

IN THE COURT OF APPEAL OF BELIZE, A.D. 2010

CIVIL APPEAL NO. 32 OF 2008

BETWEEN:

**GEORGE WESTBY
ERNEST STAINE
(Administrator of the Estate of
Abner Westby)
ELIZABETH MICHAEL
ELMA WESTBY
(Former Administrators of the
Estate of Abner Westby)**

Appellants

AND

**CHRISTOPHER ROE
MARIE ROE
(As Executors of the Estate of
Gordon Roe)
MARIE ROE**

Respondents

BEFORE:

The Hon. Mr. Justice Sosa	-	Justice of Appeal
The Hon. Mr. Justice Carey	-	Justice of Appeal
The Hon. Mr. Justice Morrison	-	Justice of Appeal

H E Elrington SC for the appellants.

D B Courtenay SC and M C E Young SC for the respondents.

9 and 19 March 2010.

SOSA JA

[1] On 9 March 2010 I was in agreement with the other members of the Court that the appeal should be dismissed; that the order of the court below should be affirmed and that the respondents should have their costs, to be taxed if not agreed. I concur in the reasons for judgment set out by my learned brother,

Carey JA, in his judgment, a draft of which it has been my privilege to be able to read.

SOSA JA

CAREY JA

[2] This was an appeal by the defendants against a judgment of the Chief Justice whereby he granted a declaration in the following terms:

- “1. That the property on which the First Defendant erected the building is the property of the Claimants and not of the Estate of the late Abner Westby nor his personal representatives nor heirs.

2. That the Defendants or any of them whether by their servants or agents are restrained from entering upon or trespassing on or interfering with the Claimant’s rights to possession of the property set out below:

Property

All that lot, piece or parcel of land situate at Placencia Village, Stann Creek District and bounded on the North by land now or formerly of Rosalyn Young, on the East by the sea, on the South by land now or formerly of Jane Young

and on the West by land now or formerly the Estate of Abner Westby and including the accreted portion of the land all as designated in the plan attached to the Deed of Conveyance dated the 15th of December 1981 recorded in Deeds Book Volume 1 of 1982 at folios 1025 to 1042.”

He also made an order –

3. “That the Defendants vacate and remove any buildings or structures erected by the First Defendant or by any of the Defendants or anyone on their behalf.”

and an order for costs.

[3] A convenient starting point is to set out the conveyancing history of the plot of land which is the subject matter of the action. This is derived from the pleadings and the facts as found by the Chief Justice.

[4] In 1972, Abner Westby owned property which included the plot in the action which he agreed to sell to the respondents for the sum of seven thousand dollars, which was duly paid. Abner Westby died in 1979 and letters of administration were issued in his estate to the third and fourth appellants. On 15 December 1981, they executed a deed of conveyance as personal representatives of the estate of Abner Westby and vendors of the property in favour of Gordon Roe and Marie Roe, as purchasers. This conveyance, which was tendered in evidence, provided a detailed description of the land.

[5] In 1992, George Westby, a son of Abner Westby (the first appellant), entered upon the land and started erecting a building. The Roes, through their lawyers, requested him to cease his activities and remove the material he had

placed there. His failure to comply resulted in the action which is now on appeal to this court.

[6] The Chief Justice summarized the case for the appellants (the defendants) as follows

- (i) There was no sale of the property to Abner Westby;
- (ii) that the Deed of Conveyance of 15 December 1981 was procured by undue influence;
- (iii) in the alternative, if the Deed was not procured by undue influence and that the late Abner Westby agreed to sell property to the claimants, the land agreed to be sold is materially different from the land described in the narrative description in the Deed of Conveyance of 15 December 1981;
- (iv) the defendants counterclaimed that the Conveyance be set aside as having been procured by undue influence or alternatively, a declaration that the property conveyed to the plaintiffs is not bound on the East by the sea but by the remaining lands of the late Abner Westby;
- (v) in the further alternative, a declaration that the land in the Conveyance is held in trust by the plaintiffs for the benefit of the estate of Abner Westby;
- (vi) in the alternative, an order that the claimants execute all necessary and proper acts to give effect to the rights of the

second defendant as the administrator of the estate of Abner Westby.

