

**IN THE COURT OF APPEAL OF BELIZE, A.D. 2008**

**CIVIL APPEAL NO. 27 OF 2007**

**BETWEEN:**

**ARTHUR GONZALEZ  
ROBERTA GONZALEZ**

**Appellants**

**AND**

**EUGENE OBRIGEWITSCH  
JOYCE GUSTAFSON**

**Respondents**

**BEFORE:**

<b>The Hon. Mr. Justice Sosa</b>	<b>-</b>	<b>Justice of Appeal</b>
<b>The Hon. Mr. Justice Carey</b>	<b>-</b>	<b>Justice of Appeal</b>
<b>The Hon. Mr. Justice Morrison</b>	<b>-</b>	<b>Justice of Appeal</b>

**Mr. Lionel Welch for the appellants.  
Mrs. Agnes Segura-Gillett for the respondents.**

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**19, 20 June, 17 October 2008.**

**SOSA JA**

1. On 20 June 2008 I agreed with the other members of this Court that the appeal should be dismissed, the cross-appeal allowed and the judgment of the court below varied in certain respects, with costs to the respondents in the appeal and appellants in the cross-appeal, such costs to be taxed, if not agreed. I have now read in draft the judgment of Morrison JA in which the extent of the variation referred to is fully set out. It only remains to say

that I concur in the reasons for judgment contained in the judgment of Morrison JA.

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**SOSA JA**

**MORRISON JA**

Introduction

2. At the conclusion of the hearing of this appeal on 20 June 2008, the appeal was dismissed and the cross appeal allowed, with costs to the respondents, to be agreed or taxed. However, the judgment of the court below was varied in terms of the respondents' notice dated 10 December 2007, as amended. These are my reasons for concurring in this decision.
  
3. This appeal is from a judgment of Muria J given on 30 October 2007 in favour of the respondents, who were the claimants in the court below. In those proceedings, the respondents sought possession of residential premises owned by them and rented to the appellants, located in the village of Sarteneja, Corozal District ("the premises"). The respondents also claimed to recover from the appellants arrears of rent and sums said to be due for use and occupation of the premises, together with costs for storage and transportation of household items belonging to the appellants and travel costs incurred by the respondents' agent in connection with the rental of the premises. The appellants by way of defence maintained that they had exercised an option to purchase the premises from the respondents and counterclaimed for specific performance of the resultant agreement.

## The background to the appeal

4. The history of the matter is succinctly set out by the learned trial judge in his judgment, in terms which I gratefully adopt, as follows:

“The Claimants are of Canadian nationality. By a conveyance dated 21 January 1993 they became the legal owners of a parcel of land and house comprising 4286.69 yards situated at the corner of Calle Cementerio and West Street in the village of Sarteneja, Corozal District, Belize. In September 2003 under a rental agreement the Claimants rented the property to the Defendants at a rental of \$500.00 BZD per month. The Claimants, however, agreed to forego the first three months rent in return for the work which the Defendants were to do to make the residence re-liveable. The Defendants actually commenced occupation of the premises on 1<sup>st</sup> January 2004, and were not expected to start making rental payments until 1<sup>st</sup> April 2004.

The first three months rent-free aside, the Claimants claim that they had not recovered any rental payments from the Defendants for some forty one (41) months since April 2004 (excluding the months for which rents were paid). The Defendants on the other hand, produced a list of expenses incurred to make improvement on the premises and claimed the right to deduct these expenses from the rent as part of purchase payments for the property.

After a period of exchanges in discussions and correspondence, the Claimants gave the Defendants notice to vacate the property. At first it seemed that the Defendants were going to vacate the property subject to finding

alternative accommodation. However, subsequently, the Defendants changed their mind and decided not to vacate the property. With this impasse the Claimants have come to the Court in these proceedings.”

5. This account of the factual background was based on the facts agreed between the parties pursuant to case management orders made by the judge at the first hearing of the matter on 22 March 2007. The parties were in addition able to arrive by agreement at the following statement of the issues that arose for resolution in the matter:

1. Whether the Defendants exercised their option to purchase the said premises prior to the Agreement for Sale executed on December 31<sup>st</sup> 2004 between the Claimants and one Judy Ann Mooney;
2. Whether there subsists a valid Agreement for Sale between the Claimants and the Defendants and if so, what are the terms of that Agreement;
3. What remedies are available to the Parties in the circumstances;
4. What sums (if any) are due to the Claimants by the Defendants under the rental agreement.

