

**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

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**21<sup>ST</sup> 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 THE COURT: Alright, can you step down please, thanks.

MR. WILLIAMS: My Lord, may this be a convenient time, I am told that  
My Lord---

THE COURT: What time is it now?

MR. WILLIAMS: It's noon, it's after 12.

10 THE COURT: I wanted to see if we can just make a little---

MR. WILLIAMS: You said you needed the afternoon so I thought---

THE COURT: At 3 o'clock.

MR. WILLIAMS: At 3:00.

THE COURT: Is there a problem?

15 MR. CAVE: My Lord, I am willing to go a little bit more.

THE COURT: You got one more witness have you, another  
witness?

MR. WILLIAMS: I think I have two (2) witnesses.

THE COURT: Who is the next witness?

20 MR. WILLIAMS: I have Mr. Usher, Mr. Bailey.

5 My Lord, it is that 3 onwards the court will not be available?

THE COURT: Yeah, I have a meeting.

MR. WILLIAMS: My Lord, what I'll try to do is to see how we could manage things---

10 THE COURT: You wish to break now?

MR. WILLIAMS: I prefer to break down.

THE COURT: And come back what time?

MR. WILLIAMS: And return in the morning---

15 THE COURT: No, no, no, no, let's get as much done as we can today.

MR. WILLIAMS: Well as best as I can... what I was offering my friend is an indication that even though I had two I would then only be calling one which will be Mr. Usher. I had two (2) witnesses remaining on my roster.

20 THE COURT: Why not, let's deal with him, is he here?

5 MR. WILLIAMS: Yes, he's here but I had a 1 o'clock commitment so I indicate to my friend but I am prepare to begin with Mr. Usher, but Mr. Usher is the witness he has the issue with in terms of a paragraph in his affidavit.

THE COURT: Well let's deal with that now.

10 MR. WILLIAMS: We could make a start.

THE COURT: Yeah.

MR. WILLIAMS: I wouldn't want to go fully across to lunch because I have brief 1 o'clock.

THE COURT: That's alright, we could come back at 2:00?

15 Do you want us to go till 1 o'clock then?

MR. WILLIAMS: I can begin Usher and then go as far as 1 o'clock.

I have a quick engagement for 1 o'clock.

THE COURT: Well let's go to 1 o'clock, is that oaky, do you want a short break now.

20 MR. WILLIAMS: No, I could begin now but I will have to stop shy of the 1 o'clock.

5 THE COURT: No that's okay, then that would make more sense.  
Let's get your witness---

MR. WILLIAMS: And then we could see where we are, whether before  
3:00 or beginning tomorrow, I was undertaking only  
to call one more witness really and that's Usher.

10 THE COURT: He is Tab what in the bundle?

MR. WILLIAMS: 13.

**WITNESS SWORN**

**EXAMINATION IN CHIEF OF JOHN USHER BY MR. WILLIAMS**

Q. Your name is John Usher?

15 A. Yes.

Q. You live is Sittee River, Stann Creek District of Belize?

A. Correct.

Q. And Mr. Usher you made a witness statement in this matter which is  
dated the 30<sup>th</sup> of May, 2016?

20 A. That's correct.

5 Q. Did you sign your witness statement?

A. I did.

Q. And if you were to be shown it, would you be able to recognize it?

A. I would be able to.

Q. Is that your signature?

10 A. Yes.

Q. Now attached to your witness statement is a bundle of several documents?

A. Yes.

15 Q. There are a number of documents exhibited to your witness statement  
I think numbered, I am not sure of the numbering I think they get into  
alphabetical JU1 down to 1P or A to P or something like that. But let  
me ask you---

20 MR. WILLIAMS: My Lord, there is one document that my friend has  
indicated he wish to object to and I guess I can have  
him identify for the benefit of the court.

5 Q. In your bundle Mr. Usher, there is a document, I think it's the last document P at the very end an email, you see that document between one Cathy Ellis and one Thomas Herskowitz?

A. Right.

10 MR. WILLIAMS: My Lord, just before I really ask for the document entry, I think my friend would want to take---

THE COURT: Are you objecting to a document, which one?

