

IN THE SUPREME COURT OF BELIZE, A.D. 2017

CLAIM NO. 131 OF 2016

BETWEEN:

SITTE RIVER WILDLIFE RESERVE ET'AL

CLAIMANTS

AND

THOMAS HERSKOWITZ ET'AL

DEFENDANTS

BEFORE: the Honourable Justice Courtney Abel

Mr. Rodwell Williams, SC }
Ms. Lissette Staine } for the Claimants
Mr. Yohannseh Cave }
Ms. Stacey Grinage } for the Defendants

21ST FEBRUARY, 2017

MORNING SESSION

(Court convened at 9:00 A.M.)

5 THE COURT: Appearances?

MR. WILLIAMS: May it please you My Lord, in appear in this matter along with Ms. Lissette Staine on behalf of the Claimants and my friends Mr.

5 **WITNESS SWORN**

EXAMINATION IN CHIEF OF JOSE BAUTISTA BY MR. WILLIAMS

Q. Your name is Mr. Jose Bautista?

A. That's correct.

10 Q. And you give your address as 35 Regent and Dean Streets, Belize City, Belize?

A. That's correct.

Q. Mr. Bautista, you are a member of the Chartered Institute?

A. That's correct.

15 Q. And in relation to this particular matter you made a witness statement dated the 30th of May, 2016?

A. I did.

Q. Did you sign it?

A. Yes I did.

Q. So you would be able to recognize it if shown to you?

20 A. Absolutely.

5 Q. Have a look of that to see if it's your---

A. Yes it is.

Q. Now, your witness statement that you sign have some documents attached to it?

A. Yes.

10 Q. There 3 documents, you recognize those too?

A. That's correct.

Q. Would you like to admit your witness statement and the documents attached into evidence?

A. Yes.

15 THE COURT: Any objections?

MS. GRINAGE: No My Lord.

THE COURT: This witness statement is admitted into evidence as examination-in-chief without objection.

MR. WILLIAMS: Oblige.

5 My Lord, I do wish to Court's permission to amplify
Mr. Bautista's witness statement.

Q. Mr. Bautista, in your witness statement you mention that Mr. ---

THE COURT: Which paragraph?

MR. WILLIAMS: In paragraph 2

10 Q. In paragraph 2, you spoke of the years you've practiced in the
profession and then you referred to a letter of complaint at the bottom
of paragraph 2 that was made against you by Mr. Thomas Herskowitz
to the Institute?

A. That's correct.

15 Q. And that letter is exhibited. Now that was a complaint made against
you by Mr. Herskowitz in that letter?

A. That's correct.

Q. In relation to that complaint, did the Institute conduct an investigation?

A. Yes they did.

20 Q. And in paragraph 7, at the time of your witness statement you said that
Mr. Herskowitz allege malpractice complaint letter to Institute was

5 submitted to an investigative committee of the Institute and that you responded to questions you were asked and supplied information and that you expect to be advised as to the result of the investigation shortly, and that's how your witness statement ended at the time in May 2016?

10 A. That's correct.

Q. And can you say whether you received the result of that investigation?

A. Yes we made the Investigation Committee come in and we had to satisfy them that we had done.

THE COURT: No, just listen to the question.

15 Q. We're not going into all that the Committee did, I ask you if...did you get a written result from the Institute in relation to the Committee's investigation?

A. Yes I did.

Q. And do you whether it was provided also to the Complainant who made
20 the complaint against you?

A. Yes it was.

5 Q. Do you remember when you got that result?

A. That must have been...I can't remember exactly.

Q. Did you brought a copy of the result anyway?

A. Right.

10 Q. And it's written to the Institute...by the Committee written to the
Institute reporting to the Institute and you got your company and you're
saying you're aware that the defendant got a copy too who made the
complaint?

A. That's correct.

15 Q. Have a look at this document, is that a copy of the Investigative
Committee's report to the Institute that you got?

A. Yes it is.

Q. What date is it?

A. 12th September, 2016.

20 Q. Would you like to give this to the Court as an extra exhibit to your
witness statement?

A. Yes, absolutely.

5 THE COURT: Do you have any objections?

MS. GRINAGE: No My Lord.

THE COURT: Admitted in evidence as Exhibit JB4

Q. Now way of amplification I wish to ask you when the letter of complaint that was made to the Institute against you, you got a copy of that letter and that letter is the first exhibit in your witness statement, you got a
10 copy of that letter?

