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

CIVIL APPEAL NO. 36 of 2008

BETWEEN:

MURLI MAHITANI **Appellant**

AND

KEVIN CASTILLO **Respondent**

CIVIL APPEAL NO. 2 of 2009

BETWEEN:

KEVIN CASTILLO **Appellant**

AND

MURLI MAHITANI **Respondent**

BEFORE:

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

Mr. Hubert Elrington for the appellant.
Mr. Derek Courtenay SC and Ms. Vanessa Retreage for the respondent.

23 October 2009 and 19 March 2010.

MOTTLEY P

[1] These appeals were heard sequentially with Appeal No. 36 of 2008 being heard first. At conclusion of the hearings we gave our decisions dismissing the appeal in Appeal No. 36 of 2008 and allowing the appeal in Appeal No. 2 of

2009. At that time we promised to put into writing our reasons for those decisions. These are those reasons.

[2] These appeals arise out of a judgment by the Chief Justice dated 3 December 2008 given in an action brought by Kevin Castillo, the claimant, against Murli Mahitani, the defendant, and a counterclaim filed by Murli Mahitani against Kevin Castillo.

Pleadings

[3] The claimant claimed that he is the registered proprietor, and as such, was entitled to possession of a business premises situated at the junction of the Belize Corozal and the Yo Creek – San Antonio Road in Orange Walk. The defendant occupied the premises under a monthly tenancy of $500 per month which was payable in advance on the first day of each calendar month. This tenancy was duly determined on 30 September 2002 by a notice to quit dated 31 July 2002. The defendant failed to deliver up possession of the premises on 30 September 2002, and remained in possession. The plaintiff claimed possession of the premises and mesne profits at the rate of $500 per month from 1 October 2002 until the date of the delivering up of possession. The rate at which mesne profits was claimed was amended to $3000 per month pursuant to an order dated 2 December 2004.

[4] In his defence, the defendant denies that he was the monthly tenant of the premises or that he paid monthly rent at the rate of $500. He admitted that he occupied the premises as a tenant of Lilly Tucker and stated that he did not receive any notice to quit from her. In his counterclaim, the defendant alleged that he was the owner of all buildings situated on the land which it was alleged in the statement of claim that he occupied. The value of these buildings were said to be $250,000.00. Finally, the defendant averred that, should the court find that the plaintiff was entitled to possession of the land, he should be permitted to

remove the buildings or to sell them to the plaintiff or that he should be given such other relief as the court deemed fit.

[5] In his reply, the plaintiff stated that Lillian Maud Tucker transferred the freehold reversion to him by way of Memorandum of Transfer dated 3 May 2001. As regards the buildings constructed by the defendant, the plaintiff denied that the buildings belonged to the defendant, but stated they were erected by the defendant to replace buildings which were on the land and which belonged to the landlord. The buildings were erected by the defendant at his own costs pursuant to an oral agreement with the then landlord. These buildings were sub-let by the defendant (tenant) who received the rent.

The Trial

[6] Imogene Ward was the owner of the property which originally consisted of four buildings which were said to be of modest construction. She lived in one of the buildings and another was used by her for selling plantains and fruit. The particular building in which she resided was made of pimento and white marl with a cement floor and a zinc roof. Lilly Tucker, her daughter, at one stage lived at the house with her mother.

[7] In 1973, the defendant became the tenant of Imogene Ward. The defendant rented the old shop which he used for the distribution of Coca Cola products. The defendant described the building as being erected of pimento sticks, and was in a very dilapidated condition with two walls already missing. A sturdier building was required. Around 1986, the defendant constructed certain buildings to replace the dilapidated structures previously used by Imogene Ward as her home, shop and kitchen. These new buildings were made of cement and consisted of a row of shops for use by the defendant. The premises were originally rented for $90 per month. Lilly Tucker stated that her home and kitchen had been demolished with her knowledge or consent. On behalf of the

defendant it was contended that the defendant undertook the work with the knowledge of Lilly Tucker's late husband.

