IN THE SUPREME COURT OF BELIZE, A.D. 2007

CLAIM NO. 186 OF 2007

BETWEEN	**(JOHN DIAZ**	**CLAIMANT**
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	(AND	
	(	
	(IVO TZANKOV	**FIRST DEFENDANT**
	(BRENT C. MISKUSKI	**SECOND DEFENDANT**
	(DELIA MISKUSKI	**THIRD DEFENDANT**

Coram: Hon. Justice Sir John Muria

***Hearing*: 18 September 2007**
***Judgment*: 10 October 2007**

***Ms M. Marin Young* for Claimant**
***Mrs. B. Mahler* for First Defendant**
***Mr. E Courtney S.C.* for Second and Third Defendants**

JUDGMENT

MURIA J.: This is an application by the second and third defendants to strike out the Claimant's Claim and to enter summary judgment for the applicants. The application is brought pursuant to Rules 26.3 (1) (b) and (c) and 15.2 (a) of the *Supreme Court (Civil Procedure) Rules 2005*.

Background

It will be helpful to ascertain the background facts to this matter. The claimant, John Diaz and first defendant Ivo Tzankov entered into an agreement (first

agreement) on 17 January 2007 for the sale of Parcel 1283, Block 7 in San Pedro for the sum of US$150,000.00. The claimant duly paid a deposit of US$14,000.00 with the balance of US$136,000.oo to be paid on completion date of the sale on 30 March, 2007.

The claimant wired the balance money on 14 February 2007 to the real estate agent, Southwind Properties Limited (SPL) for onward transmission to the first defendant. However, before the completion date, the first defendant withdrew from the sale, advising the real estate agent that he no longer wished to complete the sale transaction.

On 23rd February 2007, the first defendant entered into an agreement (second agreement) with the second and third defendants (Mr. and Mrs. Miskuskis) to sell the same parcel of land to them. Following this transaction, a Certificate of Title to the land was issued by the Registrar of Lands in the name of the second and third defendants jointly on 14 March 2007.

The first agreement dated 17 January 2007 however, was not presented to the General Registry for stamping until 23 July 2007. Consequently, that agreement was not registered at the land Registry at Belmopan and no *ad valorem* stamp duty

has been paid on the said agreement as required by the *Stamp Duties Act* (Cap. 64).

As a result of the sale of the land in question by the first defendant to the second and third defendants, the claimant brought this claim. He seeks an order of specific performance of the first agreement dated 17 January 2007, damages for breach of contract, a declaration that any transfer by first defendant of the land in question is void for fraud, a declaration that the transfer to second and third defendants is null and void for fraud and a declaration that claimant's beneficial interest in the land is in priority to those of the second and third defendants. He also seeks costs and other relief.

The basis of application

In the light of the facts of this case, the second and third defendants/applicants now seek orders from the court to strike out the Claimant's claim against them and enter summary judgment in their favour. The grounds relied upon by the applicants are:

> ***"1. The claimant has no real prospect of succeeding on the Claim for the reason that:***

a) The Agreement upon which the Claimant relies vests no rights in the Claimant as the requisite Stamp Duty has not been paid on the Agreement;

b) The Agreement has not been registered and is of no effect;

c) That on the 9th March 2007 the legal and beneficial interest vested in the Applicants absolutely.

2. The Statement of Claim is an abuse of process of the court and is likely to obstruct the just disposal of the proceedings; and

3. The Statement of Claim discloses no reasonable ground for bringing a claim."

Mr. Courtenay's submission on behalf of the second and third defendants was on two fronts. First, the agreement dated 17 January 2007 had not been duly stamped with *ad valorem* stamp duty as required by the *Stamp Duties Act*, in particular, section 71(4) and 73.01(5), and so it was incapable of creating or conferring any right or interest in the land in question.

Second, following the agreement dated 23 February 2007 between the first defendant and second and third defendants, the land in question was transferred to the second and third defendants. The land was registered in the joint names of the second and third defendants on 14 March 2007, thereby conferring on them absolute title to the land. In those circumstances, the claimant cannot successfully

pursue the claim against second and third defendants, and so it should be struck out as it is an abuse of process of the court to allow it to proceed.

Ms. Marin Young, on the other hand, argued that the claimant had paid stamp duty on 23 July 2007 (although not *ad valorem* stamp duty) on the agreement of 17 January 2007. Counsel submitted that section 71(4) of the *Stamp Duties Act* does not apply here as that provision deals with trust instruments. However, Counsel conceded that, if section 71(4) applies, then the claimant would not be able to comply with it, as the land had already been transferred to the second and third defendants.

As to section 73(1) and (5) of the Act, Ms. Marin Young argued that those provisions refer to "immediate possession," thereby attracting *ad valorem* stamp duty. In this case, argued Counsel, the claimant had made deposit payment pending the completion of the sale on 30 March 2007 at which time he would be entitled to immediate possession and thereby required to pay *ad valorem* stamp duty. He was not able to obtain immediate possession, as the land was sold and transferred to the second and third defendants before the completion date of the first agreement.

