IN THE SUPREME COURT OF BELIZE, A.D. 2009

CLAIM NO. 387 OF 2006

	(EMMANUEL YAO VOADO	**CLAIMANT**
	(	
BETWEEN	**(AND**	
	(	
	(CHUN-HUNG KUO	**DEFENDANT**

Before: Hon Justice Sir John Muria

30th September 2009

Mr. Fred Lumor S.C. for the Claimant
Ms Alifa Elrington for the Defendant

J U D G M E N T

CLAIM – contract for sale of land – actual land advertised and sold not belonging to vendor – counter-claim for recession on ground of invalidity of contract due to mistake - whether mistake in substantialibus – whether contract invalid for mistake – contract not void but unenforceable – recession of contract – purchaser entitled to the return of purchase price and costs of development – rectification ordered – section 143(1) Registered Land Act (Cap.194)

Muria J.: By his Fixed Date Claim dated 3rd August 2006 and filed in this Court on 4th August, 2006, the claimant claims the following relief:

1. Possession of the land being parcel 810 situate in Block 16 Caribbean Shores/Belize Registration Section.

2. Mesne profits at the rate of BZ$3,000.00 per month from 12th September, 2005 until possession is delivered up.
3. Damages in the sum of BZ$23,858.00.
4. a) Interest on the sum of BZ$3,000.00 per month at the rate of 12% per annum from 12th September, 2005 or pursuant to Section 166 of the Supreme Court of Judicature Act, Chapter 91, until possession is delivered up.

    b) Interest on the sum of BZ$23,858.00 at the rate of 12% per annum from the date hereof until payment or pursuant to Section 166 of the Supreme Court of Judicature Act, Chapter 91.
5. Costs.

The defendant denies the claimant's claim, relying on the defence of mutual mistake, and the argument that there was no *consensus ad idem* between the parties to the agreement entered into by the parties in this case. The defendant also counter-claims for rescission of the sale of the land in question on the basis that the contract is invalid by reason of the mutual mistake of the parties.

Factual background

It would be helpful to set out the factual background of this case, against which, the dispute between the parties has arisen. I feel that this can best be done with the help of the agreed facts.

On 2nd June, 2005, the defendant and claimant entered into an Agreement whereby the defendant agreed to sell and the claimant agreed to purchase the property described as Parcel 810, Block 16, Caribbean Shores Registration Section, with an area of 598.2 square yard which was registered in the name of the defendant in 1993. See ***Land Certificate No. 2930 of 1993***. The claimant paid $81,000.00 to the defendant for the said Parcel of land.

Shortly before the close of the sale, the defendant discovered that he lost his Land Certificate No. 2930/93 dated 7th June 1993, so he had to apply for the issue of a new land certificate. Notification of the loss of the certificate was published in the Belize Gazette of 9th July 2005. The Registrar of Lands issued a new land certificate to the defendant over parcel 810 on 1st August 2005, ***Land Certificate No. 6816 /2005***.

Having obtained the replacement land certificate, the defendant delivered the new land certificate and the Transfer of Land Instrument, to the claimant. Shortly thereafter the claimant lodged these documents with the Registrar of Lands who subsequently registered the claimant as proprietor of Parcel 810 in the Land Register. The claimant's land certificate is No. 847/2005 dated 12th September 2005.

It is also agreed that between June and August 2005 on different occasions, the defendant, and his Agent, one Jimmy Tsai, accompanied the claimant to a vacant parcel of land in Bella Vista, Belize City and identified the said *vacant land* to him *as Parcel 810* in Block 16 Caribbean Shores/Belize Registration Section.

Apart from the defendant and his agent, an officer from the Belize City Council Property Tax Section, as well as an officer from the Valuation Department of the Ministry of Natural Resources in Belize also identified the vacant Lot to the claimant as Parcel 810 in Block 16 Caribbean Shores/Belize Registration Section.

Having been shown the said Parcel 810, the claimant proceeded to make arrangement to purchase and have the land registered in his name as proprietor. These he did. Having done so, the claimant took possession of the said vacant Parcel 810 and began carrying out developments on it at a total cost of BZ$21,558.00.

In or about January, 2006, one Dr. Pedro Habet telephoned and wrote to the claimant through his lawyers threatening to sue the claimant for trespass to his parcel of land. Dr. Habet produced a copy of his title to the vacant land, being Land Certificate No. 228/86 dated 31st January, 1986 to the claimant.