[8] When Imogene Ward died in 1968 the property passed to her daughter Lilly Tucker. The claimant was raised by Lily Tucker whom he regarded as his mother. By way of a gift to him the claimant became the proprietor of the property on which the buildings had been erected. He was registered as the proprietor of the property under the provision of the General Registry Act Cap 327 and was issued a certificate of title on 8 May 2001. By a notice dated 31 July 2002, the claimant informed the defendant that the property has been vested in him and that all rents due and payable in respect of the property shall be paid to him or his agent. The tenancy was subsequently determined on 30 September 2002 pursuant to a notice to quit dated 31 July 2002.

[9] At the trial, senior counsel who appeared for the defendant conceded that the notice which was received by the defendant was valid and consequently his tenancy had been properly terminated. However, it was argued on behalf of the defendant that, while he rented the land, he erected the buildings at his own expense and as such was the owner of the buildings. The defendant's counsel relied on the provisions of section 13 of the Landlord and Tenant Act Cap 189 which provided as follows:

> "13. The doctrine of the common law, *"quicquid solo plantatur, solo cedit",* shall have no application in Belize to tenant's fixtures of any kind, and all such fixtures affixed to a tenement by a tenant and any building erected by him thereon for which he is not under any law or otherwise entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf or instead of some fixture or building belonging to the landlord, shall be the property of and be removable by the tenant before or after the termination of the tenancy:
> Provided that-
>
> *(a)* before the removal of any fixture or building, the tenant shall pay all rent owing by him and shall perform or satisfy all other obligations to the landlord in respect of the tenement;

(b) in the removal of any fixture or building, the tenant shall not do any avoidable damage to any other building or part of the tenement;

(c) immediately after the removal of any fixture or building the tenant shall make good all damage occasioned to any other building or to any part of the tenement by the removal;

(d) the tenant shall not remove any fixture or building without giving one month's previous notice in writing to the landlord of his intention to remove it;

(e) at any time before the expiration of the notice of removal, the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture or building comprised in the notice of removal, and any fixture or building thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay to the tenant the fair value thereof to an incoming tenant of the tenement, and any difference as to the value shall be settled by the magistrate of the judicial district in which the tenement lies on application made by either the landlord or the tenant.

[10] On the other hand, counsel for the claimant maintained that the buildings did not belong to the defendant as he had erected the buildings, while a tenant of Lilly Tucker, to replace the dilapidated structures on the land which had been previously occupied by Imogene Ward.

The Judgment

[11] The Chief Justice found that when the defendant rented the property in 1973 from Imogene Ward it was "not bare land". In so finding, the Chief Justice indicated that he had accepted the evidence of Lilly Tucker. He accepted that the defendant rented a building which Imogene Ward used as a shop to sell fruit and plantain and that, during "the course of the tenancy he pulled down the house and kitchen on the property that (she) has occupied and extended the corner shop by constructing a connecting cement building". (see paragraph 34 of the judgment). The Chief Justice held that, as the defendant has erected the

building to replace existing building on the land, the provision of section 13 of the Landlord and Tenant Act did not apply.

[12] The Chief Justice entered judgment for the plaintiff and ordered the defendant to deliver up possession of the premises immediately. In addition the Chief Justice awarded the plaintiff mesne profits at the rate of $500 per month from 1 October 2002 until delivery up of the premises together with interest at the rate of 3% per annum. He dismissed the counter claim of the defendant.

Appeal No. 36 of 2008

[13] In Civil Appeal No. 36 of 2008 the defendant filed Notice of Appeal on 23 December 2008. The Notice of Appeal contained three grounds of appeal. The defendant alleged that the Chief Justice had erred in determining that the defendant had rented both the land and building from Imogene Ward. He also alleged that the Chief Justice erred in determining that the defendant had erected the present structured on the land instead of some buildings belonging to Imogene Ward. Finally, it was alleged that the Chief Justice also erred in determining that the building which the defendant built and or extended did not belong to him.