On the question of registration of title to the land, Ms. Marin Young conceded that there was no way for the claimant to register the land in his name now, unless the rectification is ordered. Counsel maintains that the claimant could have still registered the land in his name, as he had three months from 17 January 2007 to do so. However, the first defendant had transferred the land to the second and third defendants, even before that three months period lapsed.

Mrs. Balderamos Mahler of Counsel for the first defendant, basically supported the submission made on behalf of the second and third defendants. Counsel however, raised the question of delay, on the part of the claimant. No steps had been taken by the claimant after the execution of the agreement on 17 January 2007. The payment of the stamp duty on 23 July 2007 by the claimant was done well after the title to the land had already passed to the second and third defendants. As such Counsel submitted that the claimant's claim against the defendants cannot stand any more.

Issues

As rightly pointed out by Counsel for second and third defendants, the main issue for the Court is whether, on the facts of the case, the claimant can maintain his claim against the second and third defendants. The contention by the second and

third defendants is that, the claimant's claim against them should be struck out since the claim has no real prospect of success, and consequently it cannot stand against the second and third defendants.

Consideration

The starting point for considering the questions of whether or not the claim should be struck out and summary judgment to be entered for the applicants/second and third defendants is Part 15 of the CPR, in particular, Rule 15.2. That Rule provides:

> ***"15.2 The court may give summary judgment on the claim or on a particular issue if it considers that –***
>
> ***(a) The claimant has no real prospect of succeeding on the claim or the issue; or***
>
> ***(b) the defendant has no real prospect of successfully defending the claim or the issue."***

The Rule requires the applicants to file affidavit evidence in support of their application and the claimant to file affidavit if she wished to rely on any evidence in opposition to the application. See Rule 15.5(1) and (2), CPR which provide:

"(1) The applicant must –

(a) file affidavit evidence in support with the application; and

(b) serve copies on each party against whom summary judgment is Sought;

not less than 14 days before the date fixed for hearing the application.

(2) If the respondent wishes to rely on evidence he must –

(a) file affidavit evidence; and

(b) serve copies on the applicant and any other respondent to the Application;

at least seven (7) days before the summary judgment hearing."

Roy Cadle filed an affidavit on 23 July 2007 in support of the second and third defendants' application. No affidavit has been filed by or on behalf of the claimant in opposition to the defendants' application. However, in the course of the argument, the claimant sought to rely on the affidavit filed by Michael Usher sworn to on 23 July 2007 and filed on same date in support of application for the continuation of the interim injunction against the defendants. Attached to that affidavit was the first agreement dated 17 January 2007.

The other rule upon which the applicants also relies is Rule 26.3(1)(b) and (c) which provide:

"26.3(1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –

……..

(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim;

The additional power conferred on the court under this Rule is to ensure that the statement of case or particulars of a claim that do not disclose reasonable ground for bringing the claim or for defending it must not be allowed to clog the court's time and incur expenses unnecessarily.

The test

It is therefore to my mind fitting that the court, while bearing in mind the overriding objective of the Rules (Rule 1.1 CPR), must be vigilant not to allow hopeless claim to be brought before the Court, thereby misusing the court

procedures. The onus is, of course, on the defendants to show that the claims against them do not have a *real prospect of success*, and at the same time ensuring also that applications for summary orders which have no real prospect of success must be discouraged. See [2000] 3All ER 752; [2000]1WLR 1988.

The test of "*real prospect of success*" has been considered in a number of cases in England, and other jurisdictions which adopted the new approach to civil procedures. The English Court of Appeal in ***Swain -v- Hillman*** **[**2001] 1All ER 91 where Lord Woolf MR, at page 92, indicated that in order to summarily dispose of a case, the judge must be satisfied that there was no realistic chance of success in the case. No mini-trial should be conducted as the procedure is meant to deal with cases that do not merit trial. In an ordinary civil claim, as in the present case, the second and third defendants bear the burden of showing that the case brought against them does not merit trial.

The House of Lords reiterated in ***Three Rivers District Council -v-Governor and Company of Bank of England*** [2001] UKHL 16; [2001] 2 All ER 513 that the question as to whether or not a claim has no real prospect of success at a trail must be answered having regard to the overriding objective of the Rules, that is to say, of dealing with the case justly (Rule 1.1. CPR). Lord Hope, in that case, goes on

to provide a very helpful guidance on the application of the rules in this regard. The learned Law Lord had this to say at paragraph 95 of his judgment:

> ***"The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral***

> ***evidence. As Lord Woolf MR said in Swain's case [2001] 1 All ER 91 at 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."***

Closer to home, the cases of ***Caribbean Outlets Limited -v- Beverley Barakat*** Suit No. CL 2002/C145 and ***Eric Hamilton v Alric Brown*** Suit No. CL 2002/HO54 adopted the position as set out by the English Court of Appeal in ***Swain***. In the light of the statement of the case as pleaded, by the claimant and the apparent concession by the claimant that he could no longer fulfill the requirement of the *Stamp Duties Act* of paying the *ad valorem* stamp duty on the agreement dated 17 January 2007 and that the defendants are now the holders of a registered title to the land in question, granted to them pursuant to an agreement dated 23 February 2007 which was duly stamped and registered, I pose the question again: can it be seriously said that the claimant has a realistic chance of success in his claim against the second and third defendants in this case?

