**IN THE SUPREME COURT OF BELIZE, A.D. 2015**

**CLAIM NO. 622 of 2014**

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| **ERNEST HECTOR BEVANS** | **CLAIMANT** |
| **AND** | |
| **CYNTHIA USHER** | **1st DEFENDANT** |
| **JEROME LOZANO also known as ROLAND LOZANO** | **2nd DEFENDANT** |

**BEFORE the Honourable Madam Justice Sonya Young**

Hearings
2015
9th June
16th July

Written Submissions
22nd June – 2nd Defendant
24th June – Claimant

Mr. Philip Zuniga, SC for the Claimant.
Mr. Ernest Staine for the Defendants.

**Keywords: Landlord & Tenant – Ownership of Property – Possession of Property – Agency – Undisclosed Agent – Power of Attorney – Scope of Authority**

**JUDGMENT**

1. Joseph Randolph Alcoser died in 1960 leaving his widow and a number of children as beneficiaries. Two months after his death, his daughter Elvira

Alcoser sought and was granted letters of administration to his estate. By a vesting assent made on 10th November, 2001, between Elvira Alcoser (as Administratrix) and three of the beneficiaries, a parcel of land was vested solely in Elvira Alcoser herself. We shall refer to that parcel of land, as 'The Ladyville Property.'

2. Elvira Alcoser says that by that assent, she became owner of The Ladyville Property. As such, she appointed The Claimant under a Power of Attorney dated 7th July, 2001 expressly:

> 1. *To negotiate the sale of the said lands hereinbefore described or any part thereof as well as all other lands in Belize that may now or in the future be vested in her name and sell the same for the best price that can be obtained.*
>
> *2. To sign seal and deliver all legal documents, instruments, and discharges deemed necessary to convey good and proper title to the buyer or buyers of the said lands.*
>
> *3. To receive from the buyer or buyers of the said lands the full purchase price thereof and give to the said buyer or buyers a good and effectual receipt and discharge therefor.*
>
> *AND GENERALLY to perform all and any acts, and to do and effect any and everything in behalf of the principal which may arise or become necessary to be performed, done, or effected in respect of the powers herein contained.*

3. In early 2008 Gloria Tillett (the Claimant's niece-in-law), acting as agent for Elvira Alcoser, leased a portion of The Ladyville Property to either one or both of the Defendants. That agreement was never reduced into writing and the precise parties and terms are disputed.

4. The Defendants (husband and wife) went into possession of a portion of The Ladyville Property and erected a structure where they conducted a food

vending business. They paid rent to Ms. Tillett, the amount of which is disputed. The Claimant says he was told it was $150.00 per month, while the second Defendant says he paid $50.00 per month.

5. By August 2008, the Claimant says he realized that the structure was bigger than it originally was, so he spoke with the first Defendant about a rent increase. He took a draft lease to her for signature but she refused to sign.

6. Gloria Tillett subsequently fell ill and eventually died on the 5th May, 2014. Prior to Gloria Tillett's death, the Claimant served a notice to quit The Ladyville Property on the first Defendant. That notice informed that it was being sent on behalf of the Claimant and Gloria Tillett. It gave one month in which to vacate and terminated on 30th April, 2014. The Defendants have remained in possession of that property but have admittedly, not paid rent since Ms. Tillett took ill. The second Defendant has also brought land fill on to the property at a claimed cost of $3,500. He says he did this because Ms. Tillett had assured both he and the first Defendant that they could stay on the property for as long as they liked. He denies that the Claimant is his landlord and disputes Elvira Alcoser's ownership of the Ladyville property, through the vesting assent, which he says, does not clothe her with proper legal title.

7. The Claimant contends that the Defendants have wrongfully continued in possession and have exhibited no intention to remove the structure unless so ordered by the court. He has now sought the following remedies:

   (1) Possession of premises situate at 9 ½ Miles Ladyville, Phillip Goldson Highway, Belize District, Belize;

(2) Damages for trespass;

(3) Arrears of rent at $150.00 per month from the 1st day of August, 2008, to date of service of Claim herein;

(4) Mense profits from the date of service of Claim herein until possession be delivered up;

(5) An Order that the Defendants do forthwith remove the structure they have place on the demised premises;

(6) Interest pursuant to Section 166 of the Supreme Court of Judicature Act; and

(7) Such further or other relief as the Honourable Court may see fit.

