

IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

CLAIM No. CV 43 of 2016

BETWEEN:

[1] ROBERT BUIRKLE AS ADMINISTRATOR OF THE
ESTATE OF THE LATE HAROLD BUIRKLE
[2] PETER K. SCOTT
[3] MICHAEL BIXBY

Claimants

and

[1] CARIBBEAN COVE DEVELOPMENT LTD
[2] CARIBBEAN COVE ESTATES LTD
[3] CARIBBEAN ESTATES REALTY LTD
[4] SCOTT ZEUS SMITH (formerly SCOTT MALLICK)

Defendants

Appearances:

Yohhahnseh Cave, for the claimants

E. Andrew Marshalleck S.C. together with Estevan Perera, for the defendants

2023: June 20
October 19

DECISION

[1] **FARNESE, J.:** Mr. Scott Smith, on behalf of the defendants, applies to lift the stay of proceedings in this matter so that the terms of the Deed of Settlement and Release dated 8th December 2017

(Settlement Agreement) between the parties can take effect. The stay of proceedings arises from a consent order entered into between the parties on 16th January 2018 (Consent Order). Mr. Smith claims that he has performed his obligations under the Settlement Agreement and was owed financial payment upon performance. To date, those payments have not been made. The claimants dispute that Mr. Smith has performed his obligations and say that some payments are not yet due. Some of the payments are contingent on the development and sale of certain lands, which have not occurred.

- [2] For the reasons set out below, the court denies the application to lift the stay of proceedings but makes certain orders to give effect to the Settlement Agreement. These orders were necessary to clarify ambiguities and to exclude Parcels that were mistakenly included in the Settlement Agreement.

Background

- [3] Clause 10 of the Settlement Agreement outlines the parties' primary obligations under the Settlement Agreement. In exchange for settling the claims between them, the parties agreed to a compromise wherein the properties listed in Schedule A and B would be transferred to Castle Capital Development Limited according to agreed terms.
- [4] In addition to settling all claims against the claimants, Mr. Smith, on behalf of the defendants, agreed to execute transfer instruments and deposit in escrow all relevant title documents for properties listed in Schedule A within 30 days of the execution of the Settlement Agreement. The defendants also agreed to assign to Castle Capital Development Limited all rights derived from any agreements for sale to lands listed in Schedule B and deposit any of their titles into escrow.
- [5] The claimants agreed to make the payments to Mr. Smith as outlined in clauses 19 and 20 in exchange for settling all claims against the defendants:

19. In consideration of the Defendants' performance of their obligation under this agreement, the Claimants shall pay to the Defendant, Scott Zeus Smith the following sums on the term set out below:

a) Within 5 days of the execution of this Agreement the Claimants shall pay to the Defendant Scott Zeus Smith the sum of Twenty Thousand Dollars (\$20,000.00) in the currency of Belize.

b) Within 5 days of the full performance by the Defendant of the terms of the Settlement Agreement, the Claimants shall pay to the Defendant Scott Zeus Smith the further sum of Twenty Thousand Dollars (\$20,000.00) in the currency of Belize.

c) The claimants shall thereafter pay to the Defendant, Scott Zeus Smith the sum of \$20,000.00 in the currency of Belize on or before the last business day of each month until the sum of Four Hundred and Eighty Thousand Dollars in the currency of Belize (\$480,000.00) is paid.

d) Thereafter the Claimants shall pay to the Defendant, Scott Zeus Smith amounts equivalent to 7.8% of the gross real estate sales made by Castle Capital Development Limited of property transfer to the said Company pursuant to this agreement.

e) The sums to be paid by the Claimants to the Defendant Smith referenced at sub clauses a), b), c) and d) above shall together not exceed the sum of Six Million Six Hundred Thousand Dollars (\$6,600,000.00) in the currency of Belize.

20. In addition to the sums referenced at Clause 19 above, it is agreed by the Parties that the Claimants shall make payments to the Defendant Scott Zeus Smith upon the following terms, provided that it is understood and agreed between the Claimants and the Defendants that such payments are contingent upon the completion of the sale of the following properties:

1) The Claimants shall pay to the Defendant, Scott Zeus Smith One Million Dollars (\$1,000,000.00) in the currency of Belize upon the completion of the sale of the property formerly known as Beach Estate No. 4.

2) The Claimants shall pay to the Defendants the sum of Two Hundred and Twenty Thousand Dollars (\$220,000.00) in the Currency of Belize, upon completion of the sale of the property registered as Parcel 4057, Block 7, San Pedro Registration Section.

