IN THE COURT OF APPEAL OF BELIZE, A.D. 2008

CIVIL APPEAL NO. 2 OF 2008

BETWEEN:

ALBERT NEAL **as Administrator of the Estate of** **Canuto Neal**	**Appellant**
AND	
MACAW FARMS LIMITED	**Respondent**

BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Morrison	**-**	**Justice of Appeal**

E. Andrew Marshalleck for the appellant.
Rodwell Williams S.C. for the respondent.

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October 2008; 27 March 2009

MOTTLEY, P.

[1] The appellant, the administrator of the estate of Canuto Neal deceased, was ordered by Awich J, on 30 January 2008, to deliver up forthwith possession to the Respondent of a portion of land which he occupied being part of Parcel 15, Block 23, Mary Hickey, Registration Section, Cayo District. The respondent was also awarded damages for trespass which were to be assessed. The counter claim of the appellant for a declaration that the transfer on which the respondent's case was based was null and void was dismissed.

[2] The appellant has appealed against that decision of Awich J alleging inter alia that the judge erred in concluding that, on the basis of the evidence of Canuto Neal, and on the judge's own examination of the marking made by Canuto Neal, Canuto Neal had signed the affidavit of the seller and memorandum of transfer. It was also alleged that the judge erred in law in finding that the appellant intended to plead **non est factum** which he had failed to establish. A further ground of appeal alleged that, having found that the purchase price was understated in the affidavit of the seller and in the memorandum of transfer and that the understatement was made with the intent to evade the payment of duty under the Stamp Duties Act Cap. 64, the judge ought to have declared that the memorandum of transfer was void.

The Pleadings

[3] In his statement of claim the respondent alleged that it was the owner and, as such, entitled to possession of premises being Parcel 15 Block 23 Mary Hickey Registration Section comprising about 115 acres which was acquired in 1990 by its predecessor in title William McDougall from Canuto Neal. It was further alleged that Canuto Neal wrongfully entered into possession of a portion of the land and wrongfully remains in possession. A claim was made for possession of the land and damages for trespass.

[4] In the defence, it was alleged that Canuto Neal lived "in open uninterrupted, lawful and actual possession" of the land since 1970. Although Canuto Neal admitted receiving money in respect of the sale of the land, he stated that this was paid as a deposit at which time the Transfer Certificate of Title was handed over to William McDougall. All of this the appellant alleged was subject to William McDougall obtaining a Minister's Licence to purchase the land pursuant to the Aliens Landholding Act Cap 144 which licence, it was further alleged, was never obtained. In addition, the appellant relied on fraud the basis for which was that Canuto Neal never signed or authorized anyone to sign any document transferring the land to William McDougall. It was further alleged that,

if the court were to find that the transfer documents were in fact signed by Canuto Neal, then the court should hold that the document was "illegal" as Canuto Neal was "illiterate at the time of the signing of the said document". It was pleaded that Canuto Neal was unaware of what he was signing and that no independent person explained in an impartial manner the implications of what he was signing. The appellant counterclaimed seeking a declaration that any purported transfer of the land was null and void and of no effect.

Judgment

[5] As regards the signatures on the affidavit of the seller and on the memorandum of transfer, Awich J concluded in paragraph 12:

> "…..that on 17.9.1991 Mr. Canuto Neal agreed to participate in the transfer of his freehold title to the land to Mr. McDougall by signing the affidavit of the seller and the memorandum of transfer, in return for payment of any agreed price. The consequence was that legal title to the land would on registration, pass from Canuto Neal to McDougall III, unless the transaction was contrary to Aliens Landholding Act."

As regards the Aliens Landholding Act ("the Act"), the judge held that the transfer of title to land from Canuto Neal to William McDougall III was not a transfer of an estate to an alien under the provisions of the Act and, in those circumstances a licence from the Minister was not required for the transfer. He concluded that the transfer was not illegal under the Act.

In so far as the appellant intended to plead *non est factum* the judge found that the burden was on the appellant to establish his plea by evidence but that he had failed to do so.

The Appeal

[6] I shall deal with grounds 1 and 2 together. In Ground 1, the appellant states that the judge erred in law in concluding that, on the evidence of Canuto Neal and from the judge's examination of the "markings" of Canuto Neal, Canuto Neal had signed the seller's affidavit and the Memorandum of Transfer. In Ground 2 it is alleged that the judge erred in law in finding that expert evidence was not necessary to prove the signature of Canuto Neal.

