

**IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction**

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

**CCJ Appeal No. BZCV2016/002
BZ Civil Appeal No. 10 of 2012**

BETWEEN

PROGRESSO HEIGHTS LIMITED

APPELLANT

AND

**PITTS & ELRINGTON
WILFRED ELRINGTON**

RESPONDENTS

Before The Honourables

**Mr Justice Saunders
Mr Justice Wit
Mr Justice Hayton
Mr Justice Anderson
Mme Justice Rajnauth-Lee**

Appearances

Mr Eamon H Courtenay, SC and Ms Pricilla J Banner for the Appellant

Mr Wilfred P Elrington, SC and Ms Alifa Elrington-Hyde for the Respondents

REASONS FOR DECISION

of

**The Honourable Justices Saunders, Wit,
Hayton, Anderson and Rajnauth-Lee**

Delivered by

**The Honourable Mr Justice Hayton
on the 4th day of August, 2017**

Introduction

- [1] This is an exceptional case where, despite adverse fact-findings by the trial judge and the Court of Appeal against the Appellant, Progresso Heights Limited (“Progresso”), this Court granted Special Leave to Appeal because it was arguable that a miscarriage of justice had occurred. The basis for this was that there was good scope for argument that the lower courts had essentially required Progresso to establish its case to a higher standard than the civil law standard of proof on a balance of probabilities. This only requires a claimant to prove it more likely than not that he has established the factual basis for his legal claim, unlike the criminal law which requires proof beyond reasonable doubt.
- [2] Before hearing the appeal, we thoroughly read and reflected upon the material in the Record (including, inter alia, the opposing evidence of the only two witnesses, with their exhibits, and the two judgments below) and also counsel’s written submissions (with supporting authorities). After hearing counsel, we considered the position clear enough immediately to allow the appeal in so far as ordering the delivery up to Progresso within 30 days of the sought documents claimed to be in the possession or control of the Respondents, with liberty to apply thereafter for further reliefs. These are our reasons for that decision. This involves a lengthy examination of the factual position.

The land development venture and falling out of the parties

- [3] Progresso was incorporated in Belize in July 2003 with Mr Lawrence Schneider (“Mr Schneider”), his son, Mr Adam Schneider, and the First Respondent, Mr Wilfred Elrington, having 55%, 25% and 20% of the shares therein. The two Schneiders are American citizens resident in Florida and are the only two directors of Progresso. Mr Elrington was a partner in the Second Respondent, the law firm, Pitts and Elrington, and did the legal work necessary for the incorporation of Progresso. Progresso is a developer which acquired 2,000 acres of land at Progresso Village, Corozal District, which it considered ideal for a substantial development by way of sub-division and sale of properties in a high-end environment. This required laying out sub-divided plots and roads and providing water, electricity, a community pier, boat ramp, gatehouses, a clubhouse, and a community swimming pool.

- [4] Most unfortunately, the relationship between Mr Elrington and the other two shareholders completely broke down as a result of bitter disputes between Mr Elrington and Mr Schneider. In June 2010 Mr Elrington filed Claim No 566 of 2010 against Progresso to seek a declaration that the latter had been acting illegally and dishonestly in various respects and an order for the appointment of an inspector to investigate the affairs of Progresso, so that all rights and entitlements should be accorded and paid to him.
- [5] In October 2010 Progresso filed the current Claim No 712 of 2010 because Mr Schneider considered that Mr Elrington and his law firm were wilfully disrupting Progresso's business of selling properties to American purchasers. Progresso claimed the following reliefs -
- (i) The delivery up of all closing documents, including documents, certificates of title and receipts in the defendants' possession or control for properties sold by the said claimant to various purchasers over the period September 2009 to June 2010.
 - (ii) Payment of the sum of \$26,120.22 had and received by the defendants.
 - (iii) Damages including special damages.
 - (iv) Interest.
 - (v) Costs.
 - (vi) Any further or other relief which this Honourable Court deems just.
- [6] As was to be expected, Legall J ordered that both trials be heard together, but this did not occur. In February 2008, Mr Elrington had become Attorney General and Minister for Foreign Affairs and Trade. Mr Schneider applied in Claim No 712 to be permitted to give evidence and be cross-examined by video link. The basis for this, according to his affidavit of 29th September 2011, was that his dealings with Mr Elrington were such that "I have a real and substantial fear that if I were to enter Belize for the trial of this matter that the Respondent will cause me to be arrested on criminal charges and that my person and my liberty will suffer harm". In his affidavit Mr Elrington objected that "the alleged fear of arrest and imprisonment is wholly unfounded."
- [7] On 3rd November 2011, however, the parties agreed to a consent order that Mr Schneider give evidence by video link and senior counsel for Progresso in both