MR. CAVE: The document which is attached to paragraph 66 which is just referred to.

15 Our application is promise upon the same grounds of the last in that...sorry, promise on the Rule, Rule 29 we say My Lord, that the particular evidence is inadmissible.

THE COURT: The Exhibit is it?

MR. CAVE: The exhibit yes.

20 THE COURT: An email from Thomas Herskowitz---

5 MR. CAVE: A purported email between Thomas Herskowitz and Kathleen Ellis.

THE COURT: But Thomas Herskowitz is a witness in this case.

MR. CAVE: That is correct My Lord.

THE COURT: So why isn't that admissible?

10 MR. CAVE: Well, first of all My Lord, we say that it doesn't comport with the requirements of the Electronic Evidence Act, in that it proposes My Lord, through this witness statement and the attachment to tender that which amounts in the circumstances the  
15 Electronic Evidence falling within the definition of Chapter 95 01 and we say further My Lord, that that Section requires a certain foundation for the admissibility of documents, we say that the foundation or the evidence in support that foundation  
20 cannot be supplied by this witness.

If I may take Your Lordship through the provisions of the Electronic Evidence Act which we say are

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applicable, not a particularly long piece of Legislation  
My Lord.

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The Electronic record under the interpretation portion  
of the legislation My Lord, and the “electronic record  
means data that is recorded or stored on any medium  
in or by a computer system or other similar device  
and that can be read or perceived by a person or a  
computer system or other similar device and includes  
a display, print out or other output of that data,”

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It is defined just above that My Lord, as meaning  
representations, in any form, of information or  
concepts.

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Now it is important My Lord, to put I believe this piece  
of legislation in context because usually it is the case  
and I am sure my learned senior would agree that  
issues of authenticity goes to the weight,  
considerations are weight, considerations are credit  
and therefore it’s a matter for the tribunal of fact.

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The issue related here My Lord, is not related to issues of weight but issues of admissibility because the Legislature in creating this piece of legislation have provided a special framework for the admissibility of certain information or evidence which fall within the definition of the Act and the chief requirement My Lord, of that this piece of legislation is that there must be some evidence capable before as a recondition of its admissibility, there must be some evidence capable of establishing its authenticity.

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THE COURT: He's challenging the authenticity of this document?

MR. CAVE: My Lord, my position is slightly...based on the legislation, I would just clarify my position. My position in relation to authenticity is that that is a requirement and I point My Lord, to specifically to Section 5 of the Legislation and this is to establish...this section I believe My Lord, establishes quite clearly that there'll be issues of authenticity being referred to here are not authenticity in relation

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that the court would have to consider at the end of trial but these issues are issues that the court would have to consider as a precondition to the admissibility of the document; because Section 5 reads My Lord:-

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*“For the person seeking to introduce an electronic record in any legal proceeding has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be.”*

So that person My Lord---

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THE COURT: Was this disclosed, this document? Is there a Rule in---

MR. WILLIAMS: 28.18 (1) and (2)

THE COURT: Yes, go on.

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MR. CAVE: Yes My Lord, we say...My Lord, do you wanted me to address specifically the one that...the Procedure Rule that you referred to, if the court wishes me to address that now I can.

5 THE COURT: Yeah, is a notice being served.

MR. CAVE: No please My Lord, not as far as I am aware.

THE COURT: Aren't you deem to have been admitted the authenticity of this document, because you didn't serve notice?

10 MR. CAVE: My Lord, we say that the Procedural Rule under 28.18 is superseded by the Substantive Legislative Provisions of Chapter 95.01. If Substantive Legislative Provision we say is pre-eminent and we say My Lord, that to the extent that Section 5 of that  
15 Legislation imposes a burden on the person who seeks to introduce such evidence. The burden of proving its authenticity that particular Legislative precondition must be satisfied, we say that it has not been.

20 My Lord, we say further that---

THE COURT: Isn't your objection premature though?