8. The issues to be determined are:

1. Whether the Claimant has the requisite authority to bring this claim.
2. Whether Elvira Alcoser owns The Ladyville Property.
3. Whether Elvira Alcoser is the landlady.
4. Whether the lease has been terminated and/or forfeited.
5. Whether the Defendants are trespassers.

9. Although there is an affidavit of service evidencing service of the claim form and all requisite documents, the first Defendant has never participated in these proceedings.

**Whether the Claimant has the requisite authority to bring this claim:**

10. Jerome Lozano submits that the terms of the Claimant's Power of Attorney are specific and limited only to the sale of The Ladyville Property. Therefore, he has no power to evict or to bring the instant claim.

11. It is accepted that "*the practical purpose of a power of attorney is not only to invest the attorney with power to act for the donor, but also to provide him with a document*

*defining the extent of his authority .."* **Powers of Attorney 7th Ed pg 1.** The editors of ***Bowstead & Reynolds on Agency 20th Edition at paragraph 3*** explain that – *"Powers of Attorney are strictly construed and are interpreted as giving only such authority as they confer expressly or by necessary implication."* So that *"Where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show then on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication."* - ***Bryant, Powis and Bryant Ltd. v La Banque du Peuple (1893) AC 170, 177 per Lord McNaughten***.

12. One must therefore consider the precise terms of the document to determine what authority was conferred and whether Ernest Bevans has indeed acted outside the scope of that authority. To my mind, the powers conferred are clear, therefore, one need not look to any extrinsic evidence to ascertain the scope. Although there is a wide and very general power inserted at the end, the rule is that the general words are restricted to what is necessary for the proper performance of the particular stated acts. The general power cannot enlarge that which is particularly given. So we need not pay too much attention to those general words either.

13. Instead, we begin with a consideration of the particular powers 1. and 2. The Claimant has been given a clear power to sell the land. That is not disputed. Implied in a contract for the sale of land is that vacant possession will be given to the purchaser on completion – ***Timmins v Moreland Street Property Co Ltd. [1957] 3 All ER 265***. A purchaser could justifiably refuse to complete if there is an unexpired tenancy. Although there is no expressed

provision in the power of attorney speaking to delivering up vacant possession, such a term could easily be implied into the authority given to sell the land for the best price, as well as to convey good and proper title to the buyer or buyers. If such is implied, then the agent has no alternative but to do all that he can reasonably and legally do to ensure that he is able to give vacant possession. That responsibility obviously would entail taking all the action necessary to achieve same, whether it be by issuing notices to quit or bringing a court action such as the present. It is therefore not necessary to discuss whether some other authority existed.

14. I therefore find this submission to be without merit and easily reject same.

**Whether Elvira Alcoser owns The Ladyville Property:**

15. Elvira Alcoser holds a duly registered deed of assent evidencing her claim to absolute ownership of The Ladyville Property. She thereby claims to have obtained the fee simple absolute through the law of succession. The issue of whether the deed of assent is valid or gives her a good or better claim than anyone else cannot lie in the mouth of a tenant. He has no locus standi to raise this. It is only someone whose interest is able to defeat the existing title who can challenge. Since *"... possession by a tenant or an agent is no foundation for a title against the landlord or the principal, for the possession is not adverse."* ***Megarry & Wade (ibid) paragraph 3-121***, the second Defendant has no standing.

16. If Elvira Alcoser has somehow taken what was not hers to take, then the rightful owner or a person with a better title than hers, is the one who ought to challenge her title. I refuse to speculate about why her title has not

otherwise been challenged, if as the second Defendant urges, there is a person with a better claim somewhere out there.

17. As stated by Barrow J, when he dealt with the standing of occupants of part of land, to impeach title in ***Edward Phillip Mathurin & Martin Julian v Magdalene Wilson et al Civil Suit No. 326 of 1999 (St. Lucia)***: *"It is no part of the present exercise to speculate why the estate are (sic) not challenging the Defendant's prescription ... However, ... I am satisfied, it is quite unnecessary for present purposes to identify the reason for the estate's inaction. Because what is definitive is that unless the estate challenges the Defendants' title it must be treated as accepting the Defendant's title. This therefore leads to the question: If the estate accepts the title why should the plaintiffs, who claim adversely to the estate, be allowed to challenge it."*