[7] In his evidence-in-chief, Canuto Neal said he did not remember signing any document for Mr. McDougall in relation to the land. He went on to point out that "any document would be a lie". In cross-examination he indicated that if he was asked to sign his name he would not write an X. He said he can "scratch it" because he had practiced to sign his name for sometime. He then proceeded to "scratch" his name on a piece of paper which was put into evidence as an exhibit. It is this exhibit that the appellant alleges that the judge examined and compared it to the signatures on the seller's affidavit and the Memorandum of Transfer. Canuto Neal having been shown the seller's affidavit and the Memorandum of Transfer said that it looked like he had scratched his name on the two documents.

[8] On behalf of the appellant it was said that the only witness who was asked to examine the signature on the documents was Canuto Neal who had admitted under cross-examination that the signatures "looks like" his signature. Counsel submits that this evidence is not inconsistent with his pleading in which he pleaded that he never signed any document transferring the land and that the signature was obtained by fraud. Counsel further contends that the evidence that he never signed any document in relation to the land and that the signature "looks like" his signature actually substantiate the allegation of fraud. In the circumstances, it is said, that the judge ought not to have compared the signature on his own but ought to have relied on the evidence of an expert as required by section 48 of the Evidence Act Cap. 95 which provides:-

> "48 Comparison of a disputed writing with any writing provided to the satisfaction of the judge to be genuine shall be permitted to be made by witness and those writings and the evidence of witnesses respecting them may be submitted to the court as evidence of the genuineness or otherwise of the writing in dispute."

Consequently counsel submits that expert evidence was required to prove the signature of Canuto Neal.

[9] In my view, if it is sought to compare disputed handwriting with genuine handwriting, this had to be done by a witness who would be subject to cross-examination. It certainly must not be done by the judge himself. (see **Regina v Simbodyal Times Law Report 10 October 1991**.)

[10] While the judge did examine the signature, his decision is not based on his examination of the document but on the evidence of Canuto Neal. The judge said:

> "11. I do not believe that the signatures of Canuto Neal were forged by someone writing imitations on the affidavit of the seller and on the memorandum of transfer. Mr. Canuto Neal testified that he was illiterate and could not write. In cross-examination he said: "I can scratch my name". He was requested to "scratch" his name; and he wrote on a piece of paper, exhibit D(CN)18, what was almost identical to the signatures on the two documents of transfer. He was then shown exhibits P(WM)7 and P(WM)8 and asked to say whether the signature on each was the same as his "scratching" in court. His answer about the affidavit of seller was: "It looks like I scratched my name on it; looks nearly like it". His answer about the memorandum of transfer was: "Same scratching; looks like my scratching.
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> "12. From those answers and the testimony of Canuto Neal as a whole, I concluded that on 19.9.1991, Mr. Canuto Neal agreed to and participated

in the transfer of his freehold title to the land to Mr. McDougall III by signing the affidavit of the seller and the memorandum of transfer, in return for payment of an agreed price…..."

[11] The judge clearly based his decision on this evidence of Canuto Neal and, in my view, he was entitled to so conclude. He did not base his decision on any examination and comparison of the handwriting of Canuto Neal.

[12] Counsel also contends, that as there was a dispute as to whether Canuto Neal signed the transfer documents, expert evidence ought to have been adduced to establish the authenticity of the signature. On the evidence, I must reject this submission for the reasons stated above the judge was entitled to conclude that signature was that of Canuto Neal.

[13] The appellant complains that the plea of *non est factum* was established on the evidence. This ground may be disposed of shortly, as counsel relies on the evidence-in-chief of Canuto Neal but did not have regard to the cross-examination. As stated earlier in his evidence-in-chief, Canuto Neal stated that he never signed any document in relation to transfer of the land to Mr. McDougall. However, this ignores concessions in his cross-examination when he was shown the signatures on the seller's affidavit and on Memorandum of Transfer. When shown the affidavit of the seller, Canuto Neal said:

> "It looks like I scratched my name on it. Looks nearly like it."

Further when shown the Memorandum of Transfer he replied:

> "Same scratching. Looks like my scratching too."

