IN THE SUPREME COURT OF BELIZE A.D. 2023

CLAIM No. 480 of 2020

BETWEEN

BEST BUY LIMITED

CLAIMANT

AND

DWIGHT FLOWERS

DEFENDANT

DECISION OF THE HONOURABLE MADAM JUSTICE MARTHA ALEXANDER

Hearing Date: February 20, 2023

APPEARANCES:

Mr. Jaraad Ysaguirre, Counsel for the Claimant

Ms. Sharryn Dawson, Counsel for the Defendant

DECISION ON APPLICATION TO STRIKE OUT THE CLAIM

INTRODUCTION

1. On November 30, 2022, the defendant approached the court seeking multiple orders primary of which was the striking out of the claimant's claim. The matter had been in the court's system for approximately two years and trial dates were fixed for February 20-22,

2023. The matter itself involves a dispute over land in the possession of the defendant, but for which the claimant claims an indefeasible title. The disputed property (Lot 2140 Heusner Crescent, Belize City) is in a compulsory registration area described as Parcel 23, Block 45, Fort George/Pickstock Registration Section ("the disputed land").

THE APPLICATION

2. The notice of application was filed pursuant to Rule 26.3 (1) and (2) (c) of the Civil Procedure Rules ("CPR") and was based, purportedly, on "several relevant admissions" made by both parties in a joint pre-trial memorandum filed on October 31, 2022. The defendant's main contention is that the claimant's admissions in the joint pre-trial memorandum effectively bar it from continuing with the claim (or defending the counterclaim) against the defendant. The admissions, allegedly, raise a major point of law that the disputed land, having been declared by law as registered before any of the deeds were executed, could not have been lawfully transferred to the claimant. The defendant seeks an order that the claim discloses no reasonable grounds for bringing or defending it.

3. The defendant's application seeks the following orders, namely that:
    a) the claimant's statement of claim be struck ;
    b) the counterclaim succeeds and a declaration made that the defendant is the legal and beneficial owner of the disputed land;
    c) the Registrar of Lands be ordered to strike the claimant's name off Land Certificate No. LRS 2015 13215 and rectify the land title record to show that the defendant is the legal and beneficial owner of the disputed land;
    d) the claimant be restrained from asserting ownership over the disputed land;
    e) the claim be struck for failure to submit questions to the expert within timelines set by the court;
    f) permission be given to amend a clerical error under Rule 42.10 on the trial order;
    g) general and special damages be assessed and awarded to the defendant;
    h) costs in the application and any other order(s) the court deems fit; and

i) the defendant's attorney-at-law to prepare, file and serve the order herein.

THE CLAIM

4. By fixed date claim form dated August 04, 2020 the claimant seeks a declaration that it is entitled to the legal and beneficial ownership of the disputed land on the basis of an indefeasible title. The claim to ownership is made under and by virtue of Land Certificate No. LRS 2015 13215 dated November 12, 2015. By this title, the disputed land is said to be free from any and all claims of the defendant under his Minister's Fiat Grant No. 1543 dated January 22, 2007. By its claim, the claimant seeks also an order for possession and an injunction restraining the defendant, his servants or agents from trespassing upon or asserting any ownership or title to the disputed land.

5. The defendant counterclaims that he has been in continuous possession for over fifty years (i.e. since 1964) of the disputed land. It was his family home where he lived with his adoptive parents, and it formed part of their Estates. His adoptive mother (Pearl Leonie Meighan a.k.a Pearly Arnold, deceased) had obtained a Grant of Administration No. 2/1968 of the Estate of Darnley Edgar White (her husband) and registered her legal interest in the disputed land by way of transfer of lease No. 31 of 1964. The family home was bequeathed to the defendant by the Will of his adoptive mother and a Grant of Probate was obtained in 1994. Since then, he has been developing the disputed land and paying property taxes and insurance.