To his dismay, the claimant discovered that the vacant parcel of land is not Parcel 810, as he was made to understand by the defendant, his agent, the BCC and Ministry of Natural Resources, but in fact it is Parcel 982 in Block 16 Caribbean Shores/Belize Registration Section. Parcel 810 is the property of the defendant and has a building erected and standing on it, and it adjoins the vacant Lot which is Parcel 982. The defendant did not and does not own the vacant Parcel 982.

The claimant made numerous unsuccessful attempts to contact the defendant and his Agent, Jimmy Tsai, thereafter to resolve the matter. The defendant

left the country for the Republic of Taiwan. It was on 17th May, 2006, when the claimant finally met the defendant in Belmopan who directed the claimant to his then attorney, Mr. Wilfred Elrington S.C.

Being aggrieved, the claimant, through his lawyers, wrote to the defendant demanding possession of the property on which the defendant's present house is standing, and said to be Parcel 810. The defendant refused to give possession of that property to the claimant, instead the defendant leased the property to tenants and collects not less than BZ$3,000.00 per month as rent.

The defendant now says that the sale of Parcel 810 is not valid and is unenforceable since there was no meeting of minds or *"consensus ad idem"* when he sold and the claimant bought Parcel 810, adding that it was not his intention to sell Parcel 810. He therefore asks the Court to rescind the "sale of Parcel 810" in a counterclaim filed in the claimant's Claim.

The defendant agreed that clause 10 of the Sale Agreement dated 2nd June, 2005 warrants that notwithstanding the completion that title to the property is good and marketable."

Agreed issues

Following those agreed facts and background of this case, the parties have identified and agreed to the following issues for the Court's determination:

> "1. Is there an error or mistake in *substantialibus* which entitles the Defendant to rescind the sale of Parcel 810 in Block 16 Caribbean Shores/Belize Registration Section?
> 2. Is the sale agreement of Parcel 810 valid and enforceable in law?
> 3. If the sale agreement is valid and enforceable in law, does the Court have jurisdiction to grant a rescission of the sale?
> 4. Is the defendant entitled to a rescission of the Sale of Parcel 810 after the registration of the Claimant as the proprietor in the Land Register made pursuant to Section 26 of the Registered Land Act, Chapter 194."

Case for the Claimant

In his usual acumen, Mr. Lumor SC submitted on behalf of the claimant that the Agreement between the parties for the sale of Parcel 810, and the subsequent transfer and registration of the claimant as the owner of the said

property was valid and enforceable in law. Counsel maintained that there was *consensus ad idem* between the parties in this case.

In short, the claimant's case is that the property agreed to be sold is Parcel 810 with an area of 598.2 square yards. The defendant intended to sell and did sell Parcel 810, and the claimant intended to buy and did buy Parcel 810. The Sale Agreement between the defendant and claimant, and the transfer instruments all deal with Parcel 810. It was also agreed between the parties that title to the property is held on Land Certificate dated 7th June, 1992. There is no mistake in the identity of the parcel of land sold and nor is there any mistake in the quality of land sold. The claimant is adamant that there was no mistake in the existence of Parcel 810. The so-called "mistake" which the defendant alleges is that he identified another Parcel of Land, Parcel 982, to the Claimant as Parcel 810. That the claimant submitted, is an assertion that cannot be considered as mistake at law.

The case for the defendant

The case for the defendant/seller, as ably put by Ms Alifa Elrington, is that the sale and purchase of Parcel 810 was done under mutual mistake and so there was no *consensus ad idem* between the parties to the Sale Agreement dated 2 June 2005. That being the case, counsel further contended, the

subsequent transfer of the said parcel of land on 12 September 2005 was and is void and unenforceable.

It is the defendant's contention, and there is no evidence to suggest otherwise, that what was offered for sale by the defendant was the vacant land adjoining the piece of land on which his house is presently standing. That vacant land was described as Parcel No. 810 which both parties later discovered to be erroneous. The vacant land is not Parcel 810 and does not belong to the defendant. It is Parcel 982 and belongs to one Pedro Habet.

To buttress the case for the defendant, a number of factual circumstances are relied upon. At the forefront of those factual circumstances is the fact that both parties agreed to the sale and purchase of the vacant Lot that was advertised for sale.

The Purchase

On becoming aware of the vacant piece of property being for sale, the claimant contacted the defendant's Real Estate Agent (Mr. Jimmy Tsai) who, together with the claimant, visited the said vacant Lot. Apart from that visit, the claimant also visited the vacant Lot on other occasions with the

defendant, officers from the Belize City Council and from the Ministry of Natural Resources. It was following those site visits, that the claimant expressed his interest in purchasing the vacant Lot.