5 MR. CAVE: Well, no My Lord, it isn't because this is the point at  
which they seek to introduce it, they seeks to have  
the court admit it and at Paragraph 5 of the  
Legislation speaks to the point at which we are now  
which is the person...the point at which the person  
10 seeks to introduce it.

My Lord, I began by putting this in the particular  
context because I fully understand that there's a  
various between this position as provided for within  
this legislative framework and what is usually the  
15 case because if I were in the ordinary situation  
circumstance to suggest to this court that this thing is  
not authentic the court would rightfully be in a  
position to say to me, well then leave that to the end  
of trial and address the court on that or cross  
20 examine on it.

But what the Legislation is saying is not that this is a  
matter for the end of trial and determination by the  
tribunal of fact after all the evidence is led in relation  
to it, what this legislation is saying clear that at the

5 point of which the evidence is sought to be introduced to this court at the point at which my learned senior seeks to tender it---

THE COURT: Isn't this evidence an email?

10 MR. CAVE: Yes My Lord, and we say that it falls within the definition of Electronic Evidence under the Electronic Evidence Act, its electronic mail.

THE COURT: But it's a printed copy.

MR. CAVE: Yes My Lord, of electronic mail.

15 My Lord, the definition section if I may take you back to that Section My Lord, that electronic record includes a display, print out or other output of that data.

20 The fact My Lord, that it's a printed copy we say doesn't change the nature of it, it's an electronic record.

THE COURT: But it talks about computer system or other similar device, it to deal with records stored in the device.

5 MR. CAVE: My Lord, we say My Lord, and the definition says any data that is recorded or stored in any medium in or by a computer system or other similar device.

THE COURT: And that can be read or perceived by a person or a computer system or other similar device and includes  
10 a display, print out or other output of that data.

MR. CAVE: My Lord, I believe this very issue confronted Your Sister Madam Shona Griffith in a case that I think that was recently concluded, I don't have the decision as a matter of fact I am not sure whether a written one has yet been issued but the similar issue confronted the court in relation to an attempt to tender electronic mail, this is...I am not relying on this but the court took the position in that case as well that email constituted electronic record for which a certain  
15 foundation ought to be established prior to its admission, it maybe that the court in that instance made the determination that that particular foundation be establish we say in this case that it hasn't been.  
20

5 THE COURT: What are you saying that it is not possible to...assuming you're correct that it's not possible for the foundation to be establish---

MR. CAVE: Not by this witness providing this court with legally admissible evidence because the issues of authentication which the court ought to be providing--

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THE COURT: Is your Client challenging the authenticity of this document?

MR. CAVE: Absolutely My Lord, absolutely, that has been his consistent position from the first time he saw it, and My Lord, I don't want to get into the facts of it, but if persons supposedly produce this document is present in court and the other side never bothered to call them.

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THE COURT: Isn't there requirement for notice to prevent any kind of ambush?

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MR. CAVE: My Lord, I don't subscribe My Lord, respectfully to the notation that there was any ambush in this matter. I

5 don't understand...I don't subscribe to the view that  
there are some expectation on the part of the other  
side that...and I know my learned senior and I don't  
doubt when my learned senior said in relation to  
whatever might have been discussed am not privy to  
10 that, not that am saying that it is not true, I'm not privy  
to it so I'm not in a position to say one way or the  
other and my learned friend who was involved---

THE COURT: Have you given notice of the intention to challenge  
the authenticity of this document?

15 MR. CAVE: You mean under Part 28.12---

THE COURT: Did you give any notice?

MR. CAVE: We have in accordance with paragraph 28.12.

THE COURT: Did you give any notice?

MR. CAVE: Not before this morning My Lord, but there's clear  
20 authority on the point and this has happen---

THE COURT: Which clear authority?

5 MR. CAVE: My Lord, there is authority on the point that the trial  
is the appropriate place at which to deal with this  
issue and routinely My Lord, there are challenges to  
portions of witness statements made on the day  
when that statement is sought to be tendered, that is  
10 the situation that obtains usually My Lord, there are  
times when you know I am sure, it's the peculiar of  
what I am saying My Lord, it's not peculiar for a party  
to make known its objection at the time when the  
statement is sought to be tendered.