[14] At the hearing of the appeal Mr. Derek Courtenay S.C. counsel for Kevin Castillo the respondent in this appeal took a preliminary point that the Notice of Appeal was invalid on the grounds that it did not comply with the provisions of section 16(1) of the Court of Appeal Act Cap 90.

[15] Section 16(1) of the Court of Appeal Act provides:

> "16.-(1) Where a person desires to appeal under this Part to the Court he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of court within twenty-one days from the date on which the order of the Supreme Court or a judge thereof was signed, entered or otherwise perfected."

[16] Mr. Courtenay pointed out that although the Chief Justice gave judgment on 3 December 2008, the Order of the court was not signed entered and perfected by the Registrar until 7 January 2009. He submitted that an appeal may only be validly brought "within twenty-one days from the date on which the order of the Supreme Court or a judge thereof was signed, entered or otherwise perfected". (emphasis added).

[17] Counsel relied on **McKnight v McKnight 44 WIR 349**. In Trinidad, a husband appealed against the Order of a judge before the order had been perfected and entered. The solicitor acting for the husband filed a notice of withdrawal of the appeal. In the notice, the solicitor stated that the reason for the withdrawal was the fact that at the time when the appeal was lodged the order of the judge had not been perfected. The wife filed, inter alia, an application that the appeal of the husband be dismissed for want of prosecution. In giving judgment of the Court of Appeal, Bernard J.A. (as he then was) referred to the "material and significant" difference between the provisions of the Rules of the Supreme Court of England and the Rules of Court in Trinidad. He stated at p. 354:

> "The practice and procedure in the United Kingdom is governed by RSC Order 59, rule 4(1), of that country. Here it is governed by Order 59, rule 7, of the Rules. RSC Order 59, rule 4(1)(England), so far as material, provides as follows:
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> > 'Subject to the provisions of this rule, every notice of appeal must be served…..within the following period *(calculated from the date on which the judgment or order of the court below was signed, entered or perfected)* that is to say:(a) in the case of an appeal from an interlocutory order….fourteen days.'
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> Order 59, rule 7, of the Rules so far as material, provides as follows:

> ‘(1) Subject to the provisions of this rule, no appeal shall be brought after the expiration of six weeks *from the date of judgment delivered or order made* against which the appeal is brought:
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> ‘Provided that-(a) in the case of an appeal from an interlocutory order or judgment the period shall, subject to paragraph (2), be fourteen days.
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> ‘(2) Where an appeal lies by leave only against an order or judgment to which paragraph (1)(a) applies, the period within which the appeal shall be brought shall be fourteen days from the grant of the leave…
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> ‘(4) An appeal shall be deemed to have been brought when the notice of appeal has been filed with the registrar.’

By definition, the word ‘order’ (see Order 59, rule 1) includes any ‘decree, judgment or decision of a court below or a judge thereof.

In a written judgment which he handed down, Brathwaite JA compared and contrasted the prevailing Orders of the two countries and later summed up the position in this way:

> ‘In the United Kingdom before an appeal can be filed the judgment or order must be signed, entered or otherwise perfected. In Trinidad and Tobago an appeal may be brought at any time within the relevant period after the delivery of the judgment or the making of the order whether or not the judgment had been signed, entered or otherwise perfected. It seems to follow that the fact that the judgment has not been perfected does not affect the validity of a notice of appeal which otherwise complies with the requirement of the Rules….’

We are entirely in agreement with this view."

[18] Mr. Hubert Elrington, counsel for Murli Mahitani the appellant in this appeal was unable to resist this submission.