claims informed the court that he was advising his client to agree to an order for an inspector to investigate the affairs of Progresso in Claim No 566 and that a draft consent order should be forthcoming once an appropriate inspector had been agreed upon. Counsel for both sides and the court agreed to proceed with the current Claim No 712. It appears, however, from the judgment of Legall J that no draft order had been submitted to the court by 28th February 2012 when he delivered his judgment in this case. It may also be noted that the matters raised in Claim No 566 were also raised in paragraphs 11 to 27 of the Defence to Claim No 712, which alleged wholesale non-compliance with the provisions of the Companies Act (Cap 250) and requested the court to appoint an inspector to investigate the affairs of Progresso, but Legall J's judgment did not consider those matters.

The Statement of Claim and Defence

[8] After the introductory paragraphs giving details of the Claimant, Progresso, and the First and Second Defendants, Mr Elrington and his law firm, stating that the First Defendant was currently a member of the House of Representatives of Belize with ministerial responsibility for Foreign Affairs and Trade, the Statement of Claim continued in paragraphs 4 to 15.

Statement of Claim

- “4. *On various dates commencing, for the purposes of the instant claim, in September, 2009, the Claimant retained the Defendants to process transfer of title documents for the transfer of sixteen (16) properties located in the Progresso Heights Registration Section (“PHL Properties”), fifteen (15) of which were sold by the Claimant as vendor to various purchasers and one (1) of which was processed by the Claimant on behalf of Adriana Texeira Di Reis and Frank Michael Sullivan.*
5. *The Claimant duly collected the purchase price from the purchasers of the PHL Properties and duly executed all the transfer documents in the Unites States of America and remitted same to the defendants along with all the closing costs and fees required by the Government of Belize (“GOB”), inclusive of GOB Stamp Duty, GOB Registration fee, and GOB certificate fee.*
6. *The Claimant also remitted to the Defendants the processing fee charged by the Defendants of 2% of the purchase price for each of the sixteen (16) PHL Properties. The corresponding parcel and check numbers are 328 (2248), 391 (check 2217), 1165 (check 1106 and 1243), 1166 (check 1106 and 1243), 1167*

(check 1106 and 1243), 1288 (check 2375), 1306 (check 2368), 1321 (check 1245), 1370 (check 2362), 1376 (check 2362), 1396 (check 2368), 1403 (check 2362), 1404 (check 2362), 1409 (check 2362), 1410 (2368), and 1412 (check 2368). Copies of the checks and corresponding receipts evidencing the payment and receipt of the funds by the Defendants are annexed hereto as "Annex 1".

7. *The closing documents for the sixteen (16) parcels were provided to the Defendants. Searches conducted by the Claimant regarding the parcels of land reveal that land title certificates have been duly issued to the Defendants out of the Ministry of Natural Resources in respect of 8 parcels namely, parcels 1370 (LRS No:201004561), 1403 (LRS No: 201004575), 1404 (LRS No. 201004574), 1409 (LRS No: 201004576), 1306 (LRS No. 201004994), 1412 (LRS No: 201004992), 1321 (LRS No: 201004995), and 1396 (LRS No: 201004989).*
8. *The transfer of land documents for the other seven (7) parcels of the Claimant's properties including the documents for parcel 328 belonging to the Claimant's clients, Adriana Texeira Di Reis and Frank Michael Sullivan, are still in the possession and under the control of the Defendants and the Defendants have failed and/or refused to record same with the Lands Registry in Belmopan even though they have been duly paid the legal/processing fee for same by the Claimant.*
9. *To date, the Claimant has paid the sum of \$42,436.74 to the defendants for legal/processing fee for the recording and registration of the executed transfer of land documents without having been provided with the titles in respect of the payments made. The Defendants have recorded transfer of land documents in respect of only eight (8) of the sixteen parcels (but has (sic) withheld titles from the Claimant) which means that the Claimant (sic) has only earned \$16,316.52 of the \$42,436.74 paid to him and has an outstanding balance for the Claimant of \$26,120.22 in respect of the unprocessed documents.*
10. *The Claimant has requested both verbally and on two occasions in writing that the Defendants deliver up the documents, however, the Defendants have failed and/or refused to comply with the Claimant's request. A copy of the final letter of demand is annexed hereto as "Annex 2".*
11. *The actions of the Defendants in failing and/or refusing to deliver up the eight (8) title documents and to record and register the other eight (8) transfer of title documents on behalf of the Claimant even though the Defendants have been duly paid all his (sic) legal fees, have severely damaged the Claimant's business reputation with purchasers and has (sic) subjected the Claimant to threats of legal proceedings by its clients for their non-delivery of the titles.*