A. That's correct.

Q. Did you... apart from the copy you got, did you sign that letter anywhere else?

15 A. It was also posted on the defendants' website.

Q. It was posted there?

A. Right and it still is, I checked it this morning and it's still there.

Q. It's still there?

A. Still there up to this morning yes.

20 THE COURT: You're saying the defendant, there are more than one defendant.

5 WITNESS: Mr. Herskowitz website, to be specific it's the independent Owners Association IOSB

Q. That website it was posted on?

A. Right.

Q. That letter was written by Mr. Herskowitz?

10 A. That's correct.

Q. It wasn't the IOSB who wrote that letter, it was Mr. Herskowitz who wrote that letter?

A. He wrote it and it was reproduced on the IOSB website.

15 Q. Let me ask you, you said you checked this morning and you found it there, in relation to the letter from the Institute, I just want to direct your attention to the penultimate paragraph of that letter---

THE COURT: Do you have a copy of the letter?

MR. WILLIAMS: Yes My Lord.

Q. The penultimate part of that letter, you like to read it for us please?

20 A. "In view of the above, the Investigative Committee has concluded that PKF Belize has a proper legal basis on which to conduct the audit and

5 to conclude that the membership fees are the property of SBHOA for
the period in question. We note that the complainant has raised other
concerns in his letter of 31st of August however we do not consider that
any of the concerns raised would amount to misconduct on the part of
PKF Belize and so we do not consider that it would be appropriate to
10 have the complaint submitted the disciplinary committee.”

Q. Now, you said this letter is dated 12th September, 2016?

A. Yes.

Q. When you check the website, did you see this letter there?

A. No it this letter was not posted there.

15 Q. This letter was not posted to the website?

A. No.

MR. WILLIAMS: Okay, that's it, you will be cross examined by my
friend and I ask that you be loud, clear and address
the trial judge.

20

5 **CROSS EXAMINATION OF JOSE BAUTISTA BY MS. GRINAGE**

MS. GRINAGE: Good morning Mr. Bautista.

WITNESS: Good morning.

Q. In your witness statement you said that I am currently the Managing
Partner of the Accounting Firm of PKF Belize, Accountant and
10 Business Advisors, are you still currently the Managing Partner?

A. Yes I am.

Q. And PKF Belize...Is Sittee River Wildlife Reserve a client of the PKF
Belize?

A. It was a Client, yes.

15 Q. When was this?

A. 2014, 2015.

Q. So PKF have done some work for Sittee River Wildlife Reserve?

A. That's correct.

Q. With respect to the audit which you referred to in your witness
20 statement at JB2, that was audit in relation to what Company?

5 A. SBHOA – which is Sanctuary Belize Home Owners Association, that's a different entity from SRWR.

Q. Thank you Mr. Bautista. In your witness statement you state that the Firm PKF, the Firm was engaged by the Board of Directors of Sittee River Wildlife Reserve, is that correct?

10 A. That's correct.

Q. The Firm was engaged by Sittee River Wildlife Reserve to carry out an audit of a totally different entity, is that what you're saying is that correct?

A. The Firm was engaged to do both...infact 3 audit actually because
15 there are 3 companies within that group right, there is Sittee River Wildlife Reserve, there's SBHOA which is Sanctuary Belize Home Owners Association and there's Eco Future Belize Limited, so the Firm was actually engaged to do the three of them.

Q. But you did state that in your witness statement, you stated that the
20 Firm was engage by the Board of Sittee River Wildlife Sanctuary Belize Home Owners to audit the Association Financial Statement.

5 A. Okay, the reason for that is that Sittee River Wildlife Reserve is actually the---

THE COURT: No, no the first question is that correct?

WITNESS: Yeah.

THE COURT: Listen to the question Sir.

10 WITNESS: We were engaged by the Board of Sittee River Wildlife Reserve---

THE COURT: What is the question again?

WITNESS: Who was controlling---

15 THE COURT: Listen to the question, listen, listen, listen to the question.

What was the question?

Q. The question was, did you state in your witness statement that the Firm was engaged to carry out these three (3) audits, you stated that yes or no?

20 A. No.

5 Q. And you stated here today that Sanctuary Belize Home Owners Association the HOA is a separate entity from Sittee River Wildlife Reserve Limited?

