

IN THE SUPREME COURT OF BELIZE, A.D. 2000

ACTION NO. 187 OF 1982

(JOHN ROBERSON Plaintiff
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BETWEEN (AND
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(BELIZE FREIGHT & TRADE
(SERVICES LIMITED
(and
(BELIZE WOOD PRODUCTS
(LIMITED Defendants

BEFORE the Hon. Chief Justice Abdulai Conteh.

Mr. Michael Young S.C. for the Plaintiff.
Mr. Jeremy Courtenay for the Defendants.

JUDGMENT

The facts of this case can, in a sense, be stated in a short compass. The Plaintiff was the owner of a piece of land measuring 17.4 acres in Warrie Head in the Cayo District. Sometime in August 1980 he sold this land to the second Defendant in this action for the agreed price of \$50,000. For this consideration, the Plaintiff was to receive 50,000 shares in the second Defendant company valued at \$50,000 (Exhibit "JR 2"). The plaintiff was also given "the option to resell these shares to the company between the 1st day of February 1981 and the last day of April of the same year at a minimum guaranteed price of \$50,000 cash payment." In due course, on 13 August 1980, a conveyance was executed between the Plaintiff and the second Defendant conveying the land to the second defendant.

On 28 April 1981, the Plaintiff through his then Attorney wrote the second defendant exercising his option to resell the shares to it. It is the case of the plaintiff that he received no money from the second defendant and consequently had to take an action against it. The writ of summons in this action dated 5 August 1981 was tendered as Exhibit "JR 4".

Subsequently, a default judgment was entered against the second defendant in favour of the plaintiff for the sum of \$50,000 with costs to be taxed.

In the meantime (the first Defendant on 7th January 1982 bought the property from the second Defendant) by a conveyance dated 7 January 1982, the land was for the consideration stated therein to be \$50,000, transferred by the second defendant to the first defendant (**Exhibit "JR 7"**).

It is against this backdrop that the plaintiff by a writ dated **1st July 1982** sued both defendants claiming as follows:

1. "A declaration that the conveyance of 7th January, 1982 between the first-named and second-named defendant is voidable as being in fraud of creditors.
2. An order setting aside the said Conveyance.
3. An injunction restraining the first-named and second-named defendant from dealing with or disposing of the property described in the said conveyance.
4. Further or other relief."

In due course, by the end of 1982, pleadings were filed and changed between the parties and by **February 1983** issues had been joined between them and the matter was slated for hearing. Unfortunately, however, for one reason or the other, the action could not be brought to resolution by a hearing in the court. It became caught in the interstices of what has been colloquially termed as the **backlog**. This refers to the mounting number of cases that have for sometime not been disposed of and are still pending in the Supreme Court.

This case therefore came to acquire the status of an "Ancient", when it is realised that the writ commencing it was first issued in **1982**, and it was not until the year 2000 when its old bones were agitated as it were, and it was given a new lease of life and sprang into action.

Early this year an application was made by the plaintiff to amend his Statement of Claim. This was duly granted by the Court in February and the Defendant was also granted leave to file an amendment Defence.

Thus it was on the amended Statement of Claim and Defence that issue was finally joined between the parties when this action came before me for trial on 27 September 2000.

By this action the plaintiff now claims:

1. "A Declaration that the Conveyance of 7th January 1982 between the first-named and second-named defendants is voidable as being in fraud of creditors.
2. An Order setting aside the Conveyance.
3. An injunction restraining the first-named and second-named defendants from dealing with or disposing of the property described in the said Conveyance save and except by Order of the Court.
4. An Order that an incumbrance be recorded against the property as security for the judgment of 1st September, 1981 in Supreme Court Action No. 256 of 1981 from the date of such judgment.
5. Further or other relief."

I must point out here that the fourth relief the plaintiff sought was grounded in paragraphs 11 and 12 of his Amended Statement of Claim as follows:

11. "Further or in the alternative, by virtue of Order 42 Rule 4 of the Supreme Court Rules the judgement of 1st September, 1981 in Supreme Court Action 256 of 1981 bound the property and became attached thereto.

12. The said judgment is registerable as an incumbrance against the property by virtue of s.103(d) of the Law of Property Act."

For its part, the first-named defendant in its Amended Defence, avers that it was not a party to the matters contained in paragraphs 1, 2 and 3 of the Amended Statement of Claim and had no knowledge before trial of any of the matters alleged.

