IN THE HIGH COURT OF BELIZE A.D. 2023

CLAIM No. CV203 of 2023

BETWEEN:

[1] CHAD SPAMAN

Claimant/ Applicant

and

[1] INVESTMENT BELIZE PARTNERSHIP LTD.

Defendant/ Respondent

Appearances:

Ms. Naima Barrow for the Claimant/ Applicant

Mr. Darrell Bradley and Ms. Kimberly Wallace for the Defendant/ Respondent

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2024: June 24;

October 03.

RULING

Civil Practice & Procedure – Evidence – Affidavit Filed During the Hearing of Arguments on Notice for Judgment on Admission – Whether the Respondent was in Breach of the Procedure for Filing the Affidavit – No Permission Obtained to File the Affidavit – Whether the Failure to Give the Other Side an Opportunity to Apply to Cross-Examine the Affiant was Unfair and Prejudicial – CPR 30.1(3) & (4) – Whether the Affidavit Contains Serious Allegations of Fraud, Deception & Abuse of Process of Court and Should be Struck Out – Power of the Court to Control Evidence and to Strike Out Scandalous & Irrelevant Evidence – CPR 29.1 and 30.3(3).

[1] **ALEXANDER, J.**: Before me are two applications, the substantive application for judgment on admission and an application to strike out an affidavit, which has overtaken the substantive application and requires a determination first in time. The application to strike out the affidavit was filed on 19th February 2024.

[2] The affidavit in question was sworn and filed on 9th February 2024 by Mr. Tom Hitchcock, the principal of the defendant ('the Hitchcock affidavit"). The application to strike out also came in the intervening period when the court, having heard extensive oral submissions on the substantive application for judgment on admission, had adjourned the matter part heard for reply submissions by the defendant. The claimant had made his application for judgment based on an admission contained in the ancillary claim filed by the defendant. Without securing permission, the defendant filed the Hitchcock affidavit. In swift response, the claimant moved to excise the Hitchcock affidavit from the proceedings as being scandalous, irrelevant and oppressive.

[3] The claimant's main ground for seeking to remove the Hitchcock affidavit was that it made serious allegations of fraud, deception and abuse of process without deposing to any relevant evidence in support. It was also in breach of the procedural rules for timeous filing and was done without seeking the permission of the court. Further, as it was filed without notice, the claimant was deprived of the opportunity to apply to cross-examine the deponent. The claimant relies on Parts 29.1 and 30.3(3) of the Civil Procedure Rules 2005 ("CPR") that empower the court to control the evidence before it and to strike out scandalous, irrelevant and oppressive evidence.

[4] I find the evidence deposed to in the Hitchcock affidavit to be incautious and unsupported by reliable evidence. Moreover, in complete disregard for the court's case management of the proceedings before it, the defendant filed the Hitchcock affidavit on the basis that it was relevant evidence that the court should have. It is trite that a court must in the interest of justice have all relevant evidence before it and retains the power to manage this evidence. Thus, whenever new evidence that is germane to the proceedings before it becomes available, the court will usually facilitate the hearing of an application to determine if the evidence is relevant and whether it is in the interest of justice that the evidence be admitted. Unfortunately, the defendant made no approach to the court before filing of the Hitchcock affidavit. The defendant neither sought leave nor demonstrated that the evidence was relevant, or that it was in the interests of justice that it be admitted.

[5] The overriding objective requires that in managing the evidence before it, the court must be just to both parties. I, therefore, grant the claimant his application and strike out the Hitchcock affidavit. I order the defendant to pay the cost of this application to the claimant.

[6] I shall refer to the claimant as "Mr. Spaman" and the defendant, Invest Belize Partnership Limited as "IBPL".

Background

[7] By the time of the filing of these applications, this matter had advanced beyond the case management stage where there was full compliance with all court directions including the filing of witness statements and notices of evidential objections. The trial was fixed for 29th January 2024 at 9:00 a.m. in-person, which trial date was lost because of the application for judgment on admission filed on 17th November 2023.