12. *The Defendants' actions have also caused the Claimant to suffer special damages in attempting to investigate the status of the sixteen (16) parcels.*

PARTICULARS OF SPECIAL DAMAGES

The Claimant claims special damages as follows:

- (1) *Express mail of PHL Properties Closing documents to Pitts & Elrington/Wilfred P. Elrington ("Annex 3") \$294.90*

13. *The Defendants' actions have further caused the Claimant to suffer loss and damage to its business reputation as a result of the Defendants' failure to deliver up the documents in due course.*
14. *The Claimant is entitled to and claims interest on any amount which the Court may determine as damages due to the Claimant pursuant to section 166 of the Supreme Court of Judicature Act, Cap. 91 or at a rate which the Court may deem fit.*
15. *in the premises, the Claimant prays that the honourable Court will grant the relief sought."*

[9] After uncontroversial admissions, paragraphs 3 to 10 of the Defence are as follows (paragraphs 11-27 dealing with alleged breaches of the Companies Act and alleged unlawful activities of Progresso and seeking appointment of competent inspectors to investigate and report upon the affairs of Progresso).

Defence

- “3. *The Defendants deny that they or any of them were retained at any time and in particular in September 2009 for any purpose whatsoever including for the purposes of processing transfer of title documents by the Claimant.*
4. *The Defendants deny that the Claimants (sic) at any time remitted to them or to any of them transfer documents or any closing costs and fees required by the Government of Belize [GOB] GOB Stamp Duty, GOB Registration Fee and GOB Certificate fees*
5. *The Defendants deny that they ever charged the Claimant any processing fees and they also deny that the Claimant ever remitted to them or to any of them any processing fees.*
6. *The Defendants deny that any closing documents were provided to them or to any of them by the Claimant.*
7. *The Defendant deny that any of the Land Certificates were issued to them or to any of them out of the Ministry of Natural Resources as averred in paragraph 7 of the Statement of Claim.*
8. *The Defendants deny paragraphs 8 and 9 of the Statement of Claim.*

9. *The Defendants make no admission as to paragraphs 10,11,12,13 and 14 of the Statement of Claim.*
10. *The Defendants deny that the Claimant is entitled to the relief sought or to any relief whatsoever against the defendants.”*

[10] It is immediately obvious that the pleadings were deficient, in particular, when no reasons were provided for the bare denial in paragraph 3 of the Defence (and re-iterated in paragraph 22 of Mr Elrington’s Witness Statement) that no defendant had been retained by Progresso at any time for any purpose whatsoever. Since then, Mr Elrington has put forward various reasons to support such bare denials. Indeed, he has even argued that the claim against him by Progresso had not been duly authorised. These matters need to be raised openly and upfront so as not to ambush a claimant. That is a key reason why Rule 10.5(4) of the Belize Civil Procedure Rules requires the reasons for a bare denial of an apparently valid claim to be spelled out.

