BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1980/20

In the matter of:-

CHILI BEACH LTD.

Duly represented by Mr. Bruno Dumazel

Appellant

v/s

THE MINISTRY OF HOUSING AND LAND USE PLANNING

Respondent

RULING

1. Counsel appearing for the Respondent, at the calling of the Appellant' first witness, a Sworn Land Surveyor, objected to the production of any report from the latter on the ground that no report was communicated to the Respondent. The Respondent then sought sometime to take a stand on the production of the report and later maintained their objection, which was argued in law. We have duly considered the submissions of both Counsel.

2. The objection of the Respondent was based on three grounds. Firstly, that the report of the expert amounts to a witness statement which should mandatorily have been filed at the time that the appeal was lodged, by virtue of **Section 5(4) (aa) of the Environment and Land Use Appeal Tribunal Act 2012 ["ELUAT Act"]** as amended. Secondly, the statement of the defence of the Respondent having already been filed, it would cause prejudice to the Respondent in the presentation of its defence if the report is admitted outside the statutory time frame provided by the law. The Respondent's stand is also that it objects to the production of the report of the expert but not to any oral evidence by the expert in order to sustain the grounds contained in the notice of appeal.

3. The Appellant's counsel submitted the proceedings before the Tribunal are meant to be conducted with *"as little formality and technicality as possible"* pursuant to **Section 5 (3) (b) ELUAT Act.** He cited the reasoning of their Lordships in the Privy Council case of ***Toomany v Veerasamy [2012] UKPC 13*** which was also applied by the Supreme Court in the case of ***Soomaroo v Burahee [2015] SCJ 102***to support his argument that the appeal has been lodged and is legally in order, therefore mere technicalities should not be a bar to natural justice. Counsel also argued that the Respondent, despite intending to call witnesses, have also not filed witness statements and that the report of the expert, has on the day of the hearing, been communicated to the Respondent for its perusal so no prejudice has been caused.

4. The proceedings of this Tribunal are regulated under **Section 5 of the ELUAT Act 2012**, as amended, part of which is reproduced hereunder for the purposes of the subject-matter of this ruling:

"(4) (a) Every appeal under section 4(1) shall, subject to paragraph (b), be brought before the Tribunal by depositing, with the Secretary, a notice of appeal in the form set out in the Schedule, setting out the grounds of appeal concisely and precisely, not later than 21 days from the date of the decision under reference being notified to the party wishing to appeal.

(aa) Every notice of appeal referred to in paragraph (a) shall be accompanied by –

(i) a statement of case; and

(ii) where necessary, any witness statement, with copy to all relevant parties.

(ab) A statement of case shall contain precisely and concisely –

(i) the facts of the case;

(ii) the grounds of appeal and the arguments relating thereto;

(iii) submissions on any point of law; and

(iv) any other submissions relevant to the appeal.

(ac) Any witness statement shall contain a signed statement by a witness certifying that the witness statement faithfully reproduces the facts obtained from the examination of records, statements or other documents or from any other source in relation to the appeal before the Tribunal.

(ad) Any party served with a copy of the notice of appeal, statement of case and any witness statement shall, within 21 days of receipt thereof, forward his reply and comments thereon to the Tribunal, with copy to the appellant."

5. From aforementioned **section 5(4) (ac),** it can be gauged that an expert report can also amount to witness statement although an expert report is not always based only on facts obtained from examination of other documents. It is also based on the knowledge of the expert as well as research and testing. There is no distinction made in the **ELUAT Act** as regards expert reports and witness statements. Therefore, if we are to accept the submissions of learned Counsel appearing for the Respondent that the expert report is a witness statement, which was not disputed by the Appellant's counsel, the issue is whether there was a mandatory obligation upon the Appellant to file this report at the time of the lodging of the appeal as per **Section 5 (4) (aa)***supra*.

6. *"The word "shall" may be read as imperative"* as per the **Interpretation and General Clauses Act**. This is as a general rule. However, the word "may" in the phrase "may be read as imperative" in itself creates a permissive approach depending on the context. We do not therefore believe that it is a fatal defect under Section 5 (4) (aa) of the Act if a witness statement has not been put in at the time of the lodging of the appeal because although the wording of the law is that *"Every notice of appeal... shall be accompanied by a statement of case"*, as regards witness statements, it says *"where necessary"*. Had it been the intention of the legislator that the provision of the witness statement be mandatory, the words *"where necessary"* as an option would not have been inserted so that it would simply read as *"Every notice of appeal referred to in paragraph (a) shall be accompanied by a statement of case and any witness statement, with copy to all relevant parties."*

7. We are fortified in our view when we read the following **subsection (4) (ab)** which provides amongst others that the statement of case at the time that the appeal is lodged shall contain precisely and concisely submissions on any point of law. It is trite law that a party can raise a point in law at any point in the course of proceedings. While it is desirable to have all submissions in law already set out in the statement of case, as per this provision of the law, to enable fair and timely justice to be delivered, the Tribunal cannot preclude a party from making submissions in law in the course of the hearing. It would be an erroneous interpretation and application of this provision of the Act if a party was so precluded. Similarly, to require expert reports be filed at the time the notice of appeal is lodged may not take account of the fact that these reports can contain significant technical material, which may require far more time to prepare.

8. In a judgment in the case of **Quality Soaps Ltd & Anor v/s M.C.C.B Ltd [1999] SCJ 221**, their lordships former Chief Justice, A.G. Pillay and Justice K.P.Matadeen, observed that the wording of section 10 (6) of the M.C.C.B. Limited (Liquidation) Act 1996 where the M.C.C.B. Claims Tribunal shall make a Determination within 15 days of the close of the trial *"can only be construed, in our view, as directory"* and that the President of the Tribunal is not statutorily precluded from making a Determination. This reasoning was endorsed in the case of **Globe Prism Ltd v Environment and Land Use Appeal Tribunal IPO Roland Hauss Co. Ltd and Ors [2020] SCJ 99**, where the Supreme Court interpreted **section 5 (7) of the ELUAT Act** where it was provided that the Tribunal "**shall** make a determination not later than 90 days after the start of the hearing" and decided that such a provision can only be taken to be directory and not mandatory.

