

IN THE COURT OF APPEAL OF BELIZE AD 2017
CIVIL APPEAL NO 5 OF 2014

**THE ATTORNEY GENERAL
KENDALL MENDEZ**

Appellants

v

BAREFOOT MANAGEMENT LIMITED

Respondent

BEFORE

The Hon Mr Justice Sir Manuel Sosa
The Hon Mr Justice Christopher Blackman
The Hon Mr Justice Murrio Ducille

President
Justice of Appeal
Justice of Appeal

N Hawke, Deputy Solicitor General and M Mohabir, Crown Counsel for the appellants.
N Espat-Myles for the respondent.

2 November 2016; 15 March 15 and 16 June, 2017.

SIR MANUEL SOSA P

[1] Having read the judgment of my learned Brother, Blackman JA, in draft, I have no hesitation in saying that I concur in the reasons for judgment given, and the orders proposed, in it.

SIR MANUEL SOSA P

BLACKMAN JA

[2] The issue for determination on this appeal in respect of the first appellant, the Attorney General is whether he is liable to the respondent for monies expended on the construction of a road, and a wasted costs order for expenditure incurred in having an Environmental Impact Assessment prepared. In relation to the second appellant, Kendall Mendez the issue is whether the respondent company is entitled to recover jointly and severally as damages the sum of \$303,750.00 from David Paulson and Mr. Mendez for a fraudulent misrepresentation.

BACKGROUND

[3] The factual background is common to both appellants.

The appellant company Barefoot Management Limited (hereinafter called Barefoot) is a company incorporated under the Laws of Belize, and as stated by the learned trial judge **Joseph-Olivetti J** at paragraph 4 of her decision, acted at all times through one of its directors, Mr. Antone Accuardi.

[4] The essential particulars of the appellant's claim is extracted from the amended Statement of Claim exhibited between pages 11 and 15 of the Record of Appeal.

5. *"In or around June 2005 the Claimant's Directors were approached by David Paulson, the First Named Defendant d.b.a Cayo Real Estate who held himself out to the Claimant and its officers as an agent of the Government of Belize, and offered to the Claimant an opportunity to obtain land from the Government of Belize for development purposes.*

3. *The First Named Defendant, in his position of agent of the Government of Belize, represented to the Claimant that a portion of the Vaca Plateau was de reserved for the purpose of exclusive eco-tourism.*

4. *The First Named Defendant produced to the Claimant plot maps and professionally done surveys titled "de reservation of the Vaca Plateau" and*

represented to the Claimant that, he had sold lands, on behalf of the Government of Belize in the region described in the plots and survey.

5. Thereafter the First Named Defendant arranged meetings with another representative of the Government of Belize the Second Named Defendant, the then Standard Bearer Western Cayo of the People's United Party who represented to the Claimant that he was a member and agent of the Government of Belize and had authority with respect to the recently de reserved lands in the Vaca Plateau region of Belize and that they would be available by sealed bid auction in an effort to raise money for the Government of Belize.

6. That induced by the representations of the 1st and 2nd Defendants that they were agents of the Government of Belize and that the Government of Belize was willing to sell the lands in the Vaca Plateau area that were already de reserved the Claimant made a sealed bid of BZ\$1 00,000 for the said lands.

7. At a subsequent meeting with the Claimant and First and Second Defendants on behalf of the Government of Belize the Claimant was informed that its bid of BZ\$ 100,000 was insufficient but that the Government would instead accept BZ\$106,000 on the condition that the Claimant would provide an additional BZ\$ 100,000 for the construction and manning of a forestry station to keep watch over the Vaca area.

8. That upon the representations made by the Defendants that the lands were dereserved and that the Government was willing to sell the said lands, the Claimant agreed to the terms outlined by the Government of Belize. As a result on the 1ST of July 2005 the Claimant signed an offer to purchase 70 acres of land in the Vaca Plateau area at the purchase price of U.S \$53,000 or BZ \$106,000. The offer to purchase was duly signed by the First Named Defendant as agent for the Government of Belize.

9. Upon the signing of the agreement BZ\$ 2,000.00 was paid to the First Named Defendant as earnest money that was to be deposited in the escrow

account of the First Named Defendant and as per the terms of the agreement the Claimant was permitted to have immediate right of possession and occupation of the lands so that development of the project could begin without delay.

