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

I. BACKGROUND

1. This ruling calls for some background context of the chronology events which lead upto the arguments offered, the subject matter of the present issue. In the light of the previous ruling of this Tribunal, all witnesses in the case were excluded from the courtroom except for the representatives of the parties. Mrs. Saha, counsel appearing for the Appellants, proceeded with her case by calling as her first witness Mr. Foondun,

planner. The latter proceeded by deponing on the background of the case and some other matters. After clarification sought by counsel appearing for co-respondent no.2 regarding the grounds of appeal on which the witness purported to be dealing with, the latter stated them and proceeded with his testimony which included reference to the EIA report and licence, none of which are evidence before the Tribunal. This prompted Counsel appearing for co-respondent no.1 to make the present motion.

II. OBJECTIONS

2. The objection is against any witness being called out of turn so that the proper cursus which is adopted before all Courts of this country is followed, whereby witnesses of fact are first brought in and in particular the parties to lay down the foundations, explain the basis, the reason for which they are before this Tribunal and why they are appealing and then other witnesses may be called. In support of her motion Counsel for co-respondent no.1 argued that the technical witness is deponing with respect to an EIA report which is not yet evidence before the Tribunal so that he can be cross-examined. The reasons for the raison d'etre of the appeal, she argued, were obscure since there is a technical report dated 2016 when the ministerial decision that is being challenged dates back to 2010, at a time where this report was obviously not available. According to her, the representative of the appellant should testify and lay the foundations on the state of affairs in 2010 when the decision was taken and then hear the evidence of the technical experts. Counsel appearing for Respondent and Co-respondent no.2 joined in the motion while co-respondent no.3 chose to abide by the decision of the Tribunal.

3. This motion was resisted by the Counsel appearing for the Appellant on 3 grounds. Firstly, that no motion was made for the witnesses to be called out of turn because in every appeal case taken before this Tribunal, the expert witnesses have always deponed first. Secondly, under the ELAT, it is the Tribunal that decides upon its own proceedings

in the light of the provisions of ELUAT Act and this procedure has been accepted each time. Finally, sinceit is a civil case, the party is at liberty to call his witnesses in any order that it wishes.

III. OUR RULING

4. We have duly considered the submissions of all parties. It is a settled principle in civil cases that a party is at liberty to call its witnesses in the order it so wishes. In England, prior to the Civil Procedure Rules ['CPR'], a party was under no duty to call witnesses in any particular order: **Briscoe v Briscoe [1966] 1 All ER 465**. The position has however changed under the CPR. In **Blackstone's Civil Practice** 2000 edition at *paragraph 47.47* the practice under the CPR has been set out and we find it of importance to reproduce an extract of it:

"Under the CPR, r. 32.1 (1), the court may now control the evidence by giving directions as to not only the issues on which it requires evidence but also as to the nature of the evidence which it requires to decide those issues and the way in which the evidence is to be placed before the court. Furthermore, under r.32. 1 (2), the court may use its powers under the rule to exclude evidence that would otherwise be admissible..... give directions as to which particular witnesses are required to decide the issues, as to the order in which the witnesses called should give their evidence, and as to which potential witnesses should not be called, on the basis either that the issue to which their evidence relates only requires evidence in written form or that their evidence although admissible in law, should be excluded in the exercise of his or her discretion. The judge also has the power to recall a witness called by a party: ***Fallon v Calvert [1960] 2 QB 201.***"

5. The above extract is a clear demonstration of the evolution of the powers and discretion of the Courts for the proper administration of justice, which is the overriding objective

of all bodies performing judicial functions such as this Tribunal. This Tribunal operates in a manner which is generally less technical and less formal, in line with the spirit of **section 5 (3) (b) of the Environment and Land Use Appeal Tribunal Act 2012** so there is no imposition on the manner in which parties present their case unless the Tribunal deems it fit to do so. The importance is that at the close of a party's case all the evidence it sought to rely upon must have been produced.

