BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 382/13

In the matter of:

Roland Haus Co. Ltd

Appellant

v/s

Minister of Environment and Sustainable Development

Respondent

IPO:

1. **Globe Prism Ltd**
2. **The Permanent Secretary, Ministry of Housing and Lands**
3. **District Council of Riviere du Rempart**

Co-Respondents

RULING

1. Counsel appearing for the Appellant, Mrs. Saha, before calling her first witness, Mr. Foondun, planner, made a motion seeking all witnesses including expert witnesses to leave the courtroom. Her motion wasbased on three grounds. Firstly that there was no counter report from any other expert to the report made by Mr. Foondun. Secondly, it is the cursus before this Tribunal to exclude expert witnesses, when other witnesses are

deponing except where there is no objection. Finally, it is a well established principle that those who are to give evidence in a case are not made privy to the proceedings unless and until they have testified.

2. This motion was resisted by Miss Gareeboo, Counsel appearing for the Ministry of Housing and Lands, on the ground that since Mr. Foondun will be testifying in his capacity as an expert, Mrs. Bumma, who is a planner from the Ministry, should be allowed to remain in the courtroom. She has not prepared a counter report but has provided input in the statement of defence of the co-respondent no.2.The stand of Counsel appearing for the Respondent and Co-respondent no.1,was that the exclusion of witnesses from proceedings did not apply to expert witnesses but rather to lay witnesses. We have duly considered all submissions.

3. Witnesses are normally excluded from the courtroom so that they are not privy to the proceedings. The rule on exclusion of witnesses from proceedings is designed to avoid fabrication and collusion. The underlying basis for this rule is where it is in the interest of justice to do so. Witnesses, generally, do not leave the courtroom until an order is made by the Court, or Tribunal, for their temporary exclusion from the proceedings. As a matter of practice, such an order may either be made by the bench or upon the request of a party. Where such request is made, the Court is duty bound to give it consideration.

4. Just as with any rule, however, there are certain instances where at the request of a party, the Court or Tribunal can exercise **its discretion** to deviate from this rule [emphasis intended]. These instances will ultimately inevitably be where the

administration of justice so demands. In this context, there is no single approach to be adopted. It would depend on the facts and circumstances of each particular case. It cannot therefore be said that the cursus before this Tribunal has been to exclude all witnesses from proceedings, as submitted by Mrs. Saha. It has always been a matter of discretion of the Tribunal either where there was a request made or on its own volition in its endeavour to ensure that no prejudice be caused to any party and where it was in the interest of justice to do so. **S. 5 (1) of the Environment and Land Use Appeal Tribunal Act 2012** allows the Tribunal to regulate the manner in which proceedings are to take place but this by no means can be interpreted that this Tribunal has adopted a single approach when the matter is one of application of the law. On the present issue, the position requires some clarity. Even the courts in other jurisdictions have adopted diverging views on this matter and the law is still evolving. While there may be some guidance specifically on matrimonial, family and probate cases with regard to lay witnesses, the position with regard to expert witnesses is general civil cases is unclear. The relevant cases in this context will be addressed further on.

5. Miss Gareeboo argued that the rule for exclusion from proceedings applied to lay witnesses who would be witnesses of fact where their credibility is at stake. We agree with these submissions. Infact, that is where the risk of fabrication exists; it may even be unintentional as they may be swayed to some extent by the testimony of other witnesses.

6. The position with expert witnesses on the other hand may be slightly different. It was submitted by counsel for the co-respondent no.2 that expert witnesses are independent

witnesses who would depone on matters within their field of expertise therefore there cannot be any risk of fabrication or collusion.

7. In this context she cited the case of **Tomlinson v Tomlinson [1980] 1 W.L.R 322**, a matrimonial case where it was decided that a witness intended to be called by a party was wrongly excluded from the courtroom on account of him having been present throughout the proceedings. It was stated by Sir John Arnold in that case,

" However, it is desirable to take this opportunity of indicating what I think should be the practice in ***matrimonial proceedings*** *in magistrates' courts [stress is ours].....The proper course for justices to pursue, if an application is made to them, would be to exclude the witnesses, unless they were satisfied that would not be the appropriate step to take...This of course does not apply and never has applied to the parties themselves or their solicitors or their expert witnesses."*

8. This was subsequently addressed in the case of **Luckwell v Limata [2014] EWHC 563 (Fam).** This was again a family case which was subsequently dealt by the High Court. The witness involved here was a lay witness, as in the case of **Tomlinson**, *supra*. We find it of relevance to reproduce an extract of the speech of Mr. Justice Holman –

"I cannot see that there can be any rational grounds for distinction, depending on whether a case is being pursued in the magistrates' court (now family proceedings court) or in the civil courts, for instance, the county court or indeed civil divisions of the High Court, or in this court. In any such court, and indeed in any class of case, once the court is sitting in public the broad approach to the exercise of discretion should be the same. Sir John Arnold put it that "the proper course for justices to pursue ... would be to exclude

the witnesses, unless they were satisfied that that would not be an appropriate step to take ..." Speaking for myself, and respectful of that decision but mindful that it is not binding upon me, my own feeling is that the approach should be the other way round. If a court is, in fact, sitting in public, and if an application is made to exclude a witness or witnesses, then the court may exclude them. But it should only exclude them if the court is satisfied, on the facts and in the circumstances of the particular situation, that it would, for good reasons, be an appropriate step to take. The threshold may not be a high one. The reason may not need to be a very cogent one. But if a court is sitting in public, no one who wishes to be present should be excluded, not even a witness, without some good reason for doing so. I propose to apply that approach and direct to myself in that way in making the present ruling".