I should state here in parenthesis that the matters alleged in these paragraphs of the plaintiff's Amended Statement of Claim relate to the sale in August 1980 by the plaintiff of the property in question to the second-named defendant at an agreed price of \$50,000, and that the said sum of \$50,000 was never paid, and that the second-named defendant was on 1st September 1981 ordered by the Court to pay the said sum of \$50,000 plus costs in Supreme Court Action No. 256 of 1981.

The first-named defendant avers that indeed the consideration for the purchase of the property was \$50,000 and denies that no monies were paid by it to the second-named defendant in respect of the property, and avers instead, that at the material time of the conveyance, the second-named defendant was indebted to it (the first-named defendant) for a sum in excess of \$50,000 and that the transfer of the said property by the second-named defendant to it was in part payment of that indebtedness. The first-named defendant further denies the averment by the plaintiff that the transfer of the property by the second-named defendant to the first-named defendant was effected with intent to defraud the creditors of the second-named defendant. The first-named defendant avers instead that at all material times it was a creditor of the second-named defendant who was and still is indebted to the first-named defendant for a considerable sum and that it was right and proper that the second-named defendant should transfer the property to the first-named defendant as part payment towards that indebtedness. The first-named defendant therefore denies the averment of the plaintiff that the natural consequence of the transfer of the property resulted in the inability of the creditors of the second-named defendant to enforce their claim.

The first-named defendant also averred that the plaintiff failed to register the judgment of 1st September 1981 in Supreme Court Action 256 of 1981 as an incumbrance against the property pursuant to **s.103(d) of the Law of Property Act** and that it (the first-named defendant) had no notice of the said judgment.

For its part, the second-named defendant denied the plaintiff's claim and put up the shield of satisfaction against his claim. That is to say, the agreed purchase price for the land between it and the plaintiff was paid for in the manner agreed between the plaintiff and itself, namely the issue of 50,000 shares of a nominal value of \$1.00 each in the capital of the second-named defendant company, and that in fact, the plaintiff had in writing acknowledged payment for the property.

The second-named defendant also avers that in pursuance of the agreement between it and the plaintiff for the sale of the land, 50,000 shares numbering 100,001 to 150,000 in the second-named defendant company were transferred to and **are presently held** by the plaintiff. Therefore, it avers, the plaintiff is already satisfied.

The second-named defendant denies the plaintiff's charge that no monies were paid for the transfer of the land by the first-named defendant, and avers instead, that at all material times it was indebted to the first-named defendant in excess of \$50,000 and that the transfer of the property by it to the first-named defendant was in part-payment of that indebtedness.

The second-named defendant also denies that the transfer of the property was effected with the intent to defraud the creditors of the second-named defendant and avers instead that the judgment claim of the plaintiff in Supreme Court Action No. 256 of 1981 was not for the recovery of the land

transferred but rather for \$50,000 and that in virtue of the transfer of 50,000 shares to the plaintiff, that judgment is already satisfied.

Finally, the second-named defendant avers that the plaintiff made no attempt to levy execution on any of its chattels prior to the execution of the Conveyance transferring the property from the second-named defendant to the first-named defendant.

Let me say right away, that I found the plaintiff to be an honest and credible witness and I commend him, in view of the age of this case, for his recollection of events that happened some twenty odd years ago.

In support of his claim, the plaintiff gave evidence. His evidence may be summarized as follows: he once owned 17.4 acres of land in Warrie Head, Cayo District which he sold to the second-named defendant company. For this he was to receive shares in the second-named defendant company for which he was given an option to re-sell to the company (Exhibits "JR 1" and "JR 2"). Sometime later his former Attorney wrote to the second-named defendant in effect exercising the plaintiff's right to have the shares bought back by the second-named defendant (Exhibit "JR 3"). The Plaintiff stated that he received no money and had to take out an action against the second-named defendant (Exhibit "JR 4"). Subsequently, judgment for \$50,000 plus costs was entered in his favour (Exhibit "JR 5"). He later said he had to change Attorneys and obtained the services of his present Attorney. A writ of Fieri Facias was later filed in pursuance to the judgment in his favour (Exhibit "JR 6"). He was later informed by his new Attorney that the property he had sold to the second-named defendant was later sold by it to the first-named defendant. The conveyance in respect of this transaction was tendered in evidence as Exhibit "JR 7.";

The plaintiff further stated in evidence that the person he always dealt with in the second-named defendant company was one Carlos Pailles; and that the second-named defendant engaged in the veneer business and that it had its plant on the piece of land he had sold it. He also stated that the said Carlos Pailles was the principal shareholder of the second-named defendant company and the manager was one Amir Zaiden. The Plaintiff further testified that second-named defendant stopped doing business about 1981 and that subsequent to the judgment in his favour he never received any money. His attorneys caused a search to be made at the Registry of Companies to extract information on the two defendant companies. This was tendered as Exhibits "JR 8(a)" and "b".

