IN THE COURT OF APPEAL OF BELIZE, A.D. 2023

CIVIL APPEAL NO 5 OF 2021

ATTORNEY GENERAL OF BELIZE
MINISTER OF NATURAL RESOURCES Appellants

v

OLIVIA SYLVIA VILLANUEVA Respondent

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BEFORE:

The Hon Madam Justice Woodstock-Riley	-	Justice of Appeal
The Hon Madam Justice Minott-Phillips	-	Justice of Appeal
The Hon Mr Justice Bulkan	-	Justice of Appeal

E. Andrew Marshalleck, SC & Ms Iliana N. Swift instructed by Ms Samantha Matute-Tucker, Assistant Solicitor General, for the appellants.
Mr Darrell Bradley & Mrs Deshawn Arzu Torres for the respondent.

Hearing: Hearing: 7 March 2023
Date of promulgation: 8 May 2023

JUDGMENT

WOODSTOCK-RILEY, JA

[1] I have read the draft judgment of Minott-Phillips JA and agree with the proposed Orders.

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WOODSTOCK-RILEY, JA

MINOTT-PHILLIPS, JA

[2] We heard this appeal on 7 March 2023. The Appellants, the Attorney General of Belize ("the AG") and the Minister of Natural Resources ("the Minister") were dissatisfied with the decision and order of the then Acting Chief Justice of Belize, the Hon Michelle Arana, made on 12 March 2021 following an assessment of damages conducted by her.

[3] In February 2008 the Respondent, Ms Olivia Sylvia Villanueva ("Ms Villanueva") paid the Government of Belize (GOB) $26,657 and $27,300 for 2 parcels of land (being the 102.53 acre "Turneffe" and the 105 acre "Hicks Caye" parcels, respectively) that together were to compensate her for property reclaimed from her by the GOB. She maintained that the GOB failed to deliver title to the two parcels of land to her. The GOB did issue fiat grants for the Turneffe and Hicks Caye parcels but, in error, both grants had the same grant number (312 of 2008). Each grant must have a separate number so that it can, through that number, be distinguished from other grants. The then Minister of Natural Resources promised Ms Villanueva that the matter would be speedily resolved. That did not happen. Land title searches done on 22 February 2019 showed that replacement grant numbers of 104 of 2016 and 105 of 2016 for the Turneffe and Hicks Caye parcels, respectively, were assigned. However, in the events that transpired, the Turneffe parcel could not be transferred to Ms Villanueva. Following entry on 7 May 2019 of judgment in default of Defence against the AG and the Minister in favour of Ms Villanueva on her claim of entitlement to be declared the proprietor of both parcels of land and for damages for loss of use and/or opportunity, the parties were ordered by the Acting Chief Justice to seek to agree the terms of the consequential judgment to be entered on the claim within 6 weeks of that date.

[4] On 11 June 2019 the parties agreed to the following consent order being made by the court:

a. The Defendants are to transfer and issue title to property situate at Hicks Caye and comprising 105 acres of land, as shown on Survey Plan 2242, situate along the Northern Seacoast near the center of Hicks Caye, approximately 13.5 miles Northeast of Belize City, Hicks Caye, Belize District (Plan No. 2242, File No. NES -201600157) to Olivia Villanueva on or before the 25th June, 2019.

b. The Defendants are to locate alternate property for issuance to the Claimant in respect of property situate at Turneffe Caye comprising 102.53 acres of land, situate along the East Coast of the Turneffe Islands, approximately 29.9 miles southeast Belize City, Turneffe Atoll, Belize District, on or before the 25th June 2019. Failing a satisfactory settlement of the matter, the Claimant shall file an application for assessment of damages on or before June 28th, 2019. The application shall be heard by way of Affidavit evidence.

c. …

d. …

e. Costs are reserved.

