

IN THE COURT OF APPEAL OF BELIZE AD 2015

CIVIL APPEAL NO 21 OF 2013

**ERNEST MARTINEZ JR
GENECO MARTINEZ**

Appellants

v

GAYBURN MARTINEZ

Respondent

BEFORE:

The Hon Mr Justice Sir Manuel Sosa
The Hon Mr Justice Samuel Awich
The Hon Madam Justice Minnet Hafiz-Bertram

President
Justice of Appeal
Justice of Appeal

M Williams for the appellant.
E Flowers SC for the respondent.

8 June and 14 October 2015.

SIR MANUEL SOSA P

[1] On 8 June 2015 I agreed with the other members of the Court that the appeal should be dismissed and the orders of the trial judge confirmed, the respondent to have his costs, to be agreed or taxed, unless the appellants filed submissions in writing for a contrary order as to costs in 10 days from 5 June 2015. Following the filing of such submissions in writing, I have read, in draft, the judgment of my learned Sister, Hafiz

Bertram JA, and wish only to say that I concur in the reasons for judgment and for refusing the application for a contrary costs order contained in such draft judgment.

SIR MANUEL SOSA P

AWICH JA

[2] I concur.

AWICH JA

HAFIZ-BERTRAM JA

Introduction

[3] This is an appeal against the decision of Arana J granting a declaration to Gayburn Martinez (“the respondent”) that he is the registered proprietor of a parcel of land in Dangriga South Registration Section, Block 31, Parcel 1817 (“the property”). Also, an order was made for Ernest Martinez Jr and Geneco Martinez (“the appellants”) to vacate the property. Damages for trespass was assessed at \$12,400.00. The learned trial judge also ordered that costs be paid by the appellants which is to be agreed or assessed.

[4] On 8 June 2015, this Court heard and dismissed the appeal. The Court ordered that the orders of the trial judge are confirmed and for the respondent to have his costs to be agreed or taxed unless the appellant file written submissions in writing for a contrary order as to costs in 10 days. On 17 June 2015, the appellant filed written submissions and urged that the costs order made be removed or varied. These are my reasons for dismissing the appeal.

Grounds of appeal

[5] The appellants appealed the decision of the trial judge on the following grounds that the trial judge:

1. Erred in law when she held that the lease came to an end in 1993 and that was the end of the appellants legal and equitable interest in the land;
2. Erred in law when she held that there was no overriding interest in existence belonging to the appellants at the time title was issued to the respondent;
3. Failed to “award any, or any sufficient significance to the fact of the Defendants (appellants) actual occupation of the land at the time of the purported transfer of title to the Claimant’s (respondent) predecessor in title, or to the fact that they had been in receipt of the rental income from the said land”;
4. Failed to appreciate and give full legal effect to the intention of the parties as so contained and expressed in the Deed of Assignment dated 30 June 1983 and made between Reconddev, as vendor, and Juanita Martinez, as purchaser, especially in the context, and against the background, of the underlying transaction which it was meant to reflect.”

5. Erred in law and fact when she held “apart from the bald assertion of a mistake in the written submissions, there is absolutely no evidence of a mistake to support this claim”.

[6] The relief sought was to quash the whole decision of the trial judge.

Chronology of Events

[7] The chronology of events in relation to the property are:

1. 17 February 1973 - the lease property was granted to Theodora Noralez for 20 years.
2. Noralez mortgaged the leasehold property to Reconddev in 1974 and made a further charge in 1975. Noralez defaulted on the loan payments;
3. 21 April 1983 - a receipt was issued by Reconddev to Juanita Martinez for payment of \$3,000.00;
4. On 30 May 1983, the Commissioner of Lands issued a notice of cancellation of the lease to Noralez;
5. 20 June 1983 – Receipt issued by Reconddev to Juanita Martinez for payment of \$3,000.00 towards repayment of housing loan;
6. June 1983 – GOB gave consent to Reconddev to sell the residue of the Noralez leasehold interest which they held as security;
7. 30 June 1983 – Deed of Assignment between Reconddev and Juanita Martinez;
8. 29 October 1995 – Civil Suit No. 265 of 1995 - Geneco Martinez v Ernest Martinez Sr., Dangriga Magistrate’s Court. By consent it

was agreed that the defendant vacate the property. Plaintiff to collect rent and occupy property;