[11] Unfortunately, the witness statements of the only two witnesses, Mr Schneider for Progresso and Mr Elrington for himself and his law firm, appear to have been prepared in ignorance of each other, so that there was no detailed response by Mr Elrington to the allegations made in Mr Schneider’s witness statement on behalf of the claimant. On the face of it, Mr Schneider’s witness statement dated 18th July 2011 and filed on 25th July, while Mr Elrington’s statement dated 15th July, but there is no evidence of its filing date. It also did not help the trial judge that Mr Elrington’s wife was not called as a witness to assist his defence when she was the person with whom Progresso alleged it had mainly dealt, particularly after 6th February 2008 when Mr Elrington said that he ceased his legal practice upon becoming Attorney General and Minister for Foreign Affairs and Trade. The trial judge thus had to referee a contest between two arch enemies with Mr Elrington making strenuous bare denials of everything, while his counsel sought to take advantage of legal technicalities and also uncertainties as to whether Progresso, Mr Schneider or his son was dealing with the law firm, Pitts & Elrington, or Mr Elrington or his wife.

The Judgment of Legall J

[12] Legall J finished hearing the case on 20th January 2012 and expeditiously delivered judgment on 28th February 2012. As to legal technicalities, he first

held that there was sufficient evidence on a balance of probabilities that Progresso had duly authorised the claim to be brought, had duly authorised Mr Schneider to make the witness statement on its behalf and had duly authorised counsel to represent it in its claim, though none of these points had been raised before the hearing.

[13] Legall J considered that two issues of fact arose. The first was whether the closing documents and land certificates or titles were received by the defendants. Legall J stated at [28], “I *have no doubt*¹ from the above evidence that the conveyancing documents were posted to the law firm of Pitts & Elrington.” [...] “But who received these documents?” He held at [29], “I am not satisfied upon the evidence that the claimant has proven on a balance of probabilities that the defendants received these documents. It is *highly likely*² that the documents were received by Mrs Elrington, who should have been called as a witness or made a defendant in this matter.” Legall J implicitly assumed Mrs Elrington had authority to receive documents on behalf of one or other defendant.

[14] The second issue was whether conveyancing costs and fees had been paid to the defendants by Progresso so as to leave a balance due to Progresso of \$26,120.22. Legall J at [20] set out Mr Schneider’s evidence that, after a period when the defendants supplied legal services free of charge, he and his son as the only directors had considered and agreed to Mr Elrington’s verbal request to have Progresso pay on each sale a legal processing fee of two per cent of the purchase price, though the burden of such fee could be passed on to purchasers. This evidence of an attorney-client retainer between Mr Elrington and Progresso was later accepted by Legall J who stated at [30], “I have no doubt on the evidence, that conveyancing costs and fees were paid into the account of the first defendant at Bank of America by the Schneiders for and on behalf of the claimant. I accept the evidence of Mr Lawrence Schneider that he discussed the payment of costs and fees with the other directors (sic) and he personally deposited the cheques in the account of the first defendant who had given him information of the said account.” Nevertheless, Legall J held that the claimant

¹ Emphasis added

² Emphasis added

had not been able to explain how the claimed sum had been reached. “The burden is on the claimant to prove its case and I am not satisfied on a balance of probabilities that the claimant has proved how the amounts claimed were calculated or arrived at.” Support for this approach arises from the searching inquisition of claimant’s counsel by Sosa P when counsel opened the appeal to the Court of Appeal. This led counsel, perhaps taken by surprise, to reduce the money claimed to the sum of \$2,472.12 paid by Progresso to Mr Elrington in two cheques in April 2010.

[15] Thus Legall J dismissed Progresso’s claims, the claim for the damage done to its business reputation not having been pursued, but favoured Progresso by making no order as to costs, rather than the usual order for the losing party to pay the winning party’s costs.

The Court of Appeal decision

[16] The Court of Appeal finished hearing Progresso’s appeal on 12th March 2014 but did not deliver judgment until 28th October 2016. Sosa P (with whom Awich JA and Hafiz-Bertram simply concurred) dismissed the appeal with Progresso to pay the respondents’ costs in the Court of Appeal to be agreed or taxed.

[17] In a detailed examination of the available evidence, though, of course, not having had the benefit of gauging the credibility of the two protagonists in the witness box, the Court of Appeal held that the evidence provided by Mr Schneider as Progresso’s sole witness had not been sufficient to prove that relevant documents were ever posted to the respondents, or ever received by the respondents, or ever delivered to the Land Registry, or that Mrs Elrington had authority to receive relevant documents.

