



2. There are no issues about payment of the purchase price and transfer of title and possession. The issue is about the measurement of the seafront which was said to be shorter than stated in the agreement, and the consequences thereto.

3. The description of the portion of the land sold was stated in the last paragraph of the preamble as:

“...All that piece or parcel of the above mentioned lands comprising 300 acres with 1300 feet sea frontage situate and being the South Eastern portion of the block of land measuring 844+ acres in the said plan of survey prepared by the said G.E. Valdez”

4. Included in the obligations of the vendors were the construction of two access roads, one along the western boundary, and the other along the northern boundary, of the 300 acre portion sold. The obligations were stated in paragraphs 2(B), 2(C) and 5 of the agreement. It is paragraph 5 which is relevant to this case, it states:

“5. The Sellers shall build/extend an all weather access road over the remaining portion of their lands running parallel to the northern boundary of the said 300 acres parcel of land the subject of this agreement and extending to a distance of 1000 feet from the sea shore, said road shall be built to the specifications recommended by the Land Utilization Authority and [the sellers] shall grant to the

Purchaser his heirs, executors and assigns an easement or right in the nature of an easement over said road for all purposes”.

5. The agreement for sale of the land was, of course, subject to the land being subdivided, which required that an application be made to the Land Subdivision and Utilization Authority, LSUA. The Authority would investigate and if satisfied recommend to the Minister that approval may be granted --see *SS: 4,9 and 14 of the Land Utilization Act Cap. 188 Laws of Belize*. Section 14 prohibits sale or other alienation of part of land not subdivided with approval by the Minister in accordance with the Act. In this case approval for subdivision was obtained and was not an issue.

6. *The Issues.*

After taking possession, the first plaintiff discovered that the seafront agreed at 1300 feet actually measured 1229.69 feet on the ground; there was a shortfall of 70.31 feet. He had the measurement on the ground checked by Mr. Anthony Roque Marin, a licensed surveyor of many years experience. Mr. Marin stated his finding in a letter dated 18.10.1999, exhibit C(AM)11, and a report of the same date, exhibit P(AM)9, to the first plaintiff. He confirmed the shortfall on the ground and also pointed out that on the authenticated plan for the subdivision, exhibit P(RF)3, the measurement was erroneously shown as 374.810 metres, which was equivalent to 1229.69 feet, not 1300 feet as stipulated in the agreement. The authenticated plan had been drawn by Mr. G. E. Valdez, a licensed surveyor, on 3.7.1997, and

filed at the Department of Lands and Surveys at Entry 3328 on Register Volume 4 on 30.7.1997 and authenticated. The first plaintiff informed the defendants about the shortfall.

7. The defendants initially contended that the plaintiffs had altered the seafront by excavating, but the defendants have since conceded the shortfall which is now a common fact. The plaintiffs and the defendants agreed during the trial that the authenticated plan, exhibit P(FR)3, depicting the subdivision as approved, showed the seafront as measuring 374.81 metres which converts to about 1229 feet, that is,  $374.81 \times 3.28 = 1229.37$  feet. The plan was at variance with the agreement.
8. The defendants, upon accepting that there was a shortfall of about 70.31 feet, agreed to make good the shortfall to settle the matter. They asked Mr. Valdez to prepare a proposed plan to that effect; the drawing is now exhibit D(AN) 15.B. Anna Nicholson said that they accepted the proposed plan although they did not like the fact that it continued the road up to the sea, not complying with the term of the agreement that the access road from the highway would end 1000 feet before the sea. They gave the plan to the first plaintiff who rejected it.
9. The defendants then asked the first plaintiff to obtain a proposed plan which would add 70.31 feet seafront to the land sold and submit it to the defendants for their approval. The first plaintiff asked Mr. J.A. Hertular, an engineer and a licensed surveyor of many years experience, to prepare a proposed plan. He prepared a proposed plan

undated, now exhibit P(RF)4. In the proposed plan the northern boundary of the 300 acres would be moved northwards by 70.31 feet and continued across in a straight line westwards more or less perpendicular to the western boundary. The road just outside the 300 acres to the north, measuring 66 feet wide, would become part of the land sold, and 13 acres would be added to the 300 acres if the western boundary was maintained. The defendants rejected the plan proposed by Mr. Hertular. They instructed Mr. Kenneth A. Gillet, a surveyor also of many years experience, to prepare a proposed plan adding the shortfall to the seafront of the land sold.