10. *Further, as per the agreement U.S\$12,500 or BZ\$25,000 was paid to the Government of Belize in or around the fifteenth of May, 2005 as the Government of Belize had accepted the payment terms stipulated by the Claimant in the offer to purchase.*

11. *Upon entering into possession of the lands the Claimant began construction of a 5 mile long road leading to the land as no passable road existed and at a cost of \$125,000.00 to the Claimant.*

12. *The Claimant also obtained an architectural plan for its proposed development at a cost of \$25,000.00 and began clearing the land and construction of its infrastructure which included four buildings, bridges, access roads and walking trails at a cost of \$100,000.*

13. *The Claimant was also advised by the Government of Belize to make an application to the Department of Lands for the granting of permission to survey the land.*

14. *Approximately one year after the Claimant began construction of the road and other infrastructure on the lands, Martin Alegria on behalf of the Forestry Department ordered the Claimant to cease and desist construction of its buildings intended to form part of the Resort. However, the Claimant was not asked to cease construction of the road.*

15. *The Forestry Department also issued the Claimant with a fine of \$18,500 which the Claimant duly paid as it was threatened that if the fine was not paid immediately its Directors would be imprisoned.*

16. *Thereafter, the Claimant ceased its development of the property and continued the construction of the road undisturbed by the Forestry Department or any other government entity.”...*

21. *It became clear to the Claimant at this point that the representations made by the Defendants were therefore false and made fraudulently and dishonestly with the intention to induce the Claimant, and which did induce the Claimant, to enter into the agreement to purchase the lands and expend money thereto.*

22. *However, the Minister assured the Claimant that the Government was still very much interested in selling the lands to the Claimant and further assured the Claimant that it would only be a short period of time before the land was dereserved.*

23. *The First and Second Defendants and then Minister also advised the Claimant to proceed to survey the land as the dereservation process would soon be completed.*

24. *As a result of these assurances of the Minister and the fact that it had already spent monies towards the investment the Claimant continued spending on its investment on the lands.*

25. *The Claimant was referred by the First and Second Named Defendants to a licensed surveyor who the Claimant hired to complete the required survey at a cost of \$3000.00.*

26. *In addition, the Forestry Department subsequently informed the Claimant •that it would be required to perform an Environmental Impact Assessment (EIA) before it would issue a lease to the Claimant.*

27. *The Claimant was assured that the lease would be issued concurrent with the EIA and that the de reservation progress was in progress and had been approved.*

28. *Subsequent meetings with the First and Second Defendants and various members of the Government yielded similar assurances.*

29. *Relying on the assurances of the Defendants the Claimant expended further monies amounting \$55,000.00; \$40,000.00 of which is still owing by the Claimant, and prepared and submitted the EIA.*

30. *However, even after its submission of the EIA the Government still failed to issue the lease to the Claimant and the Claimant was informed by the Government that it would no longer be issuing a lease to it with respect to lands in the Vaca Plateau.*

31. *The Government however offered the Claimant an alternative site but the site offered was down-stream from a plantation where harmful chemicals were being used causing the site to be unacceptable for the Claimant's plans to establish a resort.*

32. *The Government then indicated that it was prepared to offer the Claimant a concession on the property at Vaca Plateau for thirty years at the rate of \$10,000 per annum, however no agreement was arrived at to this effect.*

33. *Thereafter, in or around 2009 the Forestry Department indicated to the Claimant that the de reservation process was moving forward. The Forestry Department assured the Claimant that its project had the full support of the Government of Belize and as such the boundaries of the land should be marked after which title would be issued to the Claimant.*

34. *Having already expended a large amount of money and based on the assurances of the Government, the Claimant expended further resources in the sum of BZ\$1,500.00 and marked the boundaries of the land.*

35. *However, in a subsequent meeting with the First Defendant he indicated to the Claimant that the Government was not willing to transfer the land on the previous agreement but required an additional \$80,000 US Dollars.*

36. *The Claimant, however, refused to pay any additional money to the Government and the Government to this date has failed to transfer title to the lands at the Vaca Plateau to the Claimant as has been agreed upon.*

37. *That the Defendants falsely and dishonestly represented to the Claimant that the lands that were being purchased were de reserved with the knowledge that that was not the case.*

38. *That relying on the fraudulent misrepresentations of the Defendants the Claimant acted to its detriment in that it expended large sums of money to purchase and develop a land on the assurances of the Government that title would be transferred to the Claimant.*

