

IN THE SUPREME COURT OF BELIZE A.D. 2009

CLAIM NO. 796 OF 2009

BETWEEN

JENNIFER LONGSWORTH

CLAIMANT

AND

CHARLESTON CLELAND

DEFENDANT

Mr. Rodwell Williams SC, for the claimant.
Mr. Linbert Willis for the defendant.

AWICH Chief Justice (Ag)

24.3.2011

RULING

1. *Notes: Failure to comply with case management order to parties to file witness statements by a specified date; both parties in default; the claimant (as a witness) testified, the defendant did not raise objection, but when it was the turn of the defendant to call witnesses the claimant objected. R 2.9 of Supreme Court (Civil Procedure) Rules 2005 Proceedings by a fixed date claim form impliedly converted by a general claim form.*

2. On 21.2.2011, the trial of this case commenced. The claimant testified as a witness to establish her claim for possession of land, Parcel 236, Block 45, Fort George Pickstock Registration Section, Belize City. Her claim was based on a Land Certificate. She was the only witness; her

case was closed. When the defendant called its first witness, learned counsel Mr. Rodwell Williams SC, for the claimant, objected to the witness testifying on the ground that the witness statement of the intended witness had not been filed and a copy delivered to the claimant or her attorney. The objection was made under R 29 of the Supreme Court (Civil Procedure) Rules 2005. I overruled the objection.

3. The reasons I gave for rejecting the objection was that both the claimant and the defendant failed to file witness statements in time, that is, “before the 15 day of March 2010.” The claimant filed witness statements on 26.3.2010, ten days late, the defendant on 16.3.2010, the day after the deadline. He believed wrongly that he acted in time, and so he filed the witness statement in a sealed envelope. However, he did not serve notice on the claimant notifying that the defendant had filed witness statements in a sealed envelope. R. 29.7(2)(b) requires that a party filing a witness statement or summary in a sealed envelope must give notice of so filing the witness statement to the other party.
4. Given that the claimant’s witness had already testified, I directed that the way forward was to allow the defendant to call his witnesses. Thereafter there was no time to proceed with the trial, it was adjourned to today 24.3.2011.
5. Mr. Williams has today requested me to reconsider my decision of 21.2.2011. He submitted that an important point passed unnoticed: the claim was commenced by a fixed date claim on 14.9.2009; the fixed

date claim form was filed with an affidavit of the claimant, the witness who has testified. The significance of that, Mr. Williams argued, was that the entire evidence for the claimant had already been disclosed by the time she testified in court, and no prejudice was occasioned to the defendant by late filing of the claimant's witness statement, whereas to allow the defendant to call witnesses to testify would occasion monumental prejudice to the claimant who would be ambushed.

6. I reopened my ruling for the reason that there was apparent error that the proceedings were being conducted as proceedings by a general claim form whereas at commencement the proceedings were by a fixed date claim.
7. The claim was commenced by a fixed date claim dated 24.8.2009, filed on 14.9.2009. It was supported by an affidavit of the claimant, dated the same day as the fixed date claim, but filed on a later date on 29.9.2009. There has been no complaint that the affidavit was not served together with the fixed date claim or at all, so it is not material that the affidavit was filed 15 days later. The fixed date claim was indorsed with a date of first hearing.
8. It is my respectful view that, there have been errors in the earlier part of the proceedings. The claim was indeed commenced by a fixed date claim indorsed with a date of first hearing. The fixed date claim and the supporting affidavit were served on the defendant. He filed a

memorandum of defence, not a defence (an answer) in the form of an affidavit.

9. The usual practice is to file an affidavit in which the defence is disclosed, however, the Rules at R.10.2(1) and 10.2(2) are permissive of the unusual practice of filing a memorandum of defence. The rules state as follows:

“10.2 (1) A defendant who wishes to defend all or part of a claim must file a defence (which may be in Form 5).

