IN THE COURT OF APPEAL OF BELIZE, A.D. 2005

CIVIL APPEAL NO. 17 OF 2004

BETWEEN

FRANCISCO ARCEO	**Appellant**
v.	
NORA WAYE	**Respondent**

—

BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Morrison	**-**	**Justice of Appeal**

Messrs. Hubert Elrington and Dons Waithe for the appellant.
Mr. Dylan Barrow for the respondent.

—

3 March & 24 June 2005.

MORRISON JA

1. This is an appeal from a judgment of Barrow J (Ag) given on 9 June 2004 (written reasons handed down on 16 July 2004) in which he gave judgment for the respondent in the amount of $80,000.00,

with interest at 12% per annum from 31 December 1995 to the date of the decision, with costs of $12,000.00.

2. The respondent's pleaded case, as set out in the Amended Statement of Claim filed on her behalf, was for specific performance of an Agreement made in May 1995 by virtue of which the appellant agreed to convey title (which was to be acquired by him from the Government of Belize) to certain lands, amounting to 50 acres, situate at Arenal Road, Cayo District, to the respondent. In pursuance of this agreement, the respondent pleaded, the appellant had agreed to clear and fence the land at her expense and that between May and December 1995 she had paid to the appellant "various cheques and cash totaling $80,000.00", in respect of which the appellant "and his wife or as agent on his behalf extended various receipts acknowledging receipt of payments." The respondent pleaded further that the appellant in due course acquired title to the 50 acres, that he had failed to convey the land to her and that he as a result "holds the entire interest of the said [lands] on a resulting trust" for her. As a result of this failure, the respondent stated, she suffered "loss of the $80,000.00, damages and costs", and claimed, among other things, specific performance of the agreement made in May 1995 and, alternatively, "re-imbursement of the sum of $80,000.00", paid by her to the appellant.

3. The appellant's Defence to the Amended Statement of Claim was a complete denial of both the pleaded (or any) agreement, of having received from the respondent, "or anyone", the sum of $80,000.00 or any amount, or having given any receipts for any payments to the respondent. In addition, the appellant raised two matters of law, as follows:

> "6. The First Defendant will say that the Plaintiff has not produced any documentary or written evidence as required by section 55(1) of the Law of Property Act, Chapter 190 of the Laws of Belize, 2000 that there does not exist any agreement for sale between the Plaintiff and the first Defendant reference the property referred to in the Plaintiff's statement of Claim or any property for that matter, alternatively.
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> 7. That the Plaintiff is deemed an alien under Section 2 of the Alien's Landholding Act, Chapter 144 of the Laws of Belize, 1990 and that the Plaintiff failed to produce a Minister's License as required by section 6 of the said Act and therefore by virtue of the Plaintiff's non-compliance with the requirements of the Act the purported equitable title and the alleged land transaction are null and void."

4. The appellant accordingly denied that the respondent was entitled to any of the reliefs claimed or to any relief.

5. At the trial, Barrow J (Ag) found the respondent to be an impressive witness:

> "… At 88 years of age she was extremely alert mentally and seemed hale; she read without eye glasses and declined the

offer to sit while testifying. Her recollection of events was crisp and convincing. She gave her evidence in a frank and straight forward manner and I got the impression at all times that she was telling the truth. The testimony that she gave fully supported the case that she pleaded.

The plaintiff produced receipts and other documentation that were accepted by defence counsel as to their existence and arithmetic. She relied on these to prove that she paid in excess of $47,000.00 to Pany [the name by which the appellant was known]. She produced cheque stubs to prove she gave him additionally $12,000.00. She gave convincing oral testimony that she gave Pany the sums of $12,944.55 and $647.27 that he paid in her presence to Government as the purchase price for the land and stamp duty. She produced a note that she made for herself of the payment and testified that she kept notes of other payments that she had made to him for which she could not get receipts from him. I did not rely on the note as evidence of the payment; I relied on her oral testimony. But her evidence that she made notes of money that she paid to Pany made me readily believe her that the total she gave to Pany was $80,000.00, notwithstanding the absence of documentation for around $8,000.00."

6. The appellant, on the other hand, was found by the learned trial judge to be “totally unreliable.” Receipts for money signed by him or by his wife, he described as “bogus”, given to the respondent “to enable her to bring money out of the US” and “for tax deduction.” A letter dated 22 June 1995, which the appellant admitted writing, and which requested the respondent (addressed as “Dear Aunt Nora”) to send “$600 US more to finish pay the guys that are clearing the land since they are almost finish and the money was not enough”, was tendered and admitted in evidence at the trial on behalf of the respondent. According to the appellant, he “had to do this letter together with the receipts for her to see what we were doing for her to see if she wanted to come in”; the respondent wanted, he testified, “to have details of what I was spending for her to come in as my partner.” The learned trial judge was not impressed, finding that some aspects of the appellant’s testimony confirmed the respondent’s story and rejecting his explanations for having been given money by the respondent as “a fabrication” and “senseless.” The learned judge concluded that:

> “In giving his evidence the defendant was not a credible witness and the story he told was not a credible story. I rejected his evidence. The very limited evidence that his wife gave was incapable of rescuing him.”