[5] Once it issued, the Consent Order represented the agreed position of the parties obviating any need for the court to go behind it. The assessment of damages subject of this appeal was conducted in accordance with the terms of sub-paragraph b above. At the end of the assessment of damages the then Acting Chief Justice ordered the AG and the Minister to pay damages in the sum of $5,639,000 to Ms Villanueva together with interest on that sum at the rate of 6% from the date of the claim until payment in full. Costs of the Assessment of Damages were also awarded to Ms Villanueva.

[6] The Appellants' grounds of appeal are as follows:

a. The learned Acting Chief Justice erred in fact and in law and misdirected herself when she made an award of damages in the sum of $5,639,000:

i. in failing to appreciate that the effective date of the valuation was February 2008, when the contract was completed; and

ii. without deducting the contract price paid by Ms Villaneuva.

b. The learned Acting Chief Justice erred in law when she made an award of interest at a rate of 6% subsequent to the delivery of her written judgment.

c. The learned Acting Chief Justice erred in fact and misdirected herself when she failed to consider the totality of the evidence presented, in that the Court found that there was no cross examination of Talbert Brackett, when cross-examination did in fact take place.

c. The judgment is against the weight of the evidence.

[7] At the commencement of the appeal counsel for the AG applied to expand ground ***a*** above by adding (as iii), *in failing to consider that title to the property continued to vest in the Claimant at the time of the award."* We denied the application. The reason for doing so is that the assessment of damages conducted in the court below proceeded on the basis of the parties' consent order from which there is no appeal. It is my view that allowing that application to add that ground of appeal would not be dealing with the case justly, because it would have the effect of extending the appeal beyond the scope of the assessment of damages and require us to delve behind the consent order. No permission to appeal having been obtained, I agree with the submission made on behalf of Ms Villanueva that the consent order is not, and cannot be, the subject of an appeal[1]. Whatever transpired prior to the consent order issuing, the parties agreed that their dispute would be resolved on the basis of what was set out in the consent order. It was the considered view of the parties, as expressed in their consent order, that, failing the provision to Ms Villanueva of property in lieu of the Turneffe parcel, an assessment of damages should ensue. Essentially, this appeal is from the award of damages in the sum of $5,639,000 made at the end of that assessment.

[8] I find it useful to start by considering the ground of appeal stating that the learned Acting Chief Justice erred in fact and misdirected herself when she failed to consider the totality of the evidence presented, in that the Court found that there was no cross examination of Talbert Brackett, when cross-examination did in fact take place. I start here because it is demonstrable

[1] Section 14 (1) (g) (ii) & (3) of the then applicable Court of Appeal Act, CAP. 90, Revised Laws of Belize.

on the material before the court that this ground is made out. It is clear from the Record of Appeal that Mr Brackett was, in fact, cross-examined on his report at the assessment of damages hearing. The transcript of the proceedings commencing on 4 December 2019 at 10:48 am consists primarily of his cross-examination by Counsel Awich for over an hour (having ended at 11:50am). And yet, in expressing her reasons for her decision handed down 15 months later on 12 March 2021, the Acting Chief Justice said,

> *"I note the objections to the value of this property as articulated by Counsel for the Defendants in their submissions on this application. It is unfortunate that the Defendants did not seek to cross-examine Mr Brackett on his report and have him address these concerns or any challenges they wished to make to his report, nor did they apply to the court to have their own Valuation Expert offer an alternative report for the court to consider in determining the quantum of damages to be assessed and awarded to the Claimant."*

[9] Both parties below approached the assessment of damages relating to the Turneffe parcel as properly to be conducted on the basis of a failure to complete a contract for the sale of land - with the measure of damages being the market value less the purchase price. Their dispute was confined to the issue of what was that sum. It was contended on behalf of Ms Villanueva that the court should accept Mr Brackett's assessment of the market value of the property as $5,639,000 together with interest and costs, and also compensate her for her inability to construct or develop her property from the date of cancellation of her title to the date of the assessment. The AG and the Minister, on the basis of Mr Brackett's cross-examination, asked the court not to accept what he posited was the market value for undeveloped land on Turneffe Caye.