Based on this evidence, the judge was entitled to conclude that the appellant had failed to discharge the burden on him to establish *non est factum*. In **Saunders (Executrix of the estate of Rose Mand Gallie (deceased)) v Anglia Building Society (formerly Northhampton Town and Country Building Society) [1970] 3 ALLER 961** Lord Hodson stated at p. 966:

> "The burden of proving non est factum is on the party disowning his signature, this includes proof that he or she took care."

[14] The final ground of appeal relates to the purchase price paid by William McDougal to Canuto Neal. It is said that, having found that purchase price was understated in the affidavit of the purchaser and that it was done with the intent to evade the appropriate transfer tax, the judge ought to have treated the memorandum as being ineffective in law. The agreement for the sale of the land was never reduced into writing. After reviewing the evidence, the judge stated that "the common sum stated by Canuto Neal and Dr. McDougall Jr as the purchase price was seventy thousand dollars". However, there was a difference on whether that sum was US or Belize currency. The judge went on to conclude "that the purchase price was seventy thousand Belize dollars" which he found was paid in full by William McDougall III before his death on 1 February 1992.

[15] The affidavits of the seller of the land and buyer both sworn to on 17 September 1991 show the purchase price was $25,000.00 Belize. In addition, the Memorandum of Transfer also dated 17 September 1991 stated the purchase price as $25,000.00. The statements in these documents that the purchase price was $25,000 led the judge to conclude:

> "The price of twenty five thousand dollars stated in the affidavit of Canuto Neal, lodged at Lands Registry was intended to evade transfer tax, it was not proof of what the purchase price was."

[16] It was submitted on behalf of the appellant that the judge, having found that the purchase price was $70,000 and not $25,000 as stated in the transfer documents, and that the purchase price was stated as $25,000 with the intent to evade greater transfer tax, he was bound by the provisions of section 36 of the Stamp Duty Act, Cap. 64 to declare that the transfer documents are void.

[17] Section 36 of the Stamp Duties Act Cap. 64 provides:

> "36 If, with intent to evade the payment of duty under this Act, a consideration or sum of money shall be expressed to be paid on any instrument less than the amount actually paid or agreed to be paid, every such instrument shall be void."

In order for this section to be applicable, it must be shown that, not only was the purchase price stated in the instrument of transfer lower than the actual price paid for the land, but that the lower price was stated with the intent to evade the payment of the duty payable under the Stamp Duty Act.

[18] The judge found that the purchase price was understated. There was evidence to support this finding. However the question to be answered is whether there was evidence that the appellant, in mis-stating the purchase price, in the seller's affidavit and the Memorandum of Transfer, did so with intent to evade the duty payable under the Act? On the state of evidence and the finding by the judge that the purchase price was $70,000, the proper inference for the judge to draw was that the price of $25,000 stated in the seller's affidavit was so stated with intention to evade transfer tax. The evidence shows that on the 17 September 1991 William McDougall swore that on that date he bought land from Canuto Neal for $25,000.00. A proper inference to be drawn, in the circumstances, is that William McDougall III was also part of a scheme or plan along with Canuto Neal to understate the purchase price with the intent to evade the appropriate stamp duty.

[19] As stated earlier, the agreement for the purchase of the property was never reduced into writing. Anyone looking at the transfer documents would not be aware that there was an illegality on the face of these documents. Indeed, the appellant in his Defence did not plead the purchase price was understated in the transfer documents. Nor was Canuto Neal asked either in his evidence-in-Chief or cross-examination to explain why his affidavit as seller and the Memorandum of Transfer stated the purchase price as $25,000. This is not surprising based on the case he had put forward on his pleading.

[20] It is necessary to examine this finding against the background of the provisions of section 36 of the Stamp Duty Act. As stated earlier, if it is shown that the amount stated in any instrument is less than the amount actually paid or agreed to be paid then the instrument is void provided that it is shown that the mis-statement was done with the intent of evading the duty which is payable under the Act.

[21] While the instrument may be void, the issue that must be considered here is whether it is open to the appellant to seek to rely on the provision of section 36 where he was a party to that evasion and especially as the issue does not arise on the pleadings of either party.

