

IN THE COURT OF APPEAL OF BELIZE, A.D. 2009

CIVIL APPEAL NO. 27 of 2008

BETWEEN:

AURA MARINA VARGAS

Appellant

AND

**AKAI FUKAI
SHEREE FUKAI**

Respondents

CIVIL APPEAL NO. 28 OF 2008

BETWEEN:

**AKIRA FUKAI
SHEREE FUKAI**

Appellants

AND

**LARS KULLBERG
AURA MARINA VARGAS**

Respondents

BEFORE:

The Hon. Mr. Justice Mottley

- President

The Hon. Mr. Justice Sosa

- Justice of Appeal

The Hon. Mr. Justice Morrison

- Justice of Appeal

Mrs. Magali Marin Young and Mr. Jose Cardona for Aura Marina Vargas.
Mr. Derek Courtenay SC, Ms. Vanessa Retreage and Ms. Jaseth Jackson for Akai
and Sheree Fukai.

8 and 9 June, 30 October 2009.

MOTTLEY P

[1] I have read the judgment in draft of Morrison JA. I concur with the
judgment and the orders proposed.

MOTTLEY P

SOSA JA

[2] For the reasons given by Morrison JA in his composite judgment, which I have read in draft, I would dismiss the appeal of Aura Marina Vargas and allow, to the extent indicated by Morrison JA, the appeal of Akira Fukai and Sheree Fukai. I also concur in the orders proposed by Morrison JA.

SOSA JA

MORRISON JA:

Introduction

[3] These appeals, which were heard together, are both from a judgment of Arana J given on 29 September 2008 in Claim No. 622 of 2006 (Akira and Sheree Fukai v Lars Kullberg and Aura Marina Vargas). The order of the learned judge in that action, which has given rise to dissatisfaction on both sides, was as follows:

- (1) The Sales Contract dated the 28th day of August 2006 and signed by the First Defendant and the Claimants and by Century 21 BTAL which is mentioned in the Statement of Claim be specifically performed and carried into execution.
- (2) The Claimants shall immediately have possession of the lands containing 20.25 acres situate in Unitedville in the

Cayo District and which are designated Parcel Nos. 1 and 2 in Block 24 of the Society Hall Registration Section.

- (3) The Registrar of Lands shall remove from the register all cautions affecting the said lands and shall register the Claimants as proprietors of the said lands with absolute title.
- (4) The amount of \$92,500.00 held by Century 21 in their escrow account for the First Defendant shall be paid to the Second Defendant by way of damages due from the First Defendant but without prejudice to any further claim by the Second Defendant against the First Defendant for damages and for other redress in respect of the conduct of the first Defendant in connection with the matters which were the subject of these proceedings.

And this court does not deem it fit to make any order as to costs.

[4] The appellant in Civil Appeal No. 27 of 2008, (“Ms. Vargas”) appeals against the judgment given in favour of the respondents to that appeal (“the Fukais”). The Fukais for their part, who are the appellants in Civil Appeal No. 28 of 2008, appeal against the failure of the judge to make an award of damages and an order for costs in their favour against Ms. Vargas and the first respondent in that appeal (Mr. Kullberg). Mr. Kullberg did not appear and was not represented at the trial or before this court.

The factual background

[5] Both appeals share a common factual background. On 13 July 2006, Mr. Kullberg, who was the registered owner of Parcels 1 and 2 Block 24, Society Hall

Registration Section (“the property”) appointed Century 21 BTAL (“Century 21”) to be his non-exclusive agent for the purpose of selling the property on his behalf. The Fukais, who were residents of the United States, had for several months in the early part of 2006 tried to locate suitable property, upon which they intended to build a house, for purchase in Belize. Some time in May 2006 the Fukais were introduced to the property by Century 21 and, after making several unsuccessful offers to purchase it, on 28 August 2006 Mr. Kullberg accepted their offer to purchase for the price of US\$92,500.00.. A Sales Agreement was accordingly prepared, calling for a deposit of US \$9,000.00 “to be transferred to the Century 21 BTAL escrow account upon the acceptance of the offer” and the balance of US \$83,500.00 “to be transferred to the Century 21 BTAL escrow account”. Mr. Kullberg as vendor agreed, upon confirmation of receipt of full payment, to sign the requisite completion documents and to produce his “Original Freehold Title”, completion date being fixed for 30 September 2006. The parties agreed that time should be of the essence of the agreement and Mr. Kullberg specifically agreed that on completion day he would be in a position to deliver to Fukais title to the property “in fee simple, free and clear of all liens, encumbrances and any other legal restrictions”. Mr. Kullberg also covenanted not to encumber the property in any way and to have himself in a position on the day fixed for completion “to deliver to the Purchaser or his nominee(s) title thereto in fee simple, free and clear of all liens, encumbrances and any other legal restrictions”.