[10] In the events that happened the Acting Chief Justice made an award of damages in the sum presented by Mr Brackett as being the market value on the effective date of his valuation which was stated by him to be 16th May 2019. She made this having noted, incorrectly, that he was not cross-examined. The Acting Chief Justice cannot, therefore, be assumed to have taken cognizance of any of the material in favour of the AG and the Minister that was elicited from the

cross-examination of Mr Brackett. In my view this is a material error that entitles this court to set aside her assessment of damages.

[11] The failure of the judge below to take account of the purchase price, which is another ground of appeal, is also an error if, as was accepted by the parties and the court to be the case, the relevant principle being applied to determine the true measure of damages was that stated by McGregor on Damages (18th Edition) *viz*.,

> *The usual measure of damages for the failure of the vendor to complete is the market value of the property as at the date specified for completion under the contract less the purchase price.*

Under the contractual arrangements reflected in the consent order the date of failure to complete the transfer of the Turneffe parcel would have been the 25th June 2019.

[12] The judge below made no mention of an award of interest in her written reasons. Interest is mentioned as an award in the formal order dated a month after her written reasons were delivered and -- at a rate of 6% from the date of the claim until payment in full. As the date of Mr Brackett's valuation of the Turneffe parcel at $5,639,000 is 16 May 2019, an award of interest on that sum of 6% per annum between the date of the claim (22 February 2019) and 16 May 2019 would appear to me to constitute double recovery of that part of the pre-judgment interest component. There is no doubt but that the Judge was competent to award pre-judgment interest but the interest award should compensate for something other than the judgment sum and not repeat any element of value already contained within the judgment sum.

[13] Section 166 of the then applicable Supreme Court of Judicature Act, states,

> *"In any proceedings tried in the Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part*

of the period between the date when the cause of action arose and the date of the judgment, Provided that nothing in this section shall,

(a) authorise the giving of interest upon interest; or

(b) apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or

(c) affect the damages recoverable for the dishonour of a bill of exchange."

[14] The 6% interest awarded in this case, to the extent that it involved pre-judgment interest, ought, for good order, to have been pronounced as part of the judgment delivered and not merely included in the formal order subsequently perfected. I also see no basis for pre-judgment interest predating the date of the assessed market value of the property accepted by the court. The inclusion of the interest component between 22 February and 16 May 2019 was, in my view, an error in the award of interest.

[15] The post-judgment interest component would have been awarded pursuant to section 167 of the Act which states,

"Every judgment debt shall carry interest at the rate of six per centum per annum from the time of entering up the judgment until the same is satisfied, and such interest may be levied under a writ of execution on such judgment."

[Identical to the first paragraph of section 176 of the Senior Courts Act that replaced it.]

[16] We were referred by counsel for Ms Villanueva to the decision of the Belize Supreme Court in ***L&R Transfer Ltd v Town Council of Orange Walk***, Claim No 371 of 2005 which

references section 167. The following dicta appears at paragraph 23 of that case in reference to that section of the Act

> *"In my view s: 167 makes it compulsory to award interest on a judgment sum from the date of judgment until payment, and at the fixed rate of six percent per annum. It is therefore good practice pursuant to s:167, that a judge states in a judgment order that the judgment sum shall carry interest at six percent per annum from the date of judgment until payment. If the judge does not state so, the judgment creditor will be entitled anyway under the section to charge and demand interest at six percent per annum until payment of the judgment debt."*

[17] Perhaps it was this dicta and the relevant sections of the then applicable Supreme Court of Judicature Act that the judge below had in mind when she inserted the award of 6% per annum interest into the formal order covering the period that it did. Her error was in failing to separate pre-and post- judgment interest and in applying the pre-judgment interest component to a period that pre-dated the date of the assessment of the market value of the property.