9. Lease of property expired in 1993;
10. 6 January 2000 – Land Purchase Approval Form - Application of Ernest Martinez Sr. to purchase property;
11. 19 March 2000– Minister’s Fiat Grant No. 178 of 2000 issued to Ernest Martinez Sr.
12. 14 May 2001 – Last Will of Ernest Martinez Sr.
13. 31 March 2005 – Death of Ernest Martinez Sr.
14. On 14 January 2009, Dangriga South, Stann Creek, Block 31 (the location of the property) was declared a compulsory registration section;
15. 8 June 2010 – Grant of Probate in Estate of Ernest Martinez Sr. to Consuelo Aguilar;
16. 27 July 2010 – Land Certificate issued to Gayburn Martinez Jr.

Grounds 1 and 4

Whether the lease ended in 1993 resulting in the termination of the appellants legal and equitable interest in the land

[8] The evidence before the Court is that on 30 May 1983 the Commissioner of Lands issued a notice of cancellation of the lease to Noralez for breach of its conditions. Since the lease was cancelled there could not have been a subsequent assignment of the unexpired term of the lease. The appellants therefore, had no rights to the property when they took possession by virtue of the Deed of Assignment. In the event I am not

correct on this view, the following is my alternative reasons for concluding that the grounds of appeal were without merit.

[9] The learned trial judge at paragraph 14 of her judgment held that the appellant's lease ended in 1993 which ended the appellants legal and equitable interest in the land. The appellant at ground 1, submitted that the trial judge erred in law when she so held. At ground 4, the appellants submitted that the trial judge failed to appreciate and give full legal effect to the intention of the parties as so contained and expressed in the Deed of Assignment dated 30 June 1983. Mr. Williams for the appellants submitted that the trial judge fell into error for the following reasons:

- (1) The Deed expressed a clear intention to convey the property on purchase although not registered, for five reasons:
 - (a) there were two receipts in evidence dated 21 April 1983 and 20 June 1983 for the total sum of \$6,000.00. One of the receipts made specific reference to the purchase of the property;
 - (b) the Deed mentioned a consideration only of \$3,319.00. Also, Ernest Martinez Sr. paid only \$1,570.00 for the property and Juanita Martinez paid in excess of \$6,000.00 for her transfer;
 - (c) lease to Theodora Noralez was cancelled on 30 May 1983 indicating that Recondem was in the process of a foreclosure and selling the property as shown by the evidence of Jenico Martinez – paragraphs 6 -13;
 - (d) the language used in the document, that is, 'Vendor' and 'Purchaser' suggested a transaction to convey ownership of property coupled with the fact that the transfer is stated to be upon trust for the minor children of the Purchaser;

- (e) the deed is expressed to have been prepared by Juanita Martinez, a lay person without independent advice.

[10] Alternatively, the appellant submitted that the Deed merely conferred a lease which came to an end 20 years later in 1993. As such, since the appellants were paying taxes and collecting rent from the property under the aegis of a Court Order, this accorded them the status of tenants from year to year. Further, that this interest subsisted up until the time when the claim was brought. Mr. Williams relied on **section 54 of the Registered Land Act, Chapter 194**; paragraphs 8205 and 8206 of **Redman's Law of Landlord and Tenant**; **Kelly v Patterson**(1874) LR 9 CP 681.