[19] We find merit in Mr. Courtenay's submission. The right to appeal is created by virtue of the Court of Appeal Act. There is no common law right of appeal. The right is entirely statutory and must therefore be exercised in accordance with the provisions of the Act. The Act expressly stated that if a person is desirous of appeal he shall give his notice of appeal "within twenty one days from the date on which the order of the Supreme Court or a judge thereof was signed entered or otherwise perfected". The period during which the Notice of Appeal is to be given is twenty one days from the date on which the judgment is perfected. The appellant in this case was required to file his Notice of Appeal within 21 days from 7 January 2009, the date on which the order was entered. He is not permitted to file an appeal prior to the signing, entering or perfecting of the order. The section is mandatory (see section of the Interpretation Act Cap). In my view, the Notice of Appeal was not valid as it was not given within the time prescribed by the Act. Appeal No. 36 of 2008 was therefore dismissed.

Civil Appeal No. 2 of 2009

[20] In Civil Appeal No. 2 of 2009, Kevin Castillo the appellant filed three grounds of appeals but eventually abandoned ground three which related to the award of interest at the rate of 3% up until judgment. In ground one, the appellant alleged that the Chief Justice misdirected himself or acted upon a wrong principle in awarding mesne profits in respect of the appellant's property at the rate of the rent paid by the respondent to his landlord prior to the appellant becoming owner of the property and without having regard to the evidence of the value and of the profits received by the respondent from his sub-tenants and the lost to the appellant in the period after the appellant became owner of the property and tenancy had been terminated. In ground two, it was alleged by the

appellant that the judge misdirected himself or acted upon a wrong principle in declining to award any sum by way of damages for the wrongful retention by the respondent of the appellant's property after the tenancy had been determined. Both of these grounds were argued together by Mr. Courtenay.

[21] In his evidence, the appellant said that the respondent paid Lilly Tucker $500 per month. He said that the respondent received $3,000 per month from the sub-tenants while he paid $500 per month. This was done pursuant to an agreement between the respondent and Lilly Tucker. The appellant stated that, when he decided to give the respondent notice to quit and deliver up possession of the premises, he visited the sub-tenants and found out from them information concerning the amount of rent each of them paid to the respondent. The evidence showed that the sub-tenants paid $3,000.00 rent. Under an agreement between Lily Tucker and the respondent, the respondent paid her $500.00 rent and retained $ 2,500.00. In the circumstances, counsel argued that the Chief Justice ought to have awarded the appellant mesne profits at the rate of $3,000 per month from 1 October 2002 until delivery of possession which the Court was informed was in March 2009.

[22] Mr. Courtenay pointed out that counsel who appeared for the respondent at the trial conceded that the tenancy had been properly determined. Counsel submitted that in the circumstances the respondent had no legal right to remain in possession of the property. He contended that the respondent became a trespasser from 1 October 2002 the day after he was required by the notice to deliver up possession. The respondent remained a trespasser until March 2009 when he delivered up possession.

[23] In addition Mr. Courtenay submitted that once the appellant had proved trespass he was entitled to recover at least nominal damages. For this proposition he relied on a statement in Halsbury's Laws of England 4th ed., vol. 45 para. 1403 that:

> "In an action of trespass, if the plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss."

In any event counsel submitted that the Chief Justice ought to have awarded damages for trespass based upon the ordinary letting value of the property which the respondent received after 1 October 2002 . In support of this submission, counsel referred to **Swordheath Properties Ltd. v. Tabet and Others [1979] 1 W.L.R. 285**. In that case, the plaintiffs let residential premises at a monthly rent, in advance at a rate of £1040 per annum to the first defendant for a fixed term of three months. Before the expiry of the fixed term, the first defendant left the premises leaving the second and fifth defendants in occupation. The plaintiff brought an action against all the defendants claiming possession of the premises and against the second and fifth defendants damages for trespass from the date when the first defendant's right to possession was terminated until they had delivered up possession. The judge granted the plaintiffs an order for possession but refused the claim for damages. The basis for the court's refusal was that no evidence had been adduced that the plaintiffs could or would have been able to let the premises during the period the second and fifth defendants held over.