18. By the same token, if anyone else is entitled to The Ladyville Property, as owner, but has not sought to impeach Elvira Alcoser's title, how then can the second Defendant hope to do so. Furthermore, the second Defendant's right to possession or occupation depends on a lease he claims to have been given by Ms. Gloria Tillett. If the estate of the now deceased Gloria Tillett, have not laid claim to The Ladyville Property, how then can the second Defendant attempt to assert that ownership lies elsewhere than with Elvira Alcoser. What is even stranger is that he admits by paragraph 2 of his defence that Elvira Alcoser as administrator of the estate of Joseph Randolph Alcoser, is entitled to the property. He is therefore clearly aware that Gloria Tillett is not the owner and never was the owner.

19. As far as this court is concerned Elvira Alcoser, by virtue of the Deed of Assent dated 10th November, 2001, is the owner of The Ladyville Property.

**Whether Elvira Alcoser is the Landlady:**

20. The second Defendant's pleaded case is that Gloria Tillett, now deceased, purported to be the owner of the Ladyville property when she let same to him. The evidence, as unfolded before the court, is that Gloria Tillett was nothing more than Elvira Alcoser's agent. The defence has brought nothing to prove otherwise. Additionally, the only document evidencing ownership of the Ladyville Property is the deed of assent made in 2001. The Defendants went into possession as tenants in 2008. Gloria Tillett was not the owner and the Claimant admits that permission had been given to her to let the premises. If Gloria Tillett was merely Elvira Alcoser's agent, then whom else could the second Defendant's landlady be?

21. Even if it is accepted that Elvira Alcoser was an undisclosed principal, it makes little difference to the issues at hand. From the moment the second Defendant is made aware of the existence of Elvira Alcoser, as principal, either the agent or the principal can sue on the lease agreement and could likewise be sued. As early as August 2008 the Claimant said he spoke to the first Defendant about a rent increase. This has not been disputed. Nonetheless, by the notice to quit, both Defendants became aware that there existed someone other than Gloria Tillett who was holding themselves out to be a landlord. Correspondence between Counsel for both the Claimant and the second Defendant between 2014 and early 2015 indicates that the Claimant was perceived to be the landlord and arrangements had been made with him relating to a rent increase.

22. The Claimant's witness, Alvin Herman Nicholson, explained how he was present when the Claimant discussed raising the rent with Cynthia Usher in January, 2014. His evidence remains unrefuted.

23. I find that Elvira Alcoser is the landlady and is thereby capable of bringing an action against the tenants for possession of the Ladyville Property – whether personally or through her duly appointed agent – Ernest Hector Bevans.

**Whether the lease has been terminated and/or forfeited:**

24. From the evidence provided it is clear that an oral agreement for a lease (the duration of which is in issue) had been entered into. The second Defendant says it was to be for as long as they liked. ***Lace v Chantler (1944) KB 368*** demonstrates that the maximum duration of a tenancy must be ascertainable from the outset – *"The certainty of a lease as to its continuance must be ascertainable either by the express limitation of the parties at the time the leased is made or by reference to some collateral act which many with equal certainty measure the continuance of it otherwise it is void."*

25. It means then that the agreement entered into would be void and the second Defendant would hold nothing more than a tenancy-at-will. As a tenant-at-will he is at the mercy of the landlord who can legally determine the tenancy without any formal notice. However, because he pays rent, he is held, according to ***Metcalfe & Edlly Ltd. v Edghill*** (1963) 5 WIR 417, to be a periodic tenant. It is his evidence that when he paid rent he did so monthly. The Claimant accepts this. He is therefore a tenant from month to month.

This tenancy endures from month to month and can only be determined by either party giving one month's notice.

26. The second Defendant, in his defence, raised the issue of a business tenancy and the need for a different period of notice. He offered nothing in his submissions to support this, so one can only assume that he wisely abandoned this particular defence.