[11] The respondent in reply to grounds 1 and 4 submitted the following:

- (1) The security which Theodora Noralez gave to Reconddev was the unexpired term of the lease she obtained in 1973;
- (2) Reconddev could not transfer more than what it received and held as security;
- (3) The recitals in the Deed of Assignment states that Theodora Noralez charged the leasehold interest in 1974 and 1975;
- (4) The Deed of Assignment did not express any clear intention to convey the property on purchase;
- (5) The language used in the document did not suggest that the ownership of the property was being affected;
- (6) There was a clear transfer/assignment of the lease;
- (7) The cancellation notice dated 21 June 1983 did not indicate that Reconddev was in the process of foreclosure. The notice was from the Commissioner of Lands indicating that the lease was cancelled for non-fulfillment of the condition regarding development;

- (8) There is no evidence that the appellants were paying any rents to the Government of Belize especially since notice of cancellation was sent to Theodora Noralez in June 1983 – no protection provided by section 54 of the **Registered Land Act, Chap 194**.

Discussion

Was there an intention to convey ownership of property by the Deed of Assignment?

[12] The Deed is dated the 30 June 1983 and the parties are Reconstruction and Development Corporation (Recondev) and Juanita Martinez. It states that Recondev was the ‘Vendor’ and Martinez was the ‘Purchaser’. The property being purchased was **leasehold property** situated at Dangriga South Registration Section, Block 31, Parcel 1817. This is set out at Clause 7 of the Deed which states:

“7. The Vendor has agreed with the Purchaser for the sale to her of the said leasehold property.”

[13] There is no doubt that Juanita Martinez purchased the leasehold interest of the property as shown by clause 7. Further, the language used in the document, ‘Vendor’ and ‘Purchaser’ cannot be read in isolation. Mr. Williams argument that this suggest a transaction to convey ownership of property coupled with the fact that the transfer is stated to be upon trust for the minor children of the purchaser cannot be accepted in the face of Clause 7 which speaks of “sale to her of said leasehold property.” Recondev did not have ownership of the property and could not convey the property to Martinez.

[14] The leasehold property held by Theodora Noralez was the property of the Government of Belize (GOB). On 17 February 1973, GOB leased the said property to **Noralez** for a **term of 20 years**. On 17 February 1973, Noralez charged the leasehold property by way of a legal mortgage as shown by clause 2 of the Deed. On 15

February 1975 Noralez made a further charge on the leasehold property by way of a legal mortgage (clause 3 of the Deed). Noralez defaulted on payments and at that time Recondév was representing GOB. Recondév obtained the consent of GOB to sell the residue of the leasehold property to Martinez. Clause 6 of the Deed states: "The Consent of the Minister of Natural Resources as required has been obtained by the Vendor."

[15] When Martinez purchased the leasehold interest from Recondév, she received the unexpired term of the leased property. This is shown at page 2 of the Deed of Assignment which states:

NOW THIS DEED WITNESSETH as follows:

1. In pursuance of the said agreement and in consideration of the sum of THREE THOUSAND THREE HUNDRED AND NINETEEN & 70/100 dollars (\$3,319.70) this day paid by the Purchaser to the Vendor (the receipt of which the Vendor hereby acknowledges) the Vendor as mortgagee under the mortgage and of all other powers enabling him **hereby assigns unto the Purchaser ALL AND SINGULAR the property described in the Schedule hereto TO HOLD the same unto the Purchaser in trust for the Beneficiaries for all the residue now unexpired of the term created by the lease** subject to the agreements and conditions therein contained.

(emphasis added)

[16] The duration of the lease to Noralez was 20 years. The above excerpt shows that the unexpired term of the lease was sold to Martinez. The Deed of Assignment did not express an intention to convey the property on purchase. As such, the trial judge was correct when she held that the lease came to an end in 1993.

Alternative argument – tenants from year to year

[17] The appellants argument that they were tenants from year to year after the lease expired in 1993 was without merit. There was no evidence before the trial judge that the appellants were paying rent to GOB and as such they could not rely on section 54 of the **Registered Land Act, Chap 94**.