[18] As to the claim for \$2,472.12, this related to two of Progresso’s cheques in favour of Mr Elrington, one dated 21st April 2010 and one dated 29th April 2010. In the absence of proof that the documents to which the first cheque related had been received, the Court of Appeal held at [62] that Progresso could not claim return of the money without “any contractual term” entitling it to this money, while it was, in any event, too uncertain as to how much of the amount in the cheque for three parcels of land (1165, 1166 and 1177) covered “the alleged

2% processing fee” when other fees needed to be paid, no evidence even having been produced as to the purchase price in relation to which the 2% was calculated. In respect of the second cheque, concerned with a parcel of land (1321) for which a land certificate had been issued, the amount covered by the cheque was not the subject of a claim because, on the proper construction of paragraph 9 of the Statement of Claim, the claim covered only moneys relating to the eight properties in respect of which no land certificate had been issued.

- [19] We can at once confirm the Court of Appeal’s view that the claim for \$2,472.12 fails due to uncertainty as concerns the 2% fee amount due within the figure in the first cheque and as to deficient pleading in the case of the second cheque. However, we note that an action would lie for money had and received due to a mistake of fact or law as to the 2% payment, so that a defendant is not enriched without a just good cause for such enrichment.

The appeal to the Caribbean Court of Justice

- [20] The parties agreed that the issues for determination are as follows -
- 1) Did the Court of Appeal err in failing to find that, on a balance of probabilities, the transfer documents were mailed to or received by Mr Elrington or his law firm?
 - 2) Did the Court of Appeal apply a standard higher than a balance of probabilities when assessing the evidence?
 - 3) Did the Court of Appeal err in law or misdirect itself in upholding the ruling of the learned trial judge who accepted the evidence on behalf of Progresso that conveyancing costs and fees were paid to Mr Elrington but failed to conclude that Progresso was entitled to at least US\$2,472.12 from Mr Elrington?
 - 4) Did the Court of Appeal err in law when it found that there was no contractual basis for which it could find that Progresso was entitled to US\$2,472.12 from Mr Elrington?
- [21] Mr Elrington SC appeared before us to represent himself but left the judgments of Legall J and the Court of Appeal to speak for themselves as to factual matters, a wise course when he himself was the sole witness for the defence as to factual matters. He first questioned whether Progresso’s case was properly before the

courts because there was insufficient evidence of the requisite authorisations. As pointed out above at [10], however, Legall J had ruled that the litigation was duly authorised and there had been no appeal against this, although in written submissions by the respondents before the Court of Appeal this issue had been raised by them and dealt with by the appellant.³ The Court of Appeal ignored this in its judgment and no cross-appeal against this (under Rule 12.3(a) of the CCJ Appellate Rules 2017) is before this Court so as to affirm the judgment of the court below on grounds other than those relied on by the court below.

[22] Mr Elrington argued that there was no retainer of him by Progresso because no consideration had been provided for a contract of retainer but also sought to argue that, if there had been any consideration, no-one with the requisite authority had entered into such a contract on behalf of Progresso. It was too late to raise this issue, but, in any event, such an argument has no merit when the unanimous informal agreement of all the directors (Mr Schneider and his son) suffices for entering into contracts in the ordinary course of business.⁴

The dealings between the parties before Mr Elrington became a Government Minister in 2008

[23] It appears that Mr Elrington first realised in 2002 that there was a good land development opportunity in respect of an area of over 2000 acres in Progresso Village in the Corozal District in Belize. His first thought was to involve family members in the project, but this did not prove possible, taking into account the size of the required investment, the land costing US\$800,000 before developing costly high-end infrastructure for it. In the late 1990s, however, he had been legal adviser to Pleasure Island Limited, a Belizean company of which Mr Schneider was managing director, and so he approached him. Mr Schneider agreed that this was a good project to carry out through a company. As stated in Mr Schneider's witness statement, "The First Defendant [Mr Elrington] invested in the Claimant Company only as to the 20% shareholding allotted to him." The two Schneiders had the remaining 80% of the \$10,000 share capital divided into 10,000 shares of \$1 each. It seems that the shareholders' understanding in view of the contrasting financial resources of the parties was

³ CCJ Record pp 770-786.

