IN THE COURT OF APPEAL OF BELIZE, A.D. 2008

CIVIL APPEAL NO. 26 OF 2007

BETWEEN:

THE ATTORNEY GENERAL	**Appellant**
AND	
GEORGE BETSON **RUPERT MARTIN MARIN**	**Respondents**

CIVIL APPEAL NO. 28 OF 2007

BETWEEN:

RUPERT MARTIN MARIN	**Appellant**
AND	
GEORGE BETSON **THE ATTORNEY GENERAL**	**Respondents**

BEFORE:

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

Mrs. Magali-Marin Young for Rupert Martin Marin.
Mr. Hubert Elrington for George Betson.
Mrs. Andrea McSweeney-McKoy for the Attorney General.

—

7 March & 20 June 2008.

MOTTLEY P

1. On the 7 day of March 2008 I agreed that this appeal should be allowed and I agreed with the Orders made by the Court which are set out in para.

__ of the reasons of Morrison JA. I have had the opportunity of reading the draft judgments of Carey JA and Morrison JA and I agree with the reasons therein stated.

_____
MOTTLEY P

CAREY, JA

2. These appeals are against a judgment of Awich J dated 26 October 2007 in Supreme Court Claim No. 272 of 2001; in which he entered judgment in favour of Mr. George Betson by dismissing the action brought by Mr. Rupert Martin-Marin against him and entering judgment in favour of Mr. Betson on his counterclaim. The judge granted declarations and made other rulings and orders which need not be rehearsed here. They are however fully set out in paragraph ___ of the judgment of Morrison JA.

3. The case has some features which can only be described as curious. There is an appeal by the Attorney General against whom no adverse findings were made, except an order to pay "one-quarter of the total costs agreed or taxed". In order to appreciate the oddities, it will be necessary to examine the pleadings. First, the statement of claim:

> "(1) The Plaintiff is the leasehold owner and is entitled to possession of the land situated along miles 21/2 Northern Highway, Belize City known as Parcel 3545/1, Block 16, Caribbean Shores/Belize Registration Section under and by virtue of a Lease Approval dated 29th December, 2000 and

by virtue of a Certificate of Lease No. 1541/2001 dated the 22nd day of February, 2000 (hereinafter called "the land").

(2) That on or about the second week of January, 2001, the Defendant entered on to the Southern portion of the land without the licence or consent of the Plaintiff and placed a wooden house together with a cement septic tank on the southern portion of the land without the Plaintiff's consent, and that he erected a barb-wire fence along the said southern boundary of the said land and has occupied the southern portion of the land from the date of placing the said wooden house thereon and has continued to do up until present, without the consent and licence of the Plaintiff, and has caused others to occupy the said wooden house form time to time.

(3) That on or about the third week in May 2001, the Defendant had parked a white van and posted signs and posts along the said southern boundary of the land and place a wooden chattel house thereby obstructing the Plaintiff and his servants from entering into the said land from the southern boundary until the said Defendant was restrained from doing so on the 30th day of May 2001 and on the 12th day of July 2001.

(4) The Defendant is a trespasser to the land.

(5) By reason of the matters aforesaid, the Plaintiff has been deprived of the use and enjoyment of he southern portion of the said land and has thereby suffered loss and damage.

AND the Plaintiff claims:

"(1) Possession of the said land.

(2) Damages or mesne profits until possession is delivered up.
(3) An injunction etc…..
(4) Further or other relief."

Mr. Betson filed a defence and counterclaim. It is sufficient to say that the defence comprised some five paragraphs which denied each of the paragraphs of the statement of claim. There followed the "counterclaim". It contained fourteen paragraphs in total, all of which, save two, were claims for declarations. The remaining two paragraphs dealt with a prayer for costs in the former and such further or other relief in the latter. It is clear that the counter claim made no claim against the plaintiff, Mr. Marin. It should have been struck out, unless amended, as disclosing no cause of action. But it never was. An application at the instance of Mr. Betson was made to join the Attorney General as a defendant. Awich J granted the application and ordered an exchange of pleadings. What can only be described as a farce followed. The Attorney General, although no allegations were made against any officer or department of government specifically, did however file a "defence". This fact was obvious to the Attorney General who showed that realization by an oddly worded paragraph in the pleading:-

"Paragraph 3: The Plaintiff's claim for damages until possession should therefore be against the first Defendant only as the second Defendant is not liable for the actions of the first Defendant"

This appears to me to be a circuitous method of saying no cause of action has been disclosed against the Government of Belize. I suspect this was done in an endeavour not to seem disrespectful of the judge's order of joinder. Be that as it may, the pleader proceeded to give a history of the

land, the subject of the litigation. That history was not in favour of Mr. Betson for it showed that although approval for the purchase of the lots had been given, Mr. Betson had not accepted the approval nor had he paid the purchase price. He was duly advised that his lease was cancelled. Mr. Marin filed a reply and an amended defence to the counterclaim. There was an averment that the counterclaim disclosed "no reasonable or lawful cause of action against the Plaintiff". There followed averments in which he pleaded that when he took possession of the land, Mr. Betson was not in actual occupation of the land.