3) The Claimants shall pay to the Defendants the sum of Two Hundred and Twenty Thousand Dollars (\$220,000.00) in the Currency of Belize, upon completion of the sale of property registered as Parcel 4056, Block 7, San Pedro Registration Section.

4) The claimant shall pay to the defendants the sum of Two Hundred and Twenty Thousand Dollars (\$220,000.00) in the currency of Belize, upon completion of the sale of the property registered as Parcel 4055, Block 7, San Pedro Registration Section.

- [6] Mr. Smith says despite fully performing his obligations under the Settlement Agreement by May 2018, he has only received BZD\$100,000 in the form of 5 monthly payments of BZD\$20,000 paid between December 2017 and May 2018. Mr. Bixby, on behalf of the claimants, denies that Mr. Smith has fully performed his obligations. Mr. Bixby argues that all payments, with the exception of the first BZD\$20,000 referenced in clause 19(a), were contingent on the defendants fully performing their obligations under the Settlement Agreement.
- [7] The claimants have identified 10 Parcels on the Schedules where title was not deposited and/or transfer documents not released as agreed. Of those 10 Parcels, they state that 4 Parcels¹ were included on Schedule B the defendants had no interest in and could not have assigned or transferred and 3 Parcels² on Schedule A were purportedly subject to agreements for sale with third parties when they entered into the Settlement Agreement. Finally, 2 Parcels³ on Schedule A have cautions registered on title in favour of a third party and 1 of those Parcels⁴ also has a charge in favour of the Atlantic International Bank to Secure a substantial loan.
- [8] Mr. Smith says he relied on Mr. Bixby and his counsel to identify all parcels and prepare all transfer documents on lands subject to the consent order. He signed all transfer documents presented to him and is willing to sign any more that are required. He is unable, however, to transfer property he has no interest in and any term of the consent agreement requiring him to do so should be deemed frustrated and severed.

Issues

- [9] Despite the various allegations between the parties outlining the many ways each says the other has breached the terms of the Settlement Agreement, the resolution of this claim involves two issues:

¹ Parcels 4052, 4058, 4070, and 4071.

² Parcels 12258, 12260, and 12261.

³ Parcels 5079 and 5083.

⁴ Parcel 5083.

- a) Does Mr. Smith's failure to transfer clear title to the 10 parcels constitute a breach that relieves the claimants of their obligations under of the Settlement Agreement to make payments to Mr. Smith?
- b) Are the claimants' required to pay Mr. Smith money owed to him under the Settlement Agreement?

Analysis

Does Mr. Smith's failure to transfer clear title to the 10 parcels constitute a breach that relieves the claimants of their obligations under of the Settlement Agreement to make payments to Mr. Smith?

[10] The Settlement Agreement is a contract and whether the Parties have performed their obligations will be determined by looking at the language of the agreement itself. The Settlement Agreement contains language that specifies that the agreement's text is the entire agreement,⁵ and that it should be interpreted, enforced, and governed in accordance with the laws of Belize.⁶ The agreement also contains a severability clause that provides that any provision which is prohibited or unenforceable is "ineffective to the extent of such prohibition or unenforceability."⁷ In addition, the parties agreed that any ambiguity should not be construed against the party preparing it but should be given "its fair meaning".⁸ The court has found no need to go beyond the four corners of this agreement to understand the parties' obligations.

[11] I find that the defendants did not expressly undertake to transfer title free of any charge, lien, interest, etc. The Settlement Agreement does not specify the quality of title that was to be transferred to Castle Capital Development Limited. In addition, clause 3 of the Settlement Agreement acknowledges that there are other potential claims against Mr. Smith and his co-defendants in that claim.⁹ Castle Capital Development Limited agreed to "make all reasonable

⁵ Clause 33.

⁶ Clause 30.

⁷ Clause 24.

⁸ Clause 36.

⁹ I was not presented with sufficient evidence to suggest that the claimants were negligently, deliberately, or inadvertently misled or misinformed about any of these outstanding claims. Mr. Bixby alleges that he had no knowledge of a prior agreement with a third party for the sale of Parcel 12258 but admits that he knew that one of the Directors of Caribbean Cove Development Limited sent the Parcel's title to persons in the United States. Given the context under which this Settlement Agreement was negotiated

efforts enter [sic] into agreements with those other potential Claimants for the settlement of their claims".¹⁰ The short timeframe for Mr. Smith to provide documents in aid of transfer supports the finding that the defendants agreed to transfer the title they held or were soon to acquire in their present condition. Therefore, it is unreasonable to read into the Settlement Agreement an obligation to transfer title free and clear of any encumbrances in the circumstances.

