IN THE SUPREME COURT OF BELIZE, A.D. 2006

CLAIM NO. 614

ATTORNEY GENERAL **Applicant**

BETWEEN **AND**

KUO, CHUN-HUNG **Defendant**

—

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Ms. Andrea McSweaney with Ms. Priscilla Banner for the applicant.
Mr. Wilfred Elrington, S.C. for the defendant.

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JUDGMENT

At the close of the hearing on this matter on Monday 22nd January 2007, and having listened to the learned attorneys for both sides and a perusal of the documents, I dictated an *ex tempore judgment* granting the application in this matter.

2. This decision is my reasons and considered judgment on the application, expanding on the *ex tempore judgment* I gave earlier.

3. The issue for me to determine in this application, in my view, is whether the applicant, representing the Government of Belize, who by a conveyance between it and Mr. Abdul Hamze in 2001,

acquired title to the property from him, can pay the sum of US $1 million dollars secured by the mortgage in favour of the defendant, into court, in satisfaction and discharge of that mortgage on the property. The applicant from the evidence after acquiring the property proceeded to spend a considerable sum of money, some $90 million dollars in infrastructural improvements and other improvements in order to build a satellite town and provide housing for the public. This has been done and the area is now called "Mahogany Heights." The applicants had hoped for members of the public to acquire houses built on the property through the Development Finance Corporation (DFC). A number of houses have been sold by the DFC to members of the public.

4. But the applicant subsequently discovered that Mr. Hamze's title to sell the property to it was encumbered by the mortgage in favour of the defendant, despite having paid Mr. Hamze a considerable part of the consideration for the purchase of the property. The applicant had paid the sum of $7 million dollars to Mr. Hamze leaving a balance of some $2 million dollars.

5. Mr. Hamze seems to have vanished from the picture. He cannot be found in Belize or reliably located abroad. Therefore in this application, the applicant has asked that it be allowed to pay the US $1 million due on the mortgage in favour of the defendant so as to discharge the encumbrance on the property.

6. Mr. Wilfred Elrington S.C. for the defendant however has objected to the application. He handed in last-minute submissions to the court just fifteen minutes before the matter came on for hearing. However, his objections were three-fold: First he contended that the arrangement between Abdul Hamze and the defendant was not

a mortgage but that it created a trust for sale as the defendant had advanced the purchase price of the property to Mr. Hamze thereby giving rise to a resulting trust; secondly therefore as a trustee Abdul Hamze had no authority on his own to have effected the conveyance of the property to the applicant; and thirdly, that in any event there was a statutory trust in favour of both Mr. Hamze and the defendant and they were both therefore entitled as partners equally, by the equitable doctrine of conversion, to the proceeds of sale of the property to the applicant.

7. Having listened to both Ms. Andrea McSweaney, the attorney for the applicant and Mr. Elrington S.C. for the defendant and having read the affidavit evidence of Mr. Gian Ghandi in support of the application and the affidavit of the defendant, I dictated an **ex tempore** decision granting the application at the close of the hearing. This present decision is therefore a slightly more reasoned and structured one than the **ex tempore** one I then delivered.

8. Section 59(1) of the Law of Property Act – Chapter 190 of the Laws of Belize 2000 Rev. Ed. provides as follows:

> *"59(1) A vendor or purchaser of any legal estate or interest in land, or their representatives respectively, may apply in a summary way to the court, in respect of any question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract), and the court may make such order upon the application as it thinks fit, and may order how and by whom all or any of the costs of and incidental to the application are to be borne and paid."*

9. I therefore entertained the application in these proceeding bearing in mind that the defendant was not impeaching the existence or validity of the contract of conveyance between Hamze and the applicant. Rather, the position of the defendant as articulated by Mr. Elrington S.C., was that his arrangement with Hamze was not simply a mortgage but one of a resulting trust and that they were both entitled equally as partners to the proceeds of sale of the property to the applicant in 2001 by Hamze.

10. Having read the agreement between Mr. Hamze and the defendant dated 1st March 1994, though it has some unusual provisions, like the division of parts of the property between Hamze and the defendant, I am satisfied however, that it is a mortgage deed effecting a mortgage with all the terms and conditions stated therein. In particular, it is expressly called by the parties (that is Hamze and the defendant) a Mortgage Deed, and it secures the repayment of US $1 million dollars given to Hamze by the defendant. A "mortgage" is defined as including any charge on any property for securing money or moneys worth – section 2(1) of the Law of Property Act. There is nothing in the context of this agreement to persuade me that it is not in fact and effect a mortgage, notwithstanding some of its unusual provisions.

11. I am therefore not persuaded, as argued by Mr. Elrington S.C., that the agreement though expressly called a Mortgage Deed, is in fact a partnership agreement.

12. I am also of the view that pursuant to section 60 of the Law of Property Act, the Court has power to order the discharge of legal charges or incumbrances by directing or allowing payment into

court to effect the discharge. So far as it is material for the purpose of this application, section 60(1) provides in terms:

> "*60(1) Where land subject to any legal charge or encumbrance, whether immediately realisable or payable or not, is sold or exchanged by the court, or out of court, the court may, if it thinks fit, on the application of any party to the sale or exchange, direct or allow payment into court of such sum as is hereinafter mentioned, that is to say –*
>
> *(a) in the case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, the sum to be paid into court shall be of such amount as, when invested in Government securities, the court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge; and*
>
> *(b) in any other case of capital money charged on the land, the sum to be paid into court shall be of an amount sufficient to meet the legal charge or encumbrance and any interest due thereon,*
>
> *but in either case there shall also be paid into court such additional amount as the court considers will be sufficient to meet the contingency of further costs, expenses and interests, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the court for special reason thinks fit to require a larger additional amount."*