⁴ Eg *Runciman v Walter Runciman plc* [1992] BCLC 1084,1092.

that the Schneiders were to provide the requisite funds required to develop the infrastructure and market and sell off parcels of Progresso's property, while Mr Elrington agreed to provide legal advice and services to the company without charge. Whether the 20% shareholding allotted to Mr Elrington was fully paid for by him or was to some extent consideration for his undertaking to provide his legal services free of charge was not determined below, leaving the position unclear. However, we do not need to resolve this issue because, as will be seen, no issue arises as to such legal services until after 2008 when Progresso had agreed to pay Mr Elrington a legal processing fee of two per cent of the purchase price of properties purchased from it.

[24] Mr Elrington admitted⁵ that he was “the attorney with full responsibility for Progresso Heights Limited affairs until 7th February 2008” when he became a Government Minister. He explained that he was never retained under an attorney-client contract. “I was never retained but I assumed that responsibility because I was part of the company and because I was an attorney I tried to make sure that everything goes well.” He admitted⁶ “It was convenient for me to use the partnership stationery but the partnership had nothing to do with it. The partnership got no benefit from it, submitted no bill, entered into no contract with them; it was just the use of the paper, no more no less.” Earlier he had stated⁷, “I could not ask members of the firm of Pitts & Elrington to be involved in something that was personally mine. It was my investment and so I enlisted the support of my wife to help me do this pro bono work. Neither my wife was paid, nor myself was paid, nor Pitts & Elrington was paid.” Mrs Elrington was not a qualified attorney but worked out of the office of Pitt & Elrington, though not an employee of that firm. Mr Elrington quibbled⁸ that his wife did the work involved in dealing with Progresso “for me” and “because of me” but “not on my behalf.” We disagree: she was his unpaid agent, despite the contrary view of the Court of Appeal.

⁵ CCJ Record pp 946-947.

⁶ Ibid p 938.

⁷ Ibid p 914.

⁸ CCJ Record pp 915-916.

[25] In reply to being asked what Mrs Elrington did with respect to Progresso's affairs, Mr Elrington stated⁹, "When documents came from Progresso Heights Ltd for clients who bought land from Progresso Heights Ltd, they would be sent to Mrs Elrington addressed to her and the records are there, not to me, addressed to Mrs Barbara Elrington and the other claim has the affidavit and witness statements showing that they were addressed to her and she would simply take these documents to the Lands Registry" and the "relevant fees would be paid, documents processed." Counsel then asked Mr Elrington¹⁰, "Would I be correct to say that moneys, the stamp duty and related government fees were sent to you?" The answer was "Yes, you would be correct to say that." An example of this was a 13th September 2006 cheque for US\$23,072.78 in respect of transfer fees concerning six enumerated plots from Progresso's Florida attorney, Jason Weaver, made payable to Mr Elrington's Bank of America Florida account ending 9853, an account whose details had been supplied to Mr Schneider by Mr Elrington.

[26] Counsel later asked¹¹, "So, just to clarify again, the moneys on a routine basis, to use your word, in relation to land transfers that were received by Mrs Elrington were deposited in your accounts in the US, Mrs Elrington looked after the filing, registration of these documents, paid the necessary fees and attended to the return of these documents, would that be accurate?" "That would be accurate", Mr Elrington answered.

[27] The above answers related to the period before Mr Elrington said that he ceased practising as an attorney in the office of Pitts & Elrington on becoming a Government Minister in February 2008. He stated¹², "After 2008 I left the office. I had nothing to do with the office and up to that time I was not paid a cent by anybody for any work done and I was not contracted by anybody to do any work."

⁹ Ibid

¹⁰ Ibid p 917

¹¹ Ibid p 919

¹² Ibid p 937.

The subsequent dealings between the parties

The 2% legal fee for processing documents

[28] If, indeed, there was no contractual retainer by Progresso of Mr Elrington or his law firm before February 2008 it is clear that Mr Elrington accepted that he had assumed the role of Progresso's attorney and so was under the usual fiduciary duties of an attorney to his client. Moreover, as a joint venturer with Mr Schneider and as a person Mr Schneider trusted and confided in so much¹³, so that his asking Mr Elrington for a receipt would be like asking Mr Schneider's son for a receipt, Mr Elrington would owe some fiduciary duties to Mr Schneider.