15 THE COURT: Listen to the question I ask you, I said if you gave  
notice?

MR. CAVE: Well I did say My Lord, I did not, please forgive me.

THE COURT: Am just wondering whether this is the right moment  
to be raising this. This witness...you've indicated  
20 that you want to challenge...you're now indicating  
that you want to challenge the authenticity of the  
document?

5 MR. CAVE: No My Lord, I don't think from the point of view, what we say under the Electronic Evidence Act it ought not to be admitted, this is not a challenge to---

THE COURT: Mr. Cave, emails are routinely admitted into these courts.

10 MR. CAVE: My Lord, I do recall Your Lordship, saying something recently that if indeed the issue is not arisen or is not disputed then it's no need to decide it. It may very well be that other persons have not---

15 THE COURT: I am just wondering whether now you've indicated your objection whether Mr. Williams might want to seek to lay the foundation.

20 MR. CAVE: Well My Lord, this is what we say and I am glad the Court raise that point. The first point I want to make is that the time for him to do that have passed already because he has already made the application and he's already at the point where he wishes to tender the document, but in any event we say My Lord, that

5 this witness cannot supply the direct information or  
evidence which the court will have been required---

THE COURT: So Mr. Williams shouldn't be given the chance?

MR. CAVE: Well My Lord, it's not about being given a chance,  
Mr. Williams has gotten the chance already in  
10 preparing this witness statement and seeking to  
introduce this before the court, as a matter of fact the  
court has pointed out that these witnesses  
statements...there was a Case Management Order,  
these witness statements were filed pursuant to the  
15 Case Management Order and we're now at a point  
some considerable point afterwards where the  
witness has now come to the witness box and the  
witness says I am prepare to tender my witness  
statement as part of the evidence, along with an  
20 exhibit which we dispute.

And we say that it's not a matter of my learned senior  
not having a chance. My learned senior has had a

5 considerable opportunity already to put this evidence  
before the court but even if---

THE COURT: He has put it before the court.

MR. CAVE: Yes, yes, not the evidence---

10 THE COURT: Look, look, are we wasting time here? Listen  
when...if Mr. Herskowitz comes and gives evidence  
the witness is going to be able to put this document  
to him.

MR. CAVE: If the witness---

15 THE COURT: If Mr. Herskowitz comes and gives evidence, he'll be  
cross examine on this document.

MR. CAVE: I appreciate that My Lord, and I fully expect that he  
would be if he comes and gives evidence. We say  
however---

20 THE COURT: And it's right and proper that this witness who is here  
since he is seeking to admit it now be given an  
opportunity to deal with...because you can call him  
back later---

5 MR. CAVE: Except My Lord, and this where...this is the point I want to bring home as to why---

THE COURT: Let's not...I'm not shutting you out, I'm just wondering whether we're just wasting time now and really and truly let's hear what Mr. Williams has to say and how he intends to proceed.

10 MR. CAVE: Guided My Lord.

MR. WILLIAMS: Oblige My Lord, My Lord, it's a bit regrettable that we have to come to this point but recall the Case Management Orders in relation to the admission of witness statements as examination in chief and just for background purposes that my former colleague on the other side we had both agreed that whatever comes with the witness statements---

15 THE COURT: But don't worry with that, let's deal with the situation here at the moment.

20 MR. WILLIAMS: In terms of this particular situation, first of all and the fact is that about every document in this trial is really the product of electronic records.

5 THE COURT: Yeah, but there's an objection to this particular one.

MR. WILLIAMS: Yeah, I am just making the general observation the  
rule about this kind of objection is clear and I have  
had to deal with it many times before these courts  
and it requires that in relation to notice to prove  
document that a party is deem to admit authenticity  
10 of any document, disclose any document, not  
electronic or other, any document disclosed to him  
under this part, unless that party serve notice that the  
document must be proved at trial.