Having spoken to the authorities from the Belize City Council and Ministry of Natural Resources, and obtaining confirmation from them on the status of the vacant land, both the defendant and the claimant were satisfied that the said vacant Lot was parcel 810 and that the owner was the defendant. Thereafter, the defendant agreed to purchase, and did purchase the said vacant Lot from the defendant. The title was transferred to him by the defendant. Following the completion of the sale and transfer on 12 September 2005, the claimant took possession of the said vacant Lot and began to develop it.

It was in or about January 2006, when it became known that the vacant Lot was not Parcel 810 and was not owned by the defendant. The vacant Lot is Parcel 982 and is owned by Dr. Pedro Habet.

In the light of the above scenario of the state of affairs between the defendant and claimant, Ms Elrington of Counsel for the defendant

submitted that the proper course for the court to take would be to hold the contract invalid, and to put the parties, as much as possible, in the position they would have been, if they had not entered into the contract.

Starting point

In a case such as this where mutual mistake is relied upon as a defence, the starting point must be to look at the terms of the agreement entered into by the parties, so as to ascertain what actually was offered by the seller and accepted by the purchaser. The basic rationale for that proposition is the general principle of contract law that no contract can be formed if there is no correspondence between the offer and the acceptance. See ***CHITTY ON CONTRACTS General Principles***, Thirtieth Edition Volume 1, Sweet & Maxwell (2008), London, paragraphs 2-045 and 2-046, page 168.

Whether mistake in substantialibus

The Claimant's position on this issue is that no mistake in law occurred in this case. The basis for that contention, as put by Mr. Lumor S.C., is that the defendant intended to sell Parcel 810 and the Claimant intended to buy Parcel 810; that the Sale Agreement and transfer instruments are all in respect of Parcel 810 with an area of 598.2 square yards; and that the title to

the property sold is that shown on the Land Certificate dated 7th June 1992. Counsel further submitted that there was no mistake in the identity the quality and existence of Parcel 810. The alleged mistake, Counsel further contended, of the identifying the vacant land as Parcel 810 when in fact it was Parcel 982 belonging someone else, could not be a mistake in law.

The mistake relied upon by the defence must relate to the terms of the contract entered into by the parties in the Agreement dated 2 June 2005. By that agreement, the claimant agreed to purchase the vacant Lot described as Parcel 810 and advertised for sale from the defendant. The claimant paid $81,000 for the advertised vacant land. Having paid for the vacant Lot and registered in his name, the claimant went into possession of the Lot and started developing it until he was stopped in or about January 2006.

The critical factor, in my judgment, is not the description (Parcel 810) but the actual land (the vacant land) that was offered for sale. This is the 'real' subject of the agreement between the defendant and claimant in this case. Of course, each case depends on its own circumstances. But in this case, the real substance of the subject matter is the vacant Lot erroneously described as Parcel 810.

Having said that, I am convinced on the evidence, and in particular, on the agreed facts, that the intention of the parties in this case was for the defendant to sell the vacant Lot describing it as Parcel 810 and the claimant to purchase the same. This is evident in the defendant's affidavit where he states:

> "4. In or about mid-January, early February, 2005 I was invited by one Mr. Smith, of the Belize City Council, to examine the plan of the Bella Vista Area in the Caribbean Shores Registration Section in order to properly identify where my two parcels of land were located.
>
> 5. Mr. Smith and I visited the Bella Vista Area where he identified two areas of land and explained to me that those two areas were my property and that the smaller of the two, was Parcel 810, Block 16 of the Caribbean Shores Registration Section.
>
> 6. In or about May 2005, I advertised the property shown to me as Parcel 810 by the said Mr. Smith, for sale through Chozen Real Estate owned by one Mr. Jimmy Tsai of No. 5 Kiskadee Belmopan City, Cayo District, Belize.

10. On several occasions between 2nd June 2005 and August, 2005 October 2007, the Claimant, his attorney, Mr. Jimmy Tsai and I visited a vacant lot in the Bella Vista Area which we all believed to be Parcel 810 of Block 16 of the Caribbean Shores Registration Section. We confirmed with the Belize City Council and the Ministry of Natural Resources that the vacant lot which we all visited and believe to be Parcel 810 of Block 16 of the Caribbean Shores Registration Section was in fact the said property."

