IN THE COURT OF APPEAL OF BELIZE AD 2020

CIVIL APPEAL NO 17 OF 2015

MARCO CARUSO Appellant

v

CHRIS ATKINSON Respondent

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BEFORE

The Hon Sir Manuel Sosa	President
The Hon Mr Justice Christopher Blackman	Justice of Appeal
The Hon Mr Justice Murrio Ducille	Justice of Appeal

Y Cave for the appellant.
A Bennett for the respondent.

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13 and 15 June 2017 and 11 December 2020

SIR MANUEL SOSA P

Introduction

[1] By claim form dated 9 December 2014 but filed on a date unknown, the respondent ('Mr Atkinson') commenced Claim No 712 of 2014, whereby he sought against the appellant ('Mr Caruso') and Panther Estates Development Limited ('Panther') relief in the form of payment of the sum of BZE $70,590.00 together with interest and costs. The sum of BZE $70,590.00 was claimed as being the total amount which Mr Caruso allegedly agreed to pay to Mr Atkinson under an agreement dated 13 April 2012. The claim was heard on 18 June 2015 at a sitting, lasting a little more than half a day, during which a total of three witnesses testified. By an eight-page judgment delivered on a 31 July 2015, Young J ('the Judge'), finding in favour of Mr Atkinson, ordered Mr Caruso to pay him the sum of BZE $70,590.00 together with prescribed costs as agreed. The claim against Panther was, however, dismissed. From that decision Mr Caruso has appealed.

The evidence before the court below as relevant to the appeal

Documentary

[2] At the heart of the case for Mr Atkinson was a four-page agreement allegedly made on 13 April 2012 (hereinafter 'the purported agreement' or 'the agreement') which began by expressly naming the parties thereto as only Panther, Mr Atkinson and Placencia Estates Development LLC ('Placencia') and identifying the property the subject thereof (therein referred to as 'the Property' but hereinafter to be called 'Lot No 147'). (It is important to note for reference hereinafter that the allusion here to a Block and a Registration Section clearly indicates that Lot No 147 is situate in a compulsory registration area for the purposes of the Registered Land Act.) In its first three numbered clauses, the purported agreement provided for the purchase price of Lot No 147 to be the sum of US $70,590.00, payment of which was therein said to have been effected on 17 November 2008, and declared, first, that Placencia was 'the owner of the 1,680 acres of land on which the Property is being built') and, secondly, that title was to be issued in the names of Mr Atkinson and Placencia as well as, mystifyingly, where applicable, 'additional purchasers'. Clauses 4 to 6 respectively, concerned, first, submission of documentation to the Lands Registry, issue and delivery of title by that registry, and responsibility for payment of different taxes, secondly, the non-cancellability of the purported agreement and, thirdly, the wish of Mr Atkinson that Lot No 147 be resold. (The weak verb 'wishes' was actually employed in clause 6.) The respective subjects of clauses 7 and 8, the last of the numbered clauses, were Profit Distribution and Choice of Law, neither of which arises for consideration in the instant appeal.

[3] The remainder of the body of the purported agreement is found on its third page, under the heading 'General further terms and special conditions'. It is in this part of the purported agreement that the name of Mr Caruso appears for the first time. While six so-called terms and special conditions make up this part of the purported agreement, only one of them, viz the sixth, need be here set out. Insofar as material for present purposes, it reads as follows:

> ‘Developer ([Mr Caruso]) agrees to pay to [Mr Atkinson] the sum of $35,295.00.00 USD at 12 months of this contract date if the lot referenced in [the purported agreement] has not been sold by that time. If this payment is made then [Mr Atkinson] will receive the first $52,943.00 upon the sale of [Lot No 147].’

[4] The rest of the document consists mainly of signature lines and purported signatures. Below the first such purported signature, that corresponding to the Vendor, ie Panther, (hereinafter ‘the first purported signature’) there appears, in print, the name ‘Marco Caruso’. There follows further down the page the purported signature of a witness. Then comes the purported signature of Mr Atkinson and below it, the name of Mr Atkinson printed in ink. The purported signature of a witness follows further down. Below that, another purported signature, corresponding to Placencia and looking exactly like the first purported signature, appears. The name ‘Marco Caruso’ does not however, appear below this purported signature, which is followed, in its turn, by another purported signature of a witness. In short, then, as far as Mr Caruso is concerned, a signature purporting to be his appears twice at the foot of the purported agreement, first, as that of a representative for Panther and, secondly, as that of a representative for Placencia.