Conclusion

[18] Accordingly, (i) the appellants had no rights to the property when they took possession by virtue of the Deed of Assignment; and (ii) Alternatively, the learned trial judge was correct in holding that the lease came to an end in 1993 bringing to an end the appellants legal and equitable interest in the land. The trial judge correctly interpreted the intention of the parties as expressed in the Deed of Assignment dated 30 June 1983. These grounds were without merit.

Grounds 2 and 3

Whether there was an overriding interest in existence belonging to the appellants at the time title was issued to the respondent.

[19] The issue under ground 2 was whether the trial judge erred when she held that there was no overriding interest in existence belonging to the appellants at the time title was issued to the respondent. The appellants under ground 3 stated that the trial judge failed to give sufficient significance to the appellants **actual occupation** of the property at the time of the purported transfer of title to the respondent's predecessor in title and that they had been in **receipt of the rental income** from the property. He referred to paragraphs 13 and 14 of the judgment which states:

“13. In relation to the issue of overriding interest, I find that this is the strongest argument in favour of the Defendants' claim. It is clear from Section 31 of the Registered Land Act cited above that the law

states that the title to registered land is subject to the overriding interests as set out in that section, even though such interests are not recorded on the register. In his written submissions Learned Counsel for the Defendants sets out an excerpt on overriding interests from Gibson's Conveyancing Twenty First Edition, page 48 and 49, which I find particularly instructive:

“... The first point to observe is that the overriding interest is the right of the person in actual occupation, not the occupation itself. Second, the right must be a right of property, not a mere personal right (such as, for example, a right to sue damages for breach of covenant). Third, the rights are overriding interests even though the occupation is not such as to put any purchaser upon notice; hence it seems that a purchaser should enquire of everyone living in the property (even though quite clearly member's of the vendor's family or licensees) whether they claim any proprietary interest.

14. I find that the interest that the Defendants held in the property was an equitable interest by virtue of the Deed of Assignment between RECONDEV and their mother Mrs. Juanita Martinez in 1973. I fully agree with the submission of Learned Counsel for the Claimant that that Deed conveyed the residue of the leasehold interest in the property to Mrs. Martinez on trust for the Defendants and their sister. I also agree with the Claimant's submission that when the lease came to an end 20 years later in 1993, it was never extended or renewed by the Government of Belize so that was the end of the Defendants' legal and equitable interest in the land. The property reverted to the Government which proceeded, quite rightly, in my view, to issue the father of the [sic] [respondent] with Grant Fiat in

2000. There was therefore no overriding interest in existence belonging to the Defendants at the time that title was issued to the Claimant.”

[20] Mr. Williams submitted that the trial judge was in error for the following reasons:

- (i) The second named appellant had commenced proceedings against Ernest Martinez Sr. (the father of the respondent from whom he derives title) in an action for eviction in the Magistrate’s court;
- (ii) By a letter dated 18 August 2010, the Clerk of Court of the Stann Creek Judicial District stated that the case between *Geneco Martinez v Ernest Martinez* in a claim for eviction of the property was heard on 29 October 1995, whereby both parties agreed that the defendant, Ernest Martinez Sr. “will vacate premises where plaintiff Geneco Martinez is to collect rent from tenant Delone Jones. Upon tenant vacating, plaintiff is hereby allowed to occupy the said residence with immediate effect;”
- (iii) It was not a mere occupation by the appellants but the right of a person in actual occupation. It was also a right of property since the “Court Order declared the second-named appellant entitled to collect the rents derived from the property;”
- (iv) The evidence disclosed that Ernest Martinez Sr. requested the appellants permission to live at the property with them;
- (v) When Ernest Martinez Sr. and the respondent obtained title to the property, they were aware that the appellants were in actual occupation of the property and collecting rent from the lower portion. As a result their titles were subject to the overriding interest of the appellants, even though not noted on the register. See **Registered Land Act**, sections 26, 30 and 31 (g); **Gibson’s Conveyancing**, Twenty –First Edition, pages 47, 48 and 49;

- (vi) The respondent and his predecessor (Ernest Martinez Sr.) took their title subject to the unregistered incumbrance to the creation of which they had both been privy. See **Gibson's Conveyancing**, Twenty-First Edition, page 59.