[6] The Fukais paid the deposit as required by the agreement and on 29 August 2006 transfer of land forms to effect the transfer of the property to them were presented to them for signature by Century 21’s representative, Mr. John Acott, and these forms were duly executed by both Mr. Kullberg and the Fukais. The Fukais then left Belize at the end of August in order to make arrangements for the sale of their house in Wisconsin in preparation for relocating to Belize and establishing their new home on the property.

[7] On 4 September 2006, the Fukais received by electronic mail a message from Mr. Acott advising them, among other things, of a development that would obviously have an impact on the contractual completion date, as follows:

“We have a problem! The owner can’t find his original documents which need to be handed in when we do the transaction because this is registered land. He has copies (which he gave me) but he can’t find the originals. This means that the documents have to be declared ‘lost’ and that fact advertised in the newspapers for three consecutive weeks, etc. The whole process to replace them takes about 6 weeks so there is no way that we can make the closing date deadline. I don’t think this is going to cause you any concern because you aren’t coming down until the end of the year but you need to know that.”

[8] The Fukais responded, also by electronic mail, on 7 September 2006 as follows:

“John, We don’t have a problem with closing later. As long as it is done before we come down in December. As for the newspaper notice, can you follow through to insure that it is done and the registered documents is [sic] in your/his hand.”

[9] In confirmation that Mr. Kullberg had indeed taken steps to obtain replacement land certificates for the property, Mr. Acott delivered to the Fukais a copy of a sworn Declaration of Loss dated 28 August 2006 attesting to his having lost the original land certificates (as required by section 37(2) of the Registered Land Act). On 2 October 2006, the Fukais caused to be transferred to Century 21’s escrow account for credit to Mr. Kullberg the sum of US\$83,500.00, representing the balance of the purchase price under the agreement.

[10] At some point in mid-September 2006, the Fukais became aware that, unknown to them, Mr. Kullberg had entered into an agreement (subsequent to theirs) to sell the property to a third party. They immediately communicated this information to Century 21 by electronic mail on 18 September 2006. On the following day, 19 September 2006, Ms. Saira Mahabir, a sales representative employed to Century 21 and Mr. Noah Beachey, a sales representative attached to Diamond Realty, a real estate agency with whom Mr. Kullberg had previously listed the property for sale, visited with Mr. Kullberg and obtained his assurance that he intended to complete the sale to the Fukais.

[11] However, it turned out that by the time this meeting took place, Mr. Kullberg had already signed an agreement (on 15 September 2006) to sell the property to Ms. Vargas for US \$102,000.00 and had been paid a deposit of US \$4,000.00. On 2 October 2006, according to Ms. Vargas, she met with Mr. Kullberg and “agreed on the sale and he signed transfers on the same date.” On that same day, Mr. Kullberg told her to go ahead and work the place as “it is now yours.” Ms. Vargas asserts that she “then took possession of the properties on the following day”. On 11 October 2006 Ms. Vargas handed over to Mr. Kullberg a cheque for US \$98,000.00, being the balance of the agreed purchase price.

[12] On 15 September 2006, Ms. Vargas lodged a caution at the Land Registry against the titles to the property, while on 29 September 2006 a caution was also lodged on behalf of the Fukais. However, the evidence of the Acting Registrar of Lands at the trial was that neither caution was actually noted on the Land Register until February 2007, by which time the Fukais’ action had already commenced. Notwithstanding this inexplicable lapse, Ms. Vargas’ attempt to lodge the transfers in her favour on 11 October 2006 failed when she was informed by the Registrar that a caution had been lodged on behalf of the Fukais.

[13] The Fukais had in the interim instructed an attorney to act on their behalf and on 6 October 2006 Mesdames Jaseth Jackson & Co wrote to Mr. Kullberg

demanding that he take immediate steps to complete the sale to the Fukais. By letter of the same date, Mr. Kullberg wrote to the Fukais, acknowledging having signed a sales agreement with them, but contending that as the balance purchase price had not been paid to him by 30 September 2006, as required by the agreement, they were in breach of the agreement, thereby rendering the agreement “null and void”.

[14] Virtually no part of the foregoing account of the facts is seriously disputed on either side. Indeed the only real differences between the parties have to do with whether Ms. Vargas was aware of the Fukais’ interest when she entered into an agreement with Mr. Kullberg and whether Ms. Vargas was in actual possession of the property. On the first point, Mr. Beachey insisted on affidavit that both Ms. Vargas and her common law husband were told by him of the prior sale to the Fukais before 18 September 2006, while Ms. Vargas denied having any kind of conversation with Mr. Beachey. On the second point, Ms. Vargas swore that she took possession of the property on 3 October 2006, but Mr. Roy Cadle, who visited the property in an unsuccessful attempt to serve process on Mr. Kullberg on 4 December 2006, found the building on the property in a state of disrepair and stated that the property appeared to have been abandoned. Arana J accepted Mr. Cadle’s evidence on the second point, but does not appear to have made a finding on the first.