10. Mr. Gillet prepared “a sketched plan” undated, exhibit P(RF)5. He testified that in the sketched plan the northern boundary line “mirrored” as far as possible, the southern boundary line. He, like Mr. Hertular, would extend the seafront by 70.31 feet northwards so that the seafront would measure 1300 feet. Unlike Mr. Hertular, Mr. Gillet would then drop the boundary line from that northerly most point on the seafront down at an oblique angle over 433.33 feet, in a south-westerly direction back to the original straight-line northern boundary of the land sold, at a point between the end of the road and the sea. Originally the road ended at 1,000 feet from the sea. The effect of the proposal by Mr. Gillett would be to add to the seafront the shortfall of 70.31 feet to the land sold, and about 0.33 or one-third of an acre in a triangular area, one side of which would be the added part of the seafront measuring 70.31 feet. The overall seafront would measure 1300 feet. The road would remain in the defendant’s land. The first plaintiff rejected the sketched plan proposed by Mr. Gillett.

11. The parties have come to Court about their disagreements.
  
12. The plaintiffs' claim was that the defendants breached the agreement of sale dated, 23.1.1996, they conveyed land with less than 1300 feet of seafront contrary to the agreement. On those averments, the plaintiffs claimed reliefs in the following particulars:

- “1. A declaration that the defendants committed breach of the agreement for sale dated 23<sup>rd</sup> January 1996, in that the property transferred to the second plaintiff as the first plaintiff's nominee does not have 1300 feet on the seafront.
  
2. An order that the defendants take or cooperate in all such steps as are necessary to alter the boundaries of the land transferred to the second plaintiff so that the land will have 1300 feet on the seafront.
  
3. Damages
  
4. Further or other relief.
  
5. Costs”.

13 ***Determination.***

In the course of trial it became clear to me that the crux of this case was really the northern road constructed under the obligation in

paragraph 5 of the agreement. The plaintiffs desired a solution to the 70.31 feet shortfall on the seafront to include land that would include the northern road thereby giving the proprietary right to the road to them. The defendants, on the other hand, desired a solution that would give the 70.31 feet seafront to the plaintiffs without including the northern road into the land added to the land sold, thereby allowing the defendants to retain the proprietary right to the road.

14. In Court, the plaintiffs supported the plan proposed by Mr. Hertular by the testimony of Mr. Marin, called as an expert witness. Mr. Hertular was never called to testify. Mr. Marin testified that in survey, there was a scientific, “straight line concept”, which required in the circumstances, the use of a straight line boundary running from the point 70.31 feet north of the erroneous point E9 on the seafront, which was short of 1300 feet, all the way westwards to the western boundary. The suggestion in that statement was that the road was included into the 300 acres as an incidental matter resulting from the application of the scientific concept, not as a deliberate desire. The witness explained that the subdivision which would gain 13 acres would have to be reduced by moving the western boundary eastward to a point at which it would give an area of no more than 300 acres with a seafront of 1300 feet. All the boundaries would be in straight lines.
15. Mr. Marin was not asked whether it was necessary that the straight line demarcating the northern boundary had to be more or less

perpendicular to the western boundary. I mention that because I have noticed that a straight - line boundary drawn at a bearing much less than 90 degrees to the western boundary could avoid the road as a fact of Geometry. It could be possible then to avoid including the road into the 300 acres even when straight lines were used to demarcate the boundaries, if there was no deliberate desire to include the road.

