IN THE SUPREME COURT OF BELIZE, A.D. 1998 and A.D. 2003

CLAIM NO: 55 OF 1998
CLAIM NO: 60 OF 2003

CLAIM NO: 55 OF 1998

BETWEEN:	(RANDOLPH HOPE	PLAINTIFF
	(	
	(AND	
	(	
	(CHARLES MCINTOSH	DEFENDANT

CLAIM NO: 60 OF 2003

BETWEEN:	(RANDOLPH HOPE	PLAINTIFF
	(	
	(AND	
	(	
	(STEPHENY MCINTOSH	DEFENDANT

Mr. Hubert Elrington for the claimant
Mrs. L. Barrow – Chung for the defendants.

AWICH J.

12.7.2007 **JUDGMENT**

1. This is joint judgment in claims No. 55 of 1998 and No.

60 of 2003. The Claimant in both claims is Mr. Randolph Hope, also known as Randall Hope, the vendor of certain land lots 2 and 2A, at the corner of Marage Road and the Northern Highway, Ladyville, Belize District. The defendant in Claim No. 55 of 1998, is Mr. Charles McIntosh, the purchaser. The defendant in No. 60 of 2003, is Stepheny McIntosh who was his wife.

2. Mr. Hope and Mr. McIntosh have not been wholly truthful in court, and one of them lied more. The court has no magic wand to wave the truth out of them; it has to rely on what seems proved to the standard of a balance of probalities. Anything else must be excluded. The defendant, Stepheny McIntosh, was not called to testify as a witness. She and Mr. McIntosh no longer live together as husband and wife; she was said to be resident in Ontario, Canada.

3. In the early nineties Mr. Hope and Mr. McIntosh had several business transactions between them, and with others. The transaction which is the subject of this claim has its origin in

1992, when Mr. McIntosh asked Mr. Hope to allow him the use of his land described above. It was not yet subdivided. Mr. McIntosh needed the land for keeping building materials in connection with a contract job he had secured with a contingent of the British Army in Belize. Mr. Hope let him have the use of the land. Then McIntosh offered to buy the land. It was subdivided for the purpose, into lots 1, 2 and 2A. The lots sold to Mr. McIntosh were lots 2 and 2A. Both parties said they had an oral agreement of the sale in 1992, and then on 31.12. 1993, they had a written agreement, court exhibit No. C (RH)1, of the sale of the land or parts of it. Those are about all the common grounds between the parties.

Mr. Hope's two claims.

4. Mr. Hope in both claims said, the oral agreement was made in 1992, and the purchase price agreed for both lots was $125,000.00. He said that later on 31.12.1993, they made the written agreement which "replaced" the oral one; in the written agreement the purchase price for both lots was $60,000.00, and

interest of $250.00 per month was payable in addition, until payment of the purchase price in full was made. Mr. Hope said further, that pursuant to the agreement, he signed an escrow conveyance and left it with attorney Nicholas Du Jon; it was to be dated and recorded at Lands Registry upon full payment by Mr. McIntosh to Mr. Hope. The complaint of Mr. Hope was that Mr. McIntosh had failed to pay him, and in 1996 Mr. Hope rescinded the agreement of 31.12.1993, and demanded return of the land lots according to the agreement; Mr. McIntosh refused to deliver possession. Mr. Hope then claimed in Claim No. 55 of 1998, delivery up of possession of the two lots.

5. About Claim No. 60 of 2003, Mr. Hope added to the above account. He said that he later went and signed a conveyance for lot 2A in favour of Stepheny McIntosh, and again he left it as an escrow with Mr. Du Jon; he later discovered that a conveyance dated 22.8.1994, was recorded at the Lands Registry, transferring lot 2A to Stepheny McIntosh; his signature on it was forged. He said, he had not been paid enough for even that lot only. He claimed a declaration to the

effect that the conveyance of lot 2A was forged, and an order directing the Registrar of Lands to cancel the recording of the conveyance.