[8] Having outlined the above, only a short procedural history of the claim is required, to give context to the making of this new application to strike out the Hitchcock affidavit. Also, this history will serve to frame the discussion for the present ruling below.

[9] The claim was filed on 4th April 2023 seeking a declaration that a loan agreement between the parties was breached, the recovery of BZ$32,766.40 and, in the alternative, damages. The parties had entered the loan agreement in or around December 2019 for the defendant to supply 6,000 board feet of dressed Bullet Tree Wood at the cost of BZ$2.20 per board foot, totalling BZ$13,200 and for 3,000 board feet of Psalm Wood at the cost of BZ$3.00 per board foot, totalling BZ$3,300 (together "the Wood agreement").

[10] In accordance with the Wood agreement, Mr. Spaman paid IBPL the sum of BZ$22,200 plus a 15% management fee charged by IBPL of BZ$3,330. Mr. Spaman claims that IBPL acted in breach of the Wood agreement when it failed to deliver the wood or return his payment to him. In the alternative, Mr. Spaman pleaded that IBPL, having received the sum of BZ$25,530 that was for the use of Mr. Spaman without supplying the wood, was in breach. Mr. Spaman claims the return of the sums paid plus legal fees and interest in the global sum of BZ$32,766,40.

[11] IBPL did not admit any part of the claim in its acknowledgement of service but filed a defence on 9th June 2023. The defence pleaded a limited agency. Thus, IBPL denied the existence of the Wood agreement between the parties and its terms, as claimed by Mr. Spaman, and advanced instead that parties had agreed that IBPL would only locate a supplier of the wood and be a channel for the payment to that supplier. It was not agreed that IBPL would supply wood to Mr. Spaman. In essence, IBPL was to act as a locater of a wood supplier and a payment agent for the wood. This transaction was to be done through an independent contractor whom IBPL would pay, once authorised by Mr. Spaman to do so.

[12] IBPL located the supplier as agreed, who was Mr. Diamir Ortega. IBPL confirmed that Mr. Ortega could supply the quantity of wood requested before introducing Mr. Ortega to Mr. Spaman. Following introductions, it was also agreed that Mr. Ortega would source and mill the wood, and he would deliver the wood directly to Mr. Spaman. At no time was IBPL to supply or deliver the wood directly or at all to Mr. Spaman, as it had no control over Mr. Ortega. Indeed, IBPL was not engaged in the business of selling or supplying wood.

[13] Having been introduced to Mr. Spaman, Mr. Ortega requested payment for the wood upfront and Mr. Spaman agreed, approved and authorised IBPL to make the payment directly to Mr. Ortega. IBPL made the payment to Mr. Ortega, as authorised by Mr. Spaman, and provided a receipt of such payment. At all material times, Mr. Ortega was an independent contractor engaged to supply Mr. Spaman with wood and was not associated or connected to IBPL.

[14] Further, IBPL stated that the quantity of wood to be supplied was reduced. IBPL received only BZ$18,000 from Mr. Spaman plus the fee of BZ$2,700 and attaches evidence of this to its defence in the form of an email. The sums that Mr. Spaman now seeks to recover in his claim are erroneous.

[15] IBPL, therefore, denies the existence of any contract between Mr. Spaman and IBPL for the supply of wood and/or that IBPL was in any breach of the alleged Wood agreement.

IBPL also denies responsibility for any non-performance by Mr. Ortega, maintaining that it had paid Mr. Ortega, with full knowledge, concurrence and approval of Mr. Spaman. In further answer to the claim, IBPL stated that the wood in question was for the purpose of building a barn, which Mr. Spaman directly contracted Mr. Ortega to build. The barn was built subsequently using the specific quantity of wood supplied by Mr. Ortega, which supports IBPL's case that the wood was indeed supplied to Mr. Spaman, in accordance with the terms of the supplier locater agreement. Thus, in its defence, IBPL raised estoppel to prevent Mr. Spaman from claiming any refund of the sums paid to Mr. Ortega.