6. The defendant claims that he holds title by Minister's Fiat Grant No. 1543 of 2006, which is dated January 22, 2007 and that the claimant's root of title is defective since it failed to conduct proper investigations. He also alleges that there is a material misrepresentation in the deeds purporting to convey the disputed land to the claimant. By his counterclaim, the defendant seeks a declaration that he is entitled to the legal and beneficial ownership of the disputed land; a rectification of title by the Registrar of Lands; an injunction restraining the claimant from asserting ownership, selling and/or trespassing on the disputed land; damages and costs.

7. It is felt helpful to do a chronology of events on the disputed land to set the application in its context and so properly dispose of it.

CHRONOLOGY OF EVENTS

DATE	**EVENT**
May 20, 1964	Lease No. 31 of 1964 granted to Darnley Edgar White to Lot No. 2140 situate at Heusner Crescent, Belize City
November 05, 1965	Date of death of Darnley Edgar White
1971	Defendant migrated to the United States of America
August 18, 1985	Date of death of Pearl Arnold
January 31, 1994	Probate granted for the Estate of Pearl Arnold. Dwelling house at 12 Heusner Crescent devised to the defendant.
November 10, 2000	Minister's Fiat Grant No. 1056 of 2000 issued to Florence E. Willis for Lot No. 2140
July 18, 2001	Deed of Conveyance of Lot No. 2140 from Florence E. Willis to David Espat
June 12, 2006	Deed of Conveyance of Lot No. 2140 from David Espat to claimant
January 22, 2007	Minister's Fiat Grant No. 1543 of 2006, dated January 22, 2007, issued to the defendant for Lot No. 2140
January 14, 2009	Fort George Pickstock Registration Section is declared a compulsory registration area.
November 12, 2015	Land Certificate issued to Best Buy Limited for Parcel 23, Block 45, Registration Section Fort George/Pickstock.
April 29, 2017	Caution registered by Dwight Flowers to Block 45 Registration Section Fort George/Pickstock, Parcel 23

EVIDENCE

8. Parties have provided a wealth of documentary evidence in support of their cases, which by large confirmed the chronology of events. The facts are not in dispute. The evidence showed that the disputed land was granted first by way of Lease No. 31 of 1964 to Darnley Edgar White who died shortly thereafter on November 05, 1965. The defendant's counterclaim is that he has always been in possession as he inherited the disputed land through his adoptive parents in 1994. Six years thereafter, on November 10, 2000, Minister's Fiat Grant No. 1056 of 2000 was issued to Florence E. Willis for the disputed land.

9. Between 2001 and 2006, by a series of Deeds of conveyance, the disputed land was transferred from Florence E. Willis to David Espat and then to the claimant. The defendant alleges that there is a misrepresentation of a material nature by the signatures on the Deeds conveying the disputed land. Up to this stage, there is no allegation of fraud.

10. Subsequently, a Minister's Fiat Grant was issued on January 22, 2007 to the defendant for the disputed land. Two years later, on January 14, 2009 the Fort George Pickstock Registration Section was declared a compulsory registration area. On November 12, 2015, a Land Certificate was issued to the claimant for Block 45, Registration Section Fort George/Pickstock, Parcel 23 and two and a half years later on April 29, 2017, a Caution was issued by the defendant.

11. What gave rise to the striking out application appears to be an admission by the claimant made in the joint pre-trial memorandum that it had applied for the Land Title Certificate **first** (not in dispute) as well as the expert report that the signatures on the Deeds belonged to the same person (i.e. the vendor and commissioner). The defendant in its application alleges fraud, and a tainted title held by the claimant, which, purportedly, are supported by the expert report. His counsel submits that the court having made an order for the expert report to stand as evidence in chief, there is no need for a trial on this point of law.

THE LAW

12. The applicable rule under which a striking out application is made is Rule 26.3(1) of the CPR. It allows for the whole or part of a statement of claim to be struck out for abuse of the process of the court or if it is likely to obstruct the just disposal of the proceedings or it discloses no reasonable grounds for bringing or defending a claim.