Paragraph 9 of the amended defence encapsulates a live issue which had to be determined. It was as follows:

> "The Plaintiff therefore says that the first Defendant was not in actual occupation of Parcel 3545 when the Plaintiff was issued Lease Approval and that if he was, which is denied, he did not have any overriding interest as his lease was cancelled and his option to purchase had since expired."

4. The case then went to trial on 6 June 2005 and was concluded, we understand, after several adjournments on 3 November 2005. Some considerable time thereafter, on 26 October 2007, judgment was delivered in terms which have been set out at the commencement of this judgment. We have not been told the reason for the inordinate and shocking delay which has, not surprisingly, provoked a ground of appeal to impugn the decision. It will be necessary to return to this regrettable feature of the case hereafter. There is one other comment which should be made. The case began with the pleadings in a somewhat untidy state. There was a claim by Mr. Marin against Mr. Betson, for trespass and recovery of possession. The defence to that action was a traverse. It is trite that a traverse cannot be a proper defence to trespass. The pleader must state

the nature of the defence, whether it be consent, superior title or the like. Then there was a counterclaim which, as earlier reviewed, sought declarations, costs and further relief. The judge said that "implicit in some of the numerous declarations sought were causes of action on which the counter claim was based". This is, with respect, wholly to negate the rationale for pleadings. It is not idle to ask, how does one plead to "implicit" causes of action? Such indulgence is no part, I suggest, of the judicial function. The judge should ensure that the rules of the court are complied with, scrupulously. It guarantees that all sides have the same level playing field. Explicit pleadings accord with the rules of court: implicit do not. There was also a "defence" filed by the Attorney General in which the conveyancing history of the land was set out. Mr. Marin also filed a "defence" although no allegations were made against him in Mr. Betson's counterclaim. From the point of view of procedure, it was really in the highest degree, farce. But, constrained presumably by the order for joinder, he pleaded that when he took possession of the land, Mr. Betson was not in actual occupation of the land. In my opinion, what occurred in this case created a thicket of problems for the judge, but they were largely of his own making. The judge produced a reserved judgment, covering some seventy letter-size pages ranging far-afield and dealing with matter not arising on the pleadings. It was a monumental effort demonstrating admirable stamina to which I would like to pay tribute.

5. Mrs. Young filed a multiplicity of grounds of appeal of mixed fact and law. I propose to deal only with those which I consider to have a bearing on the outcome and mean no disrespect to counsel.

6. The most convenient method of dealing with this appeal, in my opinion, is to trace in some chronological sequence the conveyancing history of the land in question. The land is a reference to two lots of land Parcel Nos. 608 and 1737. In the interest of conciseness, both lots were consolidated

and referred to as Parcel 3545/1 Block 16, Caribbean Shores/Belize Registration Section. Mr. Marin, in his claim, pleads that he is the leasehold owner thereof. It was Mr. Betson who had the earlier connection to the land or some part of it. He accepted that he acquired an interest in the land by virtue of two leases, granted him by the government. In 1997, Mr. Betson was given approval to purchase in each case. In respect of parcel 608, one of the conditions set out in the letter of approval, was for a payment of Five Thousand Dollars within a period of three years. That sum was not paid. With respect to parcel 1737, the first instalment of one thousand four hundred and five dollars eighty four cents was paid but thereafter, there were no payments. We come then to July 2000, when Mr. Betson with political help, had a new purchase agreement prepared which reduced the purchase price considerably. The document was not signed by Mr. Betson and he himself never said he saw it. He was aware that there was a reduction which he referred to as a 25% discount. The records of the Lands Department do not show that he made any payments in that behalf and he never said he did. The significance of all this history would show that Mr. Betson's relationship with the lots was by virtue of two "fiat leases", one of which was for a period of twenty-five years (Ex DD(NC) 17A) beginning 5 January 1974, and the other for a similar period beginning 23 August 1977 (Ex. DD(NC/21). The Lands Department on 26 October 2000, advised Mr. Betson that the leases were cancelled for non-fulfillment of "the condition regarding development", but the need for such action is somewhat difficult to understand, certainly in the case of one of the leases which would have expired by effluxion of time at 5 January 1999.

7. The judge regarded Mr. Betson's counterclaim as amounting to pleadings in which there were averments. It is necessary to reiterate that the counterclaim was a composite of prayers for declarations. Remarkably

the judge was astute to mine pleadings from the prayers for declarations and said this:-

> *"(24) Mr. Betson counter-claimed that by the two fiats for leases issued in 1974 and 1977, he became the holder of leasehold titles, he had the right to exclusive possession, Mr. Marin and his workers trespassed on the parcels of land. He also counterclaimed that by the Minister approving the application to purchase the parcels of land by him Betson accepting the offers to sell and making payment of he initial installment of one purchase price, and because under the land ownership programme introduced in 1993 rents paid became part payment of the purchase price, he became the owner of the fee simple absolute titles to the two parcels No 3545. That claim to absolute title implied a claim to the right to immediate possession of the land.*
>
> *(25) Further, Mr. Betson counterclaimed that he was in actual occupation of the two parcels of land when the Minister approved a lease to Mr. Marin over them on 29 December 2000, and when Mr. Marin signed the letter of approval on 5 January, 2001, and when he had his "lease" registered. Mr. Betson claimed, therefore, that he had overriding interests in the parcels of land".*

There were no pleadings expressly along those lines. That represented what the judge said was to be implied from the "counter-claim" and proceeded to try the case on that basis.

