

IN THE SUPREME COURT OF BELIZE A. D., 2013

CLAIM NO. 104 OF 2013

BETWEEN (BYRON WARREN CLAIMANT
(
(AND
(SEABREEZE COMPANY LIMITED FIRST DEFENDANT
((In Receivership)
(THE BELIZE BANK LIMITED SECOND DEFENDANT

BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA

Mr. Aldo Reyes of Reyes Retreage LLP for the Claimant/Respondent

Mr. Edmund Marshalleck, S. C., of Barrow and Co. LLP for the First Defendant

**Godfrey Smith, S. C., of Marine Parade Chambers for the Second
Defendant/Applicant**

J U D G M E N T

1. This is an application by the Second Defendant, the Belize Bank Ltd. for Summary Judgment and in the alternative, that the Claimant/Respondent's Statement of Case be struck out.

2. The First Defendant, Seabreeze Limited, joins with and supports the Second Defendant, Belize Bank Limited, on this application and the Claimant/Respondent, Byron Warren, opposes the application.

1. The grounds of the application as stated are as follows:

- i) The Respondent's claim against the Applicant is premature and discloses no reasonable grounds for bringing the claim against the Applicant since the Claimant is claiming declarations of equitable title to a condominium unit that has not yet been strata titled.
- ii) The Claimant/Respondent has no real prospect of succeeding with this Claim against the Applicant/Second Defendant since:
 - a) The Claimant's claim against the Applicant/Second Defendant is grounded entirely in estoppel which can only be used as a shield and not a sword;
 - b) On the face of the Claimant's pleadings it is clear that the Applicant's letter of 22 February, 2001 cannot ground a claim of proprietary estoppel.

Facts

3. The following are the facts as agreed among all the parties in their Agreed Statement of Facts and Issues dated September 26th, 2013:

- 1. Seabreeze Company Limited (hereinafter "Seabreeze") was the developer of a condominium development called the Villas at Banyan Bay (hereinafter "the Development") situated on Parcels 363, 364, 365, 366 and 388, Block 7, San Pedro

Registration Section. At the time, Seabreeze was the registered proprietor of all these parcels of land holding freehold title free from all incumbrances.

2. To fund the acquisition of title to the abovementioned parcels of land and to develop the same, Seabreeze secured financing from the Belize Bank Limited (hereinafter "the Bank"). The Bank afforded Seabreeze a loan facility and pursuant thereto Seabreeze executed a first legal charge on or about October 1995 over several parcels of land including San Pedro Block 7, Parcels 361, 362, 363, 364, 365, and 388 (hereinafter "the Charged Parcels") in favour of the Bank as security.
3. Travis Harris, Justin Harris and Ava Harris entered into a contract with Seabreeze dated 14 June, 1996 for the purchase of a strata lot within the development and for the construction of Condominium Unit G3 (hereinafter "Unit G3") thereon. To date, the said strata lot does not exist.
4. Unit G3 is not part of a strata plan and as such there exists no legal title for this individual condominium unit nor for any of the condominium units comprised within the building comprising Unit G3.
5. Byron Warren(hereinafter "Warren") entered into a Deed of Assignment with Travis Harris, Justin Harris and Ava Harris dated 30 March, 2001 under which Warren acquired the contractual and proprietary rights to Unit G3.
6. Pursuant to this Deed of Assignment Warren paid to the HARRISES the sum of US\$225,000.00.
7. Prior to Warren entering into the Deed of Assignment, the Bank issued a letter to Warren in care of his attorney, Mrs. Denise Courtenay, dated 22 February, 2001 advising that the Bank was aware of the contract for the sale of Unit G3 and advising as follows:

"We understand that strata title is being processed for this unit and advise that we are prepared to release it from our charge when completed."