[15] On 9 November 2006, the Fukais filed action against Mr. Kullberg for specific performance of the agreement dated 28 September 2006, damages in addition to or in lieu of specific performance and an order for possession of the property. Ms. Vargas in due course applied to be joined as a defendant in those proceedings on the basis that she was the equitable owner as a purchaser without notice of the property by virtue of having paid the purchase price in full, as well as the fact that she “had been put and has taken possession of” the property. On the first day of the trial (13 February 2007) Arana J granted Ms. Vargas’ application and thereafter the matter proceeded essentially as a contest

between the Fukais and Ms. Vargas, Mr. Kullberg being no longer resident in Belize and taking no part in the trial.

Arana J's judgment

[16] Save for viva voce evidence given by the Acting Registrar of Lands, the matter was tried entirely on the basis of affidavit evidence and submissions from attorneys-at-law for the Fukais and Ms. Vargas. I mean no disrespect to the judge's admirably detailed and well reasoned judgment given on 29 September 2008 by summarising her reasons in this way:

- (i) Mr. Kullberg did not by his letter dated 6 October 2006 "effectively rescind" his contract with the Fukais, given that he was not himself in a position to complete on the original contractual completion date.
- (ii) In seeking and obtaining the Fukais agreement to an extension of the completion date, Century acted as agent for Mr. Kullberg.
- (iii) Ms. Vargas' subsequent contract with Mr. Kullberg gave her no more than an equitable interest in the property, which was subject to the Fukais' prior equitable interest and the rule of equity is that where the equities are equal, the first in time prevails.
- (iv) There was no evidence that Ms. Vargas was "in possession or occupation of this property."
- (v) The Fukais were accordingly entitled to specific performance and an order for possession.

- (vi) The balance purchase price of US\$98,500.00 paid by the Fukais and being held by Century as escrow agent was to be paid to Ms. Vargas as damages “for the inconvenience caused to her” by Mr. Kullberg’s dishonesty.

Civil Appeal No. 27 of 2008

[17] In this appeal, Ms. Vargas appeals against Arana J’s judgment on six grounds as follows:

- “1. That the Learned Trial Judge erred in law and misdirected herself in holding that the Appellant only had an equitable interest in Parcels Nos. 1 and 2 Block 24 Society Hall Registration Section;
- 2. That the learned Trial Judge erred in law and misdirected herself in holding that the Appellant’s interest created on the 2nd October, 2006 in Parcels Nos. 1 and 2 Block 24 Society Hall Registration Section is subject to the Respondents’ prior equitable interest in the said land created the 28th day of August, 2006;
- 3. That the Learned Trial Judge erred in law in holding that Century 21 as agent of Lars Kullberg had authority to extend the completion date of the contract between the Respondents and Lars to a date beyond September 30th, 2006;
- 4. That the Learned trial Judge erred in law in ordering specific performance against Lars Kullberg;

5. That the Learned Trial Judge erred in finding that there was no evidence before the court that the Appellant was in possession or occupation of the property;
6. The decision of the learned Trial Judge cannot be supported by the evidence.”

[18] On ground 1, Mrs. Magali Marin Young submitted that the trial judge erred in holding that Ms. Vargas had an equitable interest only in the property. She submitted further that completion of the sale to Ms. Vargas had “effectively” taken place on 2 October 2006, the date on which Mr. Kullberg had executed the requisite transfer of land forms in her favour, notwithstanding the fact that the transfer was not accepted for registration by the Land Registry when it was presented on 11 October 2006. The Fukais never having been in occupation of the property, they were unable “to substantiate any overriding interest at the time of creation of [Ms. Vargas’] interest”; and, although Mr. Kullberg had also signed transfers in their favour on 29 August 2006, those transfers were conditional on payment of the balance of the purchase price. Mrs. Marin Young relied heavily for these submissions on the decisions of the House of Lords in **Abbey National Building Society v Cann [1981] 1 AC 56** and the Eastern Caribbean Court of Appeal in **Spiricor of St. Lucia Ltd. v Attorney General of St. Lucia and Another (1997) 55 WIR 123.**

[19] On ground 2, Mrs. Marin Young submitted that Ms. Vargas was at all material times a bona fide purchaser without notice of the Fukais’ interest and that her legal interest was subject only to such overriding interest as a person in occupation of the land at the time of the creation Ms. Vargas’ interest might be able to substantiate. She submitted further that, even if the court were to accept Mr. Beachey’s evidence that he had informed Ms. Vargas of the prior sale to the Fukais, this could not avail them as the doctrine of actual notice does not apply to registered land (section 41, Registered Land Act). No prior interest having been

noted on the register at the time of the execution of the transfer to Ms. Vargas, therefore, she could not be affected by notice of the earlier sale to the Fukais, whether actual or constructive. Ms. Vargas therefore took title to the property “free and clear” of the Fukais’ interest.

[20] On ground 3, Mrs. Marin Young’s submission was that Century 21 had no authority to vary the contract between the Fukais and Mr. Kullberg and, in particular, to extend the date for completion. The balance of the purchase money not having been paid by 30 September 2006 and time being of the essence, therefore, Mr. Kullberg was entitled to and did renounce the agreement by his 6 October 2006 letter, for non-fulfillment of the payment condition.

