

IN THE SUPREME COURT OF BELIZE A.D.2013

CLAIM NO. 20 OF 2002

BETWEEN

MARIE WAGNER

CLAIMANT

AND

**MODESTO FIGUEROA
FRANK MILES
MARGUERITE MILES**

**FIRST DEFENDANT
SECOND DEFENDANT
THIRD DEFENDANT**

Before: Hon. Mde. Justice Rita Joseph-Olivetti

Appearances: Mr. Phillip Palacio of W.H. Courtenay & Co. of counsel for the Claimant.

Mrs.Deshawn Arzu Torres of Youngs Law Firm of counsel for the Second and Third Defendants.

No appearance by the First Defendant.

Judgment

Dated: 2013, 28 October

(Hearing dates -3, 11 Oct 2013)

(Property law - agreement for sale of land- whether breach by buyer or seller- whether seller acted fraudulently by conveying land subject matter of the contract or part thereof to third parties- whether third parties had notice(actual or constructive) of buyer's equitable interest in the property by the fact that a case had been instituted in the Supreme Court by buyer against seller to enforce the agreement - whether third parties had made all usual and proper inquires in

accordance with ordinary conveyancing practice into seller's title - Law of Property Act Cap.190 .s. 55 . considered)

1. **Joseph- Olivetti J:** - Mrs. Marie Wagner hopes this second time around to obtain justice on a claim she filed as long ago as February 2002 and so become owner of apparently choice land on the seafront at Salt Creek, Ladyville Belize District, Central America. By her claim, Mrs. Marie Wagner seeks as against Mr. Modesto Figueroa specific performance of an agreement made in 26 March, 1990 for sale and purchase of 3 acres of land at Salt Creek , and as against Mr. and Mrs. Miles (“the Miles”) a declaration that the Deed of Conveyance dated 26 February 1992 between Mr. Figueroa and the Miles is subject to her beneficial interest in the land as the Miles are deemed to have had constructive notice of Mrs. Wagner’s interest in the land by virtue of the filing of an earlier claim by Mrs. Wagner against Mr, Figueroa for specific performance of the same contract.

2. **Main Issues arising**

- a) Whether there was a valid and enforceable contract for sale and purchase of land by Mr. Figueroa to Mrs. Wagner; and if so whether Mr. Figueroa breached that contract;
- b) Was there fraud by Mr. Figueroa in transferring the property at Salt Creek to the Miles; and if so whether the Miles had constructive notice of fraud by virtue of the Writ of Summons in Supreme Court Action No. 336 of 1991- Marie Wagner v. Modesto Figueroa(“the First Claim”).

3. Mr. Figueroa was served with these proceedings. At first he was represented by Ms.Loïs Young Barrow, the same lawyer who represented the Miles in their land transaction and he and the Miles entered a joint defence on 15 December 2002.He also jointly made disclosure with them

on 9 January, 2003. However, in February 2008 and April 2012 Ms Young Barrow ceased to act for Mr. Figueroa and the Miles respectively ¹ and although the Miles retained new lawyers in mid -2013, Mr. Figueroa did not and has taken no further part in this action.

4. I find that as against Mr. Figueroa that Mrs. Wagner is entitled to some relief, the exact nature of which, however, must await my determination of the issues raised between Mrs. Wagner and the Miles, as he has failed to defend the claim.
5. Having regard to his defence Mr. Figueroa has admitted that he had an oral contract with Mrs. Wagner to sell her 3 acres of land at Salt Creek. However, he says although it was part of a 30 acre lot at Salt Creek that this land was in a different location from that which he subsequently sold to the Miles. He said further that the price was \$6000.00 of which Mrs. Wagner paid \$4000.00 and that she was to provide half of the costs of survey which she did not. And further that Mrs. Wagner did not pay the balance of the purchase price and therefore she by those omissions rescinded the agreement.
6. I referred to his Defence as Mr. Figueroa is bound by the admissions made as to the contract and no issue arises on its existence and enforceability as between him and Mrs. Wagner.
7. **Whether there was a valid and enforceable contract for sale and purchase of land by Mr. Figueroa to Mrs. Wagner and whether Mr. Figueroa breached that contract;**
8. The law. **Section 55 of the Law of Property Act Cap. 190** (“the LPA”) provides: “55.-(1) **No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some**