15 There has never been any notice requiring proof of  
the authenticity of this document at trial, no  
notification and in any event because this rule exists  
so that there is no ambush so that parties can infact  
then make the necessary preparation and if my friend  
20 is saying the Electronic Evidence Act applies which I  
doubt, I don't necessarily agree with that because  
this is not in that nature of what the Act purports to  
address in terms of electronics, this is simply a  
printed document and its outside the scope of that

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Act but if it was the intention to be able to object to this document and notice to prove must be served not less than 42 days before the trial and of course we've have a lot of time for that and if my friend then say okay we intend to do that, then he is obliged. It must be, it is mandatory that he gives that notice 42 days at least before the trial so that one can at the time of trial having been notified that there will be an objection to the particular once you get that notice the you could take the appropriate steps let's say that you assume there's a foundation necessary to be laid or my friend...to be able to do it appropriately---

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THE COURT: Is there any inconsistency between the Rules and this Act.

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MR. WILLIAMS: There's no inconsistency between the Rule and the Act. I will come shortly by going to the Act...going to the Statute itself where it says the general rule and so on.

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But there not having been any evidence or any notification except to whisper in our exchanges earlier today, certainly not in compliance and this is mandatory and if this is not done the objection can't be taken, that is the clear position just like objections having to do with witness statements and so on if you don't provide your witness statements and so on, you're are oblige to give notice.

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So, it is certainly a fundamental issue and there's no clash with statute and my friend has certainly had every opportunity to make the objection that the Civil Procedure Rules mandates.

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Now, if the matter one that is govern by Electronic Evidence Act. The Electronic Evidence Act Section 4 speaks to its scope, it says –

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*“This Act does not modify any common law or statutory rule relating to the admissibility of records, except the rules relating to authentication.”*

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So the standard and general rules of evidence and so on applies, when it comes to authentication this...there's a modification. When it comes to authentication the rules of court also tells you what is that modification; the rules of court that's 28.18 which requires any document, it doesn't categorize them as electronic, non-electronic, whether they are pictures and so on.

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Any document shall be deemed to be the...the authenticity of it shall be deemed to be accepted it need to be an admission. The party shall be deemed to admit the authenticity of any document disclosed to him unless the party give the notice that the document must be proved at trial.

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A notice to prove a document must be served not less than 42 days and this is hardly the case here and so I have certainly and respectfully say to the court that in terms of this document that infact my

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friend can only take any objection if he can show that he is within 28.18 and he's certainly not within 28.18. and he had every opportunity to put himself there and he's not there.

MR. CAVE:

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My Lord, and I did note respectfully that my learned senior never address the issue of the preminent nature of this particular legislation, and Your Lordship did rightfully put the finger on the issue which is whether is any conflict between the particular Procedure Rules and this piece of legislation. My Lord, I much grateful that my learned senior pointed to paragraph 4 the Scope of the Act in which the Act specifically denies any modification of common law or statutory rules relating to the admissibility of records, except importantly rules relating to authentication and best evidence. The very next section, Section 5 the marginal note reads "authentication" and that Section specifically provides for the procedure by which and the burden which must be overcome in order for a person who

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seeks to introduce an electronic record to meet before that person is allowed to admit evidence of that sought.

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That is a position we rely on My Lord, and I want to day further that any evidence which purports to supply evidence of authenticity or evidence capable of supporting a finding that the electronic record is what the person claims it to be; it can't come from this witness because he can't supply any direct evidence of it, any evidence he would supply must come from a third party and that is inadmissible hearsay.

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So I hope that addresses the point of whether my learned senior ought to be given an opportunity to have the evidence tendered establish though this witness.

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We say he is not in a position to do so, whatever opportunity is afforded to him that what he is supposed to do I propose is seek to introduce indirect

5 evidence of a third party which he cannot do. Those  
are our submissions My Lord.

MR. WILLIAMS: My Lord, can I make one observation here. This  
Electronic Evidence Act January 2003, deserves in  
terms of matters of authenticity that was expressed.  
10 The 2005 Civil Procedure Rules in terms of  
authenticity and the Rules are not just procedural but  
substantive in nature which came after this Act and  
there's not conflict between the Act and the Rule  
mandates a certain process which my friend has not  
15 followed. If we reverse it the other way---

THE COURT: Mr. Williams, I'll give you an opportunity, you  
proceed. I will overrule the application at this stage.