[16] In his reply, Mr. Spaman maintained his claim that IBPL was and continues in the business of selling lumber near Maya Beach area in Placencia, Stann Creek Village, Belize. Moreover, the Wood agreement was not *ultra vires* the powers of IBPL and, if it were, then IBPL has misrepresented its powers to Mr. Spaman. Mr. Spaman stated that IBPL represented, verbally and by its conduct, that it was able to **supply** the wood and evidenced this by collecting the payment for both the wood to be purchased and the 15% management fee for overseeing the transaction for supplying the wood.

[17] Mr. Spaman relies on the representation made by IBPL under the Wood agreement to support his case that IBPL was engaged to supply and deliver the wood and for that purpose had assigned Ms. Lisa, one of IBPL manager employee, the responsibility to oversee the process. Pursuant to the Wood agreement, IBPL was to source, price, supply and deliver the wood, as well as invoice for its service and engage the supplier directly. Further, Mr. Ortega was a foreman of IBPL and not an independent contractor. Mr. Spaman denies knowledge of any independent arrangement between IBPL and Mr. Ortega or of any separate authorisation to pay Mr. Ortega. The Wood agreement was with IBPL for the purchase/supply of wood, to whom the purchase price was deposited based on fees quoted by IBPL for it to handle the details and deliver the wood including the project management of this delivery through IBPL's employee.

[18] As the wood contracted for was never supplied or delivered to Mr. Spaman, he denies that estoppel arises on the facts and claims that IBPL is liable for the sums paid to it in reliance on the misrepresentation by IBPL.

The Hitchcock Affidavit

[19] I find it necessary at this stage to examine the Hitchcock affidavit, particularly the parts challenged by Mr. Spaman. At the time of its filing on 9th February 2024, the Hitchcock affidavit was filed long after the commencement of the hearing of the substantive application for judgment on admission on 18th January 2024. Evidence had gone in, and the court had heard extensive oral submissions on the application and had adjourned it part heard to 26th February 2024 for further responses by counsel for IBPL. It was at this juncture that IBPL filed the Hitchcock affidavit. Notably, the Hitchcock affidavit was **not** filed prior to the hearing on 18th January 2024, although there was ample time for it to be put in. And no acceptable reasons were given for the failure to file the affidavit earlier or to include the information contained in that affidavit in prior pleadings, especially given the working relationship between the defendant and Mr. Ortega.

[20] The Hitchcock affiant commences with a series of serious allegations against Mr. Spaman including that Mr. Spaman is committing a fraud on the court, has filed a deceptive claim and is acting in abuse of the process of the court. The pieces of evidence used to support these claims are a hearsay conversation with Mr. Ortega in early February 2024 and two claim forms and statements of case filed on 6th May 2022, CV 0288 of 2022, and 4th April 2023, CV 0202 of 2023, respectively. These claims were filed against "Diamir Ortega dba Ortega Builders" and related to a breach of an agreement for construction projects/services between Mr. Spaman and Mr. Ortega ("the Ortega claims").

[21] Whilst the Ortega claims are not before me, and I am not called upon in this matter to determine the issues in those claims, they were attached to the Hitchcock affidavit. A read of them showed that they related to a contract made approximately a year after the Wood agreement. Also, the Ortega claims were filed a year apart, but seemingly related to the same construction services agreement between Mr. Spaman and Mr. Ortega. The difference lay in the sums being claimed in the 2022 and 2023 claims of BZ$71,500 and BZ$85,071.25 respectively. I have no explanation from the Hitchcock affiant as to why two separate claims were filed against Mr. Ortega, what transpired between those filings

or of their relevance to the present matter (which involved a much-reduced sum). I noted only that the Hitchcock affiant treated the claims as one and the same and sought to link the Ortega claims with the present matter by alleging that the barn component of the agreement pointed to fraud and deception by Mr. Spaman and so supported IBPL's case.