¹ I feel obliged to say that Ms. Young-Barrow save for writing a letter to the Registrar to advise that she had ceased to act did not apply to have herself removed from the record pursuant to CPR 2005 r62 and that neither of her clients retained new lawyers at the time. The I the Mills did so as late as this year. Thus on the record of the court Ms Young –Barrow remained as their representative and this appears to have caused some constraints on the proceedings. . The practice of simply advising the Registrar, I have encountered before, and must reiterate that it is not condoned by the rules and militates against the just management of the cases.

memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised. (2) This section shall apply to contracts whether made before or after the commencement of this Act and does not affect the law relating to part performance, or sales by the court". Emphasis added.

9. I also accept as good law the learning on this as explained in the **Commonwealth Caribbean Property Law**, Gilbert Kodilinye 3rd edn as cited by Mr. Philip Palacio, learned counsel for Mrs. Wagner. This is to the effect that the written memorandum must contain a description of the parties and the land, the price, other terms and the signature of the party to be charged.
10. Mrs Miles who gave evidence on behalf of the Miles could not speak to the existence or otherwise of the contract itself or to the surrounding circumstances as she and her husband, Mr. Frank Miles, played no part in those negotiations. However, having regard to the law, Mrs. Deshawn Arzu-Torres learned counsel for the Miles contend that the contract is unenforceable as it does not meet the requirement of s. 55 of the LPA.
11. I was impressed with Mrs Wagner who can be compared with the incomparable Ms. Flite, whose life became entangled with those who waited aeons for the conclusion of Jarndyce v Jarndyce (surely the most famous fictional Chancery suit in all English Literature). Although she was rendered almost blind by glaucoma and cataracts those bodily ills did not impair her mental ability one whit and this 87 years old lady acquitted herself marvellously in the witness stand.
12. Mrs. Wagner at all relevant times resided in the United States of America and she met Mr. Figueroa on one of her visits home to Belize. She entered into an oral agreement with him on or around 26 March, 1990 for the sale and purchase of three (3) acres of land at Salt Creek for \$10,000.00. (I also accept her explanation that originally the agreement was for 5 acres but

that her former lawyers lost some of her documents and clearly this claim (she had filed the First Claim in 1991 for 5 acres) proceeded on what was available to her by way of documentation. I note too that by the time the statement of claim was filed in the First Claim that what was alleged was a contract for 3 acres.

13. I also find that the land was a larger part of lands owned by Mr. Figueroa situate at Salt Creek comprised in a Deed of Conveyance dated 30 April 1959; that Mr. Figueroa actually took Mrs. Wagner there by boat to see the area of land he was selling to her as there were no roads at the time. (I accept her evidence that she returned there several times thereafter with her friends).
14. I also accept Mrs. Wagner's evidence that the parties agreed that Mr. Figueroa would conduct a survey at his own costs to enable them to complete the sale. And I find that Mrs. Wagner paid him \$2000.00 on account on 26 March 1990 (see Claimants 'documents bundle Tab 1) and that over time she eventually paid Mr. Figueroa monies on account amounting to \$9,800.00 and that she was always ready able and willing to complete the purchase once he had done the survey.
15. The agreement, that is its salient parts- land, price, parties - is sufficiently documented by the several receipts relied on which were all signed by Mr. Figueroa. One in particular (receipt dated May 10 1990) actually set out the measurement of the sea frontage she was to have. I therefore find that they constitute sufficient memorandum in writing signed by the person to be charged, that is, Mr. Figueroa to evidence a contract for the sale and purchase of land for the purposes of s.55of the LPA. And, contrary to the submission of Mrs. Arzu-Torres the law does not require both vendor and purchaser to sign such a memorandum as s.55 specifically provides for the memorandum to be signed "**by the party to be charged.**"