6. After a trial on these agreed facts and issues, Muria J found that, after taking into account the agreed rent-free period of occupation by the appellants, they were in arrears of rent and that they were not entitled to a credit for any further amounts allegedly expended by them on the premises other than those mutually agreed between the parties. He also found that, even on the assumption that the appellants did have a valid

option to purchase the premises from the respondents, there was no evidence that that option had been exercised by them in a timely manner, or at all. In the meantime, as the judge also found, the respondents had entered into a valid agreement to sell the premises to a third party on 31 December 2004 and the appellants had in any event failed to exercise the purported option before that date.

7. In the result, the learned judge gave judgment for the respondents in the following terms:

1. The claimants were entitled to recover possession of the premises in question up to 31 December 2004 after which time the said property shall vest in Judy Ann Mooney pursuant to the Agreement dated 31 December 2004.
2. The claimants shall recover all rents in arrears up to 31/12/04, together with interest thereon until paid, less the sum mutually agreed by the parties as deemed essential to make the house liveable.
3. The claim by claimants for cost of use and occupation at the rate of \$500.00 from 15/3/05 until delivery of possession cannot be granted to the claimants and therefore denied.
4. The costs incurred, via agent, in the sum of \$1,738.47 on behalf of the claimants in respect of this case is granted.
5. The cost of storage and transportation in sum of \$2,070.00 is granted.

6. Cost of storage at \$75.00 per month from March 1, 2006 until possession is not made out and declined.
7. The defendants' counter-claim for specific performance fails and it is dismissed.
8. The defendants to vacate within 14 days, if they have not done so yet
9. The claimants to have the costs of this action to be taxed if not agreed.

#### The appeal

8. Dissatisfied with this outcome, the appellants appealed to this court, filing in all some ten grounds of appeal, two of which were abandoned when the matter came on for hearing. I hope that I do no injustice to the remaining eight grounds or to Mr. Lionel Welch's spirited argument in support of them, by summarizing them into the two following propositions:
  - (i) That the learned trial judge erred in failing to hold that the appellants had validly exercised their option to purchase the premises before the purported agreement to sell to the third party on 31 December 2004, and/or that the appellants had a valid agreement to purchase the premises from the respondents:
  - (ii) That the learned trial judge erred in holding that the agreement for sale of the premises to the third party amounted to a transfer of land.

9. By a respondents' notice, which was also amended during the hearing of the appeal, the respondents sought an order that, in addition to the amounts for which judgment had been given in their favour, they were entitled to recover an amount for the appellants' use and occupation of the premises from 15 March 2005 (the date of termination of their tenancy) to the date of delivery of possession to the respondents.

#### The option to purchase

10. The source of the appellants' claim to be the holders of an option to purchase the premises is the rental agreement signed on behalf of both parties on 30 September 2003. Nothing now turns on the provisions of the document relating to the terms of the tenancy, in the light of Muria J's findings on this aspect of the matter, from which there has been no appeal. However, the following paragraphs remain of some importance on this issue:

“This arrangement is made with the understanding the house and property in question have been and remain for immediate sale. In the absence of any commercial selling agents the selling price of this residence and property is \$60,000.00 U.S. dollars (or Belizean equivalent thereof) but will rise to \$70,000.00 U.S. dollars if any real estate brokers become involved.

If the above mentioned Renters and/or they're Church Organization should at any time decide to purchase this residence and property prior to any other sale, their accumulated rental payments will be fully factored in towards the purchase cost by way of making this transaction more readily available to them.”

11. The appellants also rely on a letter written on behalf of the respondents by the first named respondent to the appellants. This letter is undated but, as Muria J observed, “from the evidence it is obvious that it was written sometime in November 2004”. The letter is in the following terms:

“Dear Arthur and Roberta,

Tried phoning you off and on all day Thursday with no response, and will leave this note Friday if you’re not at home. Mel (the realtor) and I drove over this morning, so he can assess the place and take some digital photos for his listing. We’ve decided it would be best leaving things as they are for now but feel it is appropriate some form of assurance from you that the tiling will be completed by the end of the year, and some form of tangible measure which can also assure us you do have sufficient means to purchase the house and property after January 1 as per the verbal agreement we’ve already established that being a straight buy out of Joyce’s half with myself carrying some form of mortgage.