The following paragraphs of the claimant's first affidavit state:

"4. Sometime in or about May, 2005, the Defendant, Chung-Hung Kuo, caused his property Parcel 810 to be advertised for sale by Real Estate Broker, Chozen Real Estate, owned by one Jimmy Tsai of No. 5 Kiskadee Avenue in Belmopan, Cayo District, Belize.

13. Between June, 2005 and August, 2005, on a number of occasions the Defendant and his Agent, Jimmy Tsai, identified a vacant lot in Bella Vista in Belize City as Parcel 810 in Block

16 Caribbean Shores/Belize Registration Section and after confirming the identity of the land with the Belize City Council (property tax section) and the Valuation Department of the Ministry of Natural Resources I went into occupation of the land.

14. Between 23rd November, 2005 and 30th December, 2005, I carried out certain developments on the land to a total value of BZ$21, 558.00. The list of the development carried out on the land is now produced and shown to me marked 'EV-8'.

15. Sometime in January, 2006, Dr. Pedro Habet telephoned me alleging that I have trespassed on his property which is Parcel 982 in Block 16 Caribbean Shores/Belize Registration Section."

In his second affidavit, the claimant further states:

"7. Now produced and shown marked 'EV-5A,B,& C' are photographs of the empty parcel of land, Parcel 982, owned by Dr. Habet which the Defendant identified to me as Parcel 810 showing electric metre and that I installed on the property."

In his oral testimonies in Court, the claimant confirmed that the vacant Lot mentioned in paragraph 13 of his first affidavit was the land he wanted to buy.

Thus the negotiation between the parties proceeded on the basis that Parcel 810 was the vacant land which was advertised for sale and the claimant agreed to purchase that advertised vacant land.

The case law authorities referred to by both Counsel in this case are very helpful. Each case, however, must be determined under its own factual circumstances. I do, however, bear in mind the legal principles laid down in the authorities cited. I need only refer to a few of them.

The leading case on the subject of mistake is ***Bell –v- Lever Brothers Limited*** [1932] AC 161, the brief facts of which are as follows: Lever Bros had the majority (in fact ninety-nine percent) share capital in the company called Niger Co Ltd and appointed Bell to be the managing director of it for five years. Three years later, Niger Co merged with another company and Lever Bros agreed to terminate Bell's contract, paying him £30,000 as compensation for loss of employment. Sometime later, it was discovered

that Bell had been in breach of his duty, for which Lever Bros could have dismissed him without compensation. Lever Bros claimed that the compensation agreement was void and that Bell should repay them their money.

Lever Bros succeeded in the lower courts and Bell appealed to the House of Lords which found that the contract concerning an agreement to pay a managing director a certain sum upon termination of his contract was entered into under a mistake. However, the agreement was not void because it was not a mistake that made the contract essentially different from the one entered into by the parties. The test thus expressed by Lord Atkin to be whether the 'mistake makes the thing essentially different from the thing as it was believed to be'. The House of Lords did not find that there was a common mistake in that case.

Apart from the various principles discussed in the case, ***Bell v Lever Bros*** is really about mistake as to the quality of the subject matter of a contract. The case clearly demonstrates that such a mistake is unlikely to render a contract void at common law.

Nevertheless, both Lord Atkin and Lord Thankerton went further to discuss the circumstances in which common mistake might arise. Both Law Lords considered that for such mistake to arise there had to be a mistake as to a fundamental assumption on which the contract was based and which both parties considered to be the basis of the agreement. In the words of Lord Thankerton, mistake as to the subject matter of the contract -

> "… can only properly relate to something which both must have necessarily accepted in their minds as an essential and integral element of the subject matter"

One might ask: what was the fundamental assumption on which the parties based their agreement in the present case? On the evidence, both from the defendant and claimant, the answer is clearly the existence of a vacant plot of land which was advertised for sale and described as Parcel 810. That is the fundamental fact on which the Agreement dated 2 June 2005 between the parties was based. In other words, it is the essential and integral element of the subject matter of their Agreement dated 2 June 2005. Both parties accepted the existence of that fact and proceeded on the basis that the defendant owned that vacant piece of land, and so had the right to sell it.

The claimant responded to the advertisement and agreed to purchase, and did purchase the said vacant Lot from the defendant. Unfortunately, in January 2006 both parties discovered their mistake that the vacant Lot was not Parcel 810 and that it was not owned by the defendant. That is indeed a mistake *in substantialibus* common to both parties.

This to me is a classic case of parties agreeing to sell and purchase land, the description of which does not correspond to the pegs on the grounds, bordering on lack of diligence or sheer carelessness on the parts of all parties concerned. What is more startling in this case is that even with the help of the relevant official authorities, the mismatch or the lack of correspondence of the book description with the actual status of the land went undetected.