A. That's correct.

10 Q. So you would agree with me that they are separate engagements, correct?

A. Yes they are separate engagements.

Q. Did Sanctuary Belize...Sittee River Wildlife Reserve, do you know if they pay for the audit of Sanctuary Belize Home Owner Association?

15 A. It was paid by Sanctuary Belize Home Owners Association and there was a separate engagement letter with SBHOA which is a---

THE COURT: Which question are you answering?

WITNESS: No, I am just explaining to her---

THE COURT: No, no, no you're not here to give explanations.

WITNESS: I know.

20 THE COURT: Just answer questions.

MS. GRINAGE: I appreciate it My Lord.

5 WITNESS: Okay.

THE COURT: The only way...otherwise we will be here for the whole day.

WITNESS: Okay.

THE COURT: Just answer the questions.

10 MS. GRINAGE: I'll appreciate if you answer the questions that I ask.

MR. WILLIAMS: Just listen to her questions and respond to her questions if you can, don't wonder about, you're still helping by responding to the questions.

WITNESS: Okay.

15 Q. Mr. Bautista, I want to refer you to the Audit JB2.

THE COURT: What was the last answer?

MS. GRINAGE: My Lord, I asked him who had paid, he said Sanctuary Belize HOA.

Q. Under page 7 of the Audit Mr. Bautista under General Information---

20 A. Yes.

5 Q. The 8th line under General Information, the 8th line begins with the Association, are you there?

A. Yes.

THE COURT: None of your witnesses who are not parties are in the Court right?

10 MR. CAVE: We don't have any witnesses who are not party.

THE COURT: Alright.

Q. You state...PKF the Firm states the Association commenced training in March 2014, you are referring to the HOA correct?

A. That's correct.

15 Q. But you are aware that this Company was incorporated in 2012?

A. Yes.

Q. So you are aware...you would agree with me that this Company would have income prior to 2014, correct?

A. Yes.

5 Q. But of your audit, the audit which you presented it only refers to 9 months...you only audited the Company...as at 31st December, 2014 and 9 months prior to that, is that correct?

A. That's correct.

10 Q. So you didn't take into account any income derive by this Company before 2014?

A. Yes we did.

Q. You agree with me a while ago that this Company was earning income prior to 2014?

A. Right.

15 Q. But your audit does not take into consideration those income that was--

A. Yes it does.

Q. But it's not stated in the audit?

A. It's included in the figures here. It's included in the numbers here.

20 Q. But it's not expressly...on the face of it, it's not there. Would agree with me that it's not there, it's not reflected?

5 A. It is there, it is there, I will not agree with that, it's included, guaranteed and infact that is a question that the investigation committee looked into.

Q. Thank you Mr. Bautista, I just wanted to know if it is there. As part of your audit did you review the incorporating document of this company?

10 A. Yes I did.

Q. Do you review the memorandum of association?

A. Yes I did.

Q. And you noted who are the signatories, subscribers to that Memorandum?

15 A. Yes I did.

Q. And you will agree with me that all of them have addresses outside of Belize?

A. Right, that's correct.

Q. And you would agree with me that none of the persons who are
20 subscribers to that Memorandum are Sittee River Wildlife Reserve persons, correct?

5 A. As far as I know, no.

Q. So you would agree with me that the Home Owners Association is totally and separately distinct from Sittee River Wildlife Reserve?

A. It is yes.

10 Q. Mr. Bautista, are you aware that the lot owners, the persons who owned lots in Sittee River Wildlife Reserve, have you seen any of their Memorandum of Sale?

A. Yes we have.

Q. So you would know that those person pay HOA fees to Sittee River Wildlife Reserve?

15 A. Yes.

Q. They don't pay HOA fees to Sanctuary Belize HOA?

A. No they don't, they pay it to SRWR.

Q. So you would agree with me then that it would be a legitimate concern of the lot owners would like to know or would like an account of their HOA fees that would be a legitimate concern of theirs?

20

A. Yes absolutely.

5 Q. However the audit which you...the Firm...the audit which you undertook it was in relation to fees that were being assigned?

A. That was the whole purpose of the audit, to report on the fees. What fees came in and how the fees were spent.

10 Q. Thank you Mr. Bautista, but you would agree with me that those fees were to be paid to Sittee River Wildlife Reserve and not Sanctuary Belize Home Owners Association?

A. That's correct.

THE COURT: What's correct?