16. The defendants pursued their desire to keep the road by calling Mr. Gillett as an expert witness. He testified about his sketched plan as already outlined above. He explained that the southern and northern boundaries would run parallel to each other right from the sea. The descending part of the northern boundary would be parallel to the part of the southern boundary along the creek. He said that the “mirror” description derived from the fact that the northern boundary would resemble, that is, mirror, the southern boundary. I repeat that the effect of the testimony of Mr. Gillett would be to add the 70.31 feet and a triangular area measuring 0.33 or one - third of an acre to the 300 acres. The road would remain within the land of the defendants. The witness advised that the defendants would not claim the 0.33 of an acre, they would forego it. He did not give the reason for that. I suspect it might not be worth the cost of moving the western boundary eastwards by only a tiny measurement and having to build a new road thereat in compliance with paragraph 2(B) of the agreement.
17. Beside “ the straight line concept” and “the mirror method”, each expert witness advanced more detailed reasons in support of his proposal.



18. Mr. Marin explained that he would use a straight -line boundary from the sea right across to the western boundary as Mr. Hertular had proposed in exhibit P(RF)4, because: “ it was standard practice”, there were “constrains on the ground”, and “because of the language in the agreement the directions of the boundaries had been predetermined”. He also contended that the proposal by Mr. Hertular would be acceptable by the Land Subdivision and Utilization Authority, LSUA, whereas that by Mr. Gillett would not. Mr Marin’s reason for that contention was that the subdivision depicted in the plan at Entry 3328,exhibit P(FR)3, which had been approved and authenticated at the time of subdivision and transfer showed straight - line boundaries so LSUA would not approve a correction which would not be by straight-line boundaries.
19. Mr. Gillett, not surprising, disagreed with the reasons given by Mr. Marin. Mr. Gillett argued; “the expression straight - line concept simply means to have a drawing consisting of straight lines, in Survey there are a lot of designs such as curves ...” He contended that the better way to correct the shortfall in the circumstances was to use “the mirror method”. He explained, however, that there was nothing scientifically wrong with the straight-line shape of the subdivision proposed by Mr. Hertular. He, Mr. Gillett, had the sale agreement in mind, he wanted to keep the road outside the 300 acres. Mr. Hertular’s proposal was wrong on that score, Mr. Gillett contended. He further explained that LSUA could have the plan proposed by Mr. Hertular registered and authenticated just as LSUA would accept his,

Mr. Gillett's own sketched plan proposal. Either plan would no longer undergo the full extensive procedure of approval.

20. My conclusion from the scientific and non-scientific evidence as a whole, was that there was nothing in the physical features on the ground in the land area, that scientifically required the use of what was termed a "straight-line concept", that is, the use of a straight - line boundary from the sea westwards all the way to the western boundary, or for that matter, the use of a straight line at a bearing that must include the road into the 300 acre portion of the land. Equally it was my conclusion that there was nothing in the physical features that scientifically required the use of what was termed "the mirror method", that is, the use of lines on the northern boundary in such a way that the northern boundary line would mirror the southern boundary-line. It was my view that it was a matter of choice of the artistic impression that either expert desired, and that they took into consideration that their respective client wanted ownership of the road.

21. Further more, it was also my conclusion that the fact that the authenticated plan at Entry 3328, dated, 30.7.1997, which was approved to depict the approved subdivision had straight-line boundaries to the north, west and partly south, did not scientifically dictate that future correction or even future subdivision would have to be by straight - line boundaries. My reason is that both experts agreed that they took into consideration the terms of the agreement of sale, but disagreed with the other's concept or method. Further,

each did not support his “concept” or “method” with a scientific theorem.

22. That leads me to examining how the expert witnesses interpreted the agreement. Both interpreted the agreement to mean that the seafront boundary would have to be extended by 70.31 feet in order to meet the requirement of 1300 feet of seafront stipulated in the agreement. Their difference was this. Mr. Marin took the view that the agreement, (not scientific consideration) had predetermined the position of the boundaries. That, according to him, would include the northern boundary which he stated as running from the newly established point on the seafront along a straight line westwards. Surprisingly he also said that he did not consider the road when he made his proposal. The inference from that was that to him, it did not matter whether the road then became part of the addition to the 300 acres. Yet he was conscious of the need for approval by LSUA of the intended correction, and as a surveyor, he would know that an application to LSUA for approval would have to show roads, right of way and other easements that the subdivision would have. That is required *by S: 4 of the Land Utilization Act*. The other expert, Mr. Gillett, on the other hand, interpreted the agreement to mean that the ownership of the road given to the defendant in the agreement was to be maintained, so he would use a descending line from the northern most point on the seafront boundary to meet the original boundary, and from that point he would adopt the rest of the straight- line boundary westwards. He would thereby leave the road in the remainder land of the defendants.