The effect of the fundamental common mistake by the parties

The next crucial question is: what is the effect of such a fundamental mistake on the part of both parties? It is on this question that the bulk of the arguments by Counsel for the parties are focused and to which I will now turn.

The case law authorities are replete with instances of fundamental common mistakes by parties to contracts. Although the positions taken by the courts vary, it is trite that common mistake renders a contract void *ab initio* at common law. See the discussion in ***Bell v Lever Bros***, and other case law authorities cited in that case. See also ***Associated Japanese Bank (International) Ltd v Credit du Nord SA*** [1988] 3 All ER 902; ***Great Peace Shipping Limited v Tsavliris Salvage (International) Limited, (The Great Peace)*** [2002] 4 All ER 689.

The case of ***Great Peace Shipping Limited v Tsavliris Salvage (International) Limited*** [2002] 4 All ER 689 ***(The Great Peace)***, referred to by both Counsel, is also concerned with the issue of mistake. This time it is over a salvaging contract.

That case is concerned with an agreement to provide salvage services for a stricken vessel. The defendant obtained the services of a tug which would take about four to five days to reach the stricken vessel. Fearing, in the meantime, that the vessel might go down with the loss of her crew, the defendant asked its brokers to find a ship, near the stricken vessel, which would be willing to assist, if necessary, with the evacuation of the crew.

The brokers were informed by a reputable organisation that a vessel, *Great Peace*, owned by the claimant was the nearest to the stricken vessel and should be able to reach the stricken vessel within about 12 hours sailing time. Shortly thereafter, the defendant, through its brokers, entered into an agreement with the claimant to charter its vessel, for a minimum of five days to assist the stricken vessel for the purpose of saving life. From the information given to the brokers, the vessels should only have been 35 miles apart when the contract was concluded. However, unbeknown to either party, the two vessels were several hundred miles apart, and it would have taken the claimant's vessel some 39 hours to reach the stricken vessel.

Upon discovering the true position, the defendants cancelled the contract with the claimant's vessel and refused to pay for the hire. The claimant sued under the contract, claiming five days' hire. The defendants' defence was that the contract was void at common law for fundamental mistake. Alternatively, the contract was voidable in equity for common mistake.

The court at first instance found for the claimant. The defendant appealed, contending that the contract was void at common law on grounds of a

common fundamental mistake, namely that the two vessels were in close proximity to each other. Alternatively, it contended that the facts gave the defendant a right to rescission in equity.

Endorsing the view expressed in ***Bell v Lever Bros***, the Court of Appeal held that the contract concerning the salvage operation was valid at common law. The mistake complained of, namely the mistake as to the distance between the two vessels, was not of the kind that made the contract essentially different from the thing as it was believed to be. In other words, it did not render the services to be provided by the claimant's vessel essentially different from that which the parties had agreed.

Ms Elrington of Counsel for the defendant, relied on the ***Great Peace*** case to support the contention that in the present what was in fact Parcel 810 is substantially different from what the claimant thought he was buying and what he in fact took possession of.

The ***Great Peace*** case also affirmed the decision in ***Associated Japanese Bank (International) Ltd v Credit du Nord SA*** [1988] 3 All ER 902. In the latter case, the mistake was as to the existence of the subject-matter, namely,

four precision engineering machines. One Jack Bennett, a crook purported to sell the plaintiff bank the four machines valued in excess of £ l million and then to leased them back to him. The arrangement was guaranteed by the defendant bank. It turned that there were no machines. When the fraudster defaulted on the repayments the plaintiff sued the defendant on the guarantee. The defendants put up the defence that the transaction was void since it was based on the four machines that never existed. Steyn J concluded that the existence of the machines was fundamental because they formed the basis for the contract of guarantee. He held that the contract was void on the basis of mistake at common law.

The case of ***McRae v Commonwealth Disposals Commission*** (1951) 84 CLR 377 is concerned with a contract, the subject matter of which also never existed. In this case the Commonwealth Disposals Commission advertised a wrecked tanker for sale by tender. The tanker was said to be off the coast of Papua. The plaintiffs won the tender and then equipped an expedition to go and salvage the tanker, or at least its contents. The Commission gave precise location where the plaintiffs could find the tanker. Unfortunately, it turned out that there was no tanker. The plaintiffs sued the Commission for damages for breach of contract. The plaintiffs also sought

damages in tort. The High Court of Australia dealt with the claim for breach of contract and found for the plaintiffs. The court therefore did not have to consider the claims in tort.