[22] While I make no conclusive pronouncement (nor can I) on the Ortega claims, I was not convinced that fraud or deception can so easily be ascribed or made out based on the existence of the Ortega claims. A quick look at the Ortega claims showed that the building services agreement was for a range of structures including a barn, treehouse, boathouse, furniture and construction work on a house for various sums of money paid to Mr. Ortega. The pleadings seemingly related to separate sums of monies to that in the Wood agreement and, certainly, the dates in the Ortega claims spoke to contractual times post that in the Wood agreement. Interestingly, the barn in the Ortega claims was costed at BZ$61,600, inclusive of the sum of BZ$18,000 paid on 14th December 2020, BZ$25,000 paid on 3rd January 2021, BZ$10,000 paid on 7th January 2021, and BZ$8,600 paid on 3rd January 2021. The dates referenced in the Ortega claims for formation of an agreement between Mr. Spaman and Mr. Ortega were long after the December 2019 Wood agreement was breached by non-performance.

[23] The Hitchcock affiant points to the Ortega claims as evidence of deception because Mr. Spaman did not disclose particulars of his dealings with Mr. Ortega inclusive of the existence of this agreement, the nature of his relationship with Mr. Ortega, payments of substantial sums to construct the barn and that there was a settlement or compromise agreement between Mr. Spaman and Mr. Ortega on the barn project.

[24] IBPL relies on the Ortega claims to support its case that Mr. Ortega was in business for himself and was no foreman of IBPL. In the Hitchcock affidavit, the affiant conflates both agreements (i.e. Wood and Ortega claims) to make the case that they are interrelated, and the barn project/completion of the barn is evidence of Mr. Spaman's knowledge of Mr. Ortega being an independent contractor who was contracted by him to supply the wood and build the barn. IBPL stated that the Ortega claims evinced that Mr. Spaman, in his reply, was untruthful.

Submissions

[25] Ms. Barrow, counsel for Mr. Spaman, argued against allowing the Hitchcock affidavit since IBPL had ample time to file the affidavit before the hearing on 18th January 2024. The Hitchcock affidavit contains scandalous and irrelevant allegations. Because it was filed too late, it also caused prejudice to Mr. Spaman as it afforded him no opportunity to apply to cross-examine the deponent on the allegations outlined. Arguments were heard on the application for judgment on admission and IBPL should not be allowed to file additional evidence at this point on which further responses will be necessary or there will never be an end to litigation. Further, there is an ancillary claim where IBPL sued Mr. Ortega claiming that IBPL received monies under the Wood agreement, which IBPL paid to Mr. Ortega for delivery of the wood, and from which arises the application for judgment on admission. There are also the questions that arise of privity of contract and, sub-agency in the ancillary claim. Finally, both the Ortega claims and the Wood agreement speak to the existence of two separate and unrelated agreements. It is unfair to Mr. Spaman's case to allow the Hitchcock affidavit to come in to muddy the waters in an application, where arguments were ventilated on the evidence already before the court.

[26] In response submissions, Mr. Darrell Bradley, counsel for IBPL, pinioned his case for allowing the Hitchcock affidavit to the overriding objective. Mr. Bradley argued that it was only after the representative of IBPL spoke to Mr. Ortega that he got information about the Ortega claims. The court retains the power to regulate how evidence comes before it and the overriding objective mandates that a court must deal with cases justly. It is in the interest of justice that matters before the court are to be dealt with on their merits and not on the basis of mere technicalities, as raised by Ms. Barrow. There is no prejudice to the other side to have relevant evidence such as the Hitchcock affidavit placed before the court.

