IN THE SUPREME COURT OF BELIZE A.D. 2010

CLAIM NO. 778 OF 2010

BETWEEN

GLENN TILLETT **CLAIMANT**

AND

LOIS YOUNG BARROW
NESTOR VASQUEZ
SOCIAL SECURITY BOARD **DEFENDANTS**

NATIONAL TRADE UNION CONGRESS
OF BELIZE
CHAMBER OF COMMERCE AND INDUSTRY
BELIZE BUSINESS BUREAU **INTERESTED PARTIES**

Mr. E. Andrew Marshalleck SC and Mr. Godfrey Smith SC, for the claimant.
Dr. Lloyd Barnett and Mr. Nigel Ebanks for the first and second defendants.
Mrs. Agnes Gillett for the third defendant.

AWICH Chief Justice (Ag)

19.4.2011 **DECISION**

1. *Notes:* *Civil Procedure and Practice – an application to strike out claim on the ground that the defendants were public authorities and prior one month notice of the claim had not been given to the defendants before the claim was commenced; whether a letter to the Chairman (the first defendant) of the third defendant was sufficient notice; s: 3 of Public Authorities Protection Act, Cap. 31 and r 26.3.*

Civil Case Procedure and Practice – an application for permission to amend a claim, application filed after first hearing, and two working days before the date appointed for hearing – rr: 20.1(3) and 11.3(1); the discretion to allow or refuse amendment is exercised according to where justice lies; amendments may be allowed before, during or after trial; and only exceptionally after judgment, provided the order of court is not yet drawn, and that reopens the case..

2. Yesterday in chambers I expressed great disappointment at the parties filing interlocutory applications a mere two working days before the day appointed for trial to commence. The claimant filed his application on Thursday 14th April 2011; the three defendants also filed their joint application on that day. Trial was to commence on Monday 18th April 2011, and to last for two days. I was greatly disappointed because the hearing of the applications could cause the hearing of the substantive claim to be adjourned, or delayed and not completed within the two days allocated for trial. It has been said that trial is no longer a matter of ambush; it seems ambush is still very much on the minds of some attorneys, including senior attorneys.

3. I said yesterday that I would hear the two applications and reserve my decisions to the final determination after the trial of the claim. After hearing the applications, it became clear that I should give my decisions in the applications straightaway because the decisions could terminate the claim or authorise amendments which may affect the way the claim and defence are conducted.

4. The application of the claimant sought orders to amend his claim. All the amendments were not matters that arose after the first hearing/case management conference on 19.1.2011, at which the hearing dates were agreed. The claimant should have raised the amendments then. Moreover, two of the amendments have not been opposed. It would appear that attorneys for the claimant did not bother to know before filing the application, whether all or any of the requests for amendments therein would be opposed. The Supreme Court (Civil Procedure) Rules, 2005, encourage exchanges between parties with a view to minimising costs, and even to reaching a settlement.

5. Similarly the defendants had been aware all the time of the single point in their joint application, namely, that notice to them had not been given under s: 3 of the Public Authorities Protection Act, Cap. 31. They too should have made their application for an order to strike out the claim, during the first hearing.

6. Attorneys are required to make proper use of the time allocated for case management conference or first hearing, and pre-trial review in order to avoid using part of the day allocated for trial for businesses that belong to case management conference or first hearing or pre-trial review. That way adjournment or delay of trial will be avoided.

7. In these proceedings all parties attended the usual first hearing on 20.12.2010 and 19.1.2011, as required. Matters that were outstanding

were raised and direction orders were made about them; otherwise parties informed the judge (myself) that the case was ready for trial. It is disappointing to go back to case management business on the day of trial. Had only one party been disregardful of the occasion for first hearing I would have ordered costs incidental to the late application to be paid by that party, in any event.

8. *The application for amendments by the claimant*

The application by the claimant requested certain amendments to the original claim and claim form by substituting other references to sections of the Social Security Act, Cap. 44; and an order requiring disclosure of a legal opinion which had been obtained by the Social Security Board, the third defendant, prior to the commencement of these proceedings.

9. Learned counsel Mrs. Agnes Gillett for Social Security Board, took the sensible view that, she would not object to disclosing the legal opinion, despite any client-attorney privilege. It is time anyway, for any legal point relied on to be revealed in court if it is a sound advice. Skeleton arguments have been exchanged. An application seemed unnecessary. Certainly, a court order is now unnecessary about this request.

