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, Solid Waste Management and Climate Change

Respondent

IPO:

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

Co-Respondents

RULING

1. The Appellants seek to call as their next witness Mr. V. Kaupaymootoo, an expert witness, to testify and produce a report prepared by him in connection with this case. At the sitting of the 10th June 2020, Counsel appearing for the Co-respondent no.2 objected to the production of Mr. Kaupaymootoo's report on the grounds that the report refers to an extract of the "Planning Appraisals and Proposals for Use of Barachois" dated 8th April 2005 ["MHL report"] which is an internal document of the Co-respondent no.2 and which has never been finalized. She also objected to the production of the planning appraisal of Barachois dated 8th April 2005 and stated that advance notice had been given of her intention at the sitting of the 20th June 2017.

2. For the purposes of the argument, Mr. Bhunjun, representative of the MHL testified and confirmed having taken cognizance of the report of Mr. Kaupaymootoo and that it made reference to a report drawn up by the MHL dated 8th April 2005 on the Planning Appraisal and proposal for the use of Barachois. He also confirmed under solemn affirmation that this document is an internal document of the MHL and is not in the public domain. In cross-examination, the witness maintained it is a draft report which has been under preparation since 2005 and is not finalized. When asked in cross-examination, he stated that an EIA report will have to be studied when a promoter submits one but that in the present case he did not personally do so. It was put to him that at paragraph 2.9 at page 12 of the EIA report, marked as Doc F, reference was made to the same document of the MHL. The witness stated that he didn't know but later he agreed that the EIA report does make reference to the 2005 barachois development content-wise. He also stated that he didn't know if there was anything detrimental to public interest in the report of the MHL that cannot be disclosed and he also stated that he was not aware as to why Globe Prism were allowed to make reference to the report of 2005 on Barachois development.

3. Counsel appearing for the Co-respondent no.2 submitted that the report of the MHL dated April 2005 is a confidential report and an internal one which was intended for the Ministry only and that since it is a privileged document reference cannot be made to it nor can it be produced before the Tribunal.

4. Counsel appearing for the Appellants insisted on the production of the report of Mr. Kaupaymootoo on the ground that the document of the Ministry of Housing and Land Use Planning [hereinafter referred as the "MHL"] which is the planning appraisal of the Barachois, is already in the public domaine by the acts, doings and omission of the MHL. A witness from the Economic Development Board ["EDB"] deponed but his deposition did not add much as regards the subject matter of the arguments. He stated that there is a report on the EDB website entitled "Potential for sustainable aquaculture development in Mauritius" which was drafted by a consultant, not by EDB.

5. We have duly considered the submissions of Counsel for the Appellant and of Counsel for the Co-respondent no.2. As a rule, evidence is admissible if it is relevant and its probative value exceeds its prejudicial effect. We are here faced with a situation where an environmental expert would seek to produce a report compiled by him but wherein he has made reference to extracts from another report which belongs to the MHL and which addresses the development proposals for barachois. This in itself is relevant evidence which would have satisfied the test of admissibility. However the danger lies in the Tribunal placing reliance on a document which was never finalized. It was not and could not be disputed by the Appellant that the document is not a final one. We have it in evidence that the report of the MHL was dated April 2005. It is only reasonable to expect that a lot of water has flown under the bridge in these 15 years that have passed since its preparation. The views and projects of the government may have changed in face of changing times and concepts such as climate change, beach erosion, land use and waste management amongst others as in fact can be seen even in the new appellation of the Ministries involved in this case. It would not be prudent for the Tribunal at this juncture to rely on a document which may have had certain proposals for the development of a project 15 years ago but which was neither finalized nor officially released.

6. True it is that the Appellants' contention is that the report of the MHL is in the public domain whilst the Co-respondent was of a contrary view. Irrespective of how the report found its way in the public domain, whether officially or otherwise, it would appear that it is a document which should not be taken as a reference since there is a danger that this document may be subjected to modifications or could even be made obsolete. Counsel for the Appellant argued that the witness for the MHL not having stated anything about the report not being disclosed due to public interest, means that even if it is a confidential document the Tribunal can ask for its disclosure. He submitted a line of authorities to show the trend adopted by courts to support the contention that even

if the report dated April 2005 compiled by the MHL is an official document, it can be disclosed if it is relevant provided that it is not injurious to the public interest.