Viva voce

[5] As relevant for present purposes, the *viva voce* evidence in support of Mr Atkinson’s case, given by Mr Atkinson himself, was that he received a copy of the purported agreement, purportedly signed on behalf of both Panther and Placencia, from a Brent Borland who represented to him that he was acting as agent for and on behalf of Mr Caruso. He (Mr Atkinson) did not claim to have himself seen Mr Caruso sign the purported agreement or that Mr Caruso ever admitted to him that he had signed it. As Mr Atkinson called no witnesses of his own, there was no *viva voce* evidence from his side to establish that the signatures at the foot of the purported agreement purporting to be the signatures of Mr Caruso had in fact been put there by him.

[6] From the side of Mr Caruso, on the other hand, there was a collocation of pleading and evidence on the question of signature of the agreement which, to the mind of the Judge, was to prove decisively important after all had been said and done. At para 11 of the Amended Defence, it was pleaded that –

> 'With respect to Paragraph 11 of the Amended Statement of Claim [Mr Caruso and Panther] say that they never entered into any agreement with [Mr Atkinson] whether written or oral, including [the purported agreement]. [Mr Caruso] says further that the signature that appears on [the purported agreement] was not made by him.'

At the hearing of the claim, the testimony of Mr Caruso in evidence-in-chief necessarily included the contents of his witness statement, at para 16 of which he had stated that –

> 'I did not knowingly sign the purported agreement and was unaware of the existence of [the purported agreement] until I was served with the Claim filed by [Mr Atkinson] herein.'

Expanding on this at the hearing, he suggested, despite the restrictions imposed on him by the state of the pleadings, that a cut-and-paste method had been wrongfully employed by means of a computer to place at the foot of the purported agreement a signature previously put by him on some other document. He pointed to certain features of the purported agreement which, according to him, supported this hypothesis of his. To these, I shall have to revert below.

The judgment of the Judge

[7] As already indicated above, this was not an ordinary, run-of-the-mill case of a claimant suing on a contract which he, or one of his witnesses, had seen executed or signed by the defendant. The Judge appears rightly to have scrutinised the evidence placed before her for evidence consistent or otherwise with the due signature by Mr

Caruso of the purported agreement. One such piece of evidence which was clearly not lost on her was that concerning the execution of a deed of conveyance in respect of Lot No 147, which she duly noted at para 3 of her judgment. (She did not, however, comment on the gross inappropriateness of resorting to a deed of conveyance to effect a transfer of title to land which, like Lot No 147 (see para **[2]** , above), is situate in a compulsory registration area for the purposes of the Registered Land Act) The purported agreement was for the transfer of title to Lot No 147 to Mr Atkinson and Placencia: the deed of conveyance was an attempt, albeit misguided, to effect such transfer of title. (Title to land registered under the Registered Land Act must, in general, be effected by means of an instrument known as a Transfer of Land – never by a deed of conveyance.) If Mr Caruso never signed and knew nothing, until he was served with the claim form, of the purported agreement, why did he sign the deed of conveyance?

[8] The Judge considered the two issues identified to her by the parties. The first issue, which was whether the purported agreement was authentic, she resolved with an answer in the affirmative. The key paragraphs in her judgment as regards her resolution of this issue are paras 10 to 12 which read as follows:

> '10. [Mr Caruso] in his pleadings stated that he never signed [the purported agreement]. However, in his witness statement he says "I did not knowingly sign the purported agreement and was unaware of the existence of the said agreement until I was served with the claim filed by [Mr Atkinson] herein.
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> 11. During amplification, he attempted to salvage what, to my mind, he had been (*sic*) destroyed by that statement. He expressed doubt that the signatures were his own. Even stating that they were a reproduction of his own which may have been placed there by the cut and paste method. He found issue with the positioning of the signature *"three inches"* above the designated line. He is no handwriting expert and neither am I. He went on to highlight a difference in the appearance of [the purported agreement] to other agreements prepared by his companies. He presented a witness who explained that her duties involved preparation of

contracts for all [Mr Caruso's] company (*sic*). She confirmed that [the purported agreement] was not one she had prepared.

12. In a final attempt to discredit [the purported agreement], Counsel for [Mr Caruso and Panther], under cross-examination, questioned [Mr Atkinson] about the fact that he had only presented a copy of [the purported agreement] to the court. If [Mr Caruso and Panther] required an original of that document there were certain applications that could have been made prior to trial. Moreover, [Mr Atkinson] explained that he entered into [the purported agreement] via internet. He never had an original copy. In this advanced technological era that has certainly become the norm. It therefore took nothing away from [Mr Atkinson's] case.'

