IN THE COURT OF APPEAL OF BELIZE, A.D. 2001

CIVIL APPEAL NO. 4 OF 2001

BETWEEN:

MICHAEL ARNOLD
COROZAL FREE ZONE
DEVELOPMENT LIMITED **Appellants**

AND

NORMAN ANGULO McLIBERTY **Respondent**

BEFORE:
The Hon. Mr. Justice Mottley
The Hon. Mr. Justice Sosa
The Hon. Mr. Justice Carey, JJA

Mr. Dons Waithe and Mr. Hubert Elrington for Appellants.
Mr. Denys Barrow S.C. and Mr. E. Andrew Marshalleck for Respondent.

2001: October 16 and 2002: March 8.

CAREY, JA:

1. This appeal raises a question of procedure, whether the means employed by the appellants (the defendants in the original proceedings) in seeking to enforce a compromise, was correct.

2. There is in existence a judgment debt amounting to a sum in excess of $3M owed by the appellants. The parties compromised the matter by a consent order in the form of a Tomlin Order dated 12 April 2000.

3. By clauses 8 and 9, the parties agreed as follows:-

> ***"…8. The plaintiff shall be responsible for obtaining sub-division approval for subdividing parcel 440 as shown in the plan annexed hereto entitled "Proposed Subdivision of Corozal Free Zone Development Limited Lands at Santa Elena, Corozal District (Modified June 1996)" and signed for identification by the plaintiff and the defendants ("the plan").***
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> ***…9. The lands within the borders marked in yellow ("the plaintiff's lands") shall be transferred to the plaintiff's transferee absolutely. In surveying these lands the surveyor shall ensure that the roadways, parks and parcels in the plaintiff's lands shall have the dimensions shown on the plan so that if there needs to be any diminution of roadways, parks and parcels shown on the plan such diminution shall be borne by the roadways, parks and parcels shown in the remainder land and not by those shown in the plaintiff's lands…"***

4. The appellants alleged that the respondent was in breach of these clauses, and filed a summons praying for a variety of reliefs including an injunction and a declaration as to clause 11 which dealt with the payment of costs with respect to a subdivision survey by the respondent.

5. The Chief Justice on 27 March 2001 refused to make orders for an injunction, delivery up of a sub-division plan, for a declaration as to the payment of costs for rectification of Parcel 440 by the Registrar of Lands but made an order for the delivery to Best Lines Ltd. of the land certificate relating to land to which the company was entitled. In so far as the refusals went, the application stood dismissed. The appeal now before us stems from these orders.

6. The effect of the terms of a compromise recorded in a Tomlin Order (that is, where an action is stayed by consent on terms scheduled to the Order) was considered in *Anders Utkilens Rederi A/S v. O/Y Lovisa Stevedoring Co. A/B [1985] 2 ALL ER 669*. There the plaintiff obtained a judgment against the defendant for a liquidated sum. The defendant appealed, but before the appeal came on for hearing the parties reached a compromise and the English Court of Appeal, at the parties' request, made a Tomlin order recording the terms of the compromise. Under those terms the defendant agreed to sell certain property and to divide the proceeds with the plaintiff. The defendant subsequently went into creditor's voluntary liquidation and a year later the property was sold. A summons to proceed with the accounts was adjourned into court in order to determine whether the compromise effected a deemed disposal of the property for the purposes of Pt III of the Finance Act 1965. The plaintiff contended that the terms of the compromise caused the property to be held by the defendant thenceforth in trust and that the property thus became settled property for the purposes of the 1965 Act, with the result that the compromise effected a disposal of the property and the defendant became liable to corporation tax on the chargeable gains arising on the disposal. The defendant contended that the terms of the compromise were merely contractual and that the plaintiff acquired no proprietary interest in any asset until the proceeds of sale were received. It was held that the effect of the terms of the compromise recorded in the Tomlin order was that the defendant had irrevocably dedicated the property to the purposes of the compromise and good conscience would require the defendant to realize the property exactly as agreed with the plaintiff. Accordingly specific performance of the terms of the compromise would, had the necessity arisen, have been decreed by the court. The compromise had therefore imposed an immediate trust for sale, making the plaintiff and the defendant co-owners of the property for the purposes of s 22(5)(a) of the 1965 Act, with the result that the compromise had effected a part disposal of

the property by the defendant to the plaintiff within s 22(2)b of that Act and that each party had subsequently disposed of its interest to the ultimate purchaser . . ."

7. For the purposes of this appeal, this case is of particular relevance showing as it does, that a Tomlin order cannot be used to enforce terms of the settlement because the terms are not an order of the court. Mr. Barrow contended that it was not permissible for the appellants to seek the particular reliefs claimed in their summons, especially an injunction and a declaration. The learned editors of Vol. 12(1) Atkins Court Forms (2nd Ed.) 2000 issue p. 28 speaking of the enforcement of a compromise embodied in an order or judgment, state in relation to Tomlin orders, that they should include a "permission to apply" provision and the innocent party should use this to apply to the court to convert the contractual obligation into one enforceable by the courts. It is plain that the appellant did not employ this procedure. What they ought to have done, as Mr. Barrow rightly contends, was to bring a fresh action alleging breach of the compromise action.