13. The disputed land is national land so was passed by way of various grants, including lease or Fiat Grants, conveyance or Certificate of Title so it is critical to understand the statutory underpinnings governing the transfer of such titles. In submissions, counsel identified the relevant statutes as the National Lands Act ("NLA") and the Registered Lands Act ("RLA"). Initially, the passing of title would have been governed by the NLA and then once declared a registered area, the RLA would be applicable. Part II, section 11 of the RLA expressly prohibits dealings with lands in compulsory registration areas except in compliance with the Act, rendering any such contrary dealings invalid and of no effect. This prohibition is triggered from the date of declaration by the Minister by Order and not before. For that purpose, the relevant sections in the NLA are set out below and those in the RLA are dealt with in the discussion.

14. Section 2 of the NLA is clear that a grant by way of a land certificate or a conveyance can pass an estate in fee simple whilst sections 7 and 8 provide for how a lease of lands under the NLA shall be obtained, renewed and transferred to another person. By section 8(1), a lessee of national lands could only transfer or sublet his lease with written permission, payment of fees and in compliance with specified conditions. A lessee is not authorized to transfer his lease outside the statutory framework of section 8(1) or his lease could be cancelled, without any compensation for development of the leased property.

15. The NLA also makes provision for how interests in national lands can be disposed of in cases of intestacy or incomplete sale. Section 14 subsections (1), (2) (3) and (4) authorize the Minister to issue a fiat grant or lease, to the person with the best claim, after investigation

and in compliance with certain stipulated conditions. It allows for a notice of intention to issue a grant or a lease to be published in two consecutive issues of the Gazette and be posted for thirty days at the district court of the district in which the land affected is situated. The National Lands Rules, sections 2 and 12, also provide that except in special cases, national lands can only be disposed of by way of grants and with the written consent of the Minister or someone he delegates.

16. There is no evidence of compliance with the statutory procedures of investigation, publication, notice or ministerial consent. Further, the law makes it impermissible to transfer a lease of national lands, where a person dies intestate, without ministerial permission. The facts show two grants of fiat under the NLA purportedly passing fee simple estates to the grantees. The claimant argues that a first in time grant of fiat takes precedence over a later grant, as a Minister cannot give a second fiat grant if he no longer holds title in the land. A live issue is if the second Minister's Fiat Grant of the same land is invalid.

17. In further written submissions, the defendant's counsel dismisses the applicability of the NLA and shifts her argument to rely on the Law of Property Act and General Registry Act. In my judgment, the defendant's lengthy arguments opened the door to considerations of triable issues rather than to show that the test for a strike out application was satisfied.

DISCUSSION

18. A striking out application, if successful, can bring an early end to proceedings so ought to be used sparingly given its draconian nature[1]. It should not be used as a run of the mill procedure to avoid trial. Unfortunately, local courts have decried its overuse as "*a litigation strategy in this jurisdiction*"[2] that burdens the resources of the court. In dealing with the application, I was mindful of several principles, other than its sparing use, that should guide my approach to such an application. One such principle is that a strike application will be

[1] Blackstone's Civil Practice 2013 at 33.6 page 526

[2] *Tarpon Cove Estate Owners Association Limited* v *Latayna Scott Aldana* Claim No. 433 of 2021 paragraph 7delivered on February 10, 2023 by Farnese J

denied if its use will deprive a party of the right to a trial on the issues: see ***Swain*** v ***Hillman***.[3] Another relevant principle is that the exercise of the power to strike out should not be a court's first response but should be limited to clear cases. If on its face, the claim cannot succeed or is unsustainable or is an abuse of the process of the court, a strike out order will be appropriate.[4] Further, in deciding this application, it is not necessary to conduct a detailed investigation of the evidence or a "mini trial", a position reaffirmed recently in ***Barbara Estella Romero*** v ***The Minister of Natural Resources***.[5]

19. In deciding whether to strike out the claim, it is necessary to scrutinize the pleaded case. This is done to make sure there is a valid cause of action and it is not an abuse of process to have brought the claim. The application before me does not rely on the abuse of process limb. The defendant's contention is that there can be no answer to the substantial issue of law and he seeks early resolution by circumventing the trial process. The application rests on the argument that the claim discloses no reasonable grounds for bringing or defending it.