[29] According to Mr Schneider, things changed some time in 2008 because Mr Elrington told Mr Schneider and his co-director son that he now expected a legal fee of 2% of the purchase price of land sold by Progresso so as to process such purchases, and they could, of course, pass the charge on to those purchasers if they wished. Mr Schneider and his son agreed with Mr Elrington to pay the fee, so that this fee was authorised not just by the two directors of the company but by all the shareholders.¹⁴ Mr Schneider paid these fees into Mr Elrington's Bank of America account in Florida. Mr Elrington, however, denied having to repay any such legal fees, whether because the fees were never charged by him or because the relevant documents for processing never had been received by him.

[30] Legall J accepted Mr Schneider's evidence as pointed out at [13] above. As seen above at [17], in dealing with the claim concerning the two April 2010 cheques paid by Progresso to Mr Elrington, the Court of Appeal did not have to decide whether the alleged 2% fee was actually payable and included in the amounts of the cheques paid into Mr Elrington's Florida bank account because, even if it were payable, the claim failed for uncertainty and a pleading deficiency as explained in [18] above.

¹³ Ibid pp 838, 846, 848 and 850.

¹⁴ A company is bound in a matter *intra vires* the company by the unanimous consent of all its shareholders even if informal: *Parker & Cooper Ltd v Reading* [1926] Ch 975 applying *Saloman v Saloman* [1897] AC 22, 57.

[31] In these circumstances we see no reason to interfere with the finding of the trial judge that the 2% processing fee became payable in 2008, so that there was a contractual basis for an oral retainer by Progresso of Mr Elrington, there being no need for a formal written retainer: *Blyth v Fladgate*¹⁵. Thus, breach of contract is a basis for return of processing fees where processing was not carried out and for seeking damages for losses flowing from such breach. However, even if no contract subsisted an action for money had and received would lie for money paid under a mistake of fact or law as to the 2% fee.

Were the claimed documents received by the Respondents?

[32] After Mr Elrington became a Government Minister in 2008 and required a 2% legal processing fee, Mr Schneider's evidence was that, except for having to pay this additional fee, matters continued with Mrs Elrington as Mr Elrington's agent on the routine basis as before and set out in [22] and [23] above until June 2010. This was when Mr Elrington's animosity towards Mr Schneider led Mr Elrington to institute Claim No 566 of 2010, and his retainer as Progresso's attorney ended. Thus, until June 2010 cheques were deposited into Mr Elrington's account with the Bank of America in Florida to cover the closing costs and fees required by the Belize Government for stamp duty, registration fee and certificate fee as before the 2008 2% fee agreement, but now including the 2% fee. This clearly leads to the question in relation to which parcels of Progresso's land were the various cheques payable.

[33] As indicated on the face of Progresso's cheques of 21st April 2010 and 29th April 2010 paid in to Mr Elrington's account, they relate respectively to parcels 1165, 1166 and 1167 and to parcel 1321. Also paid in were a number of cheques from Jason Weaver's IOTA Trust Account, Progresso's American attorney's account for the safe-keeping of purchasers' moneys. Such cheques that on their face relate to particular parcels in parentheses are dated 14th September 2009 (including parcel 391), 2nd February 2010 (including parcel 328), 6th April 2010 (including parcels 1370, 1376, 1403, 1404 and 1409), 26th April 2010 (including parcels 1306, 1396, 1410 and 1412) and 18th May 2010 (including parcel 1288).