8. Although this submission was made in *Wilson & Whitworth v. Express & Independent Newspapers Ltd. [1969] 1 ALL ER 294*, ultimately it was not dealt with by the judge, Plowman, J. But he did give some assistance by saying that the submission was supported by a passage in *Daniel's Chancery Practice (8th Ed.) p.46 and Re: Hearn, DeBertodanto v. Hearn [1913] WN 81*, on appeal *CA. [1913] WN 103.* This case confirms the validity of Mr. Barrow's submission with clarity. A compromise was arrived at between husband and wife, the terms of which were embodied in a consent order. Subsequently the wife took out a summons asking for various orders, the effect of some of which was to enforce the order. The husband took the point that the consent order could not be enforced by the summons but only by independent proceedings. The summons was dismissed. On appeal, it was

held that the judge below (Sargent J) was right, and that the appeal must be dismissed.

9. Mr. Elrington in his reply, ventured no counter arguments. It must be supposed that he agreed with them, for otherwise he must have addressed them however briefly he chose.

10. It was also contended by Mr. Barrow that the court will not enforce the terms of a schedule in a Tomlin order if they are too vague unless a new action is lodged for that purpose. He relied on views expressed at Vol. 12(1) Atkins Court Forms (2nd Ed.) 2000 at p. 28 and the case of *Wilson & Whitworth v. Express & Independent Newspapers Ltd. (supra).*

11. His submission in this regard were put with admirable clarity and succinctness in his skeleton arguments thus:-

> ". . . Two major questions of construction arose on the Appellant's application and their determination in favour of the Appellants was a sine qua non before the court could make any of the orders sought by the Appellants. One such question is whether or not the terms of settlement impose an obligation on the Respondent to subdivide the portion of Parcel 440 in accordance with the plan annexed to the Consent Order (p. 223, para. 10). The other question is revealed in the fourth order that is sought in the amended summons (p.34), namely, whether or not the Respondent is bound in accordance with paragraph 11 of the terms of settlement to pay the cost of the plan of subdivision survey that the Appellants had procured (p.23, paras. 7 – 8). The learned Chief Justice ruled against the Appellants on both questions. The Respondent submits that while the decision of the learned Chief Justice was, with respect, perfectly right, it was open to His Lordship to have decided that it was not proper or competent for the Appellants to have brought these questions of construction before the court under the liberty to apply provision. It has been decided that the object of the liberty to apply provision is to allow the court to work out the terms of the agreement but not, for instance, to extend or otherwise vary the terms of the agreement; *Cristel v. Cristel [1951] 2 ALL ER 574 . . ."*

12. In my view, these submissions are well founded for it is patent that the proceedings taken by the appellants before the Chief Justice were not intended to work out the terms contained in the schedule, but rather to enforce terms which, it was alleged, had been breached by the respondent and accordingly required redress.

13. Mr. Elrington, who regrettably filed no skeleton argument seemed to be contending before us for a particular construction of certain clauses, viz. clause 8 and 9. These provided as follows:-

> *". . . 8. The plaintiff shall be responsible for obtaining sub-division approval for subdividing parcel 440 as shown in the plan annexed hereto entitled "Proposed Subdivision of Corozal Free Zone Development Limited Lands at Santa Elena, Corozal District (Modified June 1996)" and signed for identification by the plaintiff and the defendants ("the plan").*
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> *. . . 9. The lands within the borders marked in yellow ("the plaintiff's lands") shall be transferred to the plaintiff's transferee absolutely. In surveying these lands the surveyor shall ensure that the roadways, parks and parcels in the plaintiff's lands shall have the dimensions shown on the plan so that if there needs to be any diminution of roadways, parks and parcels shown on the plan such diminution shall be borne by the roadways, parks and parcels shown in the remainder land and not by those shown in the plaintiff's lands…"*

Whatever was the true construction of these clauses, that was not an exercise upon which the Chief Justice was entitled to embark pursuant to the "liberty to apply" provision of the compromise. It is therefore entirely unnecessary for this court to express any opinion on the view which the Chief Justice must have taken in light of the fact that he denied the reliefs claimed. Indeed we are somewhat in the dark because there are no reasons for judgment in the record. The grounds of appeal complain of errors in law that are attributed to the judge but they amount to nothing more than assertions that the judge did not grant the reliefs sought, which presumably is an error in law. Essentially the grounds are but generalities that do not condescend to particulars: the errors in law remain forever locked in the bosom of the pleader.

14. What is perhaps unfortunate is that Mr. Elrington never did in argument, expatiate on any error in law. He dealt at length with the correct interpretation of clauses 8 and 9. He addressed us with regard to who should bear the cost of survey (clause 11). Counsel did say finally that the judge failed to construe the clauses according to the canons of construction.

He said this: "…if my client gets an order that there has been a breach of contract, the remedies are both legal and equitable remedies…"

15. It is only necessary to point out that the purpose of the "liberty to apply" provision is to enable parties to the compromise "to work it out" with the assistance of the court. It cannot be used as the appellants sought to do, to obtain redress. If they wish to enforce the terms, they must bring a fresh action. The fact that the appellants have a view of the terms contrary to that held by the respondent, suggests that the terms are far from pellucid. The court will not enforce such terms by way of the "liberty to apply" provision of the compromise.

16. The question which remains is the manner of the disposal of this appeal. The matter stands thus: The Chief Justice refused to grant a number of reliefs which were sought but did order the respondent to deliver a land certificate to Best Lines or its nominees. In the light of the conclusion at which I have arrived, namely, that the procedure employed by the appellants was incorrect, it follows, that the proper order to be made is to set aside the orders in their entirety. In the result the appeal is dismissed with costs to the respodnent to be taxed, if not agreed.