20. Considered first is that it is not proper for a court to give a knee-jerk response and strike out a claim because a defendant alleges there is no answer to an issue of law. The claimant holds registered title in the disputed land, which in law stands as an absolute or indefeasible title, and for which it seeks declarations and an injunction. The application raises complexed issues, requiring detailed arguments of law for just disposal. Generally, a strike out application is not the proper place to decide difficult questions of law or the proper avenue to resolve conflicts of evidence or facts. I considered whether the claimant had no reasonable grounds for bringing the claim such that I should use a heavy-handed approach and strike it out.

21. To determine this, I turned first to what will constitute "no reasonable grounds" for bringing a claim. In ***Citco Global NV*** v ***Y2K Finance Inc***.[6], the court explained that, "*Where the claim*

[3] [2001] 1 All E.R. 91
[4] *Baldwin Spencer* v *The Attorney General Antigua and Barbuda* Civil Appeal No. 20A of 1997, Dennis Byron CJ (Ag)
[5] Claim No. 302 of 2012 delivered by Madam Justice Sonia Young
[6] BVI HCV AP 2008/022

sets out ***no facts indicating what the claim is about*** *or* ***it is incoherent*** *and* ***makes no sense*** *or if the facts it states, even if true,* ***do not disclose a legally recognizable claim*** *then striking out is appropriate.*" The party seeking the striking out order bears the responsibility to show that there is no viable cause of action or that the pleaded facts are incapable of establishing the main ingredients of a cause of action. This is not an incoherent or baseless claim, but one that carefully identifies the central issues in dispute for the court and parties. Further, the defendant's counsel has raised a serious triable issue. Generally, a court will not strike out a claim that discloses, on its face, a question fit to be decided by a trial and raises issues of law that call for mature consideration. In my view, and for the following reasons, the defendant has failed to show that the claimant's claim is unsustainable or discloses no reasonable grounds for bringing it.

(a) <u>The Admissions</u>

22. The first ground of the application is that the claimant's admissions in the joint pre-trial memorandum bar it from defending the claim against a substantial point of law. The claimant's admissions are that it applied for the first registration in the disputed land in July 2015 and that it knew that the land was in a compulsory registration area. Counsel for the defendant submits that having been declared by law as registered land before any alleged disputed deeds were executed, the disputed land could not have been lawfully transferred to the claimant. The claimant's counsel argues that the defendant's application is based, clearly, on a belief that the disputed land was declared "registered" since the 1980s.

23. The defendant's supporting affidavit states that he sees no reason for a trial because the claimant made first registration of the land using deeds that are not permitted by law to transfer land at the time that it was registered. If counsel's argument is that a conveyance was not the lawful form to transfer lands in a compulsory registered area, this is accepted. His counsel submits that the claimant's dealings with the disputed land are not in compliance with the RLA and are invalid and of no effect. By further submissions, she links this invalidity in registration of title to the Law of Property Act and the General Registry Act. Counsel argues

that the admissions meant that the claimant is incapable of mounting or defending the claim and that no evidence at a trial could displace this point of law. Moreover, to proceed to trial would place an unnecessary and unconscionable burden of costs on the defendant. I disagree with these arguments.

24. The law is clear that once declared a compulsory registered area, then all transfer of lands would be governed by the RLA and the NLA ceases to apply. Part II, section 11 of the RLA specifically prohibits dealings in registered areas outside the confines of the Act, rendering them invalid and of no effect:

> *Sec. 11 -* ***From the date of any Order made by the minister under section 4****, all dealings relating to any land in the compulsory registration area named in that Order shall be made in accordance with this Act, and* ***no dealing made otherwise than in accordance with this Act shall have any validity or effect****.* [Emphasis mine]

25. Further, section 14(2) of the RLA specifically states that once the Minister declares an area a compulsory registration area then Sections 14-22 of the NLA, "*shall cease to apply to national land in such area.*"

26. Counsel's argument is correct that a deed is not the instrument necessary to transfer lands in a compulsory registered area. There is some misunderstanding as to the material facts, which show that the conveyances of the disputed land occurred prior to the area being declared a compulsory registration area in 2009. Had the area been designated a compulsory registration area from the 1980s or before 2009, then a conveyance would not be the lawful form to effect any transfer. However, the conveyances relating to the disputed land occurred prior to 2009, when it was still national lands. The first premise for the defendant's application is hopeless as the land was not declared from the 1980s but only in 2009. An order to strike out cannot be granted on this basis.