The case of ***McRae*** is one attempt by the courts to try to find some solution other than resorting to a doctrine of mistake in this type of claim. The hallmarks of ***McRae*** and ***Associated Japanese Bank*** are that the subject matters of the contract never existed. However, in ***McRae***, the High Court of Australia found that strictly, the case was not about mistake, rather it was about a breach of contract based on the clear reliance by the buyer that the tanker existed when in fact the tanker did not exist, and so the defendants were liable for breach of contract.

Notably all the above cases are concerned with mistakes in contracts over personal property or other properties said not to exist. Our present case is concerned with sale of land, and as was said in ***Svanosio v McNamara*** (1956) 96 CLR 186, *"...it would be hard to find an analogous in the case of land because land does not cease to exist unless one can take the somewhat fanciful example suggested by Richards C.B. in Hitchcock v Giddings (1817) 4 Price 135; 146 E.R. 418 of an estate swept away by flood*.".

The case of ***Cooper v Phibbs*** (1867) L.R. 2 H.L. 149 (although not cited by either Counsel) discussed in ***Bell v Lever Bros***, is perhaps more in point. It is a case of mistake as to the subject matter of the contract. In that case the respondents agreed to lease a fishery property to the lessee who accepted to take on the lease of the property. Unbeknown to either of them, the property was already owned by the purchaser/lessee. The court held that the lease agreement could not stand and rescinded the contract. Lord Atkin considered that such a mistake would lead a contract to be void for *re sua*. Lord Thankerton felt that the case of ***Cooper v Phibbs*** was a good example of a common mistake which can result in a contract becoming void. He said:

> "***Cooper v Phibbs*** (1867) L.R. 2 H.L. 149, is a good illustration, for both parties must necessarily have proceeded on the mistaken assumption that the lessor had the right to grant the lease and that the lessee required the lease. Lord Westbury says (at p.170) 'the Respondents believed themselves to be entitled to the property, the petitioner believed that he was a stranger to it, the mistake is discovered, and the agreement cannot stand."

I feel ***Cooper v Phibbs*** is a good example of the kind of mistake which befalls us here in the present case. However, the present case goes further than a mistake of the subject matter. It is also a case that involves the question of the title to the vacant land that was conveyed to the claimant. I will return to this aspect of the matter later in this judgment. For now, let me deal briefly with the other case law authorities referred to by Counsel.

In their arguments Counsel also referred to the case of ***Solle -v- Butcher*** [1950] 1KB671, a decision of the English Court of Appeal which remains unchallenged, despite criticism of the case by academic scholars. The case of ***Solle -v- Butcher*** concerns a lease agreement entered into by the parties under a mistaken belief that the rent was not subject to rent control legislation. The rent was fixed at £250 per annum. It was discovered that the flat was subject to rent control of £140 per annum and the plaintiff claimed recovery of the rent overpayments. The defendant claimed that the contract was void for mistake. The Court of Appeal held that the contract was not void for mistake but that the contract could be set aside in equity. Lord Denning was clearly firm in his views that even if the contract is valid

in law, equity can still intervene to do justice to the parties in a case of mistake. He said at page 695:

> "If the rules of equity have become so rigid that they cannot remedy such an injustice, it is time we had, a new equity, to make good the omissions of the old. But in my view, the established rules are amply sufficient for this case."

Mr. Lumor SC strongly submitted that the contract in this case is valid and enforceable at law. It cannot be rescinded. For my part, I feel that despite the criticism of ***Solle -v- Butcher***, it is a case that is very much relevant to our situation in Belize. We have a written Constitution that recognizes the principles of equitable justice and so the courts, in my respectful view, are bound to strive to do the very thing that Lord Denning had done in ***Solle -v- Butcher***, namely, doing equity so as to achieve a just result rather than applying the English common law in its rigidity.

That being said, I return to the issue of the mistake as to title of the land in this case. It is, I think, implicit in the defendant's argument that he was mistaken as to the description and title over the vacant Lot which he

advertised for sale. He thought it was Parcel 810 and that he had title to it. Such a similar position arose in ***Svanosio -v- Mcnamara***. In that case, the respondent sold a hotel to the purchaser. It was found that the hotel was sitting partly on the respondent's and partly on Crown Land. The appellant claimed that the contract and conveyance were executed "upon the common basis and/or implied condition, which all parties accepted as fundamental," that the hotel was executed wholly on the respondent's land, and that the parties entered into the contract under a common mistake. The High Court dismissed the appellant's appeal, holding that the contract was not void, although it was unenforceable for breach of stipulation as to title or impossibility of performance. At page 196, Dixon CJ and Fullagar J. had this to say:

> "So far as the contract is concerned, it may be assumed that all parties believed that the hotel stood wholly on the land sold. In that sense there was a "common mistake". It may also be assumed that the appellant, if he had known that a considerable part of the building stood on Crown land, would not have entered into the contract. But these facts do not make the contract void."