13. Having waded through all that duff, we are still left with that statement in [Mr Caruso's] witness statement ...'

It seems clear to me that, in that opening sentence of para 13, the Judge was referring to Mr Caruso's denial of having knowingly signed the purported agreement.

[9] The Judge went on to quote, at para 14 of her judgment, the following well-known passage from the judgment of Scrutton LJ in *L'Estrange v Graucob (F) Ltd* [1934] 2 KB 394, 403:

'When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.'

And she stated her conclusion as follows, at para 16:

'This court therefore finds that [Mr Caruso] by his own admission signed [the purported agreement] …'

[10] The judge resolved the second issue, viz whether Mr Caruso and Panther were indebted to Mr Atkinson, with an affirmative reply in the case of the former and a negative one in the case of the latter. Her resolution of this issue is not challenged in the instant appeal.

The grounds of appeal argued

[11] Mr Cave, for the appellant, filed a total of eleven purported grounds of appeal but by necessary implication, as I see it, abandoned three of them, viz the seventh, eighth and tenth, upon filing submissions in writing on 15 March 2016. This implication arises from the fact that none of these three grounds was touched upon in the written submissions filed. For reasons which shall become clear as I proceed, it is as well to reproduce at this juncture the following five of the remaining eight purported grounds:

> 'IV. The [Judge] as a consequence of the erroneous finding that [Mr Caruso] had admitted signing the document erred in neglecting to consider the veracity of the witnesses who gave evidence, both on behalf of Mr Caruso and Mr Atkinson, in determining the key issues of fact concerning the authenticity of the purported agreement.
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> V. The [Judge] erred in applying the principle that [Mr Caruso] was bound by the terms of the written contract signed by him even if he was ignorant of its contents or its legal effect to the facts and circumstances of [Mr Caruso's] case since the principle was inapplicable to a situation where, as in the case of [Mr Caruso], the authenticity of the document itself was put in issue and [Mr Caruso] had denied signing it. [Mr Caruso] never indicated that he signed [the purported agreement] but was unaware of the contents. It was the consistent position of [Mr Caruso] throughout the proceedings that he had never met [Mr Atkinson], had never communicated with him, had never entered into any agreement with him and was unaware of the **existence** of the purported agreement itself, not merely its contents. (original emphasis)

VI. The [Judge] failed to consider at all or to give sufficient consideration to key facts and circumstances bearing upon the authenticity of [the purported agreement] including but not limited to the fact that the document was never initialled by Mr Caruso and that what purported to be his initials appeared unusually to be computer generated rather than manually written.

IX. The [Judge] erred in failing to give any consideration or sufficient consideration to the following facts in determining the likelihood that the document may have been forged:-

a) That [Mr Atkinson] by his own admission had never communicated with [Mr Caruso] prior to the claim being filed.

b) That [Mr Atkinson] had no previous dealings with [Mr Caruso].

c) That the consideration which had been supposedly supplied by [Mr Atkinson] was invested with Mr Brent Borland in respect of the property in the Dominican Republic and through a company with which [Mr Caruso] had no business relationship.

d) That the investment which was supposedly made by [Mr Atkinson] and which he sought to recover from [Mr Caruso] in the Claim now appealed was made in 2008.

e) That at the time when [Mr Atkinson] said that he received [the purported agreement] from Mr Brent Borland, which Borland represented was signed by [Mr Caruso], repayment of the investment which he had made with the company associated with Mr Borland had become overdue.

f) That [Mr Atkinson] admitted in his testimony that [the purported agreement] which Borland transmitted to him was really an attempt to repay

the investment which he [Mr Atkinson] had made with Borland since 2008, the repayment of which remained outstanding.

g) That it was unlikely that [Mr Caruso] would have undertaken a personal obligation by [the purported agreement] to essentially repay a debt which [Mr Atkinson] admits was never owed by [Mr Caruso].

h) That the obvious interest Borland would have had in misrepresenting Mr Caruso's actions, assertions or intentions regarding [the purported agreement] ought to have excited the Court's suspicion.

i) That it was highly unusual in the context of modern commercial transactions that the purported initials appearing at the bottom of each page on [the purported agreement] was not done manually or in cursive but appeared to be computer generated or typewritten.

j) That the fact that the document presented to the Court as evidence was a photocopy and not the original required greater consideration of Mr Caruso's Defence that his signature may have been digitally reproduced and the weight of the evidence and the reliability of it ought to have been assessed in that context. This the Court failed to do.