23. Despite what Mr. Marin said, it is obvious from the above that the two experts took the sale agreement as the most important factor in deciding their respective proposal to adjust the boundaries. It is my view that both experts considered the road as the most important single factor in the agreement, however, their views about which side of the northern boundary line the road should be on was based on the desire of their respective client, not on objective interpretation exclusively.
24. Given my appraisal of the testimonies of the expert witnesses, I concluded that the Court has to determine this case on the interpretation of the agreement of sale. Scientific impressions, variously described as concepts or methods were not proved to have dictated the decision of either expert as to whether the northern road would be included in the 300 acres as adjusted or in the remainder land of the defendants.
25. So the crucial questions for the Court to answer is: Does the agreement require that the northern boundary be by a straight - line westwards from a point 1300 feet on the seafront, north of E8 on the southern boundary? If so, was it required that the straight line run more or less perpendicular to the western boundary or along any bearing which would cause the line to enclose the road within the adjusted 300 acre subdivision?
26. The agreement does not expressly state that the boundaries on the north, west or south would be by straight lines nor does it stipulate the

bearings of boundary lines. It would be a bare guess without evidence, that the parties intended the use of a straight – line northern boundary with the bearing proposed by Mr. Hertular, or even that they intended the lines and bearings as advised by Mr. Gillett. Further, the sellers and buyer did not include anything in the agreement from which probable inference may be drawn to those effects. They were also not specific about the measurements of the three boundaries that are not on the seafront. However, they were specific about the measurement of the seafront. They specified it at 1300 feet. Then they specified the area of the land as 300 acres. They obviously left the measurements of the three sides to be determined mathematically, based on the fixed area and the fixed measurement of one side, the seafront.

27. In my view, it may be inferred that the measurement of any of the three sides was not so important to the sellers and buyer as to require specifying as was the measurement of the seafront. The measurements of the three sides could vary so long as the measurements enclosed 300 acres with a 1300 feet seafront.
28. It is my decision, that the point established at 1300 feet on the seafront from E8 on the southern boundary, must be taken as the correct northern boundary point on the seafront, but the boundary westwards from that point did not have to meet the western boundary at perpendicular angle or any other bearing that would cause the road to be included in the 300 acre subdivision even if a straight-line demarcation were to be used. The road may be

avoided in any adjustment made to correct the error in the measurement of seafront unless a term in the agreement suggest the contrary. It is important that in correcting agreed error the Court must not introduce new terms or cancel terms in the agreement. The error should be corrected with little or no alteration to the agreement.

29. That takes me to the other aspect of the issue, namely, the question of the ownership of the access roads or legally, the question of title to the roads. The road along the western boundary was not an issue, I say nothing about the proprietary right to it.

30. The ownership of the road along the northern boundary has become an issue only since it became necessary to extend the seafront. In effect the plaintiffs' case, in the shortest form, was that the extension of the seafront must include the road into the extension which would become the plaintiffs' land. The defendants' case, in similar short form, was to the effect that the extension of the seafront must not include the road which must remain the defendants'.

31. In my view, the answer is in paragraph 5 of the agreement. The paragraph clearly provides that the northern road will be in the remainder land belonging to the defendants. That means the proprietary right to the road will belong to the defendants. The defendants, however, were required to grant easement over it to the

plaintiffs. While I accept that there has been a mistake in the measurement on the seafront, I do not accept that the adjustment to be made to correct that error should alter the proprietary right or even the rights to easement, in the absence of a provision in the agreement that fixes the northern boundary in so specific a relation to the road or to the seafront such that the road would inevitably become part of the extension of the seafront boundary. For example, a provision about the bearing, that is, the angle, at which the northern boundary line would meet the seafront and the western boundary, would dictate whether the boundary line would run north or south or traverse the road. Bearings were not specified in the agreement.