27. The second Defendant states that the lease was made between himself and Ms. Tillett. But correspondence from his attorney to counsel for the Claimant suggests otherwise. The Claimant maintains that the lease was between Ms. Tillett, as agent of Elvira Alcoser, and the first Defendant. I believe him. Firstly, because the second Defendant admits that the food renting business originally belonged to Cynthia Usher. Secondly, because in correspondence dated 6th May, 2014, from his own attorney to counsel for the Claimant it is stated on his behalf: "As I understand it agreement was reached between Gloria Tillett and Cynthia Usher about seven years for the letting by Gloria to Cynthia of a portion of land for a monthly rental of $50.00 per month." That same letter refers to the Claimant's notice to quit having been sent to both the first and second Defendant. In another letter dated 11th November, 2014, the same attorney writes on behalf of both Defendants *"... allow me to reiterate that the Defendants are prepared to pay $150.00 per month subject to a proper lease agreement for ten years. On my advice they will pay arrears above since the last recorded payment."*

28. I find that both Defendants were tenants. I also find that the notice to quit is valid and having been duly served, it terminated the month to month tenancy. The Claimant is therefore entitled to possession of the premises.

29. The second Defendant admits that they have not paid any rent since Gloria Tillett fell ill and subsequently died. They offer by way of excuse or explanation that Gloria Tillett was ill and unable to come to collect the rent. They seem to be oblivious of their duty, as tenants, to pay rent. The second Defendant admits that an express covenant of the lease was payment of rent. He does not state that there was any agreement that Ms. Tillett would collect the rent. *"Under an express covenant the tenant is obliged to seek out a landlord who is intra quatuor maria to pay him, unless a place of payment has been specified."* ***Evans & Smith, The Law of Landlord and Tenant, 3rd Ed p 106***.

30. The Claimant places the date, when the Defendants ceased to pay rent as August 2008. This has not been seriously disputed. Non-payment of rent is a breach of a fundamental term, the consequence of which is the possibility of forfeiture of the lease. In the present case the amount of the monthly rent is in issue.

31. The Claimant was not an original party to the lease agreement. He conceded under cross-examination, that he did not know what arrangements had been made between Miss Tillett and the Defendants. He has provided no documents or anything else to evidence his assertion that rent was $150 per month. The rule does not change. He who asserts must prove. Since he has been unable to satisfactorily prove the rent at $150, then the court will

accept the second Defendant's claim that his rent was $50. per month. Any arrears or mesne profits will accordingly be calculated on this sum.

32. Ernest Hector Bevans claimed that he made attempts to raise the rent. This seems not to have gone beyond the stage of negotiations and by his claim based on rent of $150 per month he has clearly not asserted that there was indeed a rent increase.

33. Oddly enough, the defence raised the issue of a separate ground for forfeiture where a tenant impugns a landlord's title. However, although it was open to the Claimant to amend his claim after the impugning defence was filed, he never did so. Parties are bound by their pleadings and ought not to be allowed to go outside their pleaded case – **H*ubert Mark v Belize Electricity Limited Civil Appeal No. 11 of 2009 paragraph 20***. Ergo, this issue cannot and obviously was not expected to be considered by the court.

34. The Court therefore finds that the Defendants have also forfeited the lease through non-payment of rent and the Claimant is entitled to possession of The Ladyville Property. He is therefore entitled to arrears of rent at the rate of $50. per month from the 1st August, 2008 to the date of termination of the notice to quit and mesne profits at the same rate from that date until possession is delivered up.

**Whether the Defendants are Trespassers:**

35. The agreement to lease the premises was oral. The precise terms are not known to the Claimant. He speaks only of what he had apparently been told by, the now deceased, Gloria Tillett. He has not stated what portion of the

property was let to the first and second Defendants. Hence, he is unable to prove whether or not the Defendants have actually trespassed. He fails on this limb of his claim and is not entitled to damages in this regard.

36. **IT IS ORDERED:**

1. Judgment is entered for the Claimant.
2. The Defendants must deliver up possession of the property within 60 days of this judgment.
3. The Defendants shall within 60 days of the date of this judgment remove the structure which they placed on the property and which currently sits there.
4. Thereafter the Defendants are restrained from entering or remaining on the property.
5. The Defendants are to pay the Claimant arrears of rent in the sum of $50 per month from 1st August 2008 to the date of termination of the lease pursuant to the notice to quit.
6. The Defendants shall pay mesne profits in the sum of $50 per month from the date of the termination of the lease herein until possession is delivered up.
7. Interest shall be calculated on these sums at the rate of 6% per annum.
8. Prescribed costs, as agreed, is awarded to the Claimant to be paid by the first and second Defendants.

**SONYA YOUNG**
**JUDGE OF THE SUPREME COURT**