[27] Mr. Bradley argued further that Mr. Spaman, who had entered a contract with Mr. Ortega, failed to disclose his contractual relationships, particularly the agreement on the barn project which was subsequently settled and compromised by Mr. Ortega. In fact, Mr.

Spaman denies that there was a contract between Mr. Ortega and him, and in his reply specifically denied paragraph 19 of the defence that referenced the barn. Mr. Hitchcock affidavit presents evidence of a contract on which Mr. Spaman sued Mr. Ortega to recover the same funds sued for in the present proceedings. The settlement payment and compromise between Mr. Ortega and Mr. Spaman and the completion of the barn project are relevant pieces of evidence. Mr. Spaman certified in his pleadings that he had never entered into a contract with Mr. Ortega when he, in fact, actually filed a claim for breach of an agreement by Mr. Ortega. This is relevant evidence. The Hitchcock affidavit contains information that is germane to the application for judgment on admission and ought not to be struck out.

Issues

[28] Despite the contested and varied arguments raised by the parties, I find the main issue to be a limited one. I, therefore, confine the primary issue for my determination to whether I should strike the Hitchcock affidavit out as scurrilous and irrelevant.

[29] To properly dispose of this issue, I must determine the following:

i. Whether there are procedural breaches in the late filing of the Hitchcock affidavit that support it being struck out?

ii. Whether the Hitchcock affidavit should be admitted in the just resolution of the issues?

iii. Whether allowing the Hitchcock Affidavit that was filed out of time to stand would be unfair to Mr. Spaman's case?

The Law

[30] The relevant rules that frame the discussion of the issues identified are:

CPR

29.1 The court may control the evidence to be given at any trial or hearing by giving appropriate directions as to –

(a) the issues on which it requires evidence; and

(b) the way in which any matter is to be proved,

at a case management conference or by other means.

30.1(3) Whenever an affidavit is to be used in evidence, any party may apply to the court for an order requiring the deponent to attend to be cross-examined.

30.1(4) Such an application must be made not less than –

(a) in the case of a trial, 21 days; or

(b) in the case of any other hearing 7 days,

before the date of the hearing at which it is intended to cross-examine the deponent.

30.3(3) The court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit.

[31] Having set out the relevant rules above, I will address the issues that arise before me within those confines.

Discussion

[32] I sit now for the limited purpose of determining if to strike out or allow the Hitchcock affidavit to stand as *relevant* evidence in the substantive application for judgment on admission. In my view, this case will stand or fall on the issue of relevancy. Essentially, my function at this stage is to ascertain from the evidence before me if the Hitchcock affidavit is relevant and/or necessary to the exercise of disposing of the substantive application. Given that the Wood agreement was not condensed into writing, its terms are in question. This is a question of fact in the claim that I must objectively discover by examining the parties' conduct and their oral exchanges.[1]

[1] Carmichael et al v National Power Plc [1999] 1 WLR 2042.

[33] It appears that IBPL is seeking to withdraw its admission on what it says is new information but has not done so clearly. It is unclear if IBPL wants the court to believe that it made the admission based on ignorance or misapprehension of facts. Surely, on any project, a person may enter into numerous contracts with different parties and each of those contracts stands to be regulated by its own terms. In my view, even if Mr. Spaman stated "incorrectly" that he never had any contract with Mr. Ortega that is not any defence to whether IBPL admitted its own liability in proceedings before the court in relation to its own/separate contract. The misstatement is not sufficiently relevant or material to the determination of whether the admission made by IBPL should be upheld by the court.

[34] A close reading of the Hitchcock affidavit provides critical information on this matter. The Hitchcock affidavit points to the Ortega claims and attempts to introduce certain information as facts and evidence, representative of the terms of the Wood agreement. Through the Hitchcock affidavit, IBPL provides evidence that in the parties' business dealings, its responsibilities were limited to locating a supplier and acting as a payment agent of Mr. Spaman. It was in no way connected to Mr. Ortega, who was an independent contractor as evinced by the Ortega claims. In so doing, IBPL seeks to debunk Mr. Spaman's version of the terms of the Wood agreement, and so show his alleged deceptiveness and fraudulent conduct. In so doing, IBPL sought to make a case of abuse of the process of the court.