[12] The delay in finalizing the transfer of Parcels 5079 and 5083 cannot be attributed to Mr. Smith. To hold that Mr. Smith cannot be said to have performed his obligation to transfer Parcels 5079 and 5083 until the titles are free of any encumbrances would have the effect of fundamentally changing what the parties agreed. The court will not provide a remedy where the claimants could have searched the land register and protected themselves from this outcome. The claimants are deemed to have notice of any registered encumbrances. The charge and cautions on Parcels 5079 and 5083 were registered prior to the Settlement Agreement. Section 33 of the Registered Lands Act¹¹ provides that, "every proprietor acquiring any land, lease or charge shall be deemed to have had notice of every entry in the register relating to the land, lease or charge." Actual notice is irrelevant. Subsection 26(a) outlines that a subsequent title-holder takes any interest subject to any registered charges. Subsection 131(2) also clearly prohibits dealing with lands in any way that is inconsistent with the caution without the cautioner's consent. Any delay is by operation of law.

[13] Parcels 12260 and 12261, however, have not been transferred because the other director of Caribbean Cove Development Limited, Mr. Daniel Hartin, has allegedly refused to sign the transfer documents owing to third party claims to those Parcels. It is undeniable that Caribbean Cove Development Limited agreed to transfer those properties to the claimants. The Settlement Agreement was given effect as a Tomlin Order by order of the Supreme Court, as it was then called. As such, I have no reason to question the authority of Mr. Smith to conclude the Settlement Agreement on behalf of Caribbean Cove Development Limited. Mr. Hartin's refusal to sign the transfer documents is a violation of the duties he owes to Caribbean Cove Development Limited

and its express reference to unsettled claims, I find that Mr. Bixby was at least aware or ought to have been aware that title to this Parcel was in dispute.

¹⁰ Clause 3.

¹¹ Cap. 194, The Substantive Laws of Belize, Rev. Ed. 2020.

as a director and beyond Mr. Smith's control. Mr. Smith has signed the transfer documents for these Parcels.

[14] As I have not been informed of any charge or caution on the titles to Parcels 12260 and 12261, the court will use its jurisdiction under section 123 of the Registered Land Act to order the Registrar to affect the transfers by listing Castle Capital Development Limited on title as the registered owners. If, however, a caution or charge has been registered, the order will be postponed until those encumbrances are addressed. This action should not be interpreted as the court's assessment of the legal effect of any pre-existing unregistered interest on the claimants' titles to these parcels.

[15] Likewise, I find that an order placing Parcel 12258 in the name of Castle Capital Development Limited is appropriate. The evidence before this court is that the physical certificate of title to Parcel 12258 was sent to third parties in the United States by Mr. Daniel Hartin. As Caribbean Cove Development Limited is the registered owner of Parcel 12258, transferring title may run into the same difficulty the parties had with transferring title to Parcels 12260 and 12261. This action should not be interpreted as the court's assessment of the legal effect of any pre-existing unregistered interest on the claimants' titles to these parcels.

[16] I also find that Mr. Smith's failure to meet the deadlines for providing the titles and transfer documents within the timelines specified is not a fundamental breach that would relieve the claimants of their obligation to pay Mr. Smith sums owing under the Settlement Agreement. In various clauses in the Settlement Agreement, Mr. Smith agrees to provide the titles and/or execution of transfer documents within 7 and 30 days of execution of the Settlement Agreement and within 7 days of a written request by the Escrow Agent. The language in the agreement has not been drafted with sufficient precision to differentiate timelines for different properties. For example, clause 17 follows the clauses imposing 7- and 30-day timelines:

Scott Zeus Smith on behalf of the Defendants shall execute and deliver to the Claimants or the Claimants nominees the documents mentioned above within seven (7) days of the execution of this Agreement or within 7 days of a written request of the Claimants at any time thereafter.

The only fair meaning of the Settlement Agreement is that various timelines indicate that the parties contemplated that the provisions and execution of the titles and transfer documents would be

staggered because not all were in Mr. Smith's possession and the Escrow Agent would need time to prepare the transfer documents. Time, therefore, was not of the essence and Mr. Smith's failure to meet the timelines is not a breach that relieves the claimants of their obligations under the Settlement Agreement.