7. The learned trial judge therefore accepted that there was an agreement in the terms pleaded by the respondent. But despite these findings, there was on the undisputed evidence a clear obstacle to an award of specific performance, which was that, having accepted $80,000.00 of the respondent's money, the appellant had by the time of the trial disposed of most of the land to third parties. That, as the judge observed, "ruled out the relief of specific performance that the plaintiff claimed." He resolved this issue (as well as the defence based on section 55(1) of the Law of Property Act) in this way:

> "The plaintiff's true case was not that she entered into any contract to purchase land from either defendant. Her case was always that she provided the money for Pany to take the leasehold title in his name and for him to develop the land so that thereafter Pany could transfer title into her name. What she pleaded in substance was a trust. As appears in **Snell's Equity** by John McGee 13th Edition at 6-01 to 6-10 the essence of a trust is when a person (called a trustee) is compelled in equity to hold property for the benefit of another person (the beneficiary). Among the various relief that the plaintiff claimed was the return of the money that she paid to the defendant. That relief is the straight result of the defendant's breach of trust. Unable to specifically enforce

the trust, because the defendant parted with the trust property and no evidence was put before the court to enable it to be followed into the hands of those to whom it was transferred, the court is able to order the defendant to return the money that the plaintiff lost in consequence of the defendant's breach of trust. Section 55 of the Law of Property Act has no application to an action for the return of money paid on trust."

8. As for the defence based on the Aliens Landholding Act, Barrow J (Ag) found that "there was no evidence from the defendant to prove that at the material time the plaintiff was an alien" and that there was "clear evidence that she was domiciled in Belize since that time." In any event, the judge observed, "because the claim that the plaintiff ended up pursuing was for the refund of money paid, the question whether or not the plaintiff was an alien turned out to be irrelevant." He accordingly gave judgment for the respondent in the terms set out in paragraph 1 above.

9. From this judgment, the appellant filed the following grounds of appeal:

> "1. The Learned Judge was wrong in law in holding that, on the true construction of the Pleadings, the Plaintiff had not brought the action to enforce a contract or

agreement for the purchase (or other disposition of land)

2. The Learned Trial Judge was wrong in law in holding that on a true construction of the Plaintiff's case, what she in fact pleaded was a Trust. Where one person is compelled in equity to hold property for the benefit of another person.

3. The Learned Trial Judge was wrong in law in holding that there was no evidence to prove that the Plaintiff was an Alien.

4. The Learned Trial Judge was wrong in law in holding that as the Plaintiff ended up pursuing a claim for the return of money. The provisions of the Alien Land Holding Act, were irrelevant for the purpose of deciding the issues between the parties."

10. It is to be noted that the appellant did not by these grounds seek to challenge in any way the learned trial judge's findings of fact, in particular that he had received from the respondent the sum of $80,000.00. The main thrust of the appeal, which was argued by counsel for the appellant, Mr. Dons Waithe, was that the judge had "altered the nature of the Plaintiff's case" on the pleadings and that

"since there was no application to amend the Statement of Claim to include a claim for the return of money paid on Trust no such claim ought to have or could have been considered" by him. There was copious citation of authority in support of the principle that a party to a civil action is bound by his pleadings and is confined to the issues and questions raised therein unless and until they are duly amended. It was submitted that the respondent never pleaded a Trust and what she in fact and in substance pleaded was an action for specific performance or alternatively a claim for damages, and that it was accordingly not open to the trial judge to find for her in the terms that he did. With regard to the Aliens Landholding Act, Mr. Waithe submitted that it was for the respondent to prove that she was not an alien within the meaning of the statute and that this she had failed to do.

11. The respondent, through her counsel Mr. Dylan Barrow, sought to support the judgment of Barrow J (Ag), basically on the grounds upon which he relied in his judgment, submitting that in the circumstances there was a resulting trust in her favour, which entitled her to recover the money paid to the appellant, "because the beneficial interest under the Trust failed, either because the Appellant failed either to consumate (sic) the agreement and/or" … the agreement was void pursuant to section 5 of the Aliens Landholding Act. Mr. Barrow cited in support of this submission

Snell's Principles of Equity, 27th ed., pages 175 - 176 and The Law of Restitution by Lord Goff of Chieveley and Gareth Jones, 3rd ed., pages 512 – 513.