8. Seabreeze subsequently acknowledged the assignment to Warren of the contractual and proprietary rights to Unit G3 in a written agreement dated 9th October, 2003.
9. On the 29th December, 2008 Seabreeze was placed under receivership by the Bank pursuant to its charge over the Charged Parcels and Michael Castillo (hereinafter "Castillo") was appointed as the receiver. The receivership extended to and included the management of all condominium units and structures situated on the Charged Parcels, including Unit G3.
10. On 6th June 2011, Castillo was replaced as receiver by James Scott.
11. Since the commencement of the receivership no efforts have been made by either of the receivers, in light of Mr. Warren's unresolved claim to an interest in Unit G3, to disrupt Warren's exclusive occupation and possession of Unit G3.
12. In late 2009, the Receiver made the determination to take the necessary steps to have a strata plan prepared and registered for the remaining parcels in the development which includes parcels 363, 364 and 365 including effecting certain subdivisions and an application for the acquisition of title to a portion of a parcel (now designated as an alleyway) by prescription.
13. The registration of the strata plan, if completed, will result in the creation of a legal title and the opening of an individual register at the Land Registry for Unit G3.
14. To date very little progress has been made in the preparation or registration of the necessary strata plan so that there still exists no separate identifiable title to unit G3. It remains but an inseparable part of a building situate partly on Parcel 364.

Relief sought in the Claim

4. The following relief is sought by Warren in the substantive claim:
- a. A declaration that the Deed of Assignment dated 30th March, 2001 between the Claimant of the first part and Travis Harris, Justin Harris and Ava Harris of the second part is valid and effective to transfer equitable title in condominium unit G3 (hereinafter 'the Unit') situate on San Pedro, block 7, parcel 364 (hereinafter 'Parcel 364') to the Claimant.
 - b. A declaration that the Claimant is vested with full equitable title to the Unit.
 - c. A declaration that the Claimant is entitled to have legal title to the Unit transferred to him free and clear of the 2nd Defendant's legal charge, as soon as the relevant strata plan has been registered with the Land Registry.
 - d. An order that the 2nd Defendant effect a discharge of its legal charge over the Unit as soon as the relevant strata plan has been registered.
 - e. A declaration that the 2nd Defendant is estopped from relying on its charge over Parcel 364 in any manner whatsoever to impede the Claimant from obtaining legal title to the Unit.
 - f. An order that the 1st Defendant take all necessary steps and execute all such documents to transfer title to the Unit to the Claimant as soon as the relevant strata plan has been registered.
 - g. Costs.
 - h. Such further or other relief as the Court sees fit.

Issues

5. The parties have agreed that these are the issues to be determined by the Court on this application:

- a) Whether there can exist an equitable title to Unit G3 in the circumstances;
- b) Whether the Bank's letter dated 22 February 2001(hereinafter "the Bank's letter") is a sufficient and adequate assurance to ground claim in proprietary estoppel;
- c) Whether the equitable interest of Warren is subject to, or takes priority to, the legal security interest of the Bank in Unit G3.

Applicant/Second Defendant's Submissions on Issue One

6. *Whether there can exist an equitable title to Unit G3 in the circumstances.*

Mr. Smith, S. C., on behalf of the Applicant argues that this Claim is entirely premature as the Claimant/Respondent is asking the Court to make declarations on rights which can only come into existence upon the registration of the strata plan. In the orders sought by the Claimant/Respondent, he seeks declarations of an equitable interest in Unit G3. Mr. Smith, S. C., submits that this unit can only be created by a strata plan which accords with Section 4 of the Strata Titles Registration Act, Chapter 196 of the Laws of Belize:

1) Section 2 of the Strata Act states that “unit entitlement” means , in relation to any strata lot, the number specified in accordance with paragraph (d) of subsection (1) of section 4.

2) A “strata lot”, as defined by Section 2, means a self-contained unit comprised in a strata plan, and shown as ‘a plan of the type referred to in section 4.

Mr. Smith, S. C., also argues that section 3 of the Strata Act under the title “Creation of Lots” states as follows:

“3. - (1) Land may be subdivided into strata lots in accordance with a strata plan which shall be registerable in the manner provided by or under this Act and prescribed under the Registered Land Act.”

Learned Counsel for the Second Defendant contends that since these lots only come into existence when a strata plan is registered in accordance with the Act, then there is great uncertainty as to the nature of the subject matter of the agreement between the Claimant and the Harrises dated 30th March, 2011 and the Agreement for Sale dated 9th October, 2011 in light of the fact that Unit G3 does not exist. As such the contract for sale is unenforceable as in ***Pearce v. Watts*** (1875) LR Eq 492. Mr. Smith, S. C.,

argues that no equitable interest can arise out of an unenforceable contract of sale.