Their Honours went on to approve ***Solle v Butcher*** and adopted the following passage from Lord Denning's judgment:

> ". . . once a contract has been made, this is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty on the same terms on the same subject matter, then the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground. Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew that he was under a mistake. A *fortiori*, if the other party did not know of the mistake, but shared it."

The other three Justices McTiernan, Williams and Webb JJ, had this to say at page 206:

> "In one sense there is always a common mistake where a vendor sells land to the whole of which he honestly believes he has a good title and the purchaser honestly believes that if he contracts to purchase this

land he will get a good title to the whole of it. But if the vendor contracts to sell the land to the purchaser and the purchaser contracts to purchase it, the fact that they would not have entered into a contract but fort such a common misapprehension does not avoid the contract. The vendor contracts to sell the land on the basis that he has a good title to the whole of it and the purchaser contracts to purchase it on that basis. If the vendor cannot make title he commits a breach of the contract and, apart from special conditions, the purchaser is entitled to repudiate it. If the contract states that certain premises are erected on the land sold, that is a representation that the vendor will make title to land on which those premises are erected. The representation becomes a promise contained in the contract and no longer be relied on as an independent ground for rescission: *Pennsylvania Shipping Co. v. Compaigne Nationale de Navigation* (1936) 155 LT 294. If the premises are not erected wholly on the land sold the vendor will fail to fulfill the promise or in other words will fail to make a good title to the whole of the land described in the contract."

Again on the argument that the contract was void or voidable because the parties were said to have entered into it under the mistaken belief of both

parties that the hotel was wholly on the vendor's land, the three justices reiterated that such a mistaken belief could not possibly avoid a contract which contemplates or provides for such a stipulation. Their Honours went on to refer to what Lord Atkin said at page 218 in ***Bell -v- Lever Bros*** when discussing ***Cooper -v- Phibbs***, and stated also at page 206:

> "Even where the vendor has no title, though both parties think he has, the correct view would appear to be that there is a contract: but that the vendor has either committed a breach of a stipulation as to title, or is not able to perform his contract. The contract is unenforceable by him but is not void."

In ***Bingham -v- Bingham*** (1748) 1 Ves. Sen. 126 (27 ER 934); [1748] Eng R 397, the plaintiff had contracted to purchase land from the defendant, to which the defendant had no title, although he believed he had. The land was in fact the property of the purchaser. Despite the contention that the purchaser plaintiff was at fault not to examine the title deeds given to him, the court held that there was a plain mistake and a court would not suffer the defendant to run away with the money in consideration of the sale of an

estate to which he had no right. That was a case of a total failure of consideration similar to ***Cooper -v- Phibbs*** referred to earlier.

While some criticism may be raised as to the claimant's obligation to investigate the defendant's title to the land in question before the completion of the sale and purchase in the present case, I feel that the production of the defendant's certificate of title, the assurances by defendant's real estate agent, the authorities from the Ministry of Natural Resources and Belize City Council that the land in question was Parcel 810 and that it belonged to the defendant would properly defray the weight to any such criticism against the claimant.

The land transaction in the present case, like in ***Svanosio v McNamara***, had proceeded beyond the contract for sale. The land had been conveyed to the claimant and registered in his name. On the authority of ***Svanosio v McNamara***, it would be an uphill battle for the defendant in this case to argue that the contract and conveyance are void at law or voidable in equity for mistake. The basis of such firm position is the finality of transaction after conveyance. See ***Clare v Lamb*** (1875) L.R. 10 CP 334; ***Allen v Richardson*** (1879) 13 Ch D 524.