[35] Thus, IBPL advances that the Hitchcock affidavit is necessary and relevant evidence that is needed by the court to dispose of the substantive application before it. Basically, the Hitchcock affidavit confirms the defence and belies the reply and aims to show that Mr. Spaman is deceptive and has perpetrated a fraud on the court, by the material non-disclosure of his contractual relationship with Mr. Ortega.

[36] Before determining the question of whether these serious allegations have reached the threshold of being scurrilous and irrelevant to warrant a striking out order, I must first address the issue of whether there was any procedural irregularity in the filing of the Hitchcock affidavit. I am grateful to Ms. Naima Barrow and Mr. Darrell Bradley for their

astute submissions on the issues arising from the Hitchcock affidavit, which have assisted me in disposing of this present application.

Issue No. 1: Whether There are Procedural Breaches in the Late Filing of the Hitchcock Affidavit that Support it Being Struck Out?

[37] The answer to this question lies in an examination of the rules. There is no dispute that the court controls the evidence that comes before it at any hearing. The present substantive application for judgment on admission is a highly contested one and was progressing before the court, with lengthy oral submissions having been made. During a short adjournment afforded by the court for counsel for IBPL, Mr. Darrell Bradley, to return with responses, the Hitchcock affidavit was filed.

[38] CPR 29.1(3) rests the power to control evidence that goes in at any hearing squarely in the arms of the court, not the parties. At this stage, it required an application to be made by IBPL to secure the permission of the court for the filing of this evidence. However, Mr. Bradley did not approach the court for permission to file the Hitchcock affidavit. By filing it in disregard of the procedural requirements to get such evidence in, IBPL has telegraphed its position that it can simply put in evidence once that evidence is *relevant* and is needed by the court to dispose of an application before it. I disagree.

[39] I agree only that where there is relevant evidence available to help a court dispose of a matter, favourable consideration will be given to granting any application containing such evidence. However, the court's power to control evidence before it cannot be whisked away or dismantled because a litigant believes that it has come into possession of some evidence that might be "relevant" to assist the court. During a pause in the proceedings to afford IBPL time for further addresses, IBPL filed the Hitchcock affidavit under the guise that it contained information that came to IBPL early in February 2024. It alleged that the information was relevant and gave rise to the serious allegations against IBPL's opponent of fraud, deception and abuse of the process of the court.

[40] The procedural requirement for getting evidence in at a hearing requires an approach to be made to the court for such permission. No such request was made of me. I will not allow a litigant to ignore this requirement for permission, disregard the court's power to control evidence before it and to file whatever evidence it wants and whenever it wants. I find that IBPL acted in breach of the requirement for getting the Hitchcock affidavit into evidence. This was compounded by IBPL's failure to even make a belated attempt to cure this procedural stumble. Counsel for IBPL maintains simply that it is relevant evidence to help the court so should be allowed under the cover of the overriding objective to deal with matters justly. I agree that the overriding objective requires me to deal with cases justly, and at proportionate cost. However, the late filing of the Hitchcock affidavit and/or without leave of the court was improper.

[41] I will deal below with the consequences of this procedural failure and if the Hitchcock affidavit, despite the breach of procedure for filing it ought to stand.

Issue No. 2: Whether the Hitchcock Affidavit Should be Admitted in the Just Resolution of the Issues?

[42] The answer to this question is No. The evidence of the Ortega claims seems, on the surface, to be relevant but it is not, and it raises unnecessary matters. Ms. Barrow argues that the claims are not connected to the present matter. They involve two separate sets of monies, paid at different times, for different contractual services.