He also made findings and holdings which have been challenged by the appellant. His findings depended on inferences which he drew from the evidence adduced at the trial and this court is in as good a position to do the same, and therefore to disagree with those findings. Mrs. Young invites us to take that course. She said the judge made findings of fact

which the evidence is unable to sustain and in some cases, there was no evidence whatsoever, and as well, facts were not even pleaded. She relies on *Benmax v. Austin Motors Co. Ltd. [1955] 1 ALLER 326.*

8. She takes issue with the following findings of fact which the judge made:

   (i) That Mr. Betson remained in possession for the period including 3 January 2001.
   (ii) That Mr. Betson had a valid agreement for sale in relation to parcel 1737 as at 3 April 1997 and as varied pursuant to had Purchase Approval form dated 17 July 2000.
   (iii) That Mr. Betson remained in possession of parcel 608 as a periodic tenant after his lease had expired 5 January 1999.
   (iv) That Mr. Betson had a valid agreement for sale in relation to parcel 608 pursuant to purchase approval form dated 17 July 2000.
   (v) That the appellant had no valid lease between himself and the Government of Belize in relation to Parcel 3545.

9. Mrs. Young submitted that a declaration sought by Mr. Betson in his counter-claim was that he was in actual occupation, not in possession of the registered land with an overriding interest to protect. The onus of proof would, as it seems to me, lie on Mr. Betson to establish the fact of actual occupation. So far as such evidence can be had from his testimony, he said that "he started filling the land". He used his father's dump truck. In 1983, he acquired his own dump-truck "Try me" which he used. A Mr. Garcia assisted him with "a couple of load". He was asked if he had placed any structure on the land and said he had placed a concrete fence at the front of the property and a plywood house. After he got the land, he went off to the USA for about two or three years. Under cross-examination he admitted that neither the plywood house nor the fence

were still standing in 2000. He volunteered that the house presently on the property was there in 2000 and denied that it was placed there in January 2001. A curious fact was that no evidence was led to show when he placed that house there, which would have been powerful evidence that he was in possession and actually occupied the land.

10. Against that exiguous evidence, was evidence of witnesses of Mr. Marin and officials of the Lands Department. Indeed their evidence corroborates Mr. Betson who acknowledged that in the year 2000 there was nothing on the property except "a plum tree and coconut trees". When the land was inspected in 1998, it had reeds eight feet high and was covered with grass and shrubs. A witness for the Attorney General, Mr. Alamilla who owned adjoining land, described the land in these terms in respect of the year 2000:-

> "What can I say about that land is that it was always a vacant lot that was unoccupied and had mangroves and bushes growing into it like all lands in Belize when they are not occupied".

This evidence was not challenged, but as Mr. Betson had not given contrary evidence, that would perhaps explain the absence of any challenge. No question of credibility of witnesses was involved. The fact of the matter, was, that the land was never developed: the mechanic's shop was never built. No evidence was led to show to what use the land was put. Thus, the real question for the court was the appreciation of the significance of the evidence adduced. The submission put forward by Mrs. Young in her skeleton argument was that Mr. Betson was not in occupation (as he counter-claimed) at the commencement of the appellant's lease of parcel 3545 and that the evidence is against the finding of occupation or possession. I would agree, that the findings are

against the weight of evidence and would hold that Mrs. Young's submissions are well founded.

11. The judge found or held that a contract for the sale of the two parcels of land was concluded between the Government and Mr. Betson. Mrs. Young submitted that there was no evidence on which such a finding could be rendered. She drew our attention to the evidence given by Mr. Betson regarding purchase of the parcels. He tendered a land ownership Programme Approval Form (Exhibit D(9B) 16) in regard to parcel 608, but the receipt tendered to show payment, referred to parcel 1737. With regard to parcel 1737, she said that the balance for this parcel was to be paid immediately or within three years. Mr. Betson gave no evidence that he had done so up to 14 May 2000. It was also submitted that there were no pleadings which could warrant a finding that the original land purchase approval form dated 9 May 1997 was amended by land purchase approval form dated 17 July 2000 and that there was therefore a valid purchase agreement between Mr. Betson and the government dated 17 July 2000.

12. As was indicated earlier in this judgment, the counterclaim filed on behalf of Mr. Betson, apart from praying for declaratory relief, was devoid of any pleading. Thus there was no averment of a variation of contract. No issue could have been joined and none was. It would seem, with all respect to the judge, that he had no warrant or basis for considering the matter. But, even on a consideration of the facts allowed to be led, it was not possible to arrive at the conclusion to which he came. Mrs. Young submitted, correctly, as I think, that the lease approval form dated 17 July 2000, expressly stated that the first instalment of two thousand six hundred and sixty six dollars and sixty seven cents ($2666.67) was to be paid within three months of the approval form, and there was no evidence of any such payment. A stipulation in the form, was that if that sum was not paid within three months, the contract was void. The sum was not paid. There

is no evidence of such payment. Mr. Betson never said he had. The finding of a variation was plainly unreasonable.