6. Mr. Hope's contention was that whatever was paid before 31.12.1993, was paid on the earlier and separate oral contract which ended at the making of the written contract on 31.12.1993. The contention went further, that all sums paid by Mr. McIntosh since 31.12.1993, totalled less than the purchase price of $60,000.00, plus the total interest which was payable by instalments of $250.00 per month. He contended, he has been paid a total of "$42,000 odd", as part of the purchase price and nothing at all as interest.

Mr. McIntosh's answers and counterclaim.

7. Mr. McIntosh contended that the purchase price for the two lots was $60,000.00 in the oral agreement, it was the price simply repeated in the written agreement, which he said was the earlier oral agreement continued in the written agreement of

31.12.1993. He contended further, that he has paid the whole purchase price and more; his payments were made in 1992, 1993, 1994 and 1995. He denied that interest of $250.00 per month was payable as a separate sum under the written agreement. He explained that paragraph 2 of the agreement was an error that he and Mr. Hope were aware of. He counterclaimed $17,788.75 for goods sold and services rendered to Mr. Hope at Mr. McIntosh's filling station. He denied that the conveyance of lot 2A was forged. He said that the conveyance of the lot was expedited upon him paying $3,000.00 up-front to Mr. Hope who had asked for the money.

Determination.

8. I accept the testimony of Mr. Hope to the extent that the written agreement dated 31.12.1993, was a new agreement between Mr. Hope and Mr. McIntosh. The last paragraph, 8, stated so in the words: "This Agreement contains the entire Agreement between the parties hereto and supersedes all prior oral or written Agreements between such parties with respect to the

subject matter hereof." The paragraph indicates that the parties took into consideration the fact that they had "prior oral and or written agreement", which they wanted to exclude from their written agreement of 31.12.1993. If they wanted to continue the oral agreement, and merely put it in writing, they would have stated so, and made mention of the various payments made by Mr. McIntosh, at least the total paid, before 31.12.1993. Mr. Hope accepted that Mr. McIntosh made several payments in 1992. The sums totalled to a substantial amount.

9. Moreover, it would be contrary to the parol evidence rule in the law of contract, to accept the testimony of Mr. McIntosh that the oral contract was continued in the written; there were two many inconsistencies between the two. Besides, the oral agreement of 1992, an agreement for sale of land, would be unenforceable because it was not in writing or evidenced by some memorandum in writing or was partly performed. – see ***s: 55 of the Law of Property Act, Cap. 90, Laws of Belize.*** Moreover, on the evidence, the taking of possession in 1992,

and making the several payments would not be inconsistent with an agreement for a mere monthly lease or even a licence. I also note that as a matter of law, the two lots intended to be secured as lots 2 and 2A by subdivision, could not have been sold or even leased as such before the final approval for the subdivision had been received – see ***s: 14 of the Land Utilization Act, Cap 188, Laws of Belize.*** So it is a presumption of law that any agreement, whether for sale or lease made before the subdivision, was in respect of the land as a whole not in respect of the subdivisions, lot 2 and lot 2A.

10. I accept also the submission by learned counsel Mr. Hubert Elrington, for the claimant, that the purchase price was agreed at $60,000.00, payable by monthly instalments of $1,250.00, and in addition a monthly interest sum of $250.00 was payable. That is what paragraph 2 of the agreement stated. Attorney Nicholas Du Jon who drafted the agreement on the instruction of both Mr. Hope and Mr. McIntosh testified that, that was the instruction and that was the meaning of paragraph 2.

11. I shall assume that Mr. Hope claimed in Claim No. 55 of 1998, delivery up of possession and not part of the purchase price and interest owing because the relief for failing to pay the purchase price and interest was provided for in paragraph 5 of the agreement; it states: "If the purchaser fails to pay six successive instalments, the vendor shall have the right to cancel and /or rescind the agreement and take possession of the said two pieces or parcels of land without refund of any part of the purchase money or interests thereon". The crucial remaining issue is therefore; whether Mr. Hope who is the claimant, and bears the burden of proof, has proved that Mr. McIntosh has failed to pay the monthly instalments of the purchase price and interest, and the failure has lasted over six successive months since 31.12.1993.