10. Regarding the amendment to substitute reference to s: 10 of the Second Schedule of the Social Security Act, for reference to s: 12 of the Second Schedule, both learned counsel Dr. Lloyd Barnett and Mrs. Gillett, for the defendants, do not oppose the amendment which merely substitute the correct reference for the earlier erroneous one. The Second Schedule was amended by Act No. 20 of 2007, and s: 12 became s: 10 of the schedule. Further, both counsel do not oppose the deletion of the name Anwar Barrow from one of the reliefs claimed in the claim form. He is no longer a director. These two amendments are granted as matters of consent.

11. The proposed amendments that are contested are the introduction of s: 49 (11) of the Social Security Act, and s: 9 of the Third Schedule made under s: 49. Section 49(11) of the Act and s: 9 of the Third Schedule were also introduced by Act No. 20 of 2007. The defendants oppose the two amendments on the ground that the introduction of the laws in s: 49(11) and s: 9 of the Third Schedule is not a consequence of, a "change in the circumstances" of the case, "which became known after case management conference." The case management had been conducted at the first hearing as usual. The defendants rely on R 20.1(3) of the Supreme Court Rules, 2005. The Rule states:

> "(3) The court may not give permission to change a statement of case after case management conference unless the party wishing to make the change can satisfy the court

that the change is necessary because of some change in the circumstances which became known after the date of that case management conference."

12. It is correct that the introduction of s: 49(11) of the Act and s: 9 of the Schedule do not follow from change in the circumstances, that is, from a change in the facts of the case, since the first hearing in this claim. Section 49(11) sought to be introduced by the amendment, states:

> "11. If any member of the Committee or other persons present at a meeting of the Committee has a financial interest, directly or indirectly, in any contract or proposed contract or other matter to be considered by the Committee, he shall forthwith disclose the fact of his interest to the committee and he shall not participate in the discussion, consideration or voting on such a contract or other matter, and the fact of such disclosure shall be recorded in the minutes of the said meeting."

13. Section 9 of the Third Schedule made under s: 49 of the Act, and which is also sought to be introduced by amendment, states:

> "9. The Committee shall give advance public notice of all proposed investments by the Fund by publishing in at least two consecutive issues of the Gazette and in at

least two newspapers of general circulation in Belize, a notice of its intention to lend or invest the moneys of the Fund, giving all pertinent details."

14. The amendments to introduce s: 49(11) of the Act and s: 9 of the Third Schedule are amendments to replace references to the laws as existed when the claim was filed, and at the time of the first hearing. More details regarding the duty of a director to disclose self interest, and about publicity of investment by the Finance Committee have been given in the new sections, so the grounds for the claim seem wider. The claimant says he was not aware of these laws which were introduced by an amendment Act, in 2007. Obviously his attorney did not research the law adequately before he prepared the claim. That is no excuse in law. But the larger question remains whether it is just to allow the amendment at all, or at this late stage.

15. Act No. 20 of 2007, like any other Act, is a public document; court is required to take judicial notice of Acts of the National Assembly. **Section 6 of Interpretation Act, Cap. 1, Laws of Belize**, states that: "*Every Act shall be a public Act and shall be judicially noticed as such.*" That means this court would take into account s: 49(11) of Chap. 44 and s: 9 of the Third Schedule in deciding the claim, whether or not an application was made for amendment to introduce reference to the statutory provisions.

16. Regarding R 20.1(3) relied on by the defendants, it is my respectful view that it does not prohibit court from giving permission to change, that is, to amend a statement of case, after case management conference, but it points to the general rule that the discretion is generally exercised based on a change in the circumstances of the case, which became known after the date of the case management. Case law shows that those two conditions are not the only conditions. Often the overriding objective of the Rules requires addition to or departure from the two conditions in the rule. The case, **Willis Charlesworth v Relay Roads Ltd. [1999] 4 All ER 397**, cited by learned counsel Mr. Andrew Marshalleck SC, for the claimant, is a good illustration.

17. It was said in that case that amendments may be allowed before trial, during trial, during closing speeches and even after judgment which may lead to reopening the case. But the court must consider whether justice lies in favour of or against allowing the particular amendment; and whether the amendment can be made without injustice to the other side – see **Ketterman v Hansel Properties [1987] AC 189**; **Worldwide Corporation Limited v GPT Limited, Court of Appeal (England) 2nd December 1998,** and **Galev Superdrug Stores [1996] 1 WLR 1089**.

18. In my view, it is just to all parties in this case that, the new sections of the law with all the new details be brought to the attention of the

defendants and interested parties, and even to the attention of court, so that the details in the law are addressed fully. I see no prejudice arising to any party. The application for permission to amend the claim by introducing reference to s: 49(11) of the Social Security Act, and s: 9 of the Third Schedule made thereunder, is granted. The amended draft may be filed.