[22] The evasion of payment of the correct duty under the Stamp Duty Act raises the issue of the legality of the documents of transfer. In **Napier v National Business Agency Ltd. [1951] 2 ALL E.R. 264** Sir Raymond Evershed M.R. said at p. 266:

> "There is a strong legal obligation placed on all citizens to make true and faithful returns for tax purposes and if parties make arrangements which is designed to do the contrary i.e. to mislead and to delay it seems to me impossible for this Court to enforce that contract at the suit of one party to it."

[23] In **Snell v. Unity Finance Ltd. [1963] 3 All E.R. 50** Diplock L.J. stated at p.59:

> "The principle of law is clear. The Courts which exercise the judicial power of the Crown; will not enforce a contract that Parliament, which exercises the legislative power of the Crown, has made unlawful. In the words of Lord Mansfield in Holman v Johnson (1775) 1 Cowp. 343:
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> > "The principal of public policy in this: Ex dolomato non oritur action. No Court will lend its aid to a man who found his cause of action upon an immoral or illegal act."

[24] Canuto Neal was illiterate but was able to affix his signature. No evidence was given that either the seller or the buyer were aware that the lower the consideration stated in the documents of transfer as the purchase price, the lower the amount would be due as transfer tax under the Stamp Duty Act. Indeed, no explanation was forthcoming from either side for the insertion of the figure of $25,000 as being the purchase price. It is not merely the fact that a lower figure had been inserted in the documents of transfer as the purchase price than the figure actually paid, but the insertion of the lower figure must have been done with the intent to evade the correct duty payable under the Act.

[25] An examination of the seller and buyer affidavits and the Memorandum of Transfer would have shown that the purchase price was $25,000. No written contract was produced to indicate that this was not the true purchase price. It is the finding of the judge that the correct purchase price was $70,000 which brings the provision of section 36 into consideration. The appellant in his defence and counterclaim did not plead that the contract for the sale of the land was null and void by virtue of the provisions of section 36 of the Stamp Duty Act.

[26] On appeal the appellant now contends that, having found that the purchase price was $70,000 and not $25,000 as stated in the affidavits of the buyer and seller and the Memorandum of Transfer, the judge ought to have declared the transfer documents to be void. On the other hand, counsel for the respondent submitted that if the court was to declare the transfer documents to be void that would be allowing the appellant to benefit from his own wrong doing.

[27] As the alleged wrongdoing does not appear on the case as pleaded by either party, I adopt the approach of Viscount Haldane L.C. in **North Western Salt Company, Limited v Electrolytic Alkai Company, Limited [1914] A.C. 461 at . 470**:

> "My Lords, it is no doubt true that where on the plaintiff's case it appears to the Court that the claim is illegal, and that it would be contrary to public policy to entertain it, the Court may and ought to

refuse to do so. But this must only be when either the agreement sued on is on the face of it illegal, or where, if facts relating to such an agreement are relied on, the plaintiff's case has been completely presented. If the point has not been raised on the pleadings so as to warn the plaintiff to produce evidence which he may be able to bring forward rebutting any presumption of illegality which might be based on some isolated fact, then the Court ought not to take a course which may easily lead to a miscarriage of justice."

[28] Lord Moulton had this to say at p. 477:

"But our judicial system is based on the principle that in fairness a litigant should have due notice of the issues that are to be raised in order that he may prepare himself with the evidence necessary to present his case fittingly to the Court, and it would indeed be strange to hold to that this wholesome rule should be relaxed when he charged with something so grave as acting against the common seal."

Later Lord Moulton continued:

"One special case should perhaps be noticed. It is possible to conceive a case in which a fact comes to light in the course of the trial which of itself renders an agreement illegal on grounds which nothing could cure………..It is evident that had the issue been raised on the pleadings, it would have entitled the plaintiff to call further evidence of various kinds, and such evidence might have negatived any inference that the parties were concerned in creating or supporting a hurtful combination in restraint of trade."

[29] In **Edler v Auerbach [1949] 2 All E.R. 692** Devlin, J. referred to North Western Sale Co. Ltd. v Electrolytic Alkali Co. Ltd. and said:

"That case, I think, authorizes four propositions: first, that, where a contract is ex facie illegal, the court will not enforce it, whether the illegality is pleaded or not; secondly, that, where, as here, the contract is not ex facie illegal, evidence of extraneous circumstances tending to show that it

> has an illegal object should not be admitted unless the circumstances relied on are pleaded; thirdly, that, where unpleaded facts, which taken by themselves show an illegal object, have been revealed in evidence (because, perhaps, no objection was raised or because they were adduced for some other purpose), the court should not act on them unless it is satisfied that the whole of the relevant circumstances are before it; but, fourthly, that, where the court is satisfied that all the relevant facts are before it and it can see clearly from them that the contract had an illegal object, it may not enforce the contract, whether the facts were pleaded or not."