(b) <u>Allegations of Fraud</u>

27. The second limb of the defendant's application alleges fraud in the deeds purporting to transfer the disputed land to the claimant. In his affidavit, the defendant states that the conveyances seem unlawful to him, as the person who signed the first deed, claiming to be the title owner selling the disputed land, *appears* to be the same party who commissioned the second deed. His counsel relies on section 143, which empowers the court to order rectification of the register, whether by cancelling or amending, if it is satisfied that "any registration" was obtained by fraud or mistake. Counsel then pointed to the expert report filed on August 19, 2022 as overpoweringly supporting the defendant's case that fraud had occurred within the meaning of section 143 (2) RLA.

28. In her oral submissions, counsel pointed to page 5 of the report that stated the signatures were made by the same person. The court is asked on this basis to strike out the claim. The claimant's counsel responds with the argument that the mere appearance of fraud is not the required proof of fraud. He argues that the same person signing a deed of conveyance and later acting as a witness to another conveyance of the same parcel of land are not acts of fraud, without more.

29. In my view, the allegation of fraud raises a serious triable issue. It is an attempt to show that an indefeasible title to registered land is vulnerable to attack. This requires a full investigation, testing and assessment of all the evidence to make a decision. I will have to resolve issues involving conflict of evidence, upon mature arguments, which are better suited for trial. The objectives of a striking out application are to determine if the cause of action lacks substance or is an abuse of process or discloses no reasonable grounds for bringing the claim. Such an application is technical in nature and based on the claim itself without the aid of extraneous evidence; so it is not the proper place for ventilation of serious issues of law.

30. Rectification of the register is allowed in cases of fraud or mistake, under section 143(1) and

(2), once the court is satisfied that certain conditions exist including knowledge of the omission, fraud or mistake by the claimant or that it had caused the fraud or substantially contributed to it. Rectification will not be made because a party suspects an appearance of fraud or an expert has identified that the signatures on two deeds are from the same person. As a matter of law, the defendant has to establish that the claimant obtained the registration through fraudulent means. The expert report and its findings are aids to the court in arriving at its decision on the issue at a trial. The report is not the court's decision, as an expert does not make the decision for a court of law. What this expert report did is to raise a major triable issue.

31. That a serious triable issue is raised is made clear when one looks at the elements necessary to constitute fraud. These include: (i) proof of the fraud; (ii) making a false representation knowingly and without belief in its truth or making it recklessly, or careless whether it be true or false; and (iii) if fraud is proved the motive is immaterial: see ***Derry*** v ***Peek***.[7] These requirements to prove fraud show fraud is a serious issue that ought to be determined on an assessment of all the evidence at trial. In ***Santiago Castillo Ltd*** v ***Quinto and another***[8] involving fraud and registered land, the Privy Council (Belize's then apex court) states that rectification to an indefeasible title is possible in cases of mistake or fraud under section 143(1) of the RLA. It states further that such a construction significantly diminishes the indefeasibility of registered title but is derived from the legislation, whose intention is to balance the introduction of a simpler system of land transfer in Belize as against protecting a bona fide purchaser in possession. Whilst a court has discretion to set aside an indefeasible title because of fraud or mistake, it requires mature consideration of law, as seen in the passage below:

"[43] The Board has concluded that Conteh CJ was correct to hold that Santiago had knowledge of Ann Williams's fraud, and of the mistake that this induced in relation to both registrations and that the Court of Appeal should not have reversed this finding. As to this

[7] [1889] 14 A.C. 337
[8] *Santiago Castillo Ltd* v *Quinto and another* [2009] UKPC 15

there is a pertinent passage in the judgment of the Board given by Lord Lindley in an appeal dealing with the effect of registration of land under legislation then in force in New Zealand, namely Assets Co Ltd v Mere Roihi (Consolidated Appeals) [1905] AC 176 at 210.

'Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him.'

[44] *Mr Castillo's affidavit is remarkable, not for what it says, but for what it does not say. He believed, and had very good reason to believe, that Parcel 869 was owned by the Quintos. According to him, he was approached by Ann Williams, who offered to sell the land. It is hard to conceive that he did not ask her how it was that she was in a position to offer for sale land owned by the Quintos, but he says nothing of any such inquiry... Having regard to Mr Castillo's belief that the Quintos owned the land that Ann Williams had offered him, he could not safely abstain from making proper inquiries into the propriety of the transaction. In those circumstances a simple search of the Registry would not suffice to protect Santiago."* [Emphasis mine]

32. The claimant claims indefeasible title and fraud or mistake must be proved to invalidate its title. The fraud of the person through whom another claims title would not necessarily affect that person unless it is shown that he had some knowledge of the fraud. Knowledge of the fraud will not be assigned simply because the person could have discovered the fraud with more vigilance or more inquiries. Proper and full evidence would be required to dispose of this serious issue. I am not satisfied that the claimant, who holds an indefeasible title, has no

reasonable ground to have brought its claim.

33. The expert evidence will assist me to make a finding and is not conclusive on fraud nor does it ascribe knowledge of fraud to the claimant. I do not see how applying for first registration under the RLA can, by itself and without more, constitute knowledge of an alleged fraud. There must be a proper testing of the evidence on trial to determine whether the defendant's allegation of fraud has been proved or not. To do so on a strike out application is improper and inappropriate. Moreover, the defendant's further submissions, which shifted the basis of the point of law argument from the NLA to the Law of Property Act and the General Registry Act served only to show that the issues raised ought to be litigated at trial. At this stage, he has only to meet the test for a strike out order using the applicable principles, but instead his further submissions invited a mini trial of triable issues. I was not prepared to entertain this.

34. Where on a striking out application, it is revealed that there is a serious issue to be tried or a clear cause of action disclosed, a court will refrain from granting the order. It is not possible on the paper evidence (untested by cross-examination) to determine whether there is fraud or the allegation of fraud is capable of being proved. I will not use my power to strike out to resolve conflicts of evidence or facts on which the claims of parties will ultimately rest. A challenging question of law is in issue, so its resolution is through a trial. There is no merit to this application on the above grounds.

(c) Other Grounds for Striking Out

35. In his application, the defendant also puts forward as a ground to strike out that the claimant's questions to the expert were out of time but the expert answered them in her report. The defendant asks that the claimant's questions be struck for a failure to comply with the court's orders. By this application, he also applies to amend clerical errors in dates, and pursues the point in oral submissions despite the fact that the amendments are already made. These points are moot and take the defendant no further in his application to strike

out so are disregarded and/or dismissed.

36. In conclusion, a claim that raises serious triable issues can benefit from a ventilation at trial. This application to strike out is an inappropriate litigation mechanism as the matter raises difficult issues of law. The defendant has not persuaded me that the claim discloses no reasonable grounds for bringing or defending it. In my judgment, a fuller interrogation of the issues at trial could affect the outcome of the case, rendering a pre-emptive strike of this claim misplaced.[9] The application has failed.

37. Costs should follow the event. The defendant/applicant shall pay the claimant/respondent's costs of the application. Both parties requested costs in the range of approximately BZ$4000-BZ$5000 for the application. Having considered the submissions of the parties, the further submissions of the defendant and the work involved, it is my judgment that a reasonable sum to award as costs is BZ$4000.

DISPOSITION

38. It is ordered that:
    a) The application to strike out dated November 29, 2022 is dismissed with costs to the claimant.
    b) The defendant do pay the costs of the application in the sum of BZ$4000.

Dated March 13, 2023

Justice Martha Alexander
Judge of the High Court of Belize

[9] *Doncaster Pharmaceuticals group Ltd* v *Bolton Pharmaceutical Co* 100 Ltd [2007] FSR 63