[21] On ground 4, Mrs. Marin Young submitted that Arana J erred in ordering specific performance against Mr. Kullberg, on the basis that that remedy was not available where it would involve a breach of trust and that, in any event, it should not be granted where there was an adequate remedy available at law, in this case, a refund of the purchase moneys and/or damages. But further, she submitted, the Fukais’ failure to complete on the due date was a fundamental breach of contract, thereby disentitling them from enforcing it by an order for specific performance.

[22] And finally, on grounds 5 and 6 respectively, Mrs. Marin Young submitted that the judge erred in finding that there was no evidence before the court that Ms. Vargas was in possession, and more generally, that the judgment of the court was contrary to the weight of the evidence.

[23] Mr. Derek Courtenay SC for the Fukais, not surprisingly, disagreed with Mrs. Marin Young on all points. On ground 1, Mr. Courtenay submitted that no legal interest vests in a purchaser of land until the purchaser’s registration as proprietor of the land (section 26 of the Registered Land Act). He accordingly submitted that the trial judge was correct in holding that Ms. Vargas’ interest (if

any) in the property was no more than an equitable interest, subject to the prior existing equitable interest of the Fukais. Mr. Courtenay pointed out that the parties obviously regarded delivery of the vendor's land certificate as important to the transaction, as indeed it was in the light of section 35(1) of the Registered Land Act.

[24] On ground 2, Mr. Courtenay submitted that, in the absence of any entry on the register of a transaction in favour of either party, the effect at common law of the execution by Mr. Kullberg of a Sales Agreement in favour of the Fukais was that he had alienated his beneficial proprietary interest in the property in their favour. He was thereafter disqualified from again selling that interest and his attempt to do so to Ms. Vargas was accordingly invalid, he having become a trustee of the beneficial interest for the Fukais. Mr. Courtenay submitted further that Mr. Kullberg was clearly in breach of an express covenant in his contract with the Fukais (see paragraph [5] above) and that in any event there was ample evidence to negative any suggestion that Ms Vargas was a bona fide purchaser without notice.

[25] With regard to ground 3, Mr. Courtenay submitted that the evidence showed clearly that Century 21's authority as agent for Mr. Kullberg extended beyond that typically conferred upon real estate agents and it was therefore open to the judge to find that the 30 September 2006 completion date had been waived by Mr. Kullberg .

[26] In the alternative, basing himself on section 3(1) of the Holidays Act and section 55 of the Interpretation Act, Mr. Courtenay also submitted that, 30 September 2006 falling as it did on a Saturday, the obligation to make payment by that date was accordingly discharged by payment on the Monday following, which is when the Fukais' funds were in fact transferred to Century 21 for the account of Mr. Kullberg. In any event, it was submitted, Mr. Kullberg was not himself in a position to complain about a failure to complete, given that he was

not himself able to complete on the date fixed by the agreement because of the lost land certificates (**Finkelkraut v Monohan [1949] 2 All ER 234, 236**).

[27] And finally, on grounds 4 and 5, Mr. Courtenay submitted that the trial judge's finding that there was no evidence of actual occupation on Ms. Vargas's part was a correct one on the evidence and that any claim to an overriding interest on her part based on actual occupation was therefore bound to fail.

The issues on this appeal

[28] The issues that arise on this appeal appear to me to be as follows:

- (i) What was the legal effect of Mr. Kullberg's Sales Agreement with the Fukais?
- (ii) Was that agreement validly terminated by Mr. Kullberg's letter of 6 October 2006?
- (iii) What was the legal effect of Mr. Kullberg's Sales Agreement with Ms. Vargas?
- (iv) Was Arana J correct in finding that there was no evidence to prove that Ms. Vargas was in actual occupation of the property?
- (v) Was Ms. Vargas a bona fide purchaser for valuable consideration?
- (vi) Were the Fukais entitled to an order for specific performance?

What this case is not about

[29] Before going to these issues, I think that it is necessary to say a word about the applicability of the Registered Land Act to this matter, particularly in the light of Mrs. Marin Young's submissions on grounds 1 and 2. While it is a fact that the property in question is registered land, neither the interest claimed by the Fukais nor that claimed by Ms. Vargas is a registered interest. The effect of this, in my view, is that the case does not give rise to any contest, either between registered interests inter se, or between registered and unregistered interests, either of which would require detailed consideration of the effect of registration.

[30] **Abbey National Building Society v Cann**, for instance, which is the cornerstone of Mrs. Marin Young's submissions (in particular on grounds 1 and 2) is a case having to do with the issue of what is the relevant date for determining the existence of overriding interests arising from actual occupation as against a chargee or transferee of registered land. The problem with which the case was primarily concerned is apt to arise because, as between the parties, a transfer of land may take effect from the date that it is executed (in the case of the Fukais sales agreement, for instance, completion was to take place upon the payment of the balance purchase price on or before 30 September 2006, "at which time the Vendor shall execute and deliver proper documents of transfer in favour of the Purchaser or his nominee). However, registration will only have effect from the date of registration (see para. [32] below), giving rise to "a hiatus between the disposition and its registration" (the "so-called registration gap" - Megarry & Wade, *The Law of Real Property*, 7th edn, para.7-150).