XI. The decision of the Court is against the weight of the evidence.'

The remaining purported grounds of appeal, viz I, II and III, shall be set out immediately before the submissions urged in their support are summarised.

The submissions (summarised)

Regarding purported grounds I, II and III

[12] Grouped together by Mr Cave for purposes of his written argument, purported grounds I, II and III read as follows:

> 'I. [The Judge] erred in finding that the following statement in the Witness Statement submitted by and on behalf of [Mr Caruso]: "*I did not knowingly sign the purported agreement and was unaware of the existence of [the purported agreement] until I was served with the Claim filed by [Mr Atkinson] herein*.", amounted to a positive admission on the part of [Mr Caruso] that he had signed [the purported agreement].
>
> II. That the finding that [Mr Caruso] had made an admission of signing [the purported agreement] was in direct contradiction to Mr Caruso's pleadings and all other evidence offered by him in the proceedings including the very statement on which the Court relied as indicative of an admission and was without premise.
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> III. That the use of the qualifier, "knowingly" was merely an attempt by Mr Caruso to expand his Defence to include a situation where he may have legitimately signed some other document with full knowledge of its contents but that his signature may have been copied or otherwise reproduced and placed on the document in issue and the court erred in concluding that his use of the word amounted to an admission to signing the disputed document. Further, Mr Caruso's assertion in the very sentence the Court relied upon as amounting to an admission that he (Mr Caruso) was unaware of the existence of the purported agreement prior to being sued by [Mr Atkinson] is inconsistent with a finding by the Court that he admitted to signing it, albeit not knowingly.'

As should be manifest immediately I and II above are read, they are not grounds of appeal as such but mere argument in purported support of the complaint which is the subject of ground I.

[13] Mr Cave recognised as primary in this appeal the issue whether the Judge erred in finding that Mr Caruso had admitted that he had signed the purported agreement. The Judge, he went on to submit, had erroneously interpreted para 16 of Mr Caruso's witness statement by converting a denial into an admission or, which was the same thing, drawing a positive conclusion from a negative premise. The interpretation, said Mr Cave, was in violent conflict not only with the rest of the paragraph but also with (a) the rest of the evidence adduced by Mr Caruso and his witness and (b) his pleadings in the claim. He cited paras 6 to 14 of Mr Caruso's witness statement. He attached importance to the fact that Mr Caruso ventured no explanation of the circumstances under which he supposedly signed the purported agreement.

[14] Mr Bennett, for Mr Atkinson, relied entirely on his written submissions, which like Mr Cave, he prefaced with the acknowledgment that the issue of primary importance in the present appeal is whether the Judge erred in finding that Mr Caruso admitted to having signed the purported agreement. He contended that the Judge did not so err and quoted paras 10, 11, 15 and, in part, 16 of her judgment with tacit approval. Citing the judgment of this Court in *Hoy and anor v Awe*, Civil Appeal No 2 of 2006 (judgment delivered on 27 October 2006), at para 4, he contended that it was settled law that an appellate court will not interfere with a finding of fact of a judge below where such finding is based on the credibility of a witness. The finding here under attack was, he argued, such a finding and this Court ought not to interfere with it. At para 9 of his written submissions, he stated:

> 'It is submitted that by Paragraph 16 of his witness statement [Mr Caruso] was unequivocally stating that he was not aware or conscious of the fact that he was signing [the purported agreement]. This expression does not support his pleadings where he averred that he did not sign [the purported agreement].'

Discussion

[15] As I see it, the issue whether Mr Caruso admitted in his witness statement that he signed the purported agreement, is not only, as both counsel suggested, of primary importance in the present appeal but also determinative thereof.

[16] For my part, with the greatest respect to Mr Cave, I can see nothing in the argument presented on behalf of the appellant in purported support of ground I. I consider that Mr Caruso has not succeeded in showing that the Judge wrongly interpreted Mr Caruso's pertinent statement at para 16 of his witness statement. When Mr Caruso there stated that he did not knowingly sign the purported agreement he was saying in plain ordinary English that he may have signed it without knowing, ie realising, that he was doing so. That was to retreat several steps from the strong position taken by him at the pleading stage. That position, stated at para 11 of the Amended Defence, was, first, that he had never entered into the purported agreement or any other any agreement, written or oral, with Mr Atkinson and, secondly, that the signature on the purported agreement had not been put there by him (in his somewhat inapt language, 'was not made by him'.) Mr Caruso was now placing himself in a new position which even I, from the relatively far-removed vantage point of an appellate judge, am unable conscientiously to describe as strong. In assessing the weight of this piece of evidence, for the said pertinent statement at para 16 was nothing less than evidence, the Judge had the inestimable advantage over this Court of having been able to observe the demeanour of Mr Caruso in the witness box. She obviously attached great weight to that statement, regarding it as a costly, nay unaffordable, admission. This was a judge who, though relatively young, can hardly be called inexperienced. I hesitate to think that, with her not inconsiderable experience in civil trials, she would have made the relevant assessment and reached the conclusion in question, ie that the case for Mr Caruso could not survive the pertinent admission, with no regard whatever to the respective credibility (based on, *inter alia*, the factor of demeanour) of Mr Caruso and Mr Atkinson. In those circumstances, I am not prepared to interfere with her decisive interpretation of Mr Caruso's evidence that he had not knowingly signed the agreement as an admission which he could ill-afford to make. I