15 WITNESS: That it should have been paid...well it was paid to Sittee River Wildlife Reserve. However those fees, can I---

20 There was an assignment of fees as you mention. The fees were assigned to SBHOA okay, so it was paid to SRWR but it was assigned to SBHOA by SRWR.

Q. But do you know if this assignment was disclosed to the owners?

5 A. I don't know, that's up to Management to do, we deal with Management right, Management deals with the Home Owners.

Q. So if the Home Owners who are to pay HOA fees to Sittee River Wildlife Reserve are not aware of an assignment, there concern would be legitimate, you would agree with me?

10 A. I should think so, yes.

Q. Mr. Bautista, did PKF perform any audit for Sittee River Wildlife Reserve?

A. Yes.

Q. 2013 and, 2014?

15 A. Yes.

Q. And 2015?

A. I think it was for 2014 and 2015.

Q. I want to take you back to these fees that were paid by these lot owners. In conducting this audit, did the Firm look at the primary materials such as the Invoices by which the payments were made?

20

A. Absolutely.

5 Q. And so, do you know that these payments...that these lot owners were directed to send their payments to Newport Beach, California?

A. Yes, some were.

THE COURT: Sorry what was your question?

WITNESS: Some of them were.

10 THE COURT: Some of what?

WITNESS: Some of the owners were paying---

MS. GRINAGE: Directed to pay the HOA fees to Newport Beach, California.

WITNESS: Right.

15 Q. And this Sanctuary Belize Home Owners Association is a Belize Corporation?

A. Yes it is.

Q. It's not a California Corporation?

A. No.

20 Q. And Sittee River Wildlife Reserve is a Belize---

5 A. Yes.

Q. When the Firm does the audit, do you review how the revenues are collected?

A. Yes we do.

10 Q. And these were collected by Sittee River Wildlife sending out Invoices, correct?

A. Yes.

Q. It was not Sanctuary Belize Home Owners Association sending out these Invoices?

A. That's correct.

15 Q. It was Sittee River Wildlife Reserve who also instructed the persons to send their money, is that correct?

A. That's correct.

20 Q. So you would agree with me Mr. Bautista that is the Sanctuary of Belize Home Owners Association really had no interaction or connection with these Home Owners?

A. No.

5 THE COURT: No, what?

WITNESS: No, I won't agree with you.

Q. Mr. Bautista, I want to refer you to your letter JB3. This is the letter JB3 to your witness statement?

A. Yes.

10 Q. Take a look at paragraph 3, this is your letter to Thomas Herskowitz, is that correct?

A. That is correct.

Q. At paragraph 3 starting with we are advised; in that letter you state "we are advised that lot owners of Sittee River Wildlife Reserve are the very
15 same lot owners of Sanctuary Belize HOA, see that Mr. Bautista?

A. Yes I do.

Q. But a few moments ago you agreed with me that there was no connection at all between these lot owners and the Sanctuary Belize Home Owners Association?

20 A. No, I said there was. I said there was a connection.

Q. Alright Mr. Bautista, so you maintain there is a connection?

5 A. There is a connection.

Q. Even though their agreement state that they are to pay these fees to Sittee River Wildlife Reserve?

A. That's correct.

10 Q. Even though they have been instructed by Sittee River Wildlife Reserve?

A. Yes.

Q. You maintain that position?

A. Yes.

15 Q. When Mr. Thomas Herskowitz inquired about the assignment, did you give him a copy?

A. No.

Q. Do you know if the Home Owners Association ever had any meetings with the lot owners?

A. Yes I understand that they had meetings.

20 Q. You understand but you don't know?

5 A. I don't know for a fact.

Q. Okay, thank you---

A. We were advised that they had.

Q. Mr. Bautista, were you aware that this Sanctuary Belize HOA...sorry,
were you aware that Sittee River Wildlife Reserve has been collecting
10 HOA fees from owner from 2013?

A. Yes.

Q. But you don't refer to that in your audit?

A. No I don't.

Q. And would you agree with me that Mr. Herskowitz was making a
15 complaint to an Investigative Body?

THE COURT: Which complaint?

WITNESS: Meaning?

THE COURT: Which Investigative Body are you talking about?

MS. GRINAGE: My Lord, the letter marked SJB1.

5 WITNESS: Are you asking when I wrote this letter was I aware
that he was doing that?

MS. GRINAGE: No Mr. Bautista, I will reword my question for you.