39. *Further, by the continued assurances of the Defendants that the Government of Belize was willing to grant a lease of the lands to the Claimant, the Defendants acquiesced that the lands would be sold to the Claimant. Based on these assurances the Claimant acted to its detriment and as such the Defendants are estopped from denying that an agreement existed for the sale of the land to the Claimant.*

40. *Further the Government of Belize by requesting that the Claimant conduct an Environmental Impact Assessment, inviting discussion and negotiations with the Claimant with a view to the Claimant acquiring title to the land the Claimant has acted to its detriment and the Defendants are estopped from denying that the Claimant has an interest in the land.*

41. *As a result the Government has been unjustly enriched with the development to the land, the construction of five miles of road improvements and has breached its agreement to sell the lands to the Claimant in that title to the land has not been transferred into the name of the Claimant.”*

[5] Barefoot filed an action in the Supreme Court of Belize seeking claims for specific performance and damages for breach of contract, all of which were rejected by the defendants. In a trial before **Joseph-Olivetti J** over a period of four days, in October 2013 the learned judge found that the issues which arose for determination were:

i. Whether a contract for the sale of land was entered into between Barefoot and GOB acting through Mr. Paulson as agent and if so whether it was valid and enforceable; and,

ii. Alternatively whether Barefoot was entitled to damages for misrepresentation as against Mr. Paulson and Mr. Mendez.

[6] In a reserved decision dated December 20, 2013 the learned judge dismissed the claims by Barefoot for specific performance and damages for breach of contract, but upheld the claim for misrepresentation as against Mr. Paulson and Mr. Mendez. The judge ordered the defendant Paulson to pay to Barefoot the sum of US \$13,500.00 being a refund of earnest money and part payment of the purchase price together with pre-judgment interest at the commercial rate of 9% per annum from July 5, 2005, and further ordered Barefoot to recover damages against both Paulson and Mr. Mendez in the sum of \$303,750.00 together with pre-judgment interest at the commercial rate of 9% per annum from the date of issue of the claim form.

[7] The trial judge ordered the Attorney General, as representative of the Government of Belize to pay to Barefoot the sum of \$125,000.00 for constructing 5 miles of road and \$95,000.00 for wasted costs incurred on Environmental Impact Assessment (EIAs) in circumstances where the court found that the GOB '**whether negligently or otherwise led Barefoot on a wild goose chase and therefore must reimburse it.**' together with pre-judgment interest at the commercial rate of 9% per annum from the date of issue of the claim form.

[8] The Attorney-General has appealed the order recited immediately above on the ground that the Learned Trial Judge erred in law and fact when she found that

i: Government should "reimburse" the Claimant the \$95,000.00 (Ninety Five Thousand Belize Dollars) expended on preparing and unapproved Environmental Impact Assessment Plan, and

ii. when she found that the Government was unjustly enriched by the actions of the Claimant and therefore the Claimant should recover \$125,000 (One

Hundred Twenty Five Thousand Belize Dollars) from the Government for construction of the roads.

The AG's Appeal.

[9] Mr. Hawke, Counsel for the Attorney-General submitted at the outset of the appeal, that the central issue for determination was whether in the circumstance that the trial judge having found the contract for the sale of land entered into between Barefoot and GOB acting through Mr. Paulson as agent to be illegal, was it proper thereafter to award wasted costs and damages against the GOB.

[10] Mrs. Myles for Barefoot responded that the wasted costs order and the finding that the Government was liable to her client for the amounts detailed in paragraph 8 above, was independent of the finding of illegality in relation to the contract. Counsel pointed out that notwithstanding an Enforcement Notice being issued to Antoine Accuardi on behalf of her client on **April 10, 2006** by Martin Alegria, the Chief Environmental Officer of the Department of the Environment to immediately cease all development activities, whatsoever, at the said site near the Macal River within the Vaca Plateau Forest Reserve, Cayo District the same Mr. Martin Alegria on July 4, 2006 wrote to Mr. Accuardi to advise that the Department required Barefoot "to conduct an Environmental Impact Assessment (EIA) for the development. Permission was also granted for the continuation of the rehabilitation of the road from the Hydro Road junction to as far as the commencement of the Vaca Falls Reserve boundary.

[11] Mrs. Myles noted that the learned trial judge had clearly taken the foregoing events into account when she observed at paragraphs 49 to 51 of her judgment that:

"49. In addition, the Government through its representations to Barefoot ... encouraged Barefoot to incur the costs of E1As (\$95,000.00) before it granted it a lease when it knew or ought to have known that the National Environmental Appraisal Committee (NEAC) would not consider the E1As until the lease had been granted. The Government whether negligently or otherwise led Barefoot on a wild goose chase and therefore must reimburse, it.