[18] In fairness to the judge below I point out that the pleaded case of Ms Villanueva, as regards her claim for interest, did not conform to the requirements of Civil Procedure Rule 8.6 and, therefore, did not sufficiently assist her in my view. CPR 8.6 (3) states,

> *"A claimant who is seeking interest must-*
>
> *(a) Say so expressly in the claim form;* ***and***
>
> *(b) Include details of –*
>
> *(i) The basis of entitlement;*
>
> *(ii) The rate;*
>
> *(iii) The period for which it is claimed; and*
>
> *(iv) …."*

The Statement of Claim in this case complied with (a) but not with (b). The failure to comply with (b) deprived the trial judge of the specific assistance she was entitled to have from the pleaded case as regards the interest being claimed.

[19] The discussion above on the award of interest and on the non-deduction of the purchase price in awarding damages is purely academic as those items fall away upon the setting aside of the quantification of the assessment of damages consequent upon this court finding a material error in the failure of the judge below to take account of the cross-examination of Mr Brackett.

[20] Before leaving this appeal, however, I wish to say a few words about the legal procedural requirements applicable to expert evidence. In their written submissions counsel for the AG and the Minister drew our attention to Ms Villanueva's failure to apply for permission to call an expert witness or to put in an expert's report.

[21] Section 45 of the Evidence Act makes opinion evidence on points of science or art admissible evidence. The Act does not, however, make it admissible evidence without more. Sub-section (5) makes it the duty of the judge to decide whether any person is sufficiently skilled to entitle him to be considered an expert. So far as the procedure is concerned the Civil Procedure Rules (CPR) set out in Part 32 the requirements for adducing expert evidence. In this matter there was no order made by the court permitting Ms Villanueva to call an expert witness or put in an expert report.

[22] CPR 32.6 (1) & (2) prohibit any party calling an expert witness or putting in an expert's report without the court's permission, and provide that the general rule is that the court's permission is to be given at a case management conference. Where the matter before the court is an assessment of damages the CPR also provides for a Case Management Conference (see CPR 16.3(5) (b) and 16.4 (3)) at which appropriate directions may be given for the conduct of the proceedings.

[23] It has been said in many cases that, in the area of determining the market value of land, the court can be assisted by expert evidence. However, the law requires that expert evidence be

adduced in accordance with the procedures set out in the rules for ensuring that the proffered expert is an expert, that his evidence is required to assist the court, and that it is his independent evidence.

[24] Not only was there no order of the court permitting Mr Brackett to be called as an expert witness but the report he produced did not meet the requirements set out in CPR 32.13(2).

[25] As indicated by counsel for Ms Villanueva the point of want of permission was not taken below by counsel for the AG and the Minister at the assessment of damages hearing. That failure may, or may not, put that issue to rest depending on whether the issue is viewed as purely procedural, or jurisdictional, respectively.

[26] Fortunately, there is no need for us to decide that in this appeal which we allow on the basis of the ground asserting the error of the judge below in failing to take account of the cross-examination of Mr Brackett and not on the additional basis argued by the Appellants that the ownership of the property remained vested in the Respondent throughout.

[27] On that basis I propose the following order:

a. That part of paragraph 1 of the order of the Court below made on 12 March 2021 mandating the Appellants to make a payment of damages to the Respondent, is affirmed;

b. That part of paragraph 1 of the aforesaid order of the court below quantifying the amount of damages as $5,639,000, together with the award of interest and costs in paragraphs 2 & 3, respectively, of the order, is set aside.

c. The matter is remitted to the High Court for the assessment of damages referred to in numbered paragraph 2 of the parties' consent order made on 11 June 2019 to be conducted *de novo*.

d. The Registrar of the Court below is to fix a date for a Case Management Conference to be held in respect of that assessment of damages pursuant to Civil Procedure Rules 16.3 (5) (b) and 16.4 (3).

e. Having considered the parties' further submissions in their letters to the court following the hearing, the Appellants are awarded 50% of their costs of this appeal to be taxed if not agreed.

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MINOTT-PHILLIPS, JA

BULKAN, JA

[28] I have read the draft judgment of Minott-Phillips JA and agree with the proposed Order as set out by her in paragraph 27 above.

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BULKAN, JA