12. In my view, the unchallenged findings of fact of the learned trial judge amply justified the conclusion to which he came. The claim for a return of the $80,000.00 was clearly pleaded as an alternative to the claim for specific performance and, on that basis alone, was properly allowed by the judge on the basis of his findings. In any event, if there was any departure from the pleaded case by the respondent at the trial, which I do not think there was, it is quite clear that there was a more radical departure by the appellant, certainly in relation to his pleaded denials of having received any money from the respondent and his subsequent admissions at the trial, together with what the judge found to be his wholly implausible explanations for having accepted the respondent's money. As the case of **Domsalla and another v Barr and others [1969] 1 WLR 630**, which was drawn to the attention of Mr. Waithe by the court, demonstrates, where there has been a departure from pleadings without objection at the trial, a Court of Appeal must nevertheless assess carefully the evidence adduced at the trial, even if in support a "novel allegation." In the instant case, the evidence, which Barrow J (Ag) accepted, that the respondent paid $80,000.00 to the appellant would hardly be regarded as novel, as it was

clearly raised on her pleading: what was novel was the appellant's evidence at the trial by which he purported to explain the circumstances in which he received the respondent's money. The departure from the pleadings was in fact wholly his, a factor which the learned trial judge was entitled to take into account in assessing the evidence at the trial.

13. This Court was referred by Mr. Waithe to several authorities in support of the proposition that the function of pleadings is to give fair notice of the case which is to be met so that the opposing party may direct his evidence to the issue disclosed by them (see, for instance, **Esso Petroleum Co. Ltd. and another v Southport Corporation [1955] 3 All ER 864**, esp. per Lord Normand at 867 and Halsbury's Laws of England, 4th edition, volume 36 at paragraph 4). Naturally, I accept that statement of principle without demur. But, as Lord Edmund-Davies observed in **Farrell v Secretary of State for Defence [1980] 1 All ER 166, 172** "… it is beyond doubt that there have been times when an insistence on complete compliance with their technicalities put justice at risk, and, indeed, may on occasion have led to its been defeated."

14. In the instant case I am of the view that the Statement of Claim, though perhaps not expressed with the complete precision that a 'pure' pleader might have hoped to achieve, gave more than

adequate notice to the appellant of the case that he was to meet (see paragraph 1 above). Against the backdrop of that pleaded case, which the appellant met by laconic denials that were not sustained at the trial, it seems to me that Barrow J (Ag)'s conclusion in favour of the respondent was irresistible and that the relief he ordered was entirely in keeping with that claimed by the respondent.

15. Order XXII Rule 2 of the Rules of the Supreme Court requires a plaintiff to "deliver to the defendant a statement of his claim, and of the relief or remedy to which he claims to be entitled." This the respondent did in the instant case and I have already indicated that, in my view, she did so adequately. But, in any event, as Buckley LJ pointed out in **Belmont Finance Corporation Ltd. v Williams Furniture Ltd and others [1979] 1 All ER 117, 130**, "on proof of the necessary facts the court is not I think confined to granting that particular or precise form of relief." In that case the court was considering sections 40 and 43 of the UK Supreme Court of Judicature (Consolidation) Act 1925, which are in their terms almost identical to sections 35 and 38 of the Supreme Court of Judicature Act of Belize. Section 38 provides as follows:

> "The Court, in the exercise of the jurisdictions vested in it by this Act, shall, in every cause or matter pending before it,

> grant, either absolutely or on such terms and conditions as the Court thinks just, all such remedies whatever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided."

16. Buckley LJ's further comment (at page 131) is therefore apposite:

> "It is clear that a plaintiff cannot claim relief which is inconsistent with the relief that he has explicitly claimed; the authority for that is Cargill v Bower. But it appears to me that the court must have jurisdiction to grant any relief that it thinks appropriate to the facts as proved; but if a party seeks to raise a new claim, which has not been adumbrated in his pleading, in the course of the trial, in my opinion the court should not give relief of that kind, at any rate without offering the opposing party an opportunity for an adjournment, and giving them an opportunity to say whether they have been taken by surprise, or have been prejudiced by the fact that that particular form of relief had not been explicitly claimed earlier."

17. In my view the respondent's claim to a refund of the $80,000.00 can in no respect be described as a "new claim", it having been at the very least clearly adumbrated in her pleading. So that even if there was some deficiency in the Statement of Claim in this case, Barrow J (Ag) had the powers conferred on the court by section 38 of the Supreme Court of Judicature Act to grant the remedy, on the facts proved before him, that appeared to him to be just. Section 19(1)(a) of the Court of Appeal Act, it may be noted, also gives this court on an appeal in civil matters power "to make any order which ought to have been made, and to make such further order as the case may require."

18. That conclusion is sufficient to dispose of grounds of appeal 1 and 2. Insofar as grounds 3 and 4, which deal with the Aliens Landholding Act, are concerned, there appears to me to be no basis for challenge in this court to the learned trial judge's clear finding of fact on the evidence before him that the respondent was not an alien at the material time. In any event, what the Act prohibits is a "legal or equitable estate in land" vesting in an alien otherwise than in accordance with the Act (section 4) and I agree with the judge that the facts of the instant case as found by the him did not attract that prohibition.

19. For all the above reasons, I would dismiss this appeal, with costs to the respondent to be agreed if not taxed.

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MORRISON JA

MOTTLEY P

I have read the reasons of Morrison JA and agree with them.

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MOTTLEY P

SOSA JA

I have read the judgment of Morrison JA and concur in the reasons therefor and the order proposed therein.

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SOSA JA