13. Further, even if the arrangement between Mr. Hamze and the defendant constituted a trust for sale from a resulting trust as contended for by Mr. Elrington S.C., (of which I am not persuaded), by section 29 of the Law of Property Act, a purchaser such as the applicant, shall not be concerned with the trusts of the proceeds of sale of land subject to the trust for sale. This section provides as follows:

> *"29(1) A purchaser of a legal estate from trustees for sale shall not be concerned with the trusts affecting the proceeds of sale of land subject to a trust for sale (whether made to attach to such proceeds by virtue of this Act or otherwise), or affecting the rents and profits of the land until sale, whether or not those trusts are declared by the same instruments by which the trust for sale is created,"*

14. Mr. Elrington S.C. however, laid some emphasis on subsection (2) of section 29 which provides:

> *"(2) Notwithstanding anything to the contrary in the instrument (if any) creating a trust for sale of land or in the settlement of the net proceeds, the proceeds of sale or other capital money shall not be paid to or applied by the direction of fewer than two persons as trustees for sale, but this subsection does not affect the right of a sole personal representative as such to give valid receipts for, or direct the application of, the proceeds of sale or other capital money, nor, except where capital money arises on a transaction, render it necessary to have more than one trustee."*

Therefore, he argued the bulk of the purchase price of the land should not have been paid by the applicant to Hamze alone, for as a co-trustee of the resulting trust, the proceeds of sale should not have been paid to fewer than two persons. That is to say, they should have been paid to Hamze and the defendant as co-trustees.

15. As I have states, I am unable from a reading of the mortgage deed of 1st March 1994, between Hamze and the defendant, to hold that it created a resulting trust giving rise to a trust for sale in favour of Hamze and the defendant. I am unable to find that by the agreement they were co-trustees.

16. I am impressed and persuaded that the agreement between them was a mortgage.

17. The document is formally stated as "(This) **Deed of Mortgage** is made the 1st day of March one thousand nine hundred and ninety-four" (emphasis added).

The parties are throughout the document referred to as "mortgagor" and "mortgagee" meaning Hamze and the defendant respectively.

In the second preambular paragraph it is expressly stated:

> *"The Mortgagor has requested and the Mortgagee has advanced previous hereto to the Mortgagor the sum of One Million Dollars ($1,000,000.00) Currency of the United States of America and the Mortgagor has agreed to create a charge by way of legal mortgage as security for repayment of the said sum of money lent and advanced."*

And the document goes on to state:

> *"NOW THEREFORE in consideration of the sum of One Million Dollars ($1,000,000.00) Currency of the United States of America paid by the Mortgagee to the Mortgagor (the receipt whereof is hereby acknowledged) this Deed of Mortgage executed pursuant to Sections 64 and 65 of the Law of Property Act WITNESSETH as follows:"*

18. With respect to Mr. Elrington's submission that the document evinces a partnership agreement between Hamze and the defendant, I am left in no doubt however, that it was a mortgage between them, intended to secure the repayment of the US $1 million dollars lent to Hamze by the defendant.

19. Moreover, I am not persuaded that the document marked '**KC 1'** exhibited to the defendant's affidavit (the mortgage deed) evinces a partnership agreement between him and Hamze. A partnership is succinctly defined in section 3(1) of the Partnership Act – Chapter 259 of The Laws of Belize, Rev. Ed. 2000 as *"… the relationship which subsists between persons carrying on a business in common with a view of profit."* There is no evidence of the business Hamze and the defendant carried on in common. That they agreed as provided in the document executed between them in 1st March 1994, that is, the mortgage deed, to share equally the profits from the development and sale of the land mentioned in it, does not in and of itself, in my view, make them partners. Indeed in determining whether in any given case a partnership does or does not exist, section 4 of the Partnership Act provides some rules for this

purpose. Paragraphs (a) and (b) of this section, are in my view, instructive in the circumstances of this case:

> "*(a) joint tenancy, tenancy in common, joint property, common property or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof;*
>
> *(b) the sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint common right or interest in any property from which or from the use of which the returns are derived."*

I therefore do not think there was any partnership between Hamze and the defendant cognizable in law or constituted by the facts and circumstances of their relationship. See **Keith Spicer Ltd. v Mansell (1970) 1 All. E.R. 426.**

20. The defendant in his affidavit filed on 19th January 2007, describes in paragraphs 15, 16 and 17, how the document came to be prepared by the Law Firm of Barrow & Williams. Although the defendant says in paragraph 16 that Mr. Williams was instructed to prepare the necessary document "to reflect the business arrangement which existed between" Mr. Hamze and himself, I am satisfied that this does not make the document any the less a mortgage deed. In fact in paragraph 17, the defendant states that he and Hamze executed the document on 1st March 1994 and it is duly recorded in the Land Titles Unit, Belmopan. He exhibited a

copy of the document. Partnership agreements I think it is fair to say, are not recorded in the Land Titles Unit in Belmopan.

21. I am therefore satisfied that the document between Hamze and the defendant on 1st March 1994, was clearly intended to be a mortgage agreement between them, and that it is in fact a mortgage deed.

22. Accordingly, I order that the applicant pay the sum of US $1 million dollars into Court for the account of the defendant, together with further costs, expenses and interest and any other contingency not exceeding one-tenth part of the original amount of US $1 million dollars.

23. The application is therefore granted. There will be no order as to costs.

A. O. CONTEH
Chief Justice

DATED: 23rd January 2007.