9. The non-disclosure of a witness statement or expert report if it was not available at the time of the lodging of the appeal, hence within the time frame provided, cannot operate as an automatic bar. It is within the discretion of the Tribunal whether to allow it or not depending on certain factors which have to be to the satisfaction of the Tribunal. However, leave should have been sought as a matter of proper procedure by the Appellant's Counsel to have the expert report communicated and filed before the Tribunal prior to an expert deponing in order to ensure equality of arms.

10. As a general rule on non-disclosure of documents, **Blackstone's Civil Practice 2000, paragraph 48.42** entitled **"Failure to disclose documents"** provides

    "Under C.P.R, r. 31.21, a party who has not disclosed, or not permitted inspection of, a document may not rely on it, unless the court gives permission. In deciding whether or not to grant such permission, the court will doubtless consider the principles of proportionality, as well as the reasons why the document was not disclosed in the first place. In the absence of an inadvertent mistake it is perhaps difficult to see why a court should grant latitude to a party who, having failed to disclose and allow inspection of a document as required by the court's order, then seeks to use the document at trial. The key issue will, of course, be prejudice to the other party, although given the obvious default of the party seeking to introduce the document, the court may not be inclined to enquire too nicely into the matter."

11. We are here dealing with the Appellant's expert witness, who is a Sworn Land Surveyor, who undoubtedly is an expert in land surveying. The Appellant has not enlightened the Tribunal as regards the reasons why the expert report was not communicated and exchanged at pre-trial stage nor was the Tribunal informed why the Land Surveyor being called. The Appellant has in its statement of case made certain averments regarding some geographical features surrounding the subject site as well as a survey of the land *in lite* conducted by another Land Surveyor. The Tribunal is not privy at this stage to the report of the Sworn Land Surveyor since it was not disclosed that there was such a document that the Appellant intended to produce until the date of the Hearing.

12. When it comes to dealing more specifically on the failure to disclose expert reports, **Paragraph 52.17** of **Blackstone's Civil Practice 2000**, entitled **"Consequences of failure to disclose expert's report"** provides

    "Under CPR, r. 35.13, a party which fails to disclose an expert's report may not use the report at the trial or call the expert to give evidence orally, unless the court gives permission...There may be exceptional circumstances, such as in the case of a litigant in person, where the court may give such permission, if the issue on which expert

evidence was to be given was not a complex one and the opposing party was not prejudiced by the late disclosure of such expert evidence."

13. The Respondent has stated that prejudice will be caused to it if an expert report is produced at this stage. The Respondent has been communicated with the report, albeit at the start of the hearing, and upon request, the Respondent have been given sufficient time to take cognizance of the contents. The Respondent also has no objection to the expert giving oral evidence but it was reiterated on a few occasions that their objection is against the production of the expert's report.

14. We find the stand of the Respondent rather confusing as regards whether it has any objections to the expert evidence being brought it or not. Expert evidence can either be oral or written. It is the contention of the Respondent that it has no objection to oral evidence being given by the expert but it should not be written. While an expert report, which is basically the expert's written evidence, can restrict the expert to stay within the confines of his written testimonial, allowing the expert to give oral evidence alone is more likely to take the Respondent by surprise as the expert could then testify on all matters in his area of expertise as opposed to him being limited by his report. An expert can certainly not be bound by factual averments contained in a statement of case. We cannot therefore understand how oral expert evidence can be less prejudicial than a report which provides the Respondent with prior notice of, and circumscribes, the matters in issue.

15. Due process demands that parties focus on real issues and identify the type of evidence to produce in order to address the central issues. It is precisely for this reason that the procedure of disclosure of evidence exists before this Tribunal so that there is full and frank disclosure by all parties at the outset for all parties to know the case to be met by them and the nature of evidence that will be produced. The Tribunal for its part is under a duty to ensure fairness of procedure in that the parties are treated with equality and given full opportunity of presenting his case.

16. The concern of the Tribunal is that there may be a serious risk that the evidentiary record will be incomplete and that the efficient conduct of the hearing will thus be impeded in that all parties may be unable to fully present their case. However, alongside with allowing parties to call witnesses to substantiate their case, there is a balance to be struck between the parties' right to due process and a fair proceeding, which includes respect for time limits fixed by the Tribunals for each step in the proceedings. It is for this reason that the Tribunal insists on evidence being adduce on the central issues and that there should be no unnecessary overburdening of the record due to unnecessary repetition of evidence.

17. The qualm of the Respondent is that prejudice will be caused to its case since the statement of defence has already been filed. The communication of report has been made by the Appellant to the Respondent since February 2021. Late communication can be cured by allowing the Respondent time to study the report, file a counter-report/expert testimony, cross-examination of the Appellant's expert and amending the statement of defence, if required.

18. For all the reasons set out above, the objection of the Respondent is overruled. The Appellant, as a matter of proper procedure, ought to seek leave of the Tribunal to file the expert report addressing issues pertaining to the grounds of appeal as part of the disclosure of documents procedure. The Respondent will be allowed to take a stand as regards whether it wishes to file a counter-report and/or amend its statement of defence. The case will be called pro-forma.

Ruling delivered on the 9th July 2021

Mrs. J. RAMFUL-JHOWRY	**Mr. S. MOOTHOOSAMY**	**Mr. S.SULTOO**
Vice Chairperson	**Assessor**	**Assessor**