[43] In the affidavit in support of the present application filed on 19th February 2024, Mr. Spaman did not refute the fact that the barn was completed. It was completed by a different builder, not Mr. Ortega. He pointed to the contract annexed to the Ortega claims where "Ortega had from 20th April 2021 acknowledged that I had '*hired a new builder to build the barn*'." [Italics original].

[44] The Spaman affiant sought to delink the two agreements (Wood agreement and Ortega claims). Mr. Spaman averred that on the face of the documents filed in 2022 and 2023 i.e. the Ortega claims, which are exhibited to the Hitchcock affidavit, the business dealings

in the Ortega claims occurred approximately 1 year after the dealings with IBPL. He stated that the fact that Mr. Ortega was the defendant's agent in 2019 did not preclude Mr. Spaman from contracting directly with Mr. Ortega at a later time. Further, the subsequent contract with Mr. Ortega is not connected to the contractual obligations of IBPL under the earlier Wood agreement. Moreover, Mr. Spaman stated that the documents in his claim against Mr. Ortega are "wholly irrelevant to this instant claim and as such there was no duty to disclose them".

[45] In my view, the existence of the Ortega claims, even if unrelated, would have avoided the current impasse if disclosed by Mr. Spaman. The issues of the barn and the independent contractor, Mr, Ortega, were raised in the present proceedings. In the interest of fair play and honesty, the disclosure of the Ortega claims would have been a better look for Mr. Spaman who should have been mindful of his duty of candour to the court. However, this was not fatal to Mr. Spaman's application. I did not agree with IBPL's argument that sought to link the wood allegedly supplied under the Wood agreement in 2019 as the same wood used to build the barn. In fact, I find that the Hitchcock affidavit and allegations of fraud and deception are without basis.

[46] In coming to my conclusion that these allegations are unsupported by any relevant evidence; I noted that the affiant at paragraph 4 of the Hitchcock affidavit references and relies on a hearsay conversation in the first week of February 2024 arising from him having "located and spoken" to Mr. Ortega. That conversation led to the unearthing of the Ortega claims, involving a suit against Mr. Ortega for works on a barn pursuant to business dealings that occurred approximately 1 year after the Wood agreement. The Hitchcock affiant implies that the wood allegedly supplied under the Wood agreement in 2019 was used for that later construction and seeks, by this, to discredit Mr. Spaman's claim that he was unaware of Mr. Ortega being an independent contractor and/or that the wood ordered through IBPL was never delivered. To my mind, these allegations constitute, at best, inadmissible hearsay evidence. No proof has been advanced that the contracts in the Ortega claims related to the same contract as the one in dispute between the parties in these proceedings and in relation to which the claimant is seeking judgment on admission by the defendant.

[47] Further, the Hitchcock affiant makes serious allegations of fraud, deception and abuse against Mr. Spaman. The test[2] for satisfying fraud is high and there was no evidence in the Hitchcock affidavit evidencing elements of knowledge and intention on the part of Mr. Spaman or any other evidence to support fraud and deception. In fact, the affiant merely uses the existence of the Ortega claims to allege fraud, deception and abuse despite the fact that the Ortega claims relate to a construction services contract in December 2020 for various buildings/items and were for monies substantially greater than the present claim under the Wood agreement made in 2019.

[48] The Hitchcock affiant has not satisfied me as to the link between the Ortega claims in December 2020 and the present one, involving business dealings in December 2019. I, therefore, reject his evidence, which I find is based on assumptions and failed attempts that made only tenuous links. To my mind, the Hitchcock affidavit contains scandalous and irrelevant evidence that is baseless.

Issue No. 3: Whether Allowing the Hitchcock Affidavit that was Filed Out of Time to Stand Would be Unfair to Mr. Spaman's Case?