Submissions of First Defendant in support of Second Defendant's Application for Summary Judgment on Issue One

7. Mr. Marshalleck, S. C., on behalf of the First Defendant Seabreeze Limited, in full support of the Second Defendant's application for summary judgment, argues that the Agreement for Sale of Unit G3 may not be specifically performed unless and until a separate strata title to Unit G3 is created. Unless and until the required strata plan is registered, the interest of the Claimant is properly confined to enforcement of the contract in relation to Parcel 364 as a whole only. He further contends that the contract itself provides for registration of the strata plan upon fulfillment of the defined conditions and therefore fully contemplates this legal position. Since specific performance is not available when it is impossible to perform a contract, it is at this time impossible to transfer title to Unit G3 because separate title to Unit G3 simply does not exist. An equitable title in Unit G3 may properly arise only upon the creation of separate title for Unit G3. Given the absence of such a title at this time, there can exist no equitable interest in Unit G3 as distinct from Parcel 364. The Claimant's claim to such

an interest must indeed be regarded as premature and therefore fails. “Unit G3” at this time is but a notional concept and must be an insufficient basis upon which to find a separate and distinct equitable interest in Parcel 364. In support of this contention, Mr. Marshalleck, S. C., cites *Halsbury’s Laws of England* on Specific Performance Vol 44(1) Fourth Edition at paragraphs 801, 819, 892 and 893.

Claimant/Respondent’s Submissions on First Issue

8. Mr. Reyes for the Respondent opposes this application and argues that this Claim is not prematurely brought as the Claim pertains to a live issue. He argues that it is with the knowledge that legal title to Unit G3 does not exist that the Claimant is seeking declaratory relief and orders that are contingent on the registration of the strata plan. Mr. Reyes argues that Learned Counsel for the First Defendant has submitted no authority for the proposition that because legal title does not yet exist for Unit G3 then equitable title cannot exist. Mr. Reyes submits that it is exactly in cases such as these (where no legal title exists) that equity must step in to protect the interest of a purchaser.

He further submits that there is no uncertainty of subject matter in that the assurance letter dated February 22nd, 2001 given to the Claimant by the Second Defendant specifically referred to “Condo Unit G3”. He argues that even where there is uncertainty or a level of ambiguity as to subject matter, that is not a bar to equitable relief *Thorner v Major* 2009 1WLR 776 where Peter made certain oblique representations to David that he would inherit “Stear Farm” and the size of “Stear Farm” was consistently fluctuating. Lord Scott in the House of Lords held that:

“Peter’s representation that David would inherit Steart Farm speaks, at least where Peter remained the owner of an agricultural entity known as Steart Farm, as from his death and if, at that time, evidence were available to identify Steart Farm with certainty, David’s claim to be entitled in equity to Steart Farm cannot, in my opinion, be rejected for want of certainty of the subject matter.”

In his supplemental submissions dated January 14th, 2014, Mr. Reyes also rejects Mr. Marshalleck’s argument that since legal title to Unit G3 does not yet exist, an order for specific performance for transfer of title to Unit G3 cannot be made at this time, and therefore an equitable interest in Unit G3 cannot exist. He submits that this Court must look at the Agreement as a whole and that that Agreement between the First Defendant and the

Claimant was for the purchase of a strata lot and for the construction of a condominium on the notional strata lot. This condominium and strata lot was to be located on Parcel 364. He argues that since (as Mr. Marshalleck, S. C., has conceded in oral arguments) the First Defendant has contracted with the Claimant to register a strata plan and create title for the unit, it remains open to the Claimant to seek an order for specific performance of all obligations under the Agreement. He draws the Court's attention to an excerpt from ***Megarry and Wade*** Fifth Edition at page 602 paragraph 1 (submitted by Mr. Marshalleck, S. C.) as follows:

"If the purchaser is potentially entitled to the remedy of specific performance, he obtains an equitable interest in the property contracted to be sold; for he is, or soon will be, in a position to call for it specifically. It does not matter that the date for completion, when the purchaser may pay his money and take possession, has not yet arrived; equity looks upon that as done that which ought to be done, and from the date of the contract the purchaser becomes the owner in the eyes of equity (he cannot, of course, become owner at law until the land is conveyed to him by deed)."