[31] In **Abbey National Building Society v Cann**, the House of Lords overcame this problem by deciding that in order to substantiate a claim to an overriding interest against a chargee or transferee by virtue of section 70(1)(g) of the Land Registration Act 1925 (a section in pari materia with section 31(1) of the Registered Land Act) as a person in actual occupation of the land, the person

claiming the overriding interest had to have been in actual occupation at the time of the disposition of the legal estate, that is, the date on which the transfer was executed, as opposed to the date of registration (in the United Kingdom this result has now been given statutory effect by the provisions of the Land Registration Act 2002, Sch. 3, para. 2).

[32] However, that case is not, in my view, authority for Mrs. Marin Young's more far-reaching submission that, in relation to registered land, the legal estate is transferred upon execution of the prescribed transfer instrument, rather than upon the registration of the transfer. Indeed, section 86 of the Registered Land Act is, as Mr. Courtenay points out – correctly, in my view - expressly to the contrary:

- “(1) A proprietor, by an instrument in the prescribed form, may transfer his land, lease or charge to any person with or without consideration.

- (2) The transfer shall be completed by registration of the transferee as proprietor of the land, lease or charge and by filing the instrument.”

[33] In an illuminating judgment in **Spiricor of St Lucia Ltd v Attorney-General of St Lucia and Another** (supra, pages 130-1), Byron CJ (Ag, as he then was) stated the effect of the virtually identical section 56 of the St. Lucia Registered Land Act 1984 in this way:

“The effect of these provisions is clear. The only method of transferring title of registered land is by registration under the Act. Thus, the rights of a vendor, who is the registered proprietor, as well as those of any subsequent purchaser are governed by the state of the register, to the extent that the purchaser has no legal

interest unless he has completed the transfer by registration. The registered proprietor remains the owner of the legal title. This proposition would determine the rights of a third party who has purchased the same property whether he has completed his transfer by registration or not. This reflects the same position as the land registration system in England, which is explained in 26 Halsbury's Laws of England (4th Edn) paragraph 919:

'Dispositions of registered land are classified as either registered or unregistered dispositions, but it is only by a registered disposition that a transfer of the legal estate is effected. The proprietor may transfer the registered land in the prescribed manner, but until the transfer is completed by registration the transferor is deemed to remain the proprietor. The legal estate thus remains in him until another proprietor is registered in his place.'

And again at paragraph 1113:

'A transfer of the registered estate in land or any part of it is completed by entry on the register of the transferee as the proprietor of the estate transferred, but until such entry is made the transferor is deemed to remain the proprietor of the registered estate''.

[34] Which is not to say, however, that the Registered Land Act has no relevance to this case. Given that the property is in fact registered land, section 86 quoted above is obviously relevant, as are sections 35(1) (requiring the production of land certificates on the registration of any dealing), 37(1) (providing for lost or destroyed land certificates) and 41 (protection of persons dealing in registered land). I will in due course return to these sections.

Issue (i) - the effect of the Kullberg/Fukai sales agreement

[35] Mr. Courtenay referred us to the following passage from Halsbury's Laws of England, 4th edn, volume 42, para. 183: 183:

“An agreement for the sale of land, of which specific performance can be ordered, operates as an alienation by the vendor of his beneficial proprietary interest in the property. As from the date of the contract, his beneficial interest is transferred from the land to the purchase money, and, if his interest was of the nature of realty, it is from that date converted into personalty. As regards the land, he becomes, as between himself and the purchaser, a constructive trustee for the purchaser, with the right as trustee to be indemnified by the purchaser against the liabilities of the trust property. Thus, the purchaser becomes beneficial owner, with the right to dispose of the property by sale, mortgage or otherwise, and to devise it by will, and on his death intestate it devolves on his legal personal representatives, who hold it, subject to the requirements of administration, on trust for sale and for distribution of the net proceeds among the persons entitled on intestacy.”

[36] A statement to similar effect appears in Megarry & Wade (op cit, paras. 15-052 – 15-056) and a judicial statement of longstanding authority may also be found in **Lysaght v Edwards** (1876) 2 Ch D 499, 506 (per Jessel, M.R.):

“It appears to me that the effect of a contract for sale has been settled for more than two centuries, certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the Court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold,

and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivery of possession”.

[37] The effect of this, as I understand it, is that upon the signing of the sales agreement between Mr. Kullberg and the Fukais on 28 August 2006, the Fukais obtained an immediate equitable interest in the property as beneficial owners and Mr. Kullberg, in whom the legal estate remained until registration of the transfer, became a constructive trustee of the property for the Fukais. I therefore consider that Arana J was entirely correct in treating the Fukais as having an equitable interest in the property as of that date.