[7] The Chief Justice identified the issues arising on the pleadings and the evidence as –

- “i) Was there an agreement between the late Abner Westby and Gordon Roe for the sale of property in Placencia?
- ii) if there was an agreement what was the exact property it related to?
- iii) was there undue influence by which the Deed of Conveyance of 15th December 1981 was procured such as to make that conveyance inoperative to transfer any property to which it relates?”

[8] Two grounds of appeal were filed in challenging the judgment of the Chief justice. They were stated thus:

“The Learned trial judge erred in fact in holding that the issue for the determination were those set out by him at paragraph 12 of his Judgment. (These have been set out in paragraph 6 of this judgment).

and

The Learned trial judge erred in holding that there was no undue influence in procuring the Deed of Conveyance date (sic) the 15th day of December, 1981.”

[9] When the matter came on before us, Mr. Elrington abandoned the second ground which raised the issue of undue influence. He thought that it did not arise. The Chief Justice had been “led into error by the learned counsel who were before him.” In the light of Senior Counsel’s remarkable stance, that left the first ground for our consideration. In my opinion, the issue of undue influence arose on the pleadings. It was specifically pleaded by the appellants. Paragraph 17 averred as follows:

“(17) In the premises, the Third and Fourth-named Defendants’ execution of the said conveyance is to be presumed to have been procured by the undue influence of the Plaintiffs, acting through Horace Young QC over the Third and Fourth-Named Defendants,”

That being said, it is right to note that the Chief Justice considered the witness statements and the viva voce evidence which bore on the issue and concluded that “there was no undue influence in this case, either actual or presumptive flowing from an attorney-client relationship.” The Chief Justice was in a position of advantage denied to this court to assess and evaluate the evidence adduced before him and I can find no basis on which this court is entitled to interfere.

[10] With respect to the solitary ground remaining, and which plainly challenged the judge’s identifying the issues as relating to

- (a) whether there was an agreement between the parties?
- (b) if there was, what was the exact property to which it related?
- (c) was there undue influence in procuring the Deed of Conveyance?

Mr. Elrington launched forth into an argument based on non-compliance with section 55(1) of the Law of Property Act. This provision was not raised on the pleadings in any shape or form. Accordingly, it is absurd to suggest therefore that that was an issue which the Chief Justice should have identified as calling for determination. However, in his determination of the issue whether there was an agreement, he was not unmindful of the provision. This is made clear in paragraph 14 of his judgment, where he said –

“I am therefore convinced and satisfied that from the paper trail in this case there was an agreement, evidenced in writing between the late Abner Westby and Gordon Roe for the sale of the property in Placencia to the latter.”

It is sufficient to say of this ground that the Chief Justice correctly identified the issues which arose on the pleadings. Those issues were considered and I agree with his conclusion and can find no basis for interference. Indeed, none was suggested.

[11] There is one other matter with which, for completeness, I should deal. Mr. Elrington seemed to be questioning the specificity of the description of the land in question. His criticism was that the land was not described in relation to survey markers. He was referring to an undated receipt admitted in evidence as CR 1. This document containing essentially a description of the cardinal points of the property. It stated “Beach lot in Placencia ... bounded on the north by Rosalin Young, on the West beyond the cement walk by Abner Westby and measuring approximately 160 feet x 75 feet along with over 36 feet x 9 x 24 and all appurtenances thereon.” It was not suggested that after the land was surveyed and the conveyance executed, there could be any doubt that the land conveyed and the plot described in exhibit CR 1 were one and the same. Accordingly, the Chief Justice was justified in holding that – “The Deed of Conveyance contains ample and satisfactory description and particulars of the land agreed by Abner

Westby to be sold to the claimants, such as to make it separate, distinct and identifiable.”

[12] Having heard Mr. Elrington’s submissions, including those not raised by any ground of appeal filed in this appeal, I am not persuaded that there is any basis to differ from the Chief Justice. For these reasons which were promised at the end of the submissions, I concluded and agreed with Sosa and Morrison JJA that his order should be affirmed and the appeal dismissed with costs to the respondents to be taxed if not agreed.

[13] As a postscript, I should note that the second, third and fourth appellants took no part in these proceedings.

CAREY JA

MORRISON JA

[14] I agree entirely, and have nothing to add.

MORRISON JA