[49] The answer is yes! It is not disputed that the Hitchcock affidavit was filed late in the day. Also undisputed is that no permission was sought to file it, nor was any opportunity given in a timely way to the opposing side to respond. The fact that Mr. Spaman had not made the disclosures in his pleadings, now contained in the Hitchcock affidavit, is not disagreed. Parties diverged only on the question on whether to allow the Hitchcock affidavit is unfair, with counsel for Mr. Spaman, Ms. Naima Barrow, arguing that it was indeed unfair to Mr. Spaman's case as he was not given an opportunity to apply for cross-examination of the affiant, and Mr. Bradley, counsel for IBPL, arguing the prejudicial effects of Mr. Spaman's non-disclosures to IBPL and the court.

[50] In controlling the evidence that is allowed in at any hearing, the court is cognizant that the overriding objective of the CPR requires that matters be dealt with justly. A party faced

[2] Derry v Peek [1889] 14 A.C. 337.

with serious allegations of fraud and deception must be given an opportunity to respond and, particularly the chance to test evidence being introduced belatedly. This is not what has happened in this case. I do not hold the view that a party can make serious allegations, under the guise that these were recently discovered, and then use this scenario to circumvent procedures for getting evidence in before the court. This does not serve as a justification for depriving the person against whom these allegations are made from his right to respond. To do so would be unfair to that party's case and against the general practice of affording a party the opportunity to answer any case raised against him or to respond to serious allegations.

[51] I considered, however, the issue of non-disclosure by a party. The court's aversion to this approach to litigation is not unknown. I considered in these circumstances whether the non-disclosure was a sufficient reason for the court to make an order to cure the procedural stumble and allow the Hitchcock affidavit to stand. In this mix, I have considered that litigants owe a duty of candour to the court. Mr. Spaman cannot claim that he lacked knowledge of having previously filed the Ortega claims. He was served with a defence that raised the use of the wood supplied by an independent contractor, Mr. Ortega, to build a barn for Mr. Spaman.

[52] On the surface, the Hitchcock affidavit, which reveals the Ortega claims, seems relevant. Where a party has made an admission, and that admission is relied upon to secure a judgment on admission, it is incumbent upon the party to act with candour before the court and seek leave to amend its original pleadings to withdraw the admission. In doing so, it is to provide a proper foundation for such a withdrawal. The Hitchcock affidavit may serve as a basis for this amendment. However, in the absence of such an application from IBPL, the court has no alternative but to strike out the evidence. This is so because IBPL's approach to getting this evidence in was to circumvent the court's procedures for permission and so deny the opposing side the chance to apply to cross-examine or provide a response, hence the present application. This is undoubtedly unfair especially as counsel for IBPL knew that parties were engaged in heavily contested arguments on the substantive application at the previous hearing.

[53] I find that the Hitchcock affidavit is a futile "gotcha litigation strategy" deployed to undermine Mr. Spaman's application for judgment on admission. It was an unfair approach to Mr. Spaman and his case because the information in that affidavit is not sufficiently relevant or material to the application for judgment on admission. I will not allow it into evidence.

[54] From the discussion undertaken above, it is clear that the Hitchcock affidavit is struck out.

Costs

[55] Costs usually follow the event, and Mr. Spaman is granted the costs of having to make and argue this application. Ms. Barrow asks for costs in the sum of BZ$2,000 in the context of a claim for the recovery of BZ$32,766.40, which is much contested at every stage.

[56] Applying the usual principles of assessment of costs, which include but are not limited to reasonableness and proportionality, I find as reasonable cost for bringing and arguing this application to strike out the Hitchcock affidavit the sum of BZ$1,500 and will so award.

Disposition

[57] It is ordered that:

1. The First Affidavit of Tom Hitchcock filed on 9th February 2024 is struck out.
2. The defendant is to pay cost of the present application in the sum of BZ$1,500 before the next hearing date for continuation of the substantive hearing of the application for judgment on admission.
3. The application for judgment on admission is adjourned part heard to a date to be notified by the court.

Martha Alexander
High Court Judge