16. Mr. Figueroa never carried out the survey although by letter of 15 April 1991 he promised to do so by 15 May 1991 blaming financial difficulties for the delay. Even after she filed the First Claim Mrs. Wagner agreed in June 1993 to pay half of the costs of the survey although she did not actually appear to have done so.
17. On 29 November 1991 Mrs. Wagner's then lawyers Messrs. Musa & Balderamos, instituted the First Claim by Writ of Summons, (claim No 366 of 1991) against Mr. Figueroa. The court file shows that: -
- a) the writ was endorsed with this claim-"THE PLAINTIFF'S CLAIM is for specific performance of an agreement between the Plaintiff and the Defendant made in or about March 1990 for the sale of 5 acres of land situate in the Salt Creek Area of Belize;
 - b) the statement of claim which was not filed until January 2004 alleged an agreement in writing for 3 acres of land at Fowler situate within the boundaries of Salt Creek Works, Ladyville, Belize District part of land comprised in a Deed of Conveyance dated 30 April, 1959.
18. It is not clear exactly what happened in the course of the First Claim save that in March 2007 Mrs. Wagner was represented by new lawyers, Messrs Fred Lumor and what is certain is that the action was not prosecuted to finality and that no judgment was ever pronounced in favour of Mrs. Wagner.
19. Finally, in what seemed a last ditch effort to get him to conclude the sale Mrs. Wagner retained surveyors, Messrs. Bautista and Bautista in March 1999 to do a title search and survey of the land and paid them a deposit of \$600.00. They reported in writing dated 22 March 1999 as to their title search to the effect that Mr. Figueroa's land comprised in the Deed dated 30 April

1959 consisted of a plantation known as Fowler within the boundaries of Salt Creek of 9.3 acres of land with a sea frontage of 800.24 feet, that on 3 May 1989 by written agreement he had agreed to sell part to Mr. Eric Smith and conveyed land to him on 25 January 1991 and then in February 1992 he had conveyed 5 acres to the Miles. (The Claimant's documents bundle shows the written agreement between Mr. Figueroa and Mr. Smith dated 3 May 1989 and evidenced that Mr. Smith prudently recorded it in the Land Registry on 26 October 1989).

20. Accordingly, perceiving herself to have been deprived of the benefits of her contract Mrs. Wagner retained the services of new lawyers, Messrs. Barrow & Williams and on 27 February 2002 Ms. Tania Moody on behalf of Mrs. Wagner filed this second action against Mr. Figueroa and added the Miles as Defendants.

21. On the basis of Mrs. Wagner's evidence supported by her documentation, I find that Mrs. Wagner had a valid and enforceable contract with Mr. Figueroa and that he breached that contract by not completing the survey, and acted fraudulently in further breach by disposing of the land the subject matter of the contract or part thereof to the Miles in 26 February 1992. There is no question of Mrs. Wagner having rescinded the contract as in any event time was not of the essence and Mr. Figueroa never served her notice making time of the essence as is required by law.

22. **Was there fraud by Mr. Figueroa in transferring the property at Salt Creek to the Miles?**

23. The Law. And, **Halsbury's Laws of England vol 16 4th edn. para 1219** explains- "Nature of fraud. The court has never ventured to lay down as a general proposition what constitutes fraud. Actual fraud arises from acts and circumstances of imposition. It usually takes the form of a statement of what is false or a suppression of what is true. The withholding of information (suppressio veri) is not in general fraudulent unless there is a

special duty to disclose it.... The partial statement of fact and the withholding of essential qualifications may make that which is stated absolutely false and bring it under the head of suggestio falsi".