MR. WILLIAMS: Oblige My Lord.

THE COURT: And you got an opportunity to proceed to seek to  
20 introduce the email.

MR. WILLIAMS: Is My Lord, saying I can bring---

THE COURT: You can proceed.

5 MR. WILLIAMS: I can proceed and have the entire thing be introduce.

THE COURT: You can seek to get it introduce.

MR. WILLIAMS: Okay, because I was about to say to my learned that  
if the objection was taken the way it properly should--  
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10 THE COURT: I think it's premature, I think---

MR. WILLIAMS: I could bring the particular person.

THE COURT: He is obviously confident that you can't succeed, but  
can't deny you the opportunity to attempt to do so.

15 MR. WILLIAMS: And I can also bring that person if that's...yes, it  
would be a new witness statement.

THE COURT: The problem you see is that the other side is actually  
ambushing---

MR. WILLIAMS: Ambushing, that's what it is.

20 THE COURT: That's the difficulty, That's the problem with his  
argument because the Rules seeks to establish a

5 procedure by which there should be a challenge to  
the admissibility of any documents under the Act.

MR. WILLIAMS: Any document.

THE COURT: In so far as the Rules are inconsistent with the Act,  
then obviously the Act would take precedence. But  
10 in so far as it is not inconsistent then it will---

MR. WILLIAMS: It will operate.

THE COURT: Yeah. You can proceed, you still got this witness in  
chief, so you can proceed.

MR. WILLIAMS: Grateful, My Lord, the next step would have been to  
15 admit the witness statement and the exhibits  
attached.

**EXAMINATION IN CHIEF CON'T OF JOHN USHER BY MR. WILLIAMS**

Q. Would you like to give this to the court?

THE COURT: There is a challenge to this email, is there anything  
20 you wanted the witness to address in relation to that?

MR. WILLIAMS: In relation to the email?

5 THE COURT: A challenge, yeah.

MR. WILLIAMS: To enquire of him in relation?

THE COURT: Yeah.

MR. WILLIAMS: Well his evidence in relation to that email is in  
paragraph 56 really of his witness statement. My  
10 Lord, you mean by way of amplification?

THE COURT: Yeah.

MR. WILLIAMS: Very well My Lord.

Q. You recall that you referred to...in paragraph 56 of your witness  
statement you referred to this email between Kathy Ellis and...sent by  
15 Mr. Herskowitz to Kathy Ellis, did you also received the email?

A. I was 'cc' into it, I was copied into it.

Q. You were copied into it?

A. I was copied into it yes, by Kathy.

MR. CAVE: My Lord, I just want to clarify what his answer is,  
20 whether he was---

THE COURT: He was 'cc' into it by...it is email by Kathy.

5 MR. CAVE: By Kathy, not the person who supposedly sent it.

WITNESS: Kathy Ellis.

Q. This email, you had the opportunity to read that email?

A. Yes sir.

10 Q. When you got that email, can you tell this court if you shared it with others?

A. I did not share very much, I show told the wife and showed then more-

Q. Did you shared it with your colleagues in the company?

15 A. I showed them, I showed Alfonso and couple other people that work with us.

Q. In relation to that email Mr. Usher, the person to whom it was address Kathy Ellis, do you know her?

A. I know her.

20 Q. In relation to this dispute between the Claimants and the Defendants, do you know whether Kathy Ellis took side in this issue?

A. No, I don't really follow the sides, so I don't know.

5 Q. In the email and by way of amplification, certain things were said referring to you, you are aware of it?

A. Yes.

Q. There was a question challenging your qualification to do this project...to ran this project?

10 A. That's correct.

THE COURT: Just a second---

MR. CAVE: My Lord, we go into the contents of the email?

THE COURT: This is really to deal with the object is it?

MR. WILLIAMS: My Lord.