Joyce feels it’s appropriate (and I concur) that it would also be a good idea to gather whatever receipts you have and present the same to us by way of demonstrating that you have, indeed been using the deferred rental income to actually make and keep the place livable.

Please phone me as soon as you read this to obtain further clarification and to discuss whatever else needs to be talked about. At the moment I’m continuing with my Sat-Sun-Monday night hotel job but this may soon change as I’ve advised them to obtain a suitable replacement employee. As regards our further plans we still intend returning to Canada asap, and will do so directly our Sarteneja house and property is sold.”

12. Mr. Welch submitted that the clauses set out at paragraph 10 above were effective to grant an option to purchase the premises to the appellants. The undated letter set out at paragraph 11 was relied on by Mr. Welch as confirmation of the oral exercise of the option on behalf of the appellants,

as described in the affidavit evidence of the first named appellant in the court below:

14. Furthermore, in the said month of October 2004, I, the First Defendant called the First Claimant and after we agreed on the details of the payment terms made a verbal agreement to purchase the house after the 1<sup>st</sup> of January 2005. The said First Defendant agreed that they would meet with me and the Second Defendant at a future date to discuss the purchase further. The terms agreed upon was that there would be a straight buy out of the Second Claimant's half interest and the First Claimant's half interest would be paid in monthly installments. This agreement is evidence in writing in a letter we received from the First Claimant in November of 2004. A true copy of the said correspondent (sic) is shown to me and exhibited herewith marked "AG & RG1".
13. Accordingly, Mr. Welch submitted, the appellants oral exercise of the option took place before the end of 2004 and therefore predated the purported sale to the third party on 31 December 2004.
14. Despite the apparent agreement by the parties, as evidenced by their agreed statements of facts and issues, that the rental agreement amounted to an effective grant of an option to the appellants, I am bound to say that, for my part, I doubt very much that this assumption can be justified. The true nature of an option, as I understand it, is accurately stated by Luckhoo P (Ag) in the Jamaican case of Caribbean Asbestos Products Ltd v Andre Leopold Lopez et al (1974) 21 WIR 462, 466 as follows:

“An option when granted for value confers a right or privilege in the optionee to call for the sale to him of the land in accordance with the conditions specified for the exercise of the option and the lessor undertakes that he will not within the time, if any, specified in the option clause, which is indeed a separate contract, deal with the land in any way inconsistent with the right of the optionee to purchase the land together with a binding agreement not to revoke the offer during the time, if any, specified in the option. If the offer is accepted within the time specified a contract of sale is made”.

15. In the instant case, not only is there no consideration for the so-called option, but the very terms of the clauses of the rental agreement made it clear that, far from binding themselves to sell to the appellants on specified terms, the respondents fully intended that the premises should remain on the market “for immediate sale” and that what the appellants were in fact granted by the agreement was more akin to a right of first refusal should they decide to purchase the premises “prior to any other sale”.
16. However, notwithstanding these misgivings, I am content to approach the matter on the basis posited by the parties, which is also the basis on which Muria J approached it, that is, that the rental agreement was an effective grant of an option to purchase to the appellants. In this regard, Mrs. Segura-Gillett, in her very full and careful written submissions on behalf of the respondents, directed our attention to Professor Kodilinye’s comment that, even where there is no express requirement in a lease for the exercise of an option to be in writing, “such a requirement will be implied” (Gilbert Kodilinye, Commonwealth Caribbean Property Law,

Cavendish, 2000 at page 39; see also Birmingham Canal Co v Cartwright (1879) 11 Ch. D. 421).

17. Further, Mrs. Segura-Gillett submitted, an option is in any event no longer exercisable, if it has not been exercised within the period specified, in this case “prior to any other sale”. The option not having been exercised in writing before 31 December 2004, therefore, it could thereafter no longer avail the appellants.
18. Muria J concluded that the appellants’ November 2004 letter established no more than the fact that there had been some discussion between the parties “as to a contemplated future purchase of the premises by the defendants”. He went on to point out that the purported exercise of the option was unsupported by writing, and that it was not in any event within the time specified for the exercise of the option at an agreed price. He therefore concluded that it could not be said on the basis of the agreed facts and the November 2004 letter that the appellants had exercised the option prior to the sale of the premises to the third party on 31 December 2004.
19. I entirely agree with the learned judge’s reasoning and conclusion. The terms of the November 2004 letter, far from confirming any indication from the appellants of an intention to exercise the option, appear to me to make it clear that as at that date the appellants, though interested in acquiring the premises, were still in the process of exploring how best they might be able to achieve this (with the respondents still seeking “some form of tangible measure which can also assure us you do have sufficient means to purchase the house and property before January 1”). Indeed, as Mrs. Segura-Gillett also observed, the reference in this letter to the taking of digital photographs for the purpose of listing the premises with a realtor is entirely inconsistent with the appellants having by that time exercised an