12. Mr. Hope testified that Mr. McIntosh stopped making payment in May 1995, and has not made payment since June 1995. He said, the total payment made was for 18 months; and he was owed "$30,500, plus interests". Then in crossexamination he said that the sum owed was "$42,000.00" odd plus interests. I

concluded that Mr. Hope did not readily know the exact total sum to be paid to him on the agreement and did not know the exact sum he was owed when Mr. McIntosh stopped making payment, whether it was in May 1995, or some other date, and further, Mr. Hope did not know the exact sum he was owed when he filed the first claim on 27.3.1998, and the second on 6.2.2003. The total sum due on the agreement was in fact a matter of simple computation which Mr. Hope seemed not to have done.

13. If the sum of $60,000 was paid by monthly instalments, payment would be made over 48 months. Instalments for interest of $250.00 per month would add to $12,000.00. So the total sum due for the purchase was $72,000.00. Did the evidence prove that Mr. McIntosh has not paid up to $72,000.00?

14. I accept the evidence of payments made, as tabulated in the report of Mr. H.E.P. Fuller, a qualified accountant, practising from the firm of KPMG Peat Marwick, Belize. He was not

called as a witness; he was deceased. The claimant accepted that the report be admitted as exhibit in evidence, and in fact relied on it for proof, which I accepted, that the oral agreement was different from the written, and that payments made in 1992 could not be included as payment on the written agreement.

15. In his tabulation, Mr. Fuller split any payment of $1,250 into: $1,000 as paid towards the purchase price, and $250.00 as payment towards interest. He then added payments towards the purchase price, the total was $49,844.49; and added the payments for interest, the total was $8,750.00. The total of the two was $61,578.31. That was the total payment made by Mr. McIntosh, and it was all, in fact, payment towards the purchase price. Mr. McIntosh did not make payment towards interest. He wrongly assumed that $250.00 out of each instalment of $1,250.00 was the interest part. The tabulation by Mr. Fuller, of payments showing dates, cheque numbers or vouchers numbers and cash amounts, were supported by evidence of the cheques and voucher presented as exhibits through the testimony of Mr. McIntosh. They were put to Mr. Hope in

crossexamination. The first date of payment made was 31.8.1992, the last date was 12.12.1995.

16. Mr. Fuller was wrong in including payments made in 1992 in the total payment of $61,578.31. I have already decided that payments in 1992 were not made pursuant to the written agreement of 31.12.1993. So, out of $61,578.31, I deduct ($11,733.82 + $750) which is $12,488.82. That was the total payment shown as made in 1992. The payments made in 1993, 1994 and 1995 add to $49,094.49. My conclusion is that by 12.12.1995, the last date payment was made, the total sum owed by Mr. McIntosh for the purchase price and interests together was $22,905.51.

17. Mr. McIntosh pleaded and proved a counterclaim of $17,788.75. I reject the bare statement by Mr. Hope that the sum was owed by a joint business between him, Mr. McIntosh and another. The invoices which were from 1994, were addressed to Mr. Hope alone; he would have acknowledged receipt and denied the bills in them. He did not deny until 1998

when the first claim was filed. Taking the counterclaim into consideration, the net sum owed by Mr. McIntosh is $5,116.76. It remained owing from 12.12.1995 to date.

18. I then considered the question of $250.00 interest per month which would accrue every month until payment in full would have been made. On the other hand, I considered that on the counterclaim of $17,788.75, I would order payment of interest in favour of Mr. McIntosh. I concluded that a just decision is to deny interest on both the sum of $5,116.76 owed to Mr. Hope, and the sum of $17, 788.75 owed to Mr. McIntosh.