[24] In giving judgment, Megaw L.J. referred to the conclusion reached by the judge that in the absence of evidence he was bound to hold that the plaintiffs have failed to prove that, as a consequence of the conduct of the second and fifth defendants, they suffered damage. Megaw L.J. said at p. 287:

> "Mr. de la Piquerie submitted that the judge was wrong. There is indeed, curiously, no authority which directly deals with this question in relation to trespass in residential property. But Mr. de la Piquerie referred us to a passage in the article on "Damages" in *Halsbury's Laws of England* , 4th ed., vol. 12 (1975), para. 1170. In that paragraph the authors of that title say this:

> "Where the defendant has by trespass made use of the plaintiff's land the plaintiff is entitled to receive by way of damages such sum as should reasonably be paid for the use. It is immaterial that the plaintiff was not in fact thereby impeded or prevented from himself using his own land either because he did not wish to do so or for any other reason."

Then in a footnote various authorities are cited in support of that passage in the text. The first authority cited is *Whitwham v Westminster Brymbo Coal & Coke Co.* [1896] 2 Ch. 538. That is a case which was decided in this court by a court consisting of Lindley, Lopes and Rigby L.JJ. It appears to me that the judgments, at any rate, of Lindley and Rigby L.JJ. fully support the proposition which is set out in Halsbury in the passage which I have read. If any further authority were needed, Mr. de la Piquerie has referred us to a decision of Lord Denning M.R., sitting as an additional judge of the Queen's Bench Division, in *Penarth Dock Engineering Co. Ltd. v. Pounds* [1963] 1 Lloyd's Rep. 359. In his decision in that case, so far as the question of damages arose, the Master of the Rolls had no hesitation in saying that the plaintiffs, even though they would not themselves have made use, bringing in financial return, of the dock in respect of which the trespass was committed, were nevertheless entitled to damages for that trespass, calculated by reference to the proper value to the trespassers of the use of the property on which they had trespassed, for the period during which they had trespassed.

It appears to me to be clear, both as a matter of principle and of authority, that in a case of this sort the plaintiff, when he has established that the defendant has remained on as a trespasser in residential property, is entitled, without bringing evidence that he could or would have let the property to someone else in the

absence of the trespassing defendant, to have as damages for the trespass the value of the property as it would fairly be calculated; and, in the absence of anything special in the particular case it would be the ordinary letting value of the property that would determine the amount of the damages."

[25] In **Penarth Dock Engineering Company Ltd. v. Pound [1963]** Lloyd's Rep 359 the Court had to decide the measure of damages payable in respect of trespass to property. Lord Denning M.R. (sitting as an additional judge of the Queen's Bench Division) said at p. 361:

"The question which remains is, what are the damages? True it is that the Penarth company themselves would not seem to have suffered any damage to speak of. They have not to pay any extra rent to the British Transport Commission. The dock is no use to them; they would not have made any money out of it. But, nevertheless, in a case of this kind, as I read the law, starting with *Whitwham v. Westminster Brymbo Coal and Coke Company,* [1896] 2 Ch. 538, on which I commented myself in the case of *Strand Electric and Engineering Company Ltd. v. Brisford Entertainment, Ltd.* [1952] 2 Q.B. 246, at pp. 253 to 254, the test of the measure of damages is not what the plaintiffs have lost, but what benefit the defendant obtained by having the use of the berth; and he has been a trespasser, in my judgment, since Aug. 9, 1962. What benefit has the defendant obtained by having the use of it for this time? If he had moved it elsewhere, he would have had to pay, on the evidence, £37 10s. a week for a berth for a dock of this kind. But the damages are not put as high as that, and the damages are to be assessed in accordance with the law as I have stated it at the rate of £32 5s. a week for a period commencing from Aug. 9, 1962, which I would let run to Mar. 25, 1963, because the dock has now been removed."

[26] It is clear from these two cases **Swordheath Properties v Tabet** and **Penarth Dock Engineering Co. Ltd. v. Pounds**, that the measure of damages for trespass to property is not what the claimant lost but what benefit the defendant had obtained by reason of the fact that he retained possession of the property. The Chief Justice's approach was to award the mesne profit at the rate of $500 per month which was the monthly rent which the defendant previously paid to Lilly Tucker. There was, in my view, ample evidence that the respondent was receiving $3,000 per month from the sub-tenants and he ought to have awarded damages based on this figure. However, the Chief Justice rejected the claimant's claim for damages for trespass for the period during which the defendant had the use of the property. The Chief Justice was in my view wrong not to have awarded damages for trespass to the claimant.