24. We must now look to Mrs Miles' evidence as to the involvement of the Miles in this action. Again, I found Mrs. Miles to be a candid witness and accept her evidence as to what transpired between them and Mr. Figueroa and what steps they took to obtain her title. Mrs .Wagner could not dispute it as she had no knowledge of what transpired between Mr. Figueroa and the Miles unless in so far as there were public records of it.
25. On 2 July 1990 Mr. Figueroa entered into a written agreement for sale and purchase with the Miles of 10 acres of land at Salt Creek Area. He initially told them that he had thirty (30) acres in that area but when they subsequently conducted a survey they discovered that he had 10 acres of which he had already conveyed a part thereof to Mr. Eric Smith. The Miles paid the full purchase price of \$10, 000.00 to Mr. Figueroa and they completed the sale for 5 acres instead of 10 as he did not have 10 acres remaining to give to them. Their conveyance dated 26 February 1992 was duly executed and registered in the in Deeds Book Volume 80f 1992.
26. Prior to completion the Miles employed lawyers to conduct searches and to handle the transaction for them. There is no evidence to show that Mr. Figueroa ever informed the Miles of his contract with Mrs. Wagner and the Miles had no personal knowledge of the First Claim at that time. I accept Mrs. Miles evidence that they only learnt of the First Claim during these proceedings.
27. On the foregoing findings and having regard to the law, Mr. Figueroa committed fraud by selling to the Miles land or part thereof which he had contracted with Mrs. Wagner to sell to her and for which he had already received part-payment. He deliberately omitted to inform the

Miles of that contract and by his fraud enabled them to purchase the land or part thereof of which he had previously agreed to sell to Mrs. Wagner and to obtain title to it. However, it is patent from the evidence that the Miles had no personal knowledge of, and did not participate in, the fraud in any way whatsoever although they undoubtedly benefitted from it. However, one final question has to be addressed.

28. **Did the Miles have constructive notice of fraud as alleged i.e. by virtue of the First Claim?**

29. What constitutes constructive notice in these circumstances? The Law. **Megarry and Wade Law of Real Property** 7th edn at **para. 8-018** explains that a purchaser would be able to plead absence of notice only if he had made all usual and proper inquiries in accordance with ordinary conveyancing practice and had still found nothing to indicate the equitable interest. That a purchaser would be deemed to have had constructive notice of a fact if: - 1.he or she had actual notice that there was some incumbrance and a proper inquiry would have revealed what it was and 2. He/she deliberately abstained from inquiry in an attempt to avoid having notice, or 3. Omitted by carelessness or for any other reason to make inquiry which a purchaser acting on skilled advice ought to make and which would have revealed the incumbrance.

30. See also **Halsbury's Laws of England** 4th edn vol 16 para 1322 and 1324 and **Bailey v Barnes 1894 1 Ch.25** (cited by Mr Palacio) and **Halsburys Laws** op.cit para 767 cited by Mrs Arzu –Torres’ -“**Constructive notice in relation to dealings with land. A purchaser of land without actual knowledge, by himself or his agent, of a matter prejudicially affecting his vendor's title may yet be regarded as having constructive notice of it. Constructive notice has been defined as the knowledge which the courts impute to a person upon a**

presumption of the existence of the knowledge so strong that it cannot be allowed to be rebutted, either from his knowing something which ought to have put him upon further inquiry or from his wilfully abstaining from inquiry to avoid notice The doctrine of constructive notice is inapplicable ,as a rule ,to systems of registration in relation to transactions where priority and notice are governed by priority in, or the fact of, registration; thus a subsequent purchaser or incumbrancer who gains priority by registering first does not lose priority by actual or constructive notice, but by fraud”.

31. Mrs. Wagner contends that the Miles are to be taken to have had constructive notice of Mrs. Wagner’s beneficial interest in the land and so Mr. Figueroa’s fraud as if they through their agents had conducted a search in the Supreme Court Registry they would have been made aware of the First Claim and so be put on notice of the need to make further inquiry into Mr. Figueroa’s title.
32. . Did the Miles through their agents, i.e their lawyers and the agents appointed by their lawyers, to conduct the searches, have all usual and proper inquiries made in accordance with ordinary conveyancing practice? It cannot be gainsaid that when is dealing with unregistered land as this appears to be as no certificates of title under the Registered Land Act have been alluded to, that ordinary conveyancing practice also dictates a search in the Supreme Court Registry to ensure that the land one is about to buy is not the subject matter of any adverse claims. Moreover, by s.103 LPA a Supreme Court judgment is registrable and once that is done by law it creates an encumbrance on land of the judgment debtor, so a search would also reveal registrable judgments.
33. The Mills’ agents conducted a title search in the Land Registry and conducted a physical survey of the land but Mrs. Miles could not tell us whether a search in the Supreme Court Registry had