13. The appellant also challenged a finding of the judge that Mr. Betson remained on the parcel as a periodic tenant after his lease of parcel 608 had expired. She argued that there was no basis for that finding. The lease had expired on 5 January 1999 by effluxion of time so that when Mr. Marin's lease commenced on 29 December 2000, the parcel was free of any lease involving Mr. Betson. She alluded to the fact that there was no evidence that Mr. Betson had paid any rent since 1999 so as to found a finding that he was a periodic tenant. We were referred to the evidence of a Lands Inspector Mr. Karama Shoman who testified that when he inspected the land between April and August 2000, he found the land overgrown in bushes to such an extent that he was unable to get onto the land.

14. There is merit in the point that the evidence showed after the lease expired Mr. Betson was not in possession of the land to lead to the conclusion that he was holding over. It is right to note that the evidence of Mr. Shoman, the Lands Inspector, was not challenged in any form or manner. He said the land was overgrown and had not been developed. I conclude, in agreement with Mrs. Young, that there was no foundation whatever for this finding that Mr. Betson remained on the parcel as a periodic tenant.

15. The judge found or held that Mr. Betson's lease in respect of parcel 1737 was not lawfully cancelled because there had not been compliance with the National Lands Act. This matter can, I think, be disposed of, briefly. No issue of the conduct of any government department arose on the pleadings. The absence of appropriate pleadings on the part of the defendant, Mr. Betson, in his counter-claim precluded the judge from

embarking on any such determination. Thus the evidence before him was all one way, Mr. Betson had not developed the land, the land was overgrown with bushes and at the relevant date, he was neither in possession nor occupation of the land. There was evidence that Mr. Betson was advised that he was in non-compliance. In his judgment, the judge said this (p. 83):-

> "The letter (of cancellation) is not sufficient evidence of the exercise of the Minister's function or discretion under subsection (2)".

In my view this is an illustration of the judge's misconception of his functions. This issue was not pleaded. See the observations of Lord Russell of Killowen in *London Passenger Transport Board v. Moscrop [1942] 1 ALLER 97 at p. 105.*

16. A ground was put forward regarding the excessive delay in rendering judgment which, it was said, contributed to the judge's uncertainty and incompleteness in evaluating the testimony.

17. In my view, a delay of in excess of two years, is appalling and quite unacceptable. No reasons for this unfortunate occurrence has been vouchsafed to us. It is right to observe that such a *faux pas* is happily, a rarity. It would appear that the judge was much troubled by what he considered inefficiencies in the Ministry of Natural Resources and The Environment in regard to the sale of National lands. I venture to think that led him to approach the case with an *a priori* view of the case, which made him try to fit the instant case into his concept. The case was rendered more difficult by an absence of proper pleadings engendered by a joinder, which seems, misconceived. I think the observations of Edmund-Davies LJ (as he then was) in *Henderson v. Henry E. Jenkins [1969] 1 ALLER at 412* are apposite and are worth repeating:-

> "In general, a case should fall to be decided on those issues of fact which the parties themselves choose to raise, and it is only in rare instances that the court should, as it were, assume the role of architect and attempt to create a different type of base or consider issues different from those which the parties have raised, not only by their pleadings but also by the way they have participated in the trial. I make these observations while at the same time recognizing that on occasion, a measure of judicial exploration is not only permissible, but necessary if justice is to be done".

18. From what has been said the matter stands thus:
When Mr. Marin entered into agreements with government regarding the land, it was not the case that Mr. Betson was either in possession or occupation of the land in question. The leases of Mr. Betson had expired and/or been cancelled before Mr. Marin acquired any interest in the land. Having regard to the conclusion, I have arrived at, it is not necessary to deal with the question of section 31(1)(g) of the Registered Land Act, Cap. 194 – regarding "over-riding interests".

19. In the result, I agreed that the appeal be allowed, and the judgment of the court below be set aside, further that judgment be entered for the appellant on the claim and counter-claim, that it be ordered that an order for recovery of possession of the said land be made, that the assessment of damages or mesne profits be remitted for enquiry by another judge, that an order for injunction be granted as prayed and that t here be costs here and below for the appellant to be taxed if not agreed.

Mr. Elrington conceded that there was no *lis* with the appellant. I agreed that this appeal be allowed and the order for costs below be set aside, that there be an order for costs to the Attorney General to be taxed if not agreed, that there be no order for costs of appeal for the Attorney General.

21. My contribution to the reasons promised at the conclusion of submissions, appears above.

22. I wish to add that I have had an opportunity to read in draft, the reasons for judgment of Morrison JA and I entirely agree with them.

_____
CAREY, JA

MORRISON, JA

23. At the conclusion of the hearing of this matter on 7 March 2008, this court made the following orders:

Civil Appeal No 26 of 2007:

(i) Appeal allowed and the order for costs against the Attorney General in the court below set aside.

(ii) Costs to the Attorney General of the proceedings in the court below to be agreed or taxed.

Civil Appeal No. 28 of 2007:

(i) Appeal allowed and judgment of the court below set aside.

(ii) Judgment entered for the appellant on the claim and counterclaim.

(iii) Order for recovery of land made against the respondent George Betson and in favour of the appellant.