[27] Counsel for the appellant further submitted that the appellant as entitled to an award of exemplary damages. Counsel relied on **Drane v Evangelou [1978] 1 W.L.R. 455** where the Court of Appeal in England upheld an award of exemplary damages by a county court judge who had found that the landlord had arranged the eviction of his tenant in circumstances which the judge had labeled as "monstrous behavior". Goff LJ (as he then was) said at p. 462:

> "First, on the question whether the case fell within the second category in *Rookes v. Barnard* [1964] A.C., 1226, Mr. Cousins relied upon the fact that Lord Devlin said, at p. 1227:
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> > "Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity."

Mr. Cousins has argued that this could not be a case for exemplary damages, because there was no calculation by the defendant of actual money which he hoped to make out of the conduct in which he was engaged. But Lord Devlin was very careful to see that his words should not be construed in that narrow sense because he went on at once to say in terms:

> "This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object - perhaps some property which he covets - which either he could not obtain at all or not obtain except at a price greater than he wants to put down."

That is an exact description of what happened in this case. The defendant wanted the flat for his in-laws and he could not get it because he has a statutory tenant, so he took the law into his own hands and caused two or three men to break into the premises and remove the plaintiff's goods. I desire also to stress Lord Devlin's words at the end of the passage:

> "Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay," and I add "as it is in this case."

[28] I do not consider that this is a proper case in which exemplary damages should be awarded. I do not consider that there is any evidence that the defendant displayed a "cynical disregard for the claimant's rights. Nor can it be said on the evidence that the defendant was seeking to gain any benefit at the expense of the claimant. The evidence showed that the appellant remained in possession of the property until March 2009. The timeline filed by the appellant showed that the Writ claiming possession was filed on 1 October 2002. On 17

July 2003 the trial commenced and was adjourned until 6 October 2003 when it continued. It did not again engage the attention of the Court until 2 December 2004 when the Writ was amended to include a claim for mense profits at the rate of $3000 per month from 10 October 2002 until delivery up of possession. Sixteen months elapsed before the trial resumed on 24 January 2005. The trial concluded on 2 March 2005. Unfortunately judgment was not delivered until 3 December 2008. The respondent, in his counterclaim, claimed that, while he had rented the land, he was the owner of the buildings which he claimed he had built. While the Chief Justice in his judgment rejected the defendant's claim he did not characterize the claim as being frivolous or vexatious or without any merit. The delay in the respondent surrendering possession of the land may very well have been due to the length of time the actual trial took to complete and the inordinate delay of 3 years nine months before judgment was eventually given in December 2008. As stated previously I do not consider that there was any evidence from which it could reasonable be said that the respondent adopted "a cynical disregard for the plaintiff's rights". In my view, the respondent had a claim which required the court's determination. Within 3 months of the judgment being delivered, possession was surrendered albeit that it was pursuant to a writ of possession being issued.

[29] For the reasons given above, I agreed that the appeal should be allowed and the judgment of the Chief Justice be varied to reflect that the appellant was entitled to damages for trespass at the rate of $3,000 per month from 1 October 2002 until end of February 2009. The appellant was thus awarded $210,000 damages with interest at the rate of 3% per annum from 1 October 2002 until end of February 2009. The appellant is to have the costs of the appeal to be taxed if not sooner agreed.

[30] In any event, if it is that the claimant was only entitled to mesne profits, I would have held that he was entitled to mesne profits at the rate of $3,000 per month from 1 October 2002 until the end of February 2009 with interest at the rate of 3%.

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MOTTLEY P

CAREY JA

I agree.

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CAREY JA

BARROW JA

I concur.

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BARROW JA