[21] Learned counsel, Mr. Williams further submitted that the learned trial judge also erred when she held that since the lease was never extended or renewed by GOB, the property reverted to them (GOB) and there was no overriding interest in existence belonging to the appellants at the time title was issued to the respondent. He contended that the judge erred for three reasons: (a) the appellants remained in possession for at least 5 years (1995 to 2000) before title was issued to Ernest Martinez Sr. (respondent's father); (b) the respondent's father was evicted by virtue of a court order and the appellant remained in occupation and collected rent; and (c) the appellant paid taxes for the property and their names remained on the tax roll as evidenced by notice issued by Dangriga Town Council dated 11 March 2011.

[22] The respondent in reply contended that:

- (i) On 19 March 2000, Ernest Martinez Sr. obtained a Minister's Fiat Grant from GOB for the land;
- (ii) The appellants could not acquire any overriding interest in the property because the area was not declared until after the year 2000;
- (iii) Since the lease expired in 1993 and the appellants were not 'holding over' and paying any rents to GOB, they were trespassers on the land and had no rights within section 31(1) (g) of the **Registered Land Act** and;
- (iv) The lease that the appellants had would not have come within section 31(1) (d) of the **Registered Land Act, Chapter 194**.

The proceedings before the Magistrate's court

[23] There was no determination as to ownership of the property before the Magistrate's court. The claim for eviction of the respondent's father, Ernest Martinez Sr., before the Magistrate's court resulted in an agreement by the parties (as shown by the letter from the said court) for the respondent's father to vacate the property and the second appellant to collect rent. As such, I was not in agreement with learned counsel, Mr. Williams, that there was a right of property as the court order declared that the second appellant is entitled to collect rents derived from the property. There was no determination as to the appellant rights to the property and no court order declaring rights of the parties. It was a mere agreement between the parties. At this time, Ernest Martinez Sr. had not applied to purchase the property. He received a Minister's Fiat Grant in 2000.

Taxes paid for the property

[24] The evidence showed that a Notice was sent from the Dangriga Town Council to Angelina/Ernest Martinez, for property taxes in the sum of \$216.00 for the period 2011/12. Mr. Williams submitted that the appellants names remained on the tax roll. This evidence in my view did not prove rights to the property. The appellants had an equitable right to the property before the expiration of the lease so hence the reason their names were on the tax roll and payment of taxes were being made to the municipal authority in Dangriga. The payment of the taxes cannot give the appellants the right to the property of the Government of Belize.

Knowledge by respondent of appellants occupation of property and overriding interest

[25] The respondent and his father, Ernest Martinez Sr. were aware that the appellants were in actual occupation of the property and that they were collecting rent when Ernest Martinez Sr. obtained title. The trial judge addressed the issue of occupation as seen at paragraph 13 of the judgment and rightly held at paragraph 14 that the appellants had

an equitable interest in the property but, this ended when the lease ended in 1993. When the lease expired in 1993 the appellants were not 'holding over' and not paying any rents to GOB. As such, they were trespassers on the land and hence the reason the trial judge ordered them to pay damages for trespass.

[26] Further, in relation to an over-riding interest pursuant to section 31(1) (g) of the Registered Land Act, I was not in agreement with Mr. Williams that the appellant's title and that of his predecessor were subject to an overriding interest even though not registered. Ernest Martinez Sr. obtained Minister's Fiat Grant on 19 March 2000. The property was declared a registration section on 14 January 2009 – See the Order which was submitted by Mr. Flowers after the hearing. As such, the question of an over-riding interest pursuant to section 31(1) (g) of the **Registered Land Act**, did not arise. The property was not registered land when Ernest Martinez Sr. took title.