Q. Would you agree with me that the Institute of Chartered Accountant is
an Investigative Body?

10 A. A Regulatory Body.

Q. It is a Regulatory Body?

A. That's correct.

Q. And you would also agree with me that part of its duty as a Regulatory
Body is to investigate?

15 A. That's correct.

Q. And so Mr. Bautista, you would agree with me that Mr. Herskowitz was
making a complaint to this Investigative Body?

A. To the Regulatory Body.

Q. To the Regulatory Body?

20 A. Right.

5 Q. And that his complaint was based on the legitimate concerns he had?

A. Legitimate, I have a problem with that word.

THE COURT: Sorry I can't hear you.

WITNESS: I have a problem with the word legitimate.

10 Q. Mr. Bautista, earlier you agreed with me that the concerns of the lot owners would be legitimate concerns, correct? When I asked you that, I asked you whether these persons who are to pay HOA fees to Sittee River Wildlife Reserve that they would have legitimate concerns about their fees, you said 'yes'?

A. Yes.

15 Q. So then you would agree with me that Mr. Herskowitz a lot owner making a complaint to a Regulatory Body that this complaint was in relation to his legitimate concerns?

A. Yes.

20 MS. GRINAGE: Thank you Mr. Bautista. My Lord, I have no further questions for this witness.

THE COURT: Thank you, any re-examination?

5 MR. WILLIAMS: Yes My Lord, just one small point.

RE-EXAMINATION OF JOSE BAUTISTA BY MR. WILLIAMS

10 Q. My friend asked the last question there as to whether you understand that the Institute which the Regulatory Body, trying to enquire of you whether you understand that Mr. Herskowitz was making a complaint to the Institute because that's to whom you make complaint. Can you indicate whether as you understand it Mr. Herskowitz was making that complaint about your conduct to the Institute in his letter?

A. Yes he was.

Q. What you understand he was complaining about you to the Institute?

15 A. Well he was making allegations as to our competence, our professionalism, our ethical, the work we did, the fact that we had suggesting, implying that we had missed things, we had left things out, that we were working in collusion with Management to fraud, and defraud and to pull the wool so to speak over the eyes of the Home
20 Owners which were completely unfounded.

Infact I might add that the whole purpose of the Financial Statements was to account for the funds that Home Owners were paying into that

5 Home Owners fees and it was a separate report to show this is the money that came and this was how the moneys was used.

Q. So you're telling the court to clarify the issue that a complaint was actually being made against you and your Firm in relation to the conduct of the Audit?

10 A. Right

Q. Herskowitz' letter to the Institute under summary and beginning at the last on page 3 of the Herskowitz' letter to the Institute, you see that?

A. Yes.

15 Q. Could you begin to read there by not verify and that last word in terms of the articulation and the complaint?

A. Yes, this is the allegation that he was making.

Q. Just read it?

A. "By not verifying the legal right to receive the membership fees or verifying the legal obligation of owners to pay such membership fees--

20 -

5 THE COURT: I am not sure where you're read, where are you reading from?

MR. WILLIAMS: Page 3, I think it is JB1.

THE COURT: Start again.

10 A. "By not verifying the legal right to receive the membership fees or verifying the legal obligation of owners to pay such membership fees, I believe that PKF has committed professional malpractice.

Q. Continue?

15 A. And knowing that these audited Financial Statements will be sent to SRWR members in an attempt to confuse them and obfuscate the true financial condition of SRWR concerning the financial information that they are due from SRWR, not SB HOA, may make PKF Belize complicit in possible deception and fraud on the SRWR members.

Q. Continue?

20 A. At the very least, it does not uphold the level of professionalism expected of a licensed chartered accounting firm.

Q. The next paragraph please?

5 A. It says, this is reminiscent of the relationship between Arthur Anderson and Enron in the United States where Anderson was essentially a captive auditor of Enron and supplied information to Enron shareholders and vendors based on what Enron said, rather than relying on professional accounting and audit practices.

10 Q. Go ahead?

A. It said, I have copied this letter to Mr. Jose Bautista at PKF Belize and asked for his comments. After reviewing the enclosed material, please let me know what action will be taken to confirm or reject this malpractice complaint. Signed Thomas Herskowitz

15 MR. WILLIAMS: Thank you.

THE COURT: That's it.

MR. WILLIAMS: Yes My Lord.

THE COURT: You could step down, thank you.

MR. WILLIAMS: My Lord, I'd like to call Mr. Rod Kazazi. That's Tab 9
20 in the trial bundle, witness statement.