50. *And finally the road which Barefoot built. Barefoot constructed 5 miles of road as no passable road existed at a cost of \$125,000.00. I note Mr. Martin Alegria's evidence in chief to the effect that Barefoot after the issue of the enforcement notice asked, inter alia to be allowed to continue rehabilitation of the existing road and that it was allowed to do so. This was because, and I quote-The DOE (Department of the 'Environment) was of the 'view that the rehabilitation' would be beneficial .to the area,.."* Mr. Martin Alegria was the Chief Environmental officer in the DOE. And I note that the Government did not see fit to dispute any of the damages claimed in this action.. In fact no Defendant did.

51. *In my judgment, the Government would be unjustly enriched if it was not called upon to reimburse Barefoot for the costs of the road whilst enjoying the benefit and I so order"*

[12] Counsel for the respondent in her written submissions cited the English Court of Appeal decision of **Saunders et al v. Edwards et al** [1987] 2 All ER 651 and the remarks of **Bingham LJ** at page 666 (as he then was) that: *"Where issues of illegality are raised, the courts have (as it seems to me) to steer a middle course between two unacceptable positions. On the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss or how disproportionate his loss to the unlawfulness of his conduct."*

[13] The remarks by **Joseph-Olivetti** at paragraph 59 of the decision mirrors the observation by **Bingham LJ** also at page 666 that *"public policy does not in my view require that the...defendant should be left to enjoy the fruits of his deceit"*.

[14] In all the circumstances I am of the opinion that the learned judge came to the correct conclusion with respect to the determination against the first appellant, the Attorney General in this matter and I would dismiss the appeal of the Attorney General and affirm the orders made. The Respondent to have its costs on the appeal. I would further order (a) that the above order as to costs be provisional in the first instance but become final after 14 days from the date of delivery of this judgment, unless either party shall file an application for a contrary order within the said period of 14 days and (b) that, in the event of the filing of such an application, the matter of costs shall be determined on the basis of written submissions to be filed and delivered in 14 days from the filing of the application.

The Appeal of Kendall Mendez.

[15] The Notice of Appeal in this action was filed on behalf of the Attorney General and Kendall Mendez as appellants. However, the written submissions as well as the oral arguments advanced at the hearing on November 2, 2016 were made solely on behalf of the Attorney General.

[16] Regrettably, it was only in the course of preparing this decision that the absence of submissions, oral or written, on behalf of Mr. Mendez became embarrassingly apparent. As noted earlier, Mr. Mendez, along with David Paulson had been ordered to pay damages in the sum of \$303,750.00 to the respondent company.

[17] On March 15, 2017 Counsel for the parties were invited by the Court to address the issue. Mr. Nigel Hawke Counsel for the Attorney General submitted that his submissions were intended to cover all the findings by the trial judge and were in fact, an appeal against those findings. In response to a query from the Court, Mr. Hawke modified his previous statement to state that while he had stated his appearance was for “the appellants” indeed it was the Attorney General who had appealed against the unjust enrichment issue. Further, that his office had been unable to locate Mr. Mendez who may have been unaware that an appeal had been filed. The Deputy Solicitor General was of

the view however that Mr. Mendez was aware of the judgment as he had been present in court when the judgment was handed down.

[18] In the Court below, Ms. Illiana Swift, Crown Counsel in the Solicitor General's office represented the Attorney General, the Minister of Natural Resources and the Environment and Kendall Mendez. David Paulson, the first defendant who was represented by Mr. Leo Bradley Jr. did not pursue an appeal of the decision. However, there is a significant judgment against Mr. Mendez and his ostensible appeal has not been supported by any submissions or arguments to facilitate the proper determination of the merits of his appeal.

[19] In the circumstances, to enable a proper determination of the matter I propose the following order:

that the Solicitor General (i) procure the service upon Kendall Mendez, no later than 22 June 2017 of a copy of this judgment, such service to be effected either by posting it to him in a sealed envelope addressed to him at his address last known to the Solicitor General or by delivering it to him in person and (ii) notify the Registrar of this Court in writing, no later than 30 June 2017, that he has done so, or been unable to do so, as the case may be.

BLACKMAN JA

DUCILLE JA

[20] I concur with the reasons given by my brother Justice Blackman and cannot add anything further.

DUCILLE JA