Issue (ii) - was the Fukais’ sales agreement validly terminated by Mr. Kullberg?

[38] This issue calls for a consideration of the extent of Century 21’s authority as agent of Mr. Kullberg. The actual agreement between Mr. Kullberg and Century 21 expressly authorized the latter to receive any money paid as a deposit “and to hold this money in an escrow account until a time deemed suitable by the agent before or at the closing date.” In addition to this, the agreement between Mr. Kullberg and the Fukais designated Century’s escrow account as the authorized depository of both the deposit and the balance purchase money. It also designated Century 21’s offices as the place at which completion was to take place.

[39] In these circumstances, it appears to me that there was ample basis for Arana J’s finding that Century 21’s proposal to the Fukais of an extension of the completion date (as a result of the lost land certificates) was made as agent for Mr. Kullberg, whose obligation under the contract it was to deliver the land certificate to the Fukais on completion date. As for Mrs. Marin Young’s complaint

that evidence of Mr. Acott's letter by electronic mail to the Fukais was inadmissible, it is only necessary to state, I think, that that evidence was plainly adduced at the trial without objection and, indeed, by the consent of the parties. Further, based on the judge's finding that Century 21 acted as Mr. Kullberg's agent, the letter was also clearly admissible as if it had been written by Mr. Kullberg himself.

[40] But in any event, even if the original contractual completion date remained unextended, the Fukais did do all that was required of them under the contract by transferring the balance purchase money to Century 21 for Mr. Kullberg's account on 2 October 2006. Section 3(1) of the Holidays Act provides as follows:

“3-(1) The several days mentioned in the First Schedule shall be kept, except as hereinafter provided, as public holidays in Belize and shall, in addition to Saturdays and Sundays, be dies non.” (emphasis added)

[41] If, on the basis of this provision, both Saturday 30 September and Sunday 1 October 2006 are to be treated as dies non, then it seems to me that by transferring the balance purchase price to Century 21's escrow account on the next succeeding business day, that is, Monday 2 October 2006, the Fukais had fully performed their payment obligation under the contract.

[42] But there is yet another reason why Mr. Kullberg could not insist on completion by the Fukais on the contractual completion and that is that he was not himself in a position to complete the sale on that date. It is clear not only from Century 21's email message of 4 September 2006, but also from the Declaration of Loss over Mr. Kullberg's signature dated 28 August 2006, that he was himself not in a position to complete on the due date, given his obligation under section 35(1) of the Registered Land Act to produce his land certificate “on the registration of any dealing with the land”. While I accept that, as Mrs Marin Young submitted, the language of the section suggests that that obligation is not

absolute, it is clear from the sales agreement that that is what it called for and it is equally clear from the evidence that both parties were of the view that replacement of the lost land certificates was necessary for the transaction to be completed. As Danckwerts J observed in **Finkelkraut v Monohan [1949] 2 All ER 234, 237**, "... if time is essential, a vendor who is claiming that he is entitled to obtain an order for specific performance must show that he himself was in a position to complete on the date fixed."

[43] For all of these reasons, in my view, Arana J was correct in her conclusion that Mr. Kullberg was therefore "not entitled to rescind the agreement with the Fukais for failing to pay the balance of the purchase price when the date for completion arose."

Issue (iii) - the legal effect of Mr. Kullberg entering into a second Sales Agreement with Ms. Vargas

[44] As will have appeared from my discussion at paragraphs [29] – [34] above on the impact of the **Abbey National** case, I am not attracted to Mrs. Marin Young's submission that Mr. Kullberg disposed of his legal interest in the property to Ms. Vargas by executing transfer of land forms in her favour. I will not retrace those steps here. Given that, as it appears to me, Mr. Kullberg had in fact divested himself of the beneficial interest in the property by his agreement to sell to the Fukais and that that agreement had not been validly terminated, it seems to me that, in acting as he did, he was not only in breach of his obligations as a constructive trustee for the Fukais, but he was also in breach of an express term of the sales agreement. On this basis, Arana's J finding that Ms. Vargas "obtained an equitable interest which she took subject to the prior existing interest held by the Fukais" puts Ms. Vargas' position as high as – and probably higher than it deserves – it can possibly be put and, on that analysis, I do not think that the judge's conclusion that "it is only if Ms. Vargas were the owner of the legal title that she would acquire priority over [the Fukais'] equitable title" can

be faulted. Even if the equities were equal, as Arana J observed, (citing Megarry & Wade, 5th edn, page 144), “the first in time prevails...[it]...is only acquisition of the legal estate for value and without notice which will reverse the natural order of priority”.

Issue (iv) - was Ms. Vargas in possession of the property?

[45] The learned judge accepted, as it appears to me she was entitled to do, Mr. Cadle’s evidence that when he visited the property on 4 December 2006, the building appeared to be derelict and the property abandoned. Indeed, the only evidence before the judge to the contrary was Ms. Vargas’ bare assertion that, having received signed transfers from Mr. Kullberg on 2 October 2006, “I then took possession of the property the following day.”