6. We pause here to make an observation. Mrs. Saha, learned counsel for the Appellant,stated as her first ground for resisting the motion "...no motion was made for the witnesses out of turn because in every appeal case taken before this Tribunal, the expert witnesses have always deponed first." We believe that such broad statements can be rather misguided. This Tribunal also hears cases on appeal where parties aggrieved by the fact that local authorities have granted or rejected, as the case may be, Building and Land Use Permits (BLUP). It stands to reason that in many of such cases the issues at hand ultimately boil down to the planning merits of the application hence technical issues, that is whether a particular site can accommodate a particular development, for instance. Parties willing to call in their technical experts such as planners as their first witness are therefore allowed to do so where there is obviously no objection on the part of the other parties to this course of action if the parties are of the opinion that such witnesses are best placed to address the Tribunal on the crux of the matter, that is the planning merits of the application. Consequently, we would invite parties to refrain from making sweeping statements which cannot be taken to be settled practices before this Tribunal by the mere saying of it. These are neither to be found in the rules of this Tribunal nor in any determination delivered by this Tribunal.

7. This being said, the present matter relates to the granting of an EIA licence, not the granting of a BLUP and furthermore, objections have been raised. While agreeably a Tribunal is not expected to be unduly legalistic, this by no means should be interpreted that some basic rules of evidence should not be observed. Can someone who has no

connection whatsoever with a piece of evidence, produce it and affirm under solemn affirmation the veracity of that piece of evidence? This, in our view, would be a far cry from what the legislator intended in **section 5(3) of the ELAT Act 2012**. Can this Tribunal appreciate a piece of evidence which refers to other 'unknown' documents, for want of a better word? We do not believe so. The difficulty we are faced with in the present matter is that we are trying to follow the evidence of a planner who is making extensive reference to the EIA report /licence when these are not evidence before the Tribunal for it to appreciate the proposals, any attached terms and conditions, how it contravenes with the laws of this country. It does become cumbersome to follow.

8. Furthermore, several observations have been made by the planner, such as at Page 11, paragraph 5.1.37 :

"No consultation was held with the local residents, let alone those immediately adjoining the site who would bear the brunt of the negative impact of the construction and the operations of the hotel. The Appellants were not consulted. Local fishermen too were left out."

We are rather wary of such evidence coming from this expert witness.We agree on this score with the submissions of learned counsel appearing for Co-respondent no.1, Mrs. Boolell. One would have expected all the pieces of evidence which will be relied upon by a witness to be put in first so that he/she can refer to them. Also this witness having prepared a report in 2016 cannot testify on a number of facts which occurred in 2010 as referred above.

9. The cursus before this Tribunal when an appeal is lodgedis for the Appellant to set out the relevant facts in a Statement of Case. This is then served on the Respondent who must then file a Statement of Defence if it wishes to defend the appeal. Any co-respondents or third parties may also file their Statement of Defence if they so wish.

The underlying reasoning for this is precisely to set the scene and give the parties and the Tribunal an insight of how the appellant is aggrieved by the impugned decision. There is thus a logical and coherent flow in the presentation of the case so that one can follow the grievance and the arguments in support, followed by the counter-arguments. These pleadings are of assistance but of course do not become evidence unless and until the contents are re-iterated in the testimony of the witnesses.

10. If presentation of the evidence is meant to fit like the pieces of a jigsaw at the close of the each party's case, with the voluminous file, the bundles of documents and reports we find ourselves dealing with, we view with concern whether this will be achieved if the presentation of the case is done in a way that leaves too many loose ends to be tied up thereby defeating the purpose of making the Tribunal understand and appreciate the evidence for the effective administration of justice.

11. Whilst this Tribunal would not typically interfere with the prerogative of Counsel on how to conduct their case, it is in the spirit of proper case management with the overriding objective of this Tribunal being to dispense justice that we would direct counsel for the Appellant to give due consideration to the way the evidence is being presented before the Tribunal and to reconsider the presentation of the evidence so that there is a clear and coherent flow in the evidence being referred to. This direction will also apply to the other parties in the presentation of their respective cases.

Ruling delivered on 15th July 2016 by

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