option to purchase. The uncertainty of the first named appellant in cross examination as to when the supposed oral agreement was entered into (he had originally said it was in October 2004, then said it was in November) in addition to providing further support for the judge's findings, also highlights the importance of writing in a case such as this. The absence of such writing is in my judgment fatal to the appellants' contentions.

20. Mr. Welch also sought to rely on the doctrine of part performance as providing a basis for finding that there was a binding contract between the parties. But, again as Mrs. Segura-Gillett convincingly demonstrated, even if the appellants had been able to show the existence of an oral agreement for sale, the acts of part performance relied on would have had to be "such as to be referable to some contract ... and be consistent with the contract alleged" (Chitty on Contracts, 29<sup>th</sup> edition, 2004, Volume 1 at paragraph 4-045).
21. In the instant case, all of the acts relied on by the appellants were in fact done pursuant to the rental agreement, whether they were the effecting of repairs in lieu of rent or the tendering of rental cheques or the fact of the appellants having gone into possession of the premises. They were not acts which were by their own character therefore referable to the existence of an agreement for sale between the parties (see per Goulding J in New Hart Builders Ltd v Brindley [1975] Ch 342, 353).

#### The third party purchase

22. The respondents' evidence was that in late December 2004, Ms. Judy Ann Mooney, the daughter of the second named respondent, made an offer to purchase the premises and on 31 December 2004 the parties executed an agreement for the sale of the premises to Ms. Mooney for US \$60,000.00.

As a result of this development, Muria J ruled that the respondents were not entitled to claim any further rental from the appellants after that date “as they cannot benefit twice from the same property” and made an order for possession as at 31 December 2004 “after which time the said property shall vest in Judy Ann Mooney pursuant to the Agreement” of that date.

23. Despite several deadlines for the premises to be vacated by the appellants, they have failed to do so, as a result of which the respondents have been unable to complete the sale by transfer of the property to Ms. Mooney, in exchange for payment of the full purchase price. It was common ground between the appellants and the respondents that the learned judge fell into error by effectively treating the agreement for sale to Ms. Mooney as a transfer of the premises to her by the respondent (Law of Property Act, section 40).
24. It follows from this, in my view, that the respondents are entitled to recover rent up to the agreed date of termination of the appellants’ tenancy (15 March 2005) and thereafter to payment for the appellants’ continued use and occupation of the premises until they are vacated by the appellants. It also follows that that part of Muria J’s order by which he purported to vest the premises in Ms. Mooney as of the date of the agreement to sell to her cannot stand.

#### Disposal of the appeal

25. These are my reasons for agreeing that, in the result, the appeal should be dismissed, with costs to the respondents to be taxed, if not sooner agreed. The judgment of the court below was, however, varied to the extent indicated below:

1. The Claimants are entitled to recover possession of the property situated at Calle Cemeterio and West Street, Sarteneja Village, Corozal District;
2. The Defendants are to vacate the said property on or before 20 July 2008;
3. The Defendants shall pay to the Claimants rent at a rate of \$500.00 per month from 1 April 2004 to 15 March, 2005, less such sum annually agreed by the parties as deemed essential to make the house livable;
4. The Defendants shall pay the sum of \$1,738.47 to the Claimants being the cost incurred via their agent Judy Ann Mooney;
5. The Defendants shall pay to the Claimants the sum of \$2,070.00 being the cost incurred by them for storage and transportation;
6. Costs of this action are awarded to the Claimants, to be taxed if not agreed;
7. The Defendants shall pay to the Claimants the sum of \$500.00 per month for use and occupation of the premises from 16 March 2005 until delivery of possession;

8. The Defendants' counterclaim for specific performance fails and is dismissed.

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**MORRISON JA**

**CAREY JA**

26. I entirely agree and have nothing useful to add.

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**CAREY JA**