Under cross-examination by the Attorney for the defendants, the Plaintiff was shown Exhibit "JR 3" (Letter from J. Cuthbert Gray then Attorney for the plaintiff, dated 28 April 1981) and admitted that it was in that letter he exercised his option to resell the shares in the second-named defendant company. He states that he could not recall receiving shares for the transfer of his land. The Plaintiff was also shown Exhibit "JR 8(a)" (excerpts of company returns on second-named defendant company) and admitted that under the section detailing the shareholders of that company his name is shown as holding 50,000 shares. But he could not recall receiving 50,000 shares even though his name is so stated in Exhibit "JR 8(a)".

Also, when shown his conveyance with the second-named defendant (Exhibit "JR 1"), the plaintiff recognized his signature at page 3 thereof and he read the receipt clause at page 1 of the conveyance acknowledging that he had received \$50,000 for the land; but he denied that he was paid for his land at Warrie Head and admitted that this statement would be a stark contradiction on page 1 of the conveyance; he also conceded that his recollection would be better on the day of the conveyance than twenty years later.

The plaintiff also stated that he had no dealings with the first-named defendant company which he thought was in the freight business. He further testified under cross-examination that at the time he dealt with the second-named defendant it was in its infancy and had assets such as office equipment,

vehicles, machinery etc., although he could not honestly answer either way that at the time he obtained judgment against the second-named defendant it still had these assets.

When shown **Exhibit "JR 8(a)"** (The Annual Return of the Second Defendant), the Plaintiff stated that under the section on shareholders of the second Defendant, his name appears as holding 50,000 shares in the second Defendant company. He could not recall though receiving the 50,000 shares even though it is so stated. Again, under re-examination by his Attorney, the plaintiff repeated that he could not recall receiving any document indicating that he was a shareholder in the second Defendant.

MR. SYDNEY JOSEPH TURTON gave evidence for the defendants. He described himself as being in the tourism business. He stated that the second Defendant was in the plywood business and that he was a director and a shareholder, although not a major one, and that he was never involved in the activities of the second Defendant. He could not recall whether the plaintiff was a director or a shareholder of the second Defendant. This witness also stated that one Carlos Pailles was the senior executive of the second Defendant, and that he was in charge of running the affairs of second Defendant.

This witness further stated that the said Carlos Pailles was also a director of the first Defendant company and that although he was also a shareholder, but because of the indebtedness of the said Carlos Pailles to him, he Pailles dropped out of the picture altogether so that by 1982 and 1983, he was no longer a shareholder of the first Defendant company. The witness tendered **Exhibits "ST 1" and "2"** - the Annual Returns for the first Defendant for 1982 and 1983. In these, the said Carlos Pailles is shown as holding nil shares in the first Defendant although he was a director of it.

This witness further stated that he was the managing director of the first Defendant company and that the two Defendant companies did a lot of work together. During the course of this, the second Defendant became heavily indebted to the first Defendant in excess of \$75,000. The said Carlos Pailles wanted more money to run the second Defendant company, but this was refused by the witness as Pailles was not making any payment on behalf of the second Defendant.

In order therefore to meet some of the indebtedness of the second Defendant, the land in question was conveyed by the second Defendant to the first Defendant for the sum of \$50,000. This witness further testified that even after the conveyance, there was still some outstanding indebtedness of the second Defendant to the first Defendant. The witness also testified that at the time of the conveyance of the land in question between the two defendants, he was not aware of the claim of the plaintiff and that he was not notified at anytime of the said claim. He also testified that at the time of the conveyance, the second defendant was a going concern with asset and chattels, including plant and equipment. Under cross-examination by the Attorney for the plaintiff, this witness also testified that he had been told that the land had been bought from the plaintiff and he assumed that he had been paid for it as he heard nothing to the contrary. Still under cross-examination he stated that the first defendant was one of the creditors of the second Defendant and that everyone, presumably meaning the second defendant's creditors, were screaming for payment. He finally testified that the object of the whole exercise was to have the conveyance of the land executed to the first defendant so that as a creditor of the second defendant, it could get something. This witness also testified that from its inception, the second defendant was, to use his words "a bootstrap operation since 1979". He further testified that every bill was a difficulty for the second defendant. Its creditors were complaining and things only got worse. Mr. Pailles, the witness further stated, absconded with a lot of bills unpaid by the second defendant.