19. Mr. Hope did not claim a sum of money owed, which I have decided is $5,116.57, he claimed in Claim No. 55 of 1998, delivery up of possession of the two land lots, 2 and 2A. In view of the substantial payment already made by Mr. McIntosh, and in view of the fact that Mr. Hope owed $17, 788.75 which he failed to pay, and as the result Mr. McIntosh believed that he had paid more than due on the agreement of 31.12.1993, I decline to enter judgment for delivery up of possession of the

two lots of land, instead, in Claim No. 55 of 1998, I enter judgment for payment by Mr. McIntosh of $5,116.76 to Mr. Hope. The sum is payable forthwith, but in the event that Mr. Hope accepts payment by instalments, interest of $250.00 per month will be payable until full payment. The sum of $17,788.75 is to be regarded as paid by reason of offsetting it as counterclaim against the total sum owed by Mr. McIntosh.

20. In claim No. 60 of 2003, the evidence presented to prove the fraud averred was the testimony of Mr. Hope, that he did not sign the conveyance dated 22nd August 1994, exhibit No. D (GM) 22, registered at the Lands Registry. It was by that conveyance that title to lot 2A was transferred to Stepheny McIntosh. Counsel sought to support that testimony by crossexamination of Genoveva Marin, a handwriting expert witness. She was called to testify for Mr. McIntosh. Her testimony in chief was to compare signatures on cheques cashed by Mr. Hope and the signature on a copy of the conveyance of 22.8.1994, D (GM) 22, which she obtained from the Lands Registry. She said that the signature on the copy of

the conveyance and the signatures on the cheques were written by the same person. In crossexamination Mr. Elrington presented another copy of conveyance also dated 22nd August 1994. It was subsequently received as exhibit D (GM) 23. Ms. Marin said in crossexamination, that the signature on the copy, exhibit D (GM) 22 was different from that on the copy exhibit D (GM) 23, that the two signatures were made by two different persons.

21. So Mr. Elrington urged court to accept that the conveyance exhibit D (GM) 22, recorded at Lands Registry, was forged. I cannot make that conclusion because it can equally be said that conveyance exhibit D (GM) 23 was the one forged. In addition, two reasons operate to make me reject the submission that conveyance exhibit D (GM) 22 was forged. The first reason is where copy conveyance exhibit D (GM) 23 came from. Mr. Elrington simply presented it in court for comparison, he did not lead evidence as to its origin. The second reason is that Mr. Hope in his witness statement referring to himself in the third person, as the claimant, stated: "The claimant, recalled signing

an undated and unwitnessed conveyance in which he was the vendor and Stepheny McIntosh was the purchaser, but that the conveyance was to be completed by him only upon completion of payment of the purchase price----". That statement by Mr. Hope weakened any proof and challenge that the conveyance filed for recording was forged. It was for Mr. Hope, the claimant, to prove his case of forgery to a standard of a balance of probabilities. That has not been accomplished in Claim No. 60 of 2003.

22. With due respect, I think Mr. Elrington had a mistaken view of what an escrow is. It is essentially property or an incomplete deed because it is not to be delivered by an attorney or agent, to a promisee until the occurrence of an event or until a future date. A deed is supposed to be signed (sealed), dated and delivered. The dating and delivery of an escrow are usually held in abeyance, but beyond the power of the conveyansor, as security. So it does not help Mr. Hope to say that he was to complete the escrow that he had signed and left with attorney for both parties.

23. The claim of Mr. Randolph Hope in Claim No. 60 of 2003, fails. The declaration prayed is refused, and the claim is dismissed. It was completely unnecessary to file Claim No. 60 of 2003. All the issues arose and could have been raised in Claim No. 55 of 1998, and were bound to be resolved in that claim. Had counsel for Mr. McIntosh applied for costs at attorney and client scale, I would have granted it to pay for the wasteful manner in which the claim of Mr. Hope was conducted.

24. Mr. McIntosh will pay the costs in claim No. 55 of 1998 to Mr. Hope; and Mr. Hope will pay the costs in claim No. 60 of 2003 to Mr. McIntosh.

25. Delivered this Thursday the 12th day of July, 2007

At the Supreme Court

Belize City.

Sam Lungole Awich

Judge

Supreme Court