32. The position of the road was stated in the agreement as "... over the remaining portion of their [the sellers] land, running parallel to the northern boundary of the said 300 acres the subject of this agreement, extending to a distance of 1000 feet from the sea shore...". Mr. Gillett has demonstrated a way to achieve 1300 feet on the seafront and 300 acres without interfering with the position of the road in relation to the northern boundary of the 300 acres, as stated earlier. In his proposal the proprietary right and easement rights would not be altered. I accept that as one way of correcting the error on the seafront with little or no alteration to the rest of the agreement. I got the impression that there could be other ways to similar effects but only Mr. Gillett's proposal has been put in evidence.

33. Besides, I think the provisions in the agreement relating to the proprietary right and easement rights over the property must be regarded as distinct important terms, not to be wiped away because there has been an error about the northern boundary, unless it was impossible to correct the error without altering those rights, or the error has been proved to be a fraudulent scheme. The plaintiff did not allege any fraud as a ground in their case.
34. The question of who paid for the construction of the northern road was raised and controverted. It was not provided in the agreement that proprietary or easement rights would depend on who would pay for the building of the road. Moreover, the plaintiffs' statement of claim did not aver that as a ground for the reliefs claimed. Any claim for expenses of building the road cannot be a claim in *rem* given the terms of the agreement of 23.1.1996. It could be the subject of a separate claim.
35. It is my decision that the plaintiffs are entitled to adjustment of the boundary at the seafront to a point 70.31 feet from E9 so that the measurement of the seafront is corrected to 1300 feet, but that they are not entitled to adjustment of the boundaries in a way that must necessarily alter the proprietary right and easement rights stated in the agreement.
36. Based on all the above reasons, my decisions about the reliefs prayed are as follow.



37. On the admission of the defendants I grant the declaration that the defendants breached the agreement of sale dated 23.1.1996, in that the property transferred to the second plaintiff as the nominee of the first plaintiff did not measure 1300 feet on the seafront.
38. It follows from the breach that the plaintiffs are entitled to the relief of specific performance that will effect the transfer of 300 acres of land with a seafront measuring 1300 feet. The relief of specific performance prayed for at paragraph 8.2. of the statement of Claim succeeds only as varied herein. It is adjudged that the plaintiffs are entitled to have the measurements on the seafront adjusted to 1300 feet, and to any necessary adjustment to the northern, western and southern boundaries, although the southern boundary can only be reduced or extended eastwards or westwards because the land to the south does not belong to the defendants. The plaintiffs are not entitled to an adjustment that would include the northern access road into their 300 acre land. The proposed plan, exhibit P(FB)4, drawn by Mr. Hertular, is rejected. The proposed “sketched plan” drawn by Mr. Gillett is approved as the adjustment to be submitted to the LSUA. The defendants are enjoined to carry out the adjustments, or to cooperate in carrying them out. Expenses relevant to the adjustments necessary and to any application to LSUA, and for any necessary registration are to be paid by the defendants.
39. I also adjudge the plaintiffs entitled to damages occasioned, if any. Parties did not conduct their cases with a view to proving or contesting quantum of damages. The plaintiffs are at liberty to apply

for assessment of damages. The application, if intended is to be filed not later than 30 days from today.

40. The overall result of the case is that judgment is partly entered for the plaintiffs, to the extent stated above and partly dismissed.

41. I am mindful of the fact that this case was the result of the error in the measurement of the seafront, and that the error was the responsibility of the defendants, the sellers, but I note that the error was not fraudulently occasioned. I must, however, mention that the plaintiffs' claim if it did not include the northern road, would have not been the subject of a court case. A fair order for costs is that the defendants pay one-half of the costs of the plaintiffs, to be agreed or taxed.

42. Exhibits are to be returned to the party entitled. If an appeal is filed the exhibits will be returned after the conclusion of the appeal.

43. Pronounced this Tuesday the 18<sup>th</sup> day of February, 2005.

At the Supreme Court,

Belize City.

Sam Lungole Awich

Judge

Supreme Court