(iv) Ordered that the assessment and enquiry as to damages be remitted for hearing before another judge of the Supreme Court.

(v) An order for injunction against the respondent George Betson and in favour of the appellant granted as prayed.

(vi) Ordered that the appellant to have his costs in this court and in the court below, to be agreed or taxed.

24. I have had the distinct advantage of reading in draft the judgment prepared by Carey JA in this matter. I fully agree with his careful analysis of the pleadings (such as they were), the evidence, the judgment of Awich J and his conclusions. However, because we are differing from the learned trial judge, who obviously devoted considerable time and attention

to his reserved judgment in the matter, I wish to add my own contribution, with particular reference to the issues in the case arising out of the provisions of the Registered Land Act ("the RLA"). As Carey JA has pointed out, Civil Appeal No. 26 of 2007 was disposed of on the concession by Mr. Hubert Elrington, counsel for the respondent, that it could not be resisted, so all that follows in this judgment relates to the issues raised in Civil Appeal No. 28 of 2007.

25. This litigation was commenced by the appellant, whose statement of claim made the following averment:

> "(1) The Plaintiff is the leasehold owner and is entitled to possession of the land situated along Miles 2 ½ Northern Highway, Belize City known as Parcel 3545/1, Block 16, Caribbean Shores/Belize Registration Section under and by virtue of a Lease Approval dated 29th December, 2000 and by virtue of a Certificate of Lease No. 1541/2001 dated the 22nd day of February 2000 (hereinafter called "the land")."

26. The reference in the statement of claim to a Certificate of Lease dated 22 February 2000 is an obvious error, as the document itself, which was in due course tendered in evidence by consent, is actually dated 22 February 2001. Nothing turns on this error.

27. This is how Awich J summarized the appellant's case on the evidence:

> "8. In mid year 2000, (explained to be May or June 2000), Mr. Rupert Marin, the plaintiff, applied for allocation of land in the Caribbean Shores area of Belize City, to lease from the State. He wanted to move his sanitation business located then on Baymen Avenue, Kings Park, a residential area, to a commercial area. He submitted his application

through the office of the area representative, the member of parliament for the Caribbean Shores, Belize City. He paid the fee of $5.00. He was advised that if vacant land was identified he would be granted lease of it. About six months later on 29.12.2000, he received a telephone call from the Lands Office. He was informed that land had been identified and a lease of it to him had been approved by the Minister. An official of the Department gave to Mr. Marin the parcel number as 3545, Caribbean Shores, and a brief description of the land. He located it.

9. Mr. Marin related the events that directly led to this case as follows. On 3.1.2001, he took his workers to "clean the land". They cut down bushes and grass in an area stretching over 20 to 25 yards from the roadside; the land abuts the Northern Highway. Beyond was filled with deep water, workers could not continue on. On the morning of 4.1.2001, Mr. Marin saw Mr. George Betson, the first defendant, and news reporters on the land; he went to them. Mr. Betson asked if Mr. Marin was the one who had torn down his fence. Mr. Marin answered that he removed what was there because it was his property. Mr. Betson said that Mr. Marin was trespassing, he Mr. Betson, was the owner of the land, he had a lease over it. Mr. Marin answered that it was not possible, because he Marin, had been granted a lease over the land. In the evening Mr. Marin saw a wooden hut placed on the land. The following day, 5.1.2001, he saw that some cement and sand had been place on the land. On the same day he went to the Lands Office and signed what he called "a lease" for the land, Parcel 3545/1, Lot 16, Caribbean Shores Registration area.

10. The document was in fact styed (sic), "LEASE APPROVAL". It was set out in the form of a letter addressed to Mr. Marin. It informed him that the Minister had on 29.12.2000, approved Mr. Marin's application for a lease of parcel 3545, Caribbean shores, Belize City. It also set out terms of the lease. The agreed lease period was 7 years. The rent was $60.00 per year. It was dated and signed by the Commissioner of Lands and Surveys on 29.12.2000, and by Mr. Marin on 5.1.2001. It is exhibit No.

> P(RM)6. It was subsequently registered and, "a certificate of lease" was issued on 22.2.2001 under, "Registered Land Ordinance, Chapter 157". In Belize a lease for a period of or more than two years or for the life of the lessor or of the lesee (sic) must be registered – see **ss: 28 and 29 of the Registered Land Act Cap 194, Laws of Belize**. I regarded the lease approval document as an agreement for a lease, not a lease."

28. Save with regard to when and how the "wooden hut" referred to in paragraph 9 of the extract from the learned judge's judgment set out above came to be placed on the land, the respondent George Betson ("the respondent") did not seriously challenge this account. His major contention (through the evidence, if not on his pleadings) was that he had a prior interest in the land going back as far as 1973 and that he had remained in continuous occupation of the land right up to the beginning of 2001. Having heard evidence on both sides, Awich J found that the respondent was in "actual occupation of the land area when Mr Marin entered upon it on 31.1.2001", and concluded that the appellant "did not take any valid lease or agreement for lease in respect of the land area" and that it was his duty "to ascertain the legal position in regard to [the respondent's] leases, or take the risk as he has." As a result of all of this, in Awich J's judgment, it was not necessary for him to consider whether the appellant took his "lease" subject to an overriding interest in favour of the respondent.