accept as correctly stating the law, the following passage from the judgment of Carey JA in *Hoy's* case, at para 4:

> 'The approach of an appellate court to an appeal on the facts is not in doubt, and has been articulated in a number of cases, including *Watt (or Thomas) v Thomas* [1947] AC 484; *Benmax v Austin Motor Co Ltd* [1955] 1 All ER 326; *Industrial Chemical Co (Jamaica) Ltd v Ellis* (1982) 35 WIR 363. The principles to be derived from these cases counsel caution on the part of an appellate court in respect of findings of fact. Where the finding is based on the credibility of a witness, that is, on perception, then an appeal court ought not to interfere.'

As I have already stated above, I consider that the Judge's interpretation of Mr Caruso's statement in para 16 must have been inextricably linked to her observation of his demeanour and overall credibility. It is inconceivable that she would have arrived at such an interpretation, and accorded to it the significance which she did, had she formed the view that he was a credible witness.

[17] As regards the argument advanced as ground II, that the finding of an admission on the part of Mr Caruso was in contradiction to his pleading and the rest of the evidence adduced by him, it is plain from the judgment that the Judge was not blind to that. She obviously made her pertinent finding fully aware of the contradiction and, in my view, she was quite entitled to do so.

[18] The contention presented as ground III can fare no better. The words 'I did not knowingly sign the purported agreement' are too plain. To argue that, in using them, Mr Caruso really meant to say that he may have legitimately signed some other document with full knowledge of its contents but that his signature may have been copied or otherwise reproduced and placed on the purported agreement is to engage in distortion of their clear meaning. That meaning, as I have already suggested above, is that he may have signed the purported agreement without knowing, ie realising that he was doing so, an altogether different thing. In one interpretation, Mr Caruso is saying that he may have

signed some other document: in the other, he is admitting, in terms, that he may have signed the purported agreement itself. The Judge fastened upon that admission and used it in a manner which was, in my view, entirely permissible having regard to her advantage of having been able to see and hear Mr Caruso (and Mr Atkinson for that matter) in the witness box.

[19] At one point in his attack upon the Judge's finding of the crucial admission by Mr Caruso, Mr Cave said that it could be 'philosophically described as a false conversion'. Elaborating, he stated that she wrongly converted a denial into a positive admission. I prefer to say that the Judge made of a partial denial that which she was fully at liberty to make of it, availing herself, in the process, of all the advantages enjoyed by her as judge at first instance.

[20] The rejection of ground I effectively pulls the rug from under the other grounds which counsel sought to argue before this Court. Those grounds, viz IV, V, VI, IX and XI, which have been reproduced above, either assume the success of, or are otherwise materially subsidiary to, ground I and can therefore do precious little for Mr Caruso's appeal in circumstances where that ground has failed.

Disposition

[21] I would, for the reasons given above, dismiss the appeal, confirm the orders of the Judge and order that Mr Atkinson have his costs, to be agreed or taxed. I would further order (a) that the costs order be provisional in the first instance but become final in ten days from the due issue of this judgment to counsel for the parties by electronic means, unless Mr Caruso shall apply for a different order during such period and (b) that, in such

an event, the matter of costs be determined by the Court on written submissions to be filed and delivered by the parties in seven days from the date on which such application shall have been made (both parties being subject to one and the same deadline date).

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SIR MANUEL SOSA P

BLACKMAN JA

[22] I have read, in draft, the judgment of the learned President, and concur in the reasons for judgment given, and the orders proposed, therein.

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BLACKMAN JA

DUCILLE JA

[23] I have had the benefit of reading, in draft, the judgment of the President in this appeal, and I concur in the reasons for judgment given, and the orders proposed, therein.

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DUCILLE JA