Report adversely affecting the personal and business affairs of the claimants without having interviewed or even spoken to the claimants and without informing them that he was investigating their business affairs.”

The Chief Justice was disposed to hold that the appellants were “not accorded an appropriate measure of justice by having the (first Respondent’s) Report being submitted and circulated without first having been given the opportunity to comment on, deny or refute or explain the findings therein. Fair play in action demanded no less”. (see Sachs LJ in *The Pergammon Press Ltd [1970] 3 ALL ER 534*), represented the thinking of the Chief Justice. The Respondents did not challenge or doubt that opinion.

THE APPEAL

4. For purposes of the appeal, that view must prevail but, for myself, I have great reservations in that regard. The Forensic Auditors status in my opinion, is analogous to a detective in the criminal investigation department of the constabulary. The detective like this auditor is required to determine whether there was wrongdoing and the perpetrators thereof. He was required to provide material for the use of the Commission of Inquiry. His contract required him to work under the supervision of the DFC. I am in entire agreement with the Chief Justice when he stated in his judgment (p. 17)(para. 37):

“I therefore find that to take any action against the claimants by any of the entities to whom the report is submitted without first giving them the opportunity to comment, deny or refute or explain the findings in the report would, in my opinion, be to deny them that appropriate measure of justice which fair play in action would warrant – Re Pergammor Press (supra)”.

Accordingly, I would unhesitatingly accept that fair play in action would be triggered at the stage of hearings before the Commission under whose supervision the Forensic Auditor was employed.

5. I return then to consider the issue of the refusal to grant the declaration. The Chief Justice found in the Forensic Auditor’s Report personal references to the appellants that called for explanation or refutations. He did not however go so far as to find wrongdoing on their part. That argument was correctly advanced by Ms. Young, S.C. It is worth the while examining the references to the appellants which as the Chief Justice suggests, entitles them to comment to the Forensic Auditor. An examination of the Report shows that the first respondent discovered numerous breaches of procedure, protocol and fiduciary duty in respect of loans to the appellants’ business holdings. The examples identified,

showed where loans in arrears were transformed to new accounts, the idea being that the new account was created to remove the delinquent loans from the active portfolio. Clearly no wrongdoing was being ascribed to the appellants or indeed, with respect, any conduct on their part to invite explanation or refutation. Any such, explanation would have to be forthcoming from the DFC, which was being investigated by the Commission of Inquiry. I am not persuaded that the Forensic Auditor was obliged to interview these appellants because their names or their company's name was mentioned in connection with breaches of procedure and the like by the DFC whose operations were the specific focus of scrutiny. To suggest as Dr. Kaseke has done that the report painted the appellants as perpetrators of "the wrongdoing", is in my opinion, not supported by the evidence and is to put his case higher than it really is. For these reasons, I am not attracted by the submissions assiduously deployed by Dr. Kaseke in his written arguments regarding the applicability of natural justice and fairness in regard to the appellants as respects the Commission and the Forensic Auditor respectively.

6. At this stage of the proceedings, it is now known that the Report has been published to sundry organizations and officials. I share the perplexity of the Chief Justice in understanding the thinking behind the decision to have such a wide mailing list, given that the Forensic Auditor was employed because of the appointment of the Commission and to assist that body. But even more astonishing, is the information that one of the Commissioners has handed in his report although the hearings have not been completed. It however matters not what his contains. No one doubts that it is without effect but it has served effectively to put an end to this Commission of Inquiry. As I take the view that the references in the Forensic Auditor's Report which might have found their way into the errant report of the single commissioner do not charge the appellants with any

wrongdoing, it is not reasonable to believe that their reputation or character could suffer any damage.

## CONCLUSION

7. The Chief Justice declined the relief sought because he thought that it would not serve any useful purpose. Nor do I. The appellants were not in my judgment wronged to warrant a declaration in their favour. I think the Chief Justice came to a right conclusion and for these reasons I agreed with others of the court that the appeal be dismissed with costs.

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**CAREY JA**

**MOTTLEY P**

I concur.

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**MOTTLEY P**

**MORRISON JA**

I entirely agree.

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**MORRISON JA**