[17] Clauses 12 and 13 of the Settlement Agreement expressly provide that the parties agreed that the claimants' legal representative would be appointed the Escrow Agent and empowered to complete the land transfers. Mr. Smith's evidence that he relied on the Escrow Agent to prepare all documentation required to execute the transfers was supported by the evidence given by the Escrow Agent's representative. She testified Mr. Smith visited her office twice to sign transfer documents she prepared. These documents were prepared after she did searches of the Land Registry to confirm the parcels to be transferred.

[18] A review of the evidence reveals that Parcels 4055 and 12258 were not transferred because the Escrow Agent did not have their certificates of title. At the hearing, Mr. Smith stated that the original certificate of title to Parcel 12258 was sent to persons in the United States with an outstanding claim to one parcel but there is no caution on that title to that effect. There is nothing in evidence that prevented title being transferred after a duplicate certificate title was obtained. I found no evidence, however, that the Escrow Agent discussed with Mr. Smith that the transfer of these Parcels required that he request a duplicate certificate of title. I find it a reasonable interpretation of the Settlement Agreement that the Escrow Agent would facilitate the requests for duplicate titles as part of preparing the transfer documentation.

[19] The court has also not been provided with an explanation as to why the transfer documents for Parcel 5083 could not have been prepared and executed pending resolution of the caution and charge. The transfer documents were provided for Parcel 5079 which also had a caution registered on it. Because the charge and caution pre-date the Settlement Agreement, the claimants must either wait until the encumbrances are discharged to have the Parcel transferred or obtain the charge and caution-holders' consent for the transfer. In any event, not only is it in the claimants' interest to make all reasonable efforts to settle those claims, but they have also agreed to do so.

[20] Finally, I find the inclusion of Parcels 4052, 4058, 4070, and 4071 was a common mistake between the Parties. It is undisputable that Mr. Smith has no legal authority to transfer titles in which he has no legal interest. He, therefore, has not fully performed his obligation to transfer titles to Parcels 4052, 4058, 4070, and 4071. Mr. Bixby testified that he prepared Schedules A and B. Mr. Smith says he assumed the information on the Schedules was correct and did not verify. It is unclear why, when all parties had legal representation, no one searched the titles listed on Schedules A and B to confirm that all Parcels were correctly identified. Mr. Smith believes that because transfer is impossible, I ought to sever these from the Settlement Agreement. Mr. Bixby disagrees and reminds the court that the Settlement Agreement represents a compromise between the parties that settled an outstanding claim. The claimants accepted less than the value of their claim to avoid litigation. The exclusion of 4 parcels from the Settlement Agreement further reduces the amount of their losses they were able to recover from the defendants.

[21] I do not find severance is the appropriate remedy to this common mistake. The court must do what is just in the circumstances. Justice, as well as the Settlement Agreement's directive that it be interpreted to give fair meaning, requires that I fairly balance the interests of the parties. I have no way of determining whether either party would have entered into the Settlement Agreement or how the terms would differ without these 4 properties. It would not be fair to require the claimants to solely bear the financial losses. It is likewise unfair to ask Mr. Smith to assume the financial losses. In arguments, it was suggested by the claimants' counsel that Mr. Smith was equally a victim of fraudulent activity of his business partner. While that allegation is unproven, the statement, combined with the Settlement Agreement, support a finding that Mr. Smith has made good faith efforts to settle the claim against him and the defendant companies he controls.

[22] As a result, the court will order that the parties will equally share the financial losses of these properties mistakenly included in the Settlement Agreement. If the parties cannot agree to a sum that reflects fair market value for Parcels 4052, 4058, 4070, and 4071 at the time the Settlement Agreement was entered into, the court will appoint an assessor. The costs of any application to appoint an assessor and the assessment will be shared equally by the parties. Half of the total fair market value of Parcels 4052, 4058, 4070, and 4071 at the time the Settlement Agreement was entered into will be deducted from the amount owing to Mr. Smith under clause 19(e) of the

Settlement Agreement. To be clear, this order is to be interpreted as reducing the maximum Mr. Smith will receive under clause 19(e) for the sale of those properties. The effect is not to be interpreted as delaying payments to Mr. Smith under clause 19(e) until his share of the fair market value has been exceeded.

Are the Claimants' required to pay Mr. Smith money owed to him under the Settlement Agreement?