(2) However, where –

(a) a claim is commenced by a fixed date claim form in Form 2 and there is served with that claim form an affidavit instead of a statement of claim; or

(b) ...

the defendant may file an affidavit in answer instead of a defence.”

10. On the occasion of the first hearing, the learned judge made orders which were peculiarly applicable to proceedings by a general claim form, although she did not make a specific order that the proceedings

were converted to those by general claim form. Impliedly she converted the proceedings to proceedings by a general claim form. That is the stage at which the proceedings began to take the wrong course. The orders made were the following:

“IT IS HEREBY ORDERED:

1. That the Claimant and Defendant do make standard disclosure on or before the 15th February 2010.
 2. That the Claimant be at liberty to call three witnesses.
 3. That the Defendant be at liberty to call six witnesses.
 4. That the parties file and serve witness statements on or before the 15 day of March 2010.
 5. That the Listing Questionnaire to be sent out by the court office on 29th March 2010 and to be returned by the 19th April 2010.
 6. That witness statements do stand as examination-in-chief. All witnesses are to attend the hearing for cross-examination, unless the other side dispenses with such attendance by notice in writing.
 7. That the Pre-trial Review Conference be held on Tuesday the 4 day of May 2010 before the Hon. Justice Muria.”
11. After that hearing, the case was transferred or simply listed for pre-trial review before another judge. The second learned judge did not notice the wrong course that the proceedings had taken. On 4.5.2010, he made the following orders:

“By 7/5/10 Additional materials to be filed by Def.
By 30/6/10 Facts and issues as agreed
By 30/9/10 Skeleton Arguments
13 – 14/10/10 Trial (2 days).”

12. Unfortunately the learned judge left Belize at the end of his term of employment before the trial. The case was then listed before me for trial. On the case file was a sealed envelope containing witness statements for the defendant. There was also one witness statement for the claimant.
13. On 21.2.2011, the trial commenced in my court without any objection being raised. The claimant testified in support of her case and closed her case. When learned counsel Mr. Linbert Willis, for the defendant, presented a witness for the defendant, Mr. Williams raised the objection to the witness testifying when the claimant had not been served with the witness' statement or notice of filing it in a sealed envelope.
14. When the court pointed out to Mr. Williams that the claimant herself was late in filing her witness statement, Mr. Williams answered that it was for the defendant to have objected, he did not object.
15. With due respect, it is not correct that if the other party (the defendant) does not object, then the first party (the claimant) may be allowed to call witnesses notwithstanding that the first party filed witness

statements late. R. 29.11(1) simply prohibits calling a witness whose witness statement was not filed and served on the other party in time, unless the court permits. The prohibition obtains whether or not the other party has objected. I set out the rule here:

“29.11(1) If a witness statement or a witness summary is not served in respect of an intended witness within the time specified by the court, then the witness may not be called unless the court permits.

(2) The court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under R. 26.8.”

16. Permission of court is the only way out. It is obtained on application by the defaulting party. In this case both parties defaulted. Neither applied for relief from the sanction of being denied to call their witnesses. Both have not obtained permission to call their witnesses. The claimant cannot avoid the sanction in R. 29.11(1), and benefit from the mere fact that by an oversight its witness has already testified. The defendant cannot be denied the same benefit just because the claimant has objected.

17. What has happened is that this claim by a fixed date claim was converted by the first judge who dealt with it on 17.12.2009, to a claim

by a general claim form. Both did not comply with the order to file witness statements by 15.3.2010. To refuse both parties to call witnesses will have the effect of dismissing the claim without deciding on the evidence. To refuse the defendant only to call his witnesses when the court has already allowed the claimant to testify as a witness, is unfair.

18. The way forward which will ensure fair procedure is for the court to allow both the claimant and the defendant to call witnesses. To cure the prejudice complained about by the claimant, I allow the claimant to reopen its evidence, and she may re-testify. The defendant may then call his witnesses.

19. **Delivered today Thursday 24th day of March 2011**
At the Supreme Court
Belize City

SAM LUNGOLE AWICH
Acting Chief Justice
Supreme Court