been made on their behalf. One is therefore left to conclude that that no such search had been undertaken.

34. However, the further question to be answered is, if they had done so would the existence of the First Claim be such as to reveal an encumbrance or to put them on notice to make further inquiries which would have revealed the existence of the contract and so the fraud.

35. I note Mrs Arzu Torres' argument that the Writ of Summons in the First Claim did not bring any cause of action against the Miles and by the time the statement of claim was filed the Miles had already become owners of the land. However, the fact that the Miles were not parties to the First Claim does not preclude them from being held to have had constructive notice of it.

36. In my judgment, given the entire circumstances especially the fact that Mr.Figueroa had dishonestly told the Miles that he had 30 acres in that area which they found out to be false and the existence of the sale to Mr. Smith thus whittling down what was available that they would have been obliged to make inquiries about the alleged contract he had with Mrs. Wagner as they had knowledge that he only had about ten acres of land at Salt Creek and had already sold 2.94 acres to Mr. Smith so from what lands at Salt Creek was the land he had allegedly agreed to sell to Mrs. Wagner to come from? Had they done so I have no doubt that they would have discovered the fraud.

37. The Miles are thus fixed with constructive notice of Mrs. Wagner's beneficial interest in the land under her contract of sale and of the fraud and so their title is subject to her equitable interest and can be set aside. **Halsbury's Laws of England** vol 16 4th edn explains how that equitable interest arises- **"Upon signing of a contract for the sale of land a change takes place in the equitable, but not the legal interest, in the land. At law the purchaser has no right to the land, nor the vendor to the money, until the conveyance is executed .In equity, however, if the contract is**

one of which specific performance would be ordered, the beneficial interest passes to the purchaser immediately on the signing of the contract and thereupon the vendor, in regard to his legal ownership and possession of the land, becomes constructively a trustee of the purchaser. As such a trustee he is bound to take reasonable care of the property, since the purchaser is entitled to have it handed over to him on completion in the same condition as when he entered into the contract.”

38. Disposition

It is always difficult to have to make a decision whereby one of two innocent parties must suffer. But I see no alternative. Accordingly for the foregoing reasons, I give judgment for Mrs. Wagner. As against Mr. Figueroa, Mrs. Wagner is entitled to judgment on her claim for specific performance. As against Mr. and Mrs. Miles she is entitled to a declaration that the Deed of Conveyance dated 26 February 1992 is subject to Mrs. Wagner’s beneficial interest in the lands and an order that the Registrar of Lands cancel the deed forthwith. Further, Mrs. Wagner and the Mills are to carry out an equitable survey of the lands described in the said Deed of Conveyance at Mrs. Wagner’s costs to have 3 acres of that land delimited and conveyed by Mr. Figueroa to Mrs. Wagner and the remaining two acres to the Miles. In so doing they are to have regard to the sea frontage to be given to Mrs. Wagner as set out in the receipt dated May 10 1990. The Registrar is to execute both conveyances on behalf of Mr. Figueroa in his absence. Both parties are to bear the costs of their respective conveyances.

39. The court always has discretion in relation to the award of costs and I think it just in all the circumstance that Mr. Figueroa bear the costs of both these innocent parties -Mrs. Wagner and the

Miles. Accordingly, Mr Figueroa is to pay to Mrs. Wagner and to the Miles their prescribed costs in accordance with CPR r. 65.5 based on the default value.

Rita Joseph-Olivetti

Supreme Court Judge Ag.

Belize CA