[46] But even leaving this aside for the moment, it appears to me (on the basis of the **Abbey National** case) that for the fact of possession to avail Ms. Vargas at all, she would have had to establish that she was in possession at the time of the execution of the transfers to the Fukais. It is only in this circumstance, which did not in fact arise, that she would have been in a position to assert a claim to an overriding interest as a matter affecting Mr. Kullberg’s registered title. In the light of the fact that it is clear from all the evidence, including hers, that Ms. Vargas was not in actual occupation at that time, this aspect of the matter remains, in my view, purely academic.

Issue (v) - was Ms. Vargas a bona fide purchaser for valuable consideration

[47] Section 41 of the Registered Land Act provides as follows:

41.-(1)No person dealing or proposing to deal for valuable consideration with a proprietor shall be required -

- (a) to inquire or ascertain the circumstances in or the consideration for which such proprietor or any

previous proprietor was registered or the manner in which any such consideration or part thereof was utilised;

(b) to search any register kept under the General Registry Act.

(2) Where the proprietor of a land, a lease or a charge is a trustee he shall, in dealing therewith, be deemed to be absolute proprietor thereof, and no disposition by such trustee to a bona fide purchaser for valuable consideration shall be defeasible by reason of the fact that such disposition amounted to a breach of trust.

[48] Basing herself on Byron CJ (Ag)'s conclusion in **Spiricor** (at page 133) that "the doctrine of notice, whether actual or constructive, as it may pertain to purchasers of unregistered land has no application even by analogy to registered land", Mrs. Marin Young submitted that, notwithstanding the fact that Mr. Beachey purportedly informed Ms. Vargas of the Fukais' interest as a purchaser (which Ms. Vargas expressly denied), there was therefore no question of notice affecting her in this case and all that Ms. Vargas was required to do was to search the Land Register to see if there was any caution registered, which there was not. In any event, she submitted further, the fact of a registered caution does not give constructive notice of the interest claimed and Ms. Vargas was therefore entitled to take title free and clear from the Fukais' interest.

[49] Mr. Courtenay on the other hand submitted that the notion of a bona fide purchaser "must exclude a person who has knowledge of or shuts her eyes to circumstances which should lead to a recognition that the disposition in question involves a breach of trust."

[50] Arana J dealt with this point by accepting a submission by Mr. Courtenay that section 41(2) "applies to bona fide purchasers of the legal interest and not

equitable owners” and could not therefore protect Ms. Vargas’ interest as an equitable owner. I agree and would only add that section 41(2) would only have been relevant in this matter if Ms. Vargas had become registered as proprietor: it is at that point that (in the absence of fraud), her land certificate would have been indefeasible by any prior equitable interest of the Fukais, irrespective of the question of notice. In other words, section 41 is, as its marginal note indicates, a provision for the protection of persons dealing in registered lands, given what the learned editors of Megarry and Wade’s Law of Real Property (6th edition, 2000, paragraph 6-105) describe as the “most fundamental principle of land registration”, which is that a purchaser of registered land is entitled to act according to the information shown on the register and nothing else.

Issue (vi) - were the Fukais entitled to an order for specific performance?

[51] Mrs. Marin Young’s submissions on this point were premised on the contention that Mr. Kullberg was in fact a trustee of the legal estate for Ms. Vargas. As I have already indicated, I do not think that this position is a tenable one, given the view I have come to that the Fukais’ interests are entitled to prevail over those of Ms. Vargas. Although the equitable remedy of specific performance is in principle confined to cases in which the common law remedy of damages is inadequate, it is also the case that “land is always treated as being of unique value, so that the remedy of specific performance is available to the purchaser as a matter of course” (Megarry & Wade, 7th edn, para. 15-115). There being therefore, in my view, no obstacle to completion of the sale to the Fukais, Arana J was correct to hold, as she did, that they were entitled to an order for specific performance and to an order for possession accordingly.

[52] For all of the above reasons, I would therefore dismiss this appeal and affirm the orders of Arana J with costs to the respondents to be agreed or taxed.

Civil Appeal No. 28 of 2008

[53] This is the Fukais' appeal from what is described in their skeleton argument as "the failure of the learned trial judge to address, adequately or at all, [their] entitlement to damages". The grounds of this appeal are as follows:

- (i) The learned trial Judge misdirected herself or acted upon a wrong principle in limiting the remedies to which the Appellants were entitled exclusively to an order that the said Sales Agreement be specifically performed and ancillary orders for possession and the vesting of legal title to the land sold without determining whether the Claimants were also entitled to the damages claimed.
- (ii) The learned trial judge erred or acted on a wrong principle in holding that since the first-named Respondent was "away from Belize" the purchase money paid by the Claimants and held in escrow by Century 21 should be paid to the second-named Respondent without taking account or sufficient account of the Appellants' entitlement as against the first and second-named Respondents to be compensated for their loss.
- (iii) The learned trial judge erred or acted on a wring [sic] principle in ordering the payment of damages to the second-named Respondent when no such relief or counterclaim was sought or evidence led by the said Respondent in respect of loss or damage.
- (iv) In failing to award costs to the Appellants as successful Claimants, the learned trial Judge exercised her discretion upon wrong principles or, alternatively, took into account matters which ought to have been ignored."