29. As a consequence, the learned judge made the following declaration:

> "The approval, on 29th December, 2000, of the application of Mr. Marin, for a lease is invalid, Mr. Marin has no valid agreement for a lease or a valid lease over Parcel No. 3545/1 Caribbean Shores Registration Area, Belize City,

which was the new parcel number assigned to replaced Parcel 608 and Parcel 1737."

30. And in support of this declaration made the following order:

> "The Registrar of Lands is directed to cancel the registration of the lease for 30 years in favour of Mr. Rupert Marin, and to cancel the certificate of lease dated the 22nd day of February, 2001 evidencing the registration."

31. Four of Mrs. Marin-Young's several grounds of appeal relate directly to this aspect of the matter:

> "3.1 That the decision of the Learned Trial Judge was unreasonable and against the weight of the evidence.
>
> 3.2 That the Learned Trial Judge failed to take proper advantage of having seen and heard four eye-witnesses for the Plaintiff/Appellant and one eye-witness for the Second Defendant/Respondent and having seen pictures tendered into evidence by the Plaintiff/Appellant, in particular he failed to take into consideration the evidence of the eye-witnesses and the pictures tendered into evidence.
>
> 3.8 That the Learned Trial Judge erred in law in holding that the Lease Approval dated the 29th day of December, 2000 was an agreement for a lease and in holding that the lease commenced on the registration of the lease notwithstanding what when the offer for the lease was accepted by the Plaintiff/Appellant

signing the Lease Approval and notwithstanding what was stated on the Lease Certificate and on the register for Parcel 3545/1 Caribbean Shores Registration Section;

3.9 That the Learned Trial Judge erred in law and misdirected himself in ordering the cancellation of the lease and registration thereof in favour of Plaintiff/Appellant and especially in the absence of fraud and mistake pursuant to section 143 of the Registered Land Act."

32. In support of these grounds, Mrs. Marin-Young pointed out that although the Certificate of Lease is dated 22 February 2001, the commencement date is stated to be 29 December 2000, that is, the date of the lease approval from the Commissioner of Lands and Surveys. The appellant's evidence was that when he visited the land for the first time on 29 December 2000 it was overgrown in high grass and reeds and that there was no one in occupation. Mrs. Marin-Young accordingly submitted that since the respondent was not in occupation of the land as at that date, the appellant's lease could not be said to be subject to the respondent's overriding interest in the land. In these circumstances, once the Registrar had entered the appellant's lease on the register and issued a Certificate of Lease to him, his leasehold title could only be cancelled for fraud or mistake (section 143 of the RLA).

33. In support of these submissions, we were very helpfully referred by Mrs. Marin-Young to the relevant provisions of the RLA, the companion decisions of the House of Lords in **Abbey National Building Society v Cann [1991] 1 AC 56** and **Lloyd's Bank Plc v Rosset [1991] 1 AC 107**, the decision of the Court of Appeal of England in **Malory Enterprises Ltd**

v Cheshire Homes Ltd [2002] Ch. 216 and the recent decision of this court in **Santiago Castillo Ltd v William and Jimmy Quinto** (Civil Appeal No. 7 of 2007, judgment delivered on 26 October 2007).

34. Mr. Elrington for the respondent made no specific submissions on the RLA points, but emphasized that the evidence showed that the respondent was in actual occupation of the land at the relevant time.

35. The lease approval tendered in evidence on behalf of the appellant, dated 29 December 2000, sets out a number of conditions. Condition (1) reads as follows:

> "The term of the lease shall be for 7 years, however, the lessee will have the option to extend the lease for a further term of years provided that the conditions of the lease are fulfilled and the land is surveyed; and provided further that the lessee shall have the option to obtain a registered lease for a term of 30 years."

36. On 5 January 2001, the appellant signed this document as he was required to do, signifying his acceptance of the conditions and on 22 February 2001 a Certificate of Lease was issued to him by the Registrar of Lands under the provisions of the RLA. The certificate names the Government of Belize as the lessor, states the agreed rent of $60.00 per annum for the term of 30 years from 29 December 2000, and certifies the appellant's registration as proprietor of the leasehold interest, subject to the terms of the lease "and to such of the overriding interests set forth in section 31 of the [RLA] as may for the time being subsist and affect the land comprised in the lease."

37. As at 22 February 2001, therefore, the appellant was the registered proprietor of a 30 year lease with effect from 29 December 2000, pursuant to the provisions of section 49 of the RLA. The legal effect of such registration is to be found in the first place in section 28 of that Act:

> "Subject to section 30, the registration of a person as proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto, and subject to all implied and expressed agreements, liabilities and incidents of the lease, but if the title of the lessor is a provisional title the enforcement of any estate, right or interest affecting or in derogation of the right of the lessor to grant the lease shall not be prejudiced."

38. Section 30 (dealing with the effect of a "voluntary transfer") is not now relevant, but section 31, which is referred to in the appellant's Certificate of Lease itself, clearly is: that section sets out those overriding interests to which (unless the contrary is expressed in the register, which is not the case here) registered land is subject without having to be notified on the register. Of particular relevance for present purposes is section 31(1)(g) which recognizes and preserves "the rights of a person in actual occupation of land … except where inquiry is made of such person and the rights are not disclosed."