Mercifully, equity has come, not to soften the law, but to do justice where it is most needed in cases of mistake. Thus we see a line of case law authorities, in this regard, where equitable relief had been given, even after conveyance was granted. Two of such cases which I have already referred to above are ***Bingham -v- Bingham*** and ***Cooper -v- Phibbs.*** The others include ***Hitchcock v Giddings*** (1817) 4 Price 135 (146 ER 418); ***Wilde v Gibson*** (1848) EngR 658; (1848) 1 HLC 605; ***Hart v Swaine*** (1877) 7 Ch D 42; ***Brownlie v Campbell*** (1880) 5 App Cas 925; and ***Re Tyrell, Tyrell v Woodhouse*** (1900) 82 LT 675. See also the Australian case of ***Taylor v Johnson*** (1993) 151 CLR 422, where the High Court of Australia moved away from the hardline stand in ***Svanosio v McNamara*** and found that mistake may form the basis of equitable relief. The New Zealand case of ***Waring v SJ Brentnall Ltd*** [1975] 2 NZLR 401 (where both parties were mistaken as to the identity of the land in the contract) follows the similar approach as in ***Taylor v Johnson***, unequivocally adopting ***Solle v Butcher***.

The principle, however, established by these cases is that equity will not undo a sale of land after conveyance unless there had been fraud or there is such a discrepancy between what has been sold and what has been conveyed

that there is a total failure of consideration, or what amounts practically to a total failure of consideration: ***Svanosio v McNamara***.

In the light of principles discussed in the above cases referred in this judgment, and applying then to the facts as agreed to by the parties in the present case, it would seem obvious that in order to do justice in this case this court adopts and follows the approach taken by the English, Australian and New Zealand cases which established that in a case such as the present one, the contract is not void for mistake but could be set aside in equity.

I respectfully agree with Mr. Lumor SC that the contract in this case is valid. There was *consensus ad idem* as to the sale and purchase of the advertised vacant Lot (though wrongly described as Parcel 810). That is a valid contract. However, it can only be set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground as pointed out in ***Solle v. Butcher*** and ***Svanosio v. McNamara***. The contract in this case cannot be enforced and so it must be set aside.

In dealing with the consequence of the recession of the contract in this case, I adopt the position held in ***Bingham -v-Bingham*** that there was a plain mistake and a court would not suffer the defendant to run away with the money in consideration of the sale of an estate to which he had no right. The mistake was so fundamental that there was a total failure of consideration. Equally, this is also a case closely akin to a defendant committing a breach of a stipulation as to title.

The mistake in this case is so fundamental that, although the contract is not void, equity will supplant the law so as not to allow the parties to enforce their contract. Principally, and the fact of the matter is that the land which the defendant sold and the claimant purchased, did not and does not belong to them. It belongs to someone else, namely Dr. Pedro Habet. In such a case, and in the present case, despite the strong argument by Mr. Lumor S.C. and the authorities cited, I feel this is a proper case for the application of section 143 (1) of the ***Registered Land Act*** (Cap.194) which provides:

> "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 first a registration, has been obtained, made or omitted by fraud or mistake."

The mistake in this case caused the claimant to purchase the land in question and have it subsequently registered in his name. On the facts of this case, the power of the Court in section 143(1) ought to be exercised and to order the rectification of the land register. See ***William Quinto and Jimmy Quinto v Santiago Castillo Limited*** (28 April 2009) Privy Council (on appeal from Court of Appeal of Belize) Privy Council App. No. 27 of 2008.

Conclusion and order

I found that there is a mistake in *substantialibus* in this case. The contract, however, is not void, though unenforceable.

In the light of the finding by the court that the *real* substance of the agreement between the parties in this case is the vacant Lot adjoining the defendant's existing piece of land on which his house presently stands, the claimant's claims for possession and mesne profits with interest of 12% thereon cannot be sustained and are refused.

Further having found that the contract between the parties is valid, but that it is unenforceable, the defendant's counter-claim that the contract is invalid and should be rescinded for invalidity cannot be sustained and it is refused.

This is a case in which equity comes to the aid of the parties. So that although the contract between them is valid, it is unenforceable and must be rescinded.

Consequently the defendant must repay the claimant the purchase price in full, in the sum of $81,000 together with the costs of development incurred by the claimant who expended the expenses on the warranty of title given by the defendant in the sum of $23,858.00. There will be interest paid on this judgment at the rate of 6% from the date of judgment until paid in full.

It is further ordered that the land register be rectified so that the registration of the claimant as owner of Parcel 810 Block 16 Caribbean Shores/Belize Registration Section is cancelled pursuant to section 143(1) of the ***Registered Land Act*** (Cap. 194).

As to the question of costs, the circumstances of this case, in my judgment, justify an order that the defendant must also pay the claimant's costs of this case.

Order accordingly.

Sir John Muria)
Justice of Supreme Court