[54] Grounds (i) – (iii) were argued together by Mr. Courtenay. He directed us to section 38 of The Supreme Court of Judicature Act and submitted that by

virtue of this section the judge “was compelled to consider any and every relief to which the [Fukais] were entitled, including an award of damages for the hardship which was caused as a result of [Mr, Kullberg’s] failure to complete the Sales Agreement.” Mr. Courtenay urged the court to have regard to the damages which would have naturally arisen from the delay in completing the agreement and submitted that Arana J ought therefore to have made an award of damages in addition to her order of specific performance.

[55] Ground (iv) complained that by not making an order for costs in favour of the Fukais, who were the successful claimants in the action, the trial judge had exercised her discretion upon wrong principles or, in the alternative, took into account matters which ought to have been ignored.

[56] Mrs. Marin Young resisted the appeal on both counts, contending that the Fukais had failed to prove the damages which they claimed and that the award of costs was a matter for the judge’s discretion, with which this court should be reluctant to interfere.

[57] Section 38 of the Supreme Court of Judicature Act, to which we were referred by counsel on both sides, empowers the court to grant “all such remedies whatever as any of the parties ... may appear to be entitled ...” and it is common ground that Arana J did have the power to award damages to the Fukais, had she been minded to do so. In cases of delay by the vendor in completion of a contract for the sale of land, the normal measure of the purchaser’s damages for such delay is the value of the user of the land, “which will generally be taken as its rental value, for the period from the contractual time for completion to the date of actual completion” (McGregor on Damages, 16th edn, para. 969). However, it is also the case that it is for a claimant claiming damages to prove his case, both with regard to the fact of damage and as to its amount (McGregor, *op cit*, at para. 343).

[58] In the instant case, while it is a fact that there was unchallenged evidence before the court that Century 21 and, by extension, Mr. Kullberg, were aware that the Fukais were purchasing the property in order to relocate to Belize, there was absolutely no evidence, in my view, upon which the judge could have assessed damages or compensation for the undoubted dislocation that the delayed completion of the sale must have occasioned them. I do not therefore see a basis in the evidence for an award of damages to the Fukais in this case.

[59] On the question of costs, rule 63.6(1) of The Supreme Court (Civil Procedure) Rules, 2005 provides as follows:

“63.6(1) If the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.”

[60] However, rule 63.6(2) provides that the Court may also order the successful party to pay all or part of the costs of the unsuccessful party, or it may make no order as to costs. Rule 63.6(6) sets out the kinds of circumstances to which the court should have regard in deciding who should pay the costs of any proceedings, including the conduct and relative success of the parties.

[61] The award of costs being, subject to the applicable rules, a discretionary matter, it is well settled that an appellate court will only interfere with the exercise of that discretion “if it is shown that the judge’s decision was informed by a wrong principle, or took into account irrelevant matters, so that the ultimate decision is so aberrant that no reasonable judge could have made it.” (per Carey JA, in **Hoare v Registrar of Lands**, Civil Appeal No. 11 of 2003, judgment delivered 12 March 2004).

[62] In the instant case, Arana J’s order was that “Each party is to bear its own costs”, leading Mr. Courtenay to submit that, having made an order for costs, the judge was compelled by the terms of rule 63.6(1) to order costs in favour of the

Fukais against both Mr. Kullberg and Ms. Vargas. However, despite, on the face of it, a certain logic to this submission, I do not find it persuasive, as the judge's declaration that each party should bear its own costs, it seems to me, is in fact tantamount to her having made no order as to costs. But, leaving that aside, it is not entirely clear to me on what basis the judge decided not to make an award of costs in favour of the Fukais, who had largely succeeded on all matters of significance in the case. It may well be that the judge took the view that Ms. Vargas, herself a victim of Mr. Kullberg's dishonesty, was entitled to solace of some sort, but I would not myself consider that to be a legitimate reason for not applying the general rule that costs should follow the event (see Halsbury's, volume 37, para. 716). I therefore consider this to be an appropriate case in which to, unusually, dissent from the trial judge's exercise of her discretion and to order that the Fukais should also have their costs of the trial, to be agreed or taxed.

[63] I am therefore of the view that this appeal succeeds in part. As far as the judge's order that the moneys being held for Mr. Kullberg in Century 21's escrow account should be paid over to Ms. Vargas is concerned, while I must confess to having a question in my mind as to the actual source of her power to make this order, I cannot fault the justice of the order in all the circumstances. In any event, this would be a matter for the absent Mr. Kullberg to challenge, and not the Fukais.

[64] I would therefore allow this appeal to the extent indicated in para. [62] above. I would, however, make no order as to the costs of this appeal, each party having had, in the result, a measure of success (see rule 63.6(6)(b)).

MORRISON JA