19. *The application by the defendants*

. The application dated 12.4.2011, by the defendants, filed also on 14.4.2011, raises a substantial point which should have been taken at the first hearing *in limine*. The application requests the following orders:

> "i) An order pursuant to rule 26.3(1)(c) to strike out statement of case, particularly to strike out the fixed date claim form and affidavit in support in this matter;
>
> ii) Alternatively, an order pursuant to rule 26.3.(1)(a) to strike out statement of case particularly to strike out the fixed date claim form and affidavit in support in this matter."

20. The ground relied on by the defendant is that the defendants are public authorities under s: 2 of the Public Authorities Protection Act, Cap. 31,

Laws of Belize; and that the claimant was required by s: 3 of that Act to give one month notice in writing before he served the fixed date claim on the defendants.

21. Section 3 of Cap. 31 states as follows:

> "3.-(1) No writ shall be sued out against, nor a copy of any process be served upon any public authority for anything done in the exercise of his office, until one month after notice in writing has been delivered to him, or left at his usual place of abode by the party who intends to sue out such writ or process, or by his attorney or agent, in which notice shall be clearly and explicitly contained the cause of the action, the name and place of abode of the person who is to bring the action, and the name and place of abode of the attorney or agent.
>
> (2) No evidence of any cause of action shall be produced except of such as is contained in such notice, and no verdict shall be given for the plaintiff unless he proves on the trial that such notice was given, and in default of such proof the defendant shall receive in such action a verdict and costs."

22. The claimant concedes that the defendants are public authorities by statutory definition. He contends however, that notice is not required when a claim is brought by a fixed date claim form; notice would be required where a claim was brought by a general claim form which has replaced a writ of summons. Secondly, the claimant contends that notice was not required because the defendants had been fully aware of the claim to be brought against them.

23. I reject the first contention. Section 3 prohibits service of *a writ of summons or any process of court*, before prior notice of the claim has been given. A process of court is by definition, a document issued by court to require the attendance of parties, or the performance of some initial step in the proceedings by a defendant. So a process used to initiate proceedings is referred to as an originating process. A fixed date claim is a process of court under s: 3 of Cap. 31; it has not been expressly excluded.

24. I accept that in some claims notice to a public authority is not required. One obvious example is a constitutional claim. Fundamental rights under the Constitution are not subject to conditions; in any case, such conditions would have to be provided for in the Constitution itself. It was said in, **Belize City Council v Gordon 3 BZ L R 363**, "that the Public Authorities Protection Act does not apply to actions for breach of contract." With greatest respect, I think that generalisation according to head of claim, that is, by the law under which the claim has been

brought, could lead to error. The deciding factor as to whether prior notice of a claim is required is whether the wrongful act or omission alleged in the intended claim has been done or carried out "in the exercise of [the] office" of the public authority. In my view, the wrongful act or omission must arise or be connected to the exercise of office, that is, to the functions or duties of the office of the public authority.

25. In **Castillo v Corozal Town Board and Acosta 1 BZ L R 365**, the Town Board was a public authority. Its driver while driving in the course of employment (in furtherance of the duties of the Board), drove the Board's vehicle into the claimant's car causing considerable damage. It is easy to see the connection between the wrongful act and the duty, the function of "the office" of the Board. It was not because the claim was in Tort that notice of the claim was required to the public authority. It was because the wrongful act occurred in the course of carrying out duties. The Court of Appeal held that giving prior notice and proving by evidence at trial that prior notice had been given to the Board, a public authority were mandatory statutory requirements. The appeal was dismissed.

26. In this claim, the defendants made the decision complained about in the exercise of their office under the Social Security Act. The claimant in fact pleads that much. The only question that remains to provide answer to the issue in the application by the defendants, is whether the notice required has been given. Section 3 does not provide a format of

the notice to be adopted, although it requires that the notice shall contain: the cause of action, the name and place of abode of the person who is bringing the action and the name and place of abode of the attorney or agent.

27. It is my respectful view that, the letter dated 3rd November 2010, of Mr. Glenn Tillett to Lois Young, Chairperson, Belize Social Security Board, meets the requirements of notice under s: 3(1) of Cap. 31. A copy of the letter has been exhibited ('GT 10') to the affidavit of Mr. Tillett in support of his claim. So it is in evidence as required by s: 3(2). Proof will be decided at trial.

28. The application dated 12.4.2011, by the defendants is dismissed.

29. No order as to costs of both applications because the claimant and defendants flouted the Rules of Court by bringing these interlocutory applications late, after the first hearing, and without justification. The interested parties then chose to support the late application by the claimant.

30. Trial of the claim to proceed.

31. **Delivered this Tuesday 19th day of April 2011**

At the Supreme Court

Belize City

SAM LUNGOLE AWICH
Acting Chief Justice
Supreme Court