When one turns to the affidavit of Roy Cadle filed in support of the application, it is quite clear that any claim in contract or otherwise against the second and third defendants based on the agreement dated 17 January 2007 is no longer feasible. Not only that the second and third defendants are not parties to that agreement, but

that the agreement itself is of no effect having not complied with *Stamp Duties Act.*

I pause here to add that, as submitted by Mr. Courtenay, sections 71(4) and 73.01(1), (3) and (5) of the *Stamp Duties Act* refer to agreements for sale of land coupled with rights of possession. Section 71(4) provides:

> ***"(4) Any declaration of trust or other instrument of whatever kind, used to pass legal or equitable interest to land or to give a person some interest in land shall be chargeable with ad valorem tamp duty."***

and section 73.01(1) states:

> ***"(1) There shall be paid by a purchaser or occupier of land under an agreement for the sale, exchange or gift of land which includes a clause giving the purchaser a right of possession or occupation to the land, stamp duty at the rates specified in section for Caricom nationals and Non-Caricom nationals (including a company under the control of a Non-Caricom National), as the case maybe, of the value of the land or the amount of consideration, for the land, whichever is the greater"***

and subsection (5) is as follows:

> ***"(5) An agreement, instrument, deed or share referred to in subsection (1) or (3), or in section 71(4) shall, unless the stamp duties payable therfor have duly been paid-***
>
> ***(a) be incapable of creating or transferring any legal rights or interests; and***
>
> ***(b) have no effect unless and until registered."***

Mr. Courtenay submitted that the above provisions are designed to deal with the mischief of avoiding stamp duty by purchasers who bought land, acquired the right of possession and yet do not go into immediate possession. I respectfully agree. In this regard, the contention by Ms Marin Young that the word "possession" here means "immediate possession" cannot be supported. The intention of the provisions would be defeated if that were to be so.

By the amended Statement of Case, the declaration sought against the second and third defendants is basically that the transfer of land by the first defendant was a fraud. Unfortunately, no nexus has been shown between the agreement dated 17 January 2007 (relied upon by the claimant) and the transfer of land to the second and third defendants under the agreement dated 23 February 2007. The court is in effect being asked to infer fraud on the part of the second and third defendants when they acquired title to the land under the agreement they entered into with the first defendant.

The burden of proof of establishing fraud is on the claimant. The law allows the court to order rectification of a title to land where fraud is established. See ***British American Cattle Company v Caribe Farm Industries Limited and The Belize Bank Limited***, The Belize Law Reports, 468, a case cited by Counsel for the claimant. Plainly on the face of the amended statement of the case, which clearly is in conflict with the affidavit evidence now before the court, it would be difficult, if not impossible, for the claimant to maintain a successful challenge against the title of the second and third defendants in the land in question.

In such situation, as the case law authorities have established that, not only that the claimant should not be allowed to waste the court's time and resources, but that it would be an abuse of the court process to pursue such a claim. The court must also, in the interest dealing with the case justly, discourage such cases being vented through the court.

Can it be said that in the light of the overriding objective of the rules, the court should nevertheless allow the claimant to test his case against the second and third defendant, even though the likelihood of succeeding against them is nil? I think

not, for to do so would amount to encouraging a litigant with a hopeless claim misusing the court procedures.

There is also the question of delay in this case. As rightly submitted by Mrs Mahler of Counsel for the first defendant, that following the execution of the agreement dated 17/1/07, the claimant did nothing about that agreement until after the land had already passed to the second and third defendants. This resulted in that agreement becoming ineffective. On this question of delay, Lord Woolf M.R. had this to say in ***Clark –v- University of Lincolnshire and Humberside:***

> ***"Delay in bringing proceedings for a discretionary remedy has always been a factor which a court could take into account in deciding whether it should grant that remedy. Delay can now be taken into account on an application for summary judgment under CPR Pt 24 if its effect means that the claim has no real prospect of success."***

In my judgment, the claimant's claim against the second and third defendants in this case stands with no realistic prospect of succeeding and it must be stopped at this stage. It must be struck out.

Disposition

The claimant's claim against the second and third defendants is struck out.

Summary judgment is entered for the said defendants.

Order:

1. Claim against second and third defendants struck out
2. Summary judgment entered for the second and third defendants
3. Costs to the applicants/second and third defendants to be taxed if not agreed.

Hon Justice Sir John Muria