Ruling on Issue One: Whether there can exist an equitable title to Unit G3 in these circumstances

9. At the time Mr. Warren contracted with the Harrises in 2001 to purchase a unit in the condominium development, there was no building on Parcel 364. When the Harrises assigned the contract to Seabreeze Limited in 2003, the building was physically constructed and Mr. Warren has been occupying a unit in that condominium development since that date. But even though the unit is physically there and Mr. Warren has been living in it, in the eyes of the law Unit G3 does not yet exist because the strata plan has not yet been registered. The difficulty is that Seabreeze Limited has since gone into receivership and Mr. Warren, anxious that he may not be able to secure his legal title to Unit G3 in light of Belize Bank's prior claim on the property, has come to court to get a declaration as to his equitable title in the meantime his legal title is acquired. To my mind, the issue is what did Mr. Warren become entitled to when he paid his money to the Harrises in 2001? Did he merely get a right to sue the Harrises (and by Deed of Assignment Seabreeze Limited) for damages for breach of contract if they as vendors did not fulfill their part of the contract? Or did he as a

purchaser become owner of the equitable title to Unit G3 as soon as he paid his \$225,000 to the vendors?

I find that not only does Mr. Warren have a right to sue the First Defendant, Seabreeze Limited, for breach of contract if he does not get the legal title to his condominium; I must agree with the Claimant/Respondent's submission that Mr. Warren also became the owner in equity of Unit G3 as soon as he paid his money to the Harrises. Equity regards as done that which ought to be done. To my mind, this is clear from the excerpt cited from ***Megarry and Wade*** above. Mr. Warren obviously cannot obtain legal title to Unit G3 at this time because the strata plan has not yet been registered. But, he has paid his money as the full purchase price of the unit, he is presently living in the unit and so in the eyes of equity Mr. Warren owns Unit G3. He has fully performed his obligations under the contract for sale of this condominium. It is Seabreeze who has failed to do what it contracted to do under the Deed of Assignment e.g. ensure the strata plan registered so that Mr. Warren could get legal title to his strata lot. Seabreeze's failure to honor its commitment under the Deed of Assignment (for whatever reason) does not negate the fact that Mr. Warren is the equitable owner of Unit G3.

Issue Two: Whether the Bank's letter dated 22 February, 2001 (hereinafter "the Bank's letter") is a sufficient and adequate assurance to ground a claim in proprietary estoppel.

Issue Three: Whether the equitable interest of Warren is subject to, or takes priority to, the legal security interest of the Bank in Unit G3.

Applicant/Second Defendant's Arguments on Second and Third Issues

10. On behalf of the Belize Bank, Mr. Smith, S. C., argues that the Claimant has failed to meet the legal threshold to raise the equity of proprietary estoppel. He cites *McGee, Snell's Equity* 13 ed (2000) at p 727-728 as follows:

"Without attempting to provide a precise or comprehensive definition, it is possible to summarize the essential elements of proprietary estoppel as follows:

(i) An equity arises where:

(a) The owner of land (O) induces, encourages or allows the Claimant (C) to believe that he has or will enjoy some right or benefit over O's property;

(b) In reliance upon this belief, C acts to his detriment to the knowledge of O; and

(ii) O then seeks to take unconscionable advantage of C by denying him the right or benefit which he expected to receive."

Mr. Smith, S. C., argues on behalf of the Belize Bank that the Claimant has failed to meet the legal threshold to raise the equity of proprietary estoppel at a more fundamental level. He says that the equity can only arise where the Claimant is dealing with an owner of land and Belize Bank was clearly not the owner of the land in this case. Mr. Smith, S. C., goes on to state that the Claimant is grounding his claim to proprietary estoppel on a short letter dated 22 February, 2001 from the Belize Bank written to the Claimant's attorney. As the pleadings disclose, the Claimant and the Belize Bank differ sharply on the interpretation to be given to this letter. Mr. Smith, S. C., after referring to various aspects of the evidence, then outlines the reasons why the Bank's interpretation of the letter should be preferred by this Court. In conclusion, he asserts that the legal charge that the Belize Bank holds must take priority over any possible equitable interest that the Claimant may have as it was registered on October 9th, 1996 well before the Claimant arguably acquired an equitable interest over the property. He cites the Registered Land Act, Chapter 194 of the Laws of Belize, section 44 which states that priority of interests is determined by the date on which the instruments which led to their registration were presented to the Registry.