From the pleadings and evidence in this case, the issues to my mind that arise for determination can be stated as follows:

1. Was the transfer of the land in question between the two defendants voidable as being in fraud of creditors.
2. Was the land then in the hands of the second defendant bound and attached by the judgment of 1st September 1981 in favour of the plaintiff against the second defendant in Supreme Court Action No. 256 of 1981 from the date of that judgment?

Let me hasten to add here that the plaintiff is praying the aid of this Court to order, if the answer to this second question is in the affirmative, that an incumbrance be recorded against the said land as security for the said judgment.

The evidence before me is that the plaintiff obtained on 1st September 1981 a default judgment for the sum of \$50,000 plus costs to be taxed against the second defendant for the value of shares the plaintiff held in the second defendant company.

The plaintiff then pressed into service the machinery for the enforcement of the judgment. The particular method the plaintiff had recourse to was that old, tried and tested writ of ***feri facias (fi fa)*** - see ***Exhibit "JR 6"***. This perhaps in the circumstances, was perfectly understandable, as the judgment in favour of the plaintiff in Action No. 256 of 1981 was for the payment of the sum of \$50,000 with costs by the second Defendant.

But evidently this exercise did not yield the desired result. This notwithstanding the plaintiff could have proceeded to enforcing the judgment in his favour for the payment of the sum of \$50,000 with costs by the other means the law makes available to a successful party in executing judgment for the payment of money.

Order 45 Rule 3 of our Supreme Court Rules provides specifically as follows:

"A judgment for the recovery by or payment to any person of money may be enforced by writ of ***feri facias***, sale of lands of judgment debtor under Rules of this Order, imprisonment under the Debtors Act and rules made thereunder and by such other means as the law may provide."

Therefore it was perfectly in place for the plaintiff as a successful party in Action No. 256 of 1981 to have proceeded against the second defendant by the other means permissible, not having got satisfaction by way of the ***fi fa*** route.

As a registered company under the laws of Belize, the second defendant could also have been proceeded against under the aegis of the ***Companies Act - Chapter 206 of the Revised Edition 1980 -1990 of the Laws of Belize***. Clearly under this regime, the plaintiff could have utilised the provision of ***sections 128 to 133*** to have instituted winding-up proceedings against the second defendant when the returns to his writ of ***fi fa*** were, in effect, ***nulla bona***. The immediate effect of this and in the circumstances of the case extremely beneficial to the plaintiff, would have been, in virtue of the provisions of ***section 196(2) of Chapter 206***, to render ". . . every disposition of the property of the . . . of the company . . . void" unless the Court otherwise orders.

Again as a judgment creditor as a result of Action No. 256 of 1981, the plaintiff could have clearly proceeded against the second defendant under the provisions of Supreme Court Rules to have the very land he had sold to the second defendant sold by an Order of the Court in execution of the judgment in his favour - see ***Rules 4 and 5 of Order 46 of the Supreme Court Rules***

In law also, a recourse opened to the plaintiff in this case as between him and the second defendant on the original sale of his land at Warrie Head to this defendant, was the provision of ***section 59 of Chapter 154 - The Law of Property***. He could have applied for a summary determination by the Court of any question arising out of or connected with the contract for the sale of the land. This would

have, of course, included the issue of payment or non-payment for the land, which at bottom has, I believe, agitated this action and the suit in Action No. 256 of 1981.

These avenues of enforcement of the judgment in favour of the plaintiff in Action No. 256 of 1981 relating to the resale of the 50,000 shares stemming from the sale of the land by him to the second defendant, not having been availed of, the plaintiff has now come to Court to impugn the transaction concerning the same land but between the two defendants.

The learned attorney for the plaintiff has ably argued that that transaction was tainted with the intention to defraud and is therefore voidable at the instance of the plaintiff as a person prejudiced thereby, pursuant to **section 149(1) of the Law of Property Act - Chapter 154 of the Laws of Belize 1980 Revised Edition**.

But a determination of this issue will have to turn on first, whether the plaintiff was a "person prejudiced by the transfer of the land between the two defendants and secondly, whether from the evidence the transfer itself was made with intent to defraud creditors.

Firstly, clearly from the facts and the evidence, the plaintiff is an **unsatisfied judgment creditor** of the second defendant by the force of the judgment of 1st September 1981 in Action No. 181 of 1981 - see **Exhibit "JR 5"**. The fact that for reasons best known only to themselves, the plaintiff's legal advisers did not utilise some of the other legal avenues that could.