Conclusion

[27] The learned trial judge was correct in finding that there was no overriding interest in existence belonging to the appellants at the time title was issued to the respondent. Accordingly, grounds 2 and 3 were also without merit.

Ground 5

Whether the trial judge erred when she held that there was no evidence of mistake

[28] The learned trial judge at paragraph 12 of the judgment said: "... In the case before me, apart from the bald assertion of a mistake in the written submissions, there is absolutely no evidence of a mistake to support this claim."

[29] Mr. Williams submitted that since there was an absence of direct evidence of mistake adduced at trial, an inference should have been drawn from uncontroverted facts that the executrix of the Will of Ernest Martinez Sr., Consuelo Aguilar, who was an employee of the Lands Department, had knowledge of the transfer of the property by

Deed of Assignment to Juanita Martinez. Mr. Williams submitted that Ernest Martinez Sr. and the respondent were also aware of this fact. As such, he contended that the grant of title to Ernest Martinez Sr. in 2000 was done in error. Further, the appellants had been in occupation of the property since 1995 and a court order also confirmed and legitimized their occupation in a manner adverse to him. He contended that there should be an amendment to the register in relation to the property on the basis of mistake.

[30] In my view, there was no error on the part of GOB when title was given to Ernest Martinez Sr. since the Commissioner of Lands had issued a notice to Noralez informing her that the lease had been cancelled from 1983. The lease however, had not been cancelled in the true sense. Recondov thereafter obtained consent from GOB to assign the unexpired term of the lease to Martinez (appellants mother). The said lease expired in 1993 and Ernest Martinez Sr. obtained Minister's Fiat Grant in 2000. This is the only knowledge that Consuelo Aguilar may have had and this cannot be a basis for an amendment to the register. Further, as discussed under previous grounds, there was no court order which determined the rights to the property. Accordingly, it was my opinion, that the trial judge had not erred when she said that there was no evidence of mistake to support the claim. This ground was also devoid of merit.

Costs

[31] When the appeal was heard, this Court ordered that the orders of the trial judge are confirmed and for the respondent to have his costs to be agreed or taxed unless the appellant file written submissions in writing for a contrary order as to costs in 10 days. On 17 June 2015, the appellant filed written submissions and urged that the costs order made be removed or varied.

[32] Mr. Williams in written submissions pointed to the fact that the parties are brothers and are all children of the late Ernest Martinez Sr. who was the husband of their mother, Juanita Martinez. The lease property was formerly assigned to Juanita Martinez and subsequently title was issued to Ernest Martinez Sr. He contended that this feature,

together with the fact that there is evidence of significant monetary contributions having been made on account of the property by Juanita Martinez, should serve as a mitigating factor as it relates to the order for costs.

[33] Learned Counsel further submitted that the conduct of the appellants was not unreasonable in defending the case brought against them, in that theirs was a genuine attempt to maintain their possession of property which was accorded to them by a court of law.

[34] For the sake of clarity, I must reiterate that there was no determination of rights to the leased property before the Magistrate's court.

[35] Although the appellants were not unreasonable in defending the claim and pursuing the appeal, I have taken into consideration that the appellants were collecting rent for the property at a time when they were trespassers. The damages ordered for trespass in the court below was "\$400. per month (rent collected by the Defendants from tenant on the property) from August 1, 2010, the date when the Claimant received his Land Certificate from the Government of Belize" However, the appellants equitable interest expired upon the expiration of the lease in 1993 and they had all benefits to the property from then to 1 August 2010. As such, the provisional cost order is made final.

Conclusion

[36] It was for these reasons that I agreed that the appeal be dismissed and the orders of the trial judge confirmed.

[37] Costs for the respondent to be agreed or taxed.

HAFIZ-BERTRAM JA