9. The position adopted in some states in the United States, according to Dr. Ralph Slovenko, Professor of Law and Psychiatry at Wayne State University Law School, Michigan, in a publication dated 4th November 2004, Vol.32 entitled **"Sequestration of Lay Witnesses and Experts- Analysis and Commentary"**, he stated

"To avoid having a witness color his testimony by hearing the testimony of the other witnesses, any party may invoke the rule of sequestration (exclusion) of lay witnesses or experts. By not allowing a witness, lay or expert, to hear other witnesses before being called, the chances of fabrication and collusion are reduced."

He further stated *"...Professor John Wigmore, the leading authority on the laws of evidence, maintained: But when all allowances are made it remains true that the*

expedient of sequestration is (next to cross-examination) one of the greatest engines that the skill of a man has ever invented for the detection of liars in a court of justice.""

These quotes are simply used here as a pointer of the legal reasoning adopted.

10. There is generally an assumption that experts give their evidence independently, impartially and without any external influence with their primary duty towards the Court or Tribunal so as to enable it to discharge of its functions. There may be instances however where having experts of opposing parties present in a case can also be counter-productive in that they run the risk contradicting each other without being of much assistance to the tribunal, thereby defeating the purpose of expert testimony. It is in this spirit that in many foreign jurisdictions, at pre-trial stage parties seek leave to put in expert report and to call an expert so that if the Court is of the view that the expert will not be of assistance to the case, leave will not be granted. In the UK for instance, the application of rule 35 of the CPR has seen such changes over the years.

11. Now, in the present case the planning report made by Mr. Foondun was filed by the Appellants in May this year. The other parties had no objection to it being filed. No counter report was filed. Counsel for co-respondent no. 2 stated that the co-respondent no. 2 did not intend to file any counter report at this stage. We are faced with a situation where there is a request by a party to exclude even expert witnesses on the one hand and on the other hand the stand of the other party is to have an expert witness in the courtroom whereby the expert may or may not decide to file a counter report at a later stage. We need to weigh up on a balance the value that the presence of the expert will add as opposed to the prejudice it may cause.

12. If we are to consider what value it will add if there is an expert witness present in the courtroom in the course of proceedings and how will that assist the Tribunal, the answer would be none. Experts have a primary duty towards assisting the Tribunal. Their presence will not be providing the Tribunal with any further assistance since their evidence will be restricted to their technical knowledge and their field of expertise on which they will testify. Expert witnesses, agreeably, are meant to beindependent.

13. It was argued that it might cause prejudice to the co-respondent no.2 not to have its expert witness present to give Counsel instructions as to whether or not certain matters are true or not if the expert witness of the appellant decides to give evidence on other matters in the course of his examination in chief. But this argument seems to be running counter to the submission of Counsel who argued that it was a question of which expert gave a better opinion, if at all, and not a question of credibility as in the case of witnesses of fact. In the eventuality thatany matter needs clarification, questions may be put to the expert witnesses by counsel in the course of examination or cross examination.

14. Furthermore, as stated earlier there is a rule of exclusion and if a party raises it, it must be considered. Given that no counter report has been put in yet, in the eventuality that co-respondent no.2 decides to do so at a later stage of the hearing, Mrs. Bumma would have had the benefit of having taken cognizance of the testimony of Mr. Foondun without it being a reciprocal process and thus creating a perception of unfairness. . In fact in the case of **Tomlinson** (supra), the judges of the superior court based their

decision on their assessment of the fairness of the trial in the light of the exclusion of the witness.

15. Being given that such matters require the discretion of the Tribunal to be exercised on a case to case basis, for all the reasons given above we believe that in the present instance, the ends of justice will be met if the expert witnesses are to be temporarily excluded from the courtroom. Any issue in need of clarification can always be put to the expert witnesses in the course of examination in chief or cross examination. The motion of the Mrs. Saha is accordingly granted.

16. As a final point, we have duly considered the objection that counsel for co-respondent no.2 has placed on record and find it to be of substance. All parties, including Counsel, are under a duty to disclose all relevant information to the Tribunal. Due process demands that there be equality of arms. Mrs. Saha is to take note of this.

Ruling delivered on 13th July 2016 by

Mrs. J. RAMFUL-JHOWRY	**Mr. MOTAH**	**Mr. BUSAWON**
Vice Chairperson	**Assessor**	**Assessor**