[30] In my judgment, the contract for the sale of the land was not ex facie illegal. The purchase price as stated in the affidavits of the vendor and purchaser and Memorandum of Transfer did not raise any issue of the Memorandum of Transfer being void. The illegality does not arise on the pleadings of either party. The suggested illegality arose as a result of the finding of the judge in relation to the purchase price. The circumstances surrounding why the purchaser in swearing his affidavit stated that the purchase price was $25,000 was not put to witnesses for the plaintiff. The seller from the very nature of his case did not lead and would not have led any evidence as to why the purchase price is stated in his affidavit and in the Memorandum of Transfer as $25,000.

[31] The circumstances surrounding the stating of the purchase price as $25,000 was not a live issue on the pleadings and was not canvassed by either side during the evidence. It cannot be said with any certainty that the trial judge had before him all the relevant circumstances with regards to the stating of the purchase price as $25,000 and not $70,000 as found by him. If the appellant intended to rely on section 36 of the Stamp Duty Act that the instrument of transfer is void then the appellant ought to have pleaded that it was null and void and of no effect. To hold that the instrument of transfer is null and void might, in the circumstances of this case, have the effect of allowing the appellant to rely on

his own wrongdoing without having all the reasons why the figure of $25,000 was used.

[32] For the reasons given above I would dismiss the appeal and confirm the order of Awich J. The appellant is to pay the respondent its costs to be taxed if not sooner agreed.

[33] Before leaving this appeal, I think it is important to comment on the length of time which elapsed between the completion of the hearing and the delivery of the judgment. Nothing turned on it in this case and it was not made an issue. I consider it necessary to draw to the attention of the judges the observation by Lord Hoffman in **Citco Bank Corporation N.V. v Pusser's Limited and Charles S Tobias**, Privy Council Appeal No. 55 of 2005. Commenting on the failure of the judge's failure to give his reserved judgment which he had promised to deliver within a month, his Lordship said at para. 21

> "21. But their Lordships feel bound to observe that such delays are completely unacceptable. Besides being a violation of the constitutional right of the parties to a determination of their dispute within a reasonable time, they are likely to be detrimental to the interest of the British Virgin Islands as a financial centre which can offer investors efficient and impartial justice."

In a similar vein was the recent admonition of Mr. Justice de la Bastide, President of the Caribbean Court of Justice, also commenting on the delay by judges in rendering their judgments. In **Reid v Reid (2008) CCJ 8 (AJ)** his Lordship said:

> "Before addressing the arguments of counsel made to us, it would be remiss of this Court not to advert to the length of time taken by the Court of Appeal to deliver its judgment in this case. This was an astonishing period of almost five years. In the first appeal we heard from Barbados, Mirchandani (No. 1), de la Bastide, P. expressed this Court's strong disapproval of judicial delays. Such delays, the President stated, "deny

parties the access to justice to which they are entitled and undermine public confidence in the administration of justice". The effectiveness of a judiciary is seriously compromised if it fails to monitor itself in respect of the time taken to deliver judgments and to arrest promptly any tendency to lapse in this aspect of its performance. This is the second time we have had occasion to call attention to inordinate delay in the delivery of judgments in Barbados. We trust that effective remedial action, if not already taken, will now be taken to ensure that judgments are delivered within a reasonable time as required by the Constitution of Barbados. What is a reasonable time? In our view, as a general rule no judgment should be outstanding for more than six months and unless a case is one of unusual difficulty or complexity, judgment should normally be delivered within three months at most."

Judges should be guided accordingly.

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MOTTLEY P

SOSA JA

34. I have read, in draft, the judgment of Mottley P and concur in the reasons for judgment given, and the orders proposed, in it.

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SOSA JA

MORRISON JA

35. I have read, in draft, and entirely agree with, the judgment of the President in this matter.

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MORRISON JA