[23] Clauses 12 and 13 of the Settlement Agreement expressly provide that the parties agreed that the claimants' legal representative would be appointed the Escrow Agent and empowered to complete the land transfers. Mr. Smith's evidence that he relied on the Escrow Agent to prepare all documentation required to execute the transfers was supported by the evidence given by the Escrow Agent's representative. She testified Mr. Smith visited her office twice to sign transfer documents she prepared. These documents were prepared after she did searches of the Land Registry to confirm the parcels to be transferred. The evidence also establishes that Mr. Smith was only alerted to the need for further transfers when the claimants' attorneys responded in a letter dated 14th November 2022 to Mr. Smith's demand of payment under the Settlement Agreement.

[24] The Settlement Agreement, however, does not contain an express provision that mandates a timeline for the Escrow Agent to complete the documentation for the property transfers. As a consequence, Mr. Smith has agreed that but for the first payment of BZD\$20,000, the claimants, through the action of the Escrow Agent, can set the timeline for subsequent payments listed in clauses 19(a), (b), and (c). The claimants can similarly set the timeline for payments promised in clauses 19(d) and (e) and clause 20 because the payments are conditional on the claimants' sale of properties. Mr. Smith asks that I read in a requirement that the claimants must make a good faith effort to sell those properties to ensure that payments are made within a reasonable time.

[25] In light of the findings that Mr. Smith, on behalf of the defendants, did not promise to provide titles free of any encumbrances, that the claimants are deemed to have knowledge that some Parcels had an interest and cautions registered against their title, and that the claimants agreed to make reasonable efforts to settle third-party claims, I find that Mr. Smith has performed all his obligations under the Settlement Agreement except executing the documentation required to transfer Parcels

4055 and 5083 to the claimants. Therefore, I order that, upon the expiry of 60 days from the day of this judgment, or Mr. Smith's execution of the transfer document for Parcels 4055 and 5083, whichever is earlier, the amounts owing to him under clauses 19(a), (b), and (c) are due. As I have been provided with no explanation as to why Mr. Smith was not alerted to the fact that transfer of these titles is outstanding, I find it appropriate to set the 60-day deadline for preparing the transfer documents to ensure these payments are made within a reasonable time.

[26] Mr. Smith, however, has not satisfied me that not yet being paid the amounts owing under clauses 19 (d) and (e) and 20 is unreasonable. The claimants say that they have not offered these Parcels for sale because they wish to proceed with the development of a single residential and vacation resort that requires planning approvals. In light of the location and nature of the property, this proposal does not seem unreasonable to the court. Mr. Smith has the burden to dissuade the court that either the proposal delaying the Parcels' sale or the time to acquire the necessary approvals is unreasonable. He has led no evidence to this effect.

[27] Mr. Smith, while represented by independent counsel, freely entered into a settlement that made payments conditional on the sale of land without negotiating a time for completion of the sales or an alternate arrangement if sales were not completed in a timely fashion. Just as the claimants cannot complain to the court about neglecting to specify that they obtain clear titles free of encumbrances, Mr. Smith cannot now complain that he ought to have considered the circumstances in which he now finds himself. The court will not interfere with the parties' freedom to contract unless the bargain struck is unconscionable or unlawfully oppressive.

Disposition

[28] The court orders that:

- a) The Escrow Agent prepare any outstanding transfer documents and Mr. Smith execute those documents for Parcels 4055 and 5083 forthwith.

- b) Upon the expiry of 60 days from the day of this judgment or Mr. Smith's execution of the transfer document for Parcels 4055 and 5083, whichever is earlier, the balance of amounts owing to Mr. Smith under clauses 19(a), (b), and (c) is due.
- c) The Registrar of Lands register the titles of Parcels 12588, 12260, and 12261 in the name of Castle Capital Development Limited. If a Parcel has charges or cautions registered against them, this order is postponed for that Parcel until any charge or caution is either discharged or its holder consents to the transfer of title.
- d) Parcels 4052, 4058, 4070, and 4071 be struck from Schedule B of the Settlement Agreement.
- e) If the parties fail to agree to a sum that reflects fair market value for Parcels 4052, 4058, 4070, and 4071 at the time the Settlement Agreement was entered into, on the application of any party, the court shall appoint an assessor. The costs of any application to appoint an assessor and the assessment will be shared equally by the parties.
- f) That half of the total fair market value of the Parcels 4052, 4058, 4070, and 4071 at the time the Settlement Agreement was entered into be deducted from the amount owing to Mr. Smith under clause 19(e) of the Settlement Agreement.
- g) Each party shall bear their own costs.

**Patricia Farnese
High Court Judge**