Claimant/Respondent's Submissions on Second and Third Issues

11. Mr. Reyes on behalf of the Claimant argues that Warren's case falls squarely within the parameters of proprietary estoppel. He cites Lord Walker in ***Gestingthorpe Thorne v Major*** where His Lordship expounded on the essential elements of the principle as follows:

" 'There is no definition of proprietary estoppel that is both comprehensive and uncontroversial (and many attempts at one have been neither).' Nevertheless most scholars agree that the doctrine is based on three main elements, although they express them in slightly different terms: a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of (his) reliance ..."

Mr. Reyes contends that the Belize Bank made an unqualified assurance to Warren that it would release its charge when the strata plan was registered. Warren relied on this assurance and in turn acted to his detriment by paying US\$225,000.00 to the sellers. He submits that Warren's case therefore satisfied the criteria for relief under the concept of proprietary estoppel. He also disagrees with Mr. Smith's argument that Warren's claim under proprietary estoppel must fail because the Belize Bank is not the owner of the land. Mr. Reyes submits that the party giving the assurance need not be an owner of land in order to ground a claim

under proprietary estoppel and in support of this contention he refers to **Crabb v Arun** DC [1976] QB 225 where Lord Denning M.R. held that the effect of estoppel on the true owner may be that:

*“His own title to the property, **be it land or goods**, has been held to be limited or extinguished and new rights and interests have been created therein. And this operates by reason of his conduct – what he has lead the other to believe- even though he never intended it.”*

Learned Counsel also refers to the House of Lords’ case of **Yeoman’s Row Management Limited and another v Cobbe** where Lord Scott of Foscoe held as follows:

“The estoppel becomes a ‘proprietary’ estoppel - a sub-species of a ‘promissory’ estoppels - if the right claimed is a proprietary right, usually a right to or over land, but, in principle, equally available in relation to chattels or choses in action.”

Mr. Reyes then goes on to highlight portions of the evidence to illustrate why the Claimants’ interpretation of the letter is sufficient to ground a claim of proprietary estoppel. In conclusion he states that while he recognizes that the Belize Bank held a charge over Parcel 364 long before Warren entered into a Deed of Assignment, he submits that it was the discovery of this very fact that prompted Warren to seek an assurance from the Bank. The issuance of the Assurance Letter by the Bank vests Warren

with the equity under proprietary estoppel and trumps the Bank's legal charge.

Ruling on Second and Third Issues

12. As clearly seen by the arguments of both sides, these two issues overlap and interrelate; hence I address both issues simultaneously. In presenting their arguments to substantiate their points on this application, both counsel delved into the evidence in some detail. Did the Bank know that Warren was going to rely on this letter before purchasing the unit? Did Warren rely on this letter from the Bank, and not on the letter given to him by the Harrises? Was the Deed of Assurance finalized but not signed and executed by the parties? I am not comfortable addressing these issues at this time as they involve questions of fact which can only be determined after the court has had a chance to have a full hearing on the matter. Both sides have made assertions as to their clients' positions and views on this letter and other documentary evidence such as the Deed of Assignment but none of the affiants in this matter have been tested by cross examination.

On the face of it, the legal position is quite clear. Mr. Smith, S. C., is correct when he points out that the bank held a prior legal charge over Parcel 364 which long predates any equitable interest the Claimant may have. However, if (as Mr. Reyes argues) the Bank's letter amounts to an assurance which vested Mr. Warren with an equity under proprietary estoppel, then I have to consider whether that equity if established would be sufficient to defeat the Bank's charge. I therefore have to determine based on the evidence what were the circumstances which prompted the Bank's letter to Mr. Warren's attorney. Mr. Smith, S. C., alludes to this in his submissions at paragraph 19 in citing the evidence surrounding the Bank's letter as follows: *"It is important to note that there is no evidence before the court of what question or query from the Claimant's attorney elicited the response from the Belize Bank."* I will only state that the Claimant, in my view, has a steep hill to climb in order to establish on a balance of probabilities that the Bank's letter was sufficient to extinguish the Bank's prior legal charge. But I find that there must be a full trial of these issues and a thorough ventilation of the evidence, where affiants are tested by cross examination, as these are not issues which I am prepared to

determine on a cursory view of the evidence in a summary application such as this.

13. Application denied.

14. Costs awarded to the Claimant/Respondent to be agreed or assessed.

Dated this 23rd day of September, 2014

Michelle Arana
Supreme Court Judge