39. In **Santiago Castillo** (supra) this court, after a review of the RLA, as well as a few of the leading authorities on the subject, confirmed that registration under the Act is effective to vest title in the registered proprietor, irrespective of any deficiencies or imperfections in matters antecedent to such registration. As Lord Wilberforce observed, in **Frazer v Walker [1967] 1 All ER 649**, (the leading case) it is "the registration and

not its antecedents which vests and divests title" (page 651). Although **Santiago Castillo** was primarily concerned with section 26, which deals with the effect of registration as proprietor of the freehold interest, I do not think that this makes a difference to the applicability of its conclusions with regard to the general scheme of the Act.

40. The result of this, in my view, is that without more, the issue of the Certificate of Lease to the appellant on 22 February 2001 was effective to vest in him the leasehold interest in the land on the terms therein mentioned, irrespective of any of the supposed deficiencies in the lease or lease approval process that appeared to be of concern to Awich J (such as, for instance, whether what the appellant acquired was a "lease" or "an agreement for a lease"). The efficacy of the leasehold title so vested, it appears to me, can only be qualified by the operation of section 31(1)(g), which preserves overriding interests, or by the power of the court to order rectification of the register on the ground of fraud or mistake, as provided for by section 143(1) of the Act (and as to which, see further paragraph 31 below).

41. So that, far from it being unnecessary to consider the issue of whether the appellant took his lease subject to the respondent's overriding interest arising out of his previous dealings with the land, as Awich J concluded, this in fact became the critical issue, turning entirely on the question whether the respondent was in actual occupation of the land at the relevant time. But, perhaps out of an abundance of caution, Awich J did nevertheless express his view "that the evidence proved that Mr. Betson was in actual occupation of the land area when Mr. Marin entered upon it on 3.1.2001 …"

42. The evidence on this issue has been fully analyzed by Carey JA and I agree with his conclusion that the respondent did not discharge the onus

of proof which was surely on him to establish that he was in actual occupation of the land when the appellant came into the picture.

43. In addition to the appellant, two witnesses called on his behalf and two others called on behalf of the Attorney General all testified that by the middle to the end of 2000 the land was open, overgrown (with 7 to 8 feet of bush) and unoccupied land. On the one issue of fact which achieved special significance, that is, whether a small wooden house was already on the property at the time when the appellant first viewed it on 29 December 2000, the appellant and his witnesses were all emphatic that it was not. The appellant's evidence was that this was still so when he returned to the land on 3 January 2001, for the purpose of clearing it, but that by the evening of 4 January 2001, he noticed that "somebody had moved a small wooden building on the property … The following day they moved construction material which was some cement block and construction sand."

44. According to the appellant, he took photographs of the land on both 4 and 5 January 2001 and these photographs were put in evidence as exhibits at the trial by consent (exhibits P(RM), 2, 3, 4 and 5). Some four years later in February 2005, (by which time action had been filed and, according to the appellant, both parties had been "instructed by the judge that no further development be carried out until the matter is resolved"), the appellant took some additional photographs of the land which showed that by that time there was a water attachment, stairs, a veranda and a septic tank in the vicinity of the house. These photographs were also put in evidence by consent (exhibits P(RM) 12 and 13). I shall return to the photographic evidence below.

45. Carey JA has already commented on the "curious fact" that despite his unsolicited assertion in cross-examination that the house "that is there now" was there in 2000, the respondent gave no evidence at all as to

when and in what circumstances it was placed there. However, perhaps in an attempt to fill this gap in the evidence, Mr. Edwin Logan was called to testify on the respondent's behalf. Mr. Logan is an automobile mechanic, whose garage was separated from the land by a single lot at Miles 1 ½ on the Northern Highway and who had known the respondent and the land since 1983. He confirmed the respondent's evidence that a plywood structure had been on the land some 20 years before ("way back then"), but that even then "the building was already deteriorating, falling apart, maybe half of it was left." But, Mr. Logan said, the respondent had "bought a house and place it on the land" about "a year or more" before the appellant came to the land at the end of 2000. Mr. Logan went on to insist that that house had a cement septic tank sitting on the ground beside it, which had been placed there by the respondent at the same time when he had placed the house on the land a year or more before the end of 2000.

46. But Mr. Logan was to be spectacularly undone in cross examination when, having been shown one of the photographs taken in February 2005 (exhibit P(RM) 13), he confirmed that it showed the septic tank which was "hooked up to the house" which the respondent had placed there before the end of 2000. When shown the photograph of the house taken in January 2001 (exhibit P(RM) 2) in which the septic tank was nowhere to be seen, he retreated quite unconvincingly, conceding in answer to a direct question from the judge himself that, having seen the January 2001 photograph, there was -

> "a possibility maybe the septic tank was there a little later, but I could recall seeing the septic tank and it was hooked up to the building. I don't know when it was placed there or how long it was placed there, but I know it was there … before Mr. Marin came to claim the property."