15 THE COURT: You just start with the objection, you finish dealing with the objection?

MR. WILLIAMS: Yes My Lord.

THE COURT: Alright---

MR. WILLIAMS: And I thought I was given the opportunity just to  
20 amplify with regards to---

5 THE COURT: To do with the objections specifically right now. You wanted to deal with amplification fully right?

MR. WILLIAMS: I'm sorry I didn't realize My Lord, I was focused on the---

THE COURT: Yeah, because of the lack of notice—

10 MR. WILLIAMS: I understand what My Lord, my junior has just brought me home to what the judge was expecting.

THE COURT: Yeah.

Q. When you received this email, did you do anything to it, to add to it?

A. I did not.

15 Q. Did you print it?

A. I think I printed it out yes.

Q. Did you forward it to anyone, and if you did can you tell us who you recall sending it to?

A. I don't remember who I sent it to, I might have sent it to the Marketing  
20 group but I am not sure, I don't remember.

Q. Did you bring it to the attention of your Lawyers?

5 A. I definitely brought it to your attention.

Q. And you sent it to your Lawyers?

A. Yes I did.

Q. Do you recall if in relation to this email whether Mr. Herskowitz said anything to you?

10 A. He said nothing to me.

Q. So he had no conversation with you concerning the email?

A. No.

MR. WILLIAMS: Okay, that's as much as I will ask Mr. Usher in relation of finding the email.

15 **CROSS EXAMINATION OF JOHN USHER BY MR. CAVE**

Q. Mr. Usher, you said you didn't alter or modify that email in anyway before you sent it that was your evidence?

A. That's correct.

Q. But you can't say whether it was altered or modified before it was sent to you, can you?

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5 A. No, I just got what I got, I am not an expert in that Sir.

Q. You have forwarded message before haven't you?

A. Many a times.

10 Q. And you are fully aware that if one forward a message...an email it allows for the person to change all of the properties in the email which is being forwarded including the contents, date, subject, every aspect of it, you are aware of that?

A. I am very challenge with computer, you might---

Q. So you can speak to whether an email...that email is authentic or not, is that correct?

15 A. I just know that it came---

Q. It came from a person?

A. Yes.

Q. Who sent it to you, or it was sent by somebody else?

A. Kathy Ellis sent it to me and that's what I got.

20 Q. But you can't speak to the authenticity of the record?

5 A. I can only assume it was, I really can't.

Q. You can't say if it was altered or not?

A. I cannot.

MR. CAVE: Those are my questions My Lord.

THE COURT: Do you want to say anything now?

10 MR. CAVE: My Lord, consistent with the evidence that this  
witness...this is the basis of my objection which I  
repeat and rely on that this witness can't assist this  
court in overcoming the hurdle which they are  
required to overcome pursuant to Section 5 of the  
15 Electronic Evidence Act, Chapter 95:01, that is the  
basis of my objection and I making that now.

MR. WILLIAMS: Well My Lord, I say that the particular statute my  
friend is citing does not present any conflict or  
obstacle in relation to either the admissibility or on  
20 the authenticity. What the rules ultimately do, the  
CPR 28.10 or 28.18 is to amplify the process  
consistent with the new climate of no ambushing and

5 set a clear procedure which is mandatory that if my friend fail to follow that procedure is deem to admit the authenticity of that document which they have been aware of since witness statements exchange.

10 The rationale behind the process My Lord, is to allow, is to avoid this kind of thing here at trial the whole ambush and it would have been very simple with the objection---

THE COURT: Mr. Williams, I will admit the document for purposes of identification.

15 MR. WILLIAMS: Yes My Lord.

THE COURT: And give a ruling on its authenticity at the end of the case.

MR. WILLIAMS: Very well My Lord.

20 THE COURT: So it's admitted for the purposes of identification, cross examination of all the witnesses and then at the end of the day I'll rule on its admissibility and its weight.

5 MR. WILLIAMS: Very well My Lord, is this a convenient time.

THE COURT: We'll adjourn and come back at 9 o'clock tomorrow.

Court adjourned at 1:05 p.m.

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