7. We do not subscribe to the submissions of learned counsel appearing for the Appellant. The witness for the MHL may not have been of much assistance to the Tribunal in its quest for information as regards the report of the MHL, he may also not have displayed the level of knowledge as regards the facts of this case or as regards his file for that matter but this in no way can be taken to mean that since he stated he was not aware whether the disclosure of the report of the MHL would be detrimental to public interest, it had to be disclosed even if the Tribunal was of the view that it was relevant. There are different types of confidential or internal documents of the government and there may be a number of reasons for which they are not disclosed. In this case the government owns this document which it is not willing to disclose because it has never been finalized and in essence action hasn't been taken as regards the implementation of the proposals contained therein. We believe the Ministry is best placed to inform the Tribunal if reliance should or should not be placed on such a document and the Ministry should know that the "interests of society will better served by a civil service that has nothing to hide..." as per Edward Koroway's article on "Confidentiality in the Law of Evidence" Osgoode Hall Law Journal 16.2(1978) at page 367.

8. In the case of **Duncan v Cammel Laird & Co Ltd [1942] 1 All ER 587**, submitted by Counsel for the Appellant, reference was made at Page 10 to the judgment of **Beatson v Skene [1860] 5 H & N 838** where Pollock CB observed at pages 853-854: *"It appears to us, therefore that the question whether the production of the documents would be injurious to the public service must be determined, not by the judge but by the head of the department having the custody of the paper; and if he is in attendance and states that in his opinion the production of the document would be injurious to the public service, we think the judge ought not compel the production of it. The administration of justice is only a part of the general conduct of the affairs of any State or nation, and we*

think is (with respect to the production or non-production of a state paper in a court of justice) subordinate to the general welfare of the community."

9. Counsel for the Co-respondent no.2 referred us to the case of **Commissioner of Police v/s Director of Public Prosecutions 2018 SCJ 141** in which reference is made to the case of **Chinien v/s The Public Service Commission and anor 1981 SCJ 411.** In this case a test was established as to when a public body may be called upon to bring up the record of its decision. As a rule, the record of a statutory body which contains confidential and personal information relating to parties other than those in Court cannot be obtained by the mere asking. Exceptionally however, such records may be brought to Court if, firstly, the Court is satisfied that the production of such records is required "*for the purpose of determining the real question at issue, or that the material necessary to determine the question is not already contained in the affidavits filed by the parties*." We believe that this test is applicable firstly to a complete set of documents. The issue that we are faced with here is that the MHL report is a report which has remained unfinalized since 15 years and has remained in the drawer of the Ministry. Times change, circumstances change and the intention of the government could have changed since then.

10. Counsel appearing for the Appellant brought to our attention that reference has been made to the report of the MHL in the EIA report of the Co-respondent no.1. At Page 12 paragraph 2.9 of the EIA report it is stated: *"Indeed as per the planning appraisals of April 2005 for Barachois Development, it has been recommended by MHL that Butte a L'Herbe barachois be developed into a multi-purpose recreational activity with marginal barachois action. The appraisal also mentions that there is high potential for tourism activities*." Since the information imparted to the Tribunal by the Co-respondent no.2 that the EIA report infact mentions the report of the MHL dated April 2005 and that there was no other planning appraisal from the MHL for such development in 2005, we find this very telling on the way the MHL have "studied" the EIA report, to use the word of the representative of the MHL himself.

11. After due consideration, we believe the ends of justice will be met if the report of Mr. Kaupaymootoo is produced but without any reference being made to the MHL report dated 8th April 2005. The Appellants are allowed to either have the relevant parts excised from the report or the parts may simply be crossed out as they will be totally disregarded by the Tribunal. No weight will be attached to any evidence where the MHL report of April 2005 is referred to. Infact, any reference whatsoever of this report of the planning appraisal of the MHL on barachois development dated April 2005 in any document produced or that will be produced before this Tribunal will be disregarded. The report of the MHL dated 8th April 2005 is also not to be produced by Mr. Kaupaymootoo.

12. The case is fixed for continuation as scheduled.

Ruling delivered on 15th June 2020 by

Mrs. J. RAMFUL-JHOWRY	**Dr. B. MOTAH**	**Mr. M. BUSAWON**
Vice Chairperson	**Member**	**Member**