47. Although Awich J obviously took a keen interest in the incident in cross examination described in the foregoing paragraph, it is, in the light of its obvious significance to the overall credibility of the respondent's case on this issue, more than a little surprising that it does not even achieve a passing reference in his detailed written judgment. Which leads me to think that this is indeed a case in which the learned trial judge failed to take proper advantage of having seen and heard the evidence in the case and also misapprehended the correct inferences to be drawn from that evidence (see **Benmax v Austin Motor Co Ltd [1955] 2 WLR 418**, especially per Viscount Simonds at 419-21 and per Lord Reid at 421-423). Certainly the photographs themselves which were in evidence, though obviously not conclusive, tended to support the appellant's account of the circumstances in which the wooden house came to be placed on the land.

48. In these circumstances, I therefore think that the learned judge's finding that the respondent was in actual occupation of the land up to 3 January 2001 is completely against the weight of the evidence and that this is indeed a case in which it is open to this court to disagree with that finding. This was essentially a question of fact, in respect of which I bear in mind the comment of Lord Oliver of Aylmerton in **Abbey National Building Society v Cann [1991] 1 AC 56**, **93** that "actual occupation" for these purposes must "involve some degree of permanence and continuity which would rule out mere fleeting presence", as well as the later observation of Arden LJ in **Malory Enterprises Ltd v Cheshire Homes Ltd [2002] Ch. 216, 236**, that "the requisite physical presence must … be such as to put a person inspecting the land on notice that there was some person in occupation." I do not think that the evidence adduced by the respondent at the trial of this matter was sufficient to establish "the requisite physical presence" on the land at the material time. I would therefore conclude that

the registration of the appellant's leasehold title was not subject to any overriding interest of the respondent pursuant to section 31(1)(g).

49. Carey JA has already dealt with the ground of appeal relating to the delay in excess of two years in the delivery of his reserved judgment by Awich J. While, as the authorities show, a long period of delay – even if on the face of it, as it clearly is in this case, inordinate – is not by itself sufficient to justify interference with the judgment, it appears to me that Awich J's finding on the issue of the respondent's actual occupation of the land at the end of 2000 is a clear manifestation of an error that is "probably, or even possibly, attributable to the delay" (per Lord Scott in **Cobham v Frett [2001] 1 WLR 1775, 1783** and see also **Hoy and Hoy v Aurora Awe et al**, Civil Appeal No. 2 of 2006, judgment delivered 27 October 2006, esp. per Morrison JA at paragraphs 15 to 22.

50. An additional question that arises is what is the relevant time for the purposes of section 31(1)(g) of the RLA. In the **Abbey National case**, it was held that to substantiate a claim to an overriding interest against a transferee or chargee by virtue of section 70(1)(g) of the UK Land Registration Act, 1925 as a person in actual occupation of the land, the person claiming the overriding interest had to have been in actual occupation at the time of the creation or transfer of the legal estate (as distinct from the date of registration). Mrs. Marin-Young submitted that section 70(1)(g) of the UK Act is in *pari materia* with section 31(1)(g) of the RLA and that the **Abbey National** case is therefore of persuasive authority in Belize and ought to be followed on this point.

51. I agree with Mrs. Marin-Young on both counts, on the basis of which the relevant date for the purposes of section 31(1)(g) in the instant case would be 29 December 2000, which is the date on which the appellant accepted the conditions of the lease offered to him, and not 22 February 2001, which is the date of the issue of the Certificate of Lease (which also

recites 29 December 2000 as the commencement date of the lease). As Lord Oliver observes in the **Abbey National** case, the reference in the UK equivalent of section 31(1)(g) "to inquiry and failure to disclose cannot make sense unless it is related to a period in which such inquiry could be other than otiose" (at page 88, see also per Lord Jauncy at pages 104-5).

52. The only remaining question is whether Awich J was entitled to order cancellation of the registration of the appellant's lease. Mrs. Marin-Young submitted that in the circumstances of this case, the learned judge's order amounted to a rectification of the register of Parcel 3545, which is only possible in accordance with section 143(1) of the RLA in cases of fraud or mistake. As Mrs. Marin-Young also points out, fraud was neither pleaded nor proved by the respondent.

53. Section 143 of the RLA provides as follows:

> "143.-(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be made, cancelled or amended where it is satisfied that any registration, including a first registration, has been obtained, made or omitted by fraud or mistake.
>
> (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession or is in receipt of the rents or profits and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default."

54. The power of the court to order rectification of the register by cancellation of any registration is, as this court held in **Santiago Castillo**, "carefully circumscribed" (the phrase is Lord Wilberforce's in **Frazer v Walker**, supra, at page 652) in the light of the primary objective of registration

under the RLA, which is to secure the conclusiveness of the register (see **Santiago Castillo**, at paragraph 60). In this case, there was in fact no claim by the respondent for rectification of the register, his counterclaim raising only (by way of a declaration sought) the question of an overriding interest. Such a claim would in any event have had to be based on either fraud or mistake, neither of which is alleged or supported by the evidence in the case. In these circumstances, I am therefore also in agreement with Mrs. Marin-Young that the order directing the cancellation of the registration of the lease cannot stand.

55. It is for these reasons, in addition to those given by Carey JA in his judgment, that I concurred in the result of this appeal.

MORRISON, JA