¹⁵ [1891] 1 Ch 337, 355, 358

- [34] Mr Schneider claims that the relevant documents concerning these sixteen parcels were sent as usual by US Postal Service Express Mail to Pitts & Elrington, Attention Mrs Barbara Elrington, 50 North Street, Belize City, Belize. Indeed, he provided four Express Mail receipts for documents sent out to her on 19th September 2009, 4th February 2010, 22nd April 2010 and 3rd June 2010. The receipts, however, only name the sender and receiver, not the details of the mailed documents, though the dates have proximity to the date some cheques were paid into Mr Elrington's Florida bank account.
- [35] Most significantly, a search at the Land Registry reveals that, somehow, someone has taken the relevant conveyancing documents and paid the relevant Government stamp duty, registration fees and certificate fees so that title certificates have been duly issued to purchasers of eight relevant parcels in respect of which cheques have been paid into Mr Elrington's Florida bank account as indicated at [32] above. Nevertheless, the purchasers have never received their title certificates and Mr Elrington says he knows nothing at all about these matters. LRS No 201004995 relates to parcel 1321 above, LRS No 201004561 relates to parcel 1370 above, LRS No 201004575 relates to parcel 1403 above, LRS No 201004574 relates to parcel 1404 above, LRS No 201004576 relates to parcel 1409 above, LRS No 201004994 relates to parcel 1306 above, LRS No 201004992 relates to parcel 1412 above, LRS No 201004995 relates to parcel 1321 above and LRS No 201004989 relates to parcel 1396 above.
- [36] We cannot agree with the view of the Court of Appeal that there was an absence of proof that relevant documents were ever posted because no evidence was given as to who posted the documents and so it followed that the question of who received the documents did not arise. Nor can we agree with its view that because of absence of proof that either respondent, whether acting by employees or agents either took documents to the Land Registry or collected the titles from the Registry, one cannot find that those events happened. It appears to us that the Court of Appeal was seeking for direct evidence of proof beyond reasonable doubt, while, in our view, there is sufficient circumstantial evidence that it was more likely than not that Mr Elrington, through his wife as his agent, received and processed the documents, paying the fees that led her to

receiving the relevant certificates of title to the parcels enumerated in [34] above. Who else is likely to have done so?

[37] Such a view is supported in light of two circumstances. First, the evidence of the Respondents is a bare denial, Mr Elrington providing nothing that would suggest an alternative theory. Second, there is the background bitter dispute between Mr Elrington and Mr Schneider, the essence of which was that Mr Elrington as a 20% shareholder considered that he had been robbed of 20% of US\$12 million that Progresso had allegedly made out of the development¹⁶ and had led to Mr Elrington filing Claim No 566 of 2010. It is to be observed that disruption of Progresso's sales could have the effect of pressurising Mr Schneider to come to terms over Mr Elrington's allegations.

[38] Once it is accepted that on a balance of probabilities the parcels enumerated in [34] were received by Mrs Elrington on Mr Elrington's behalf, it follows that it is more likely than not that the other parcels covered by the cheque relating to those enumerated parcels were similarly received. There are two such parcels: parcel 1376 which was covered in the 6th April 2010 cheque referring also to parcels 1370, 1403, 1404 and 1409 that were later registered as appears in [34] above; and parcel 1410 which was covered in the 26th April 2010 cheque referring also to parcels 1306, 1396 and 1412 that were also later registered.

[39] There remain six parcels in respect of which cheques were paid into Mr Elrington's bank account in Florida for processing transfer of such parcels. As appears from [32] above these are parcels 1165, 1166 and 1167 covered by the 21st April 2010 cheque, parcel 391 covered by the 14th September 2009 cheque, parcel 328 covered by the 2nd February cheque and parcel 1288 covered by the 18th May cheque. Why would Progresso pay money into Mr Elrington's account for processing particular parcels without sending to Mrs Elrington the documents needing to be processed?

[40] We thus find that it is more likely than not that Mr Elrington, whether by himself or his agent, received the documents relating to parcels 328, 391, 1165, 1166, 1167, 1288, 1376 and 1410 and also to the following parcels, in respect of

¹⁶ CCJ Record p 958.

which title certificates were duly issued: parcels 1306, 1321, 1370, 1396, 1403, 1404, 1409, and 1412. We find it more likely than not that Mr Elrington received into his possession or control the unprocessed documents relating to the eight above parcels in respect of which title certificates have not been duly issued and also the title certificates to the parcels in respect of which such certificates have been duly issued. He has no right against Progresso to retain these documents and so must deliver them up to Progresso, as also is the case for his law firm if, as is likely from the connection of himself and his wife with the firm, the documents are held under its possession or control, it not being expected that such important legal documents have been destroyed. It is, however, possible, that the relevant documents might not materialise. Thus, no final disposition of the case is possible at this stage, Progresso having indicated that it might seek for relief by way of rectification of the Land Register under the Land Registration Act (Cap 194).

[41] Before ordering interim relief, we note the need for Mr Elrington and Mr Schneider sensibly to resolve their bitter dispute that underlies Claim No 566 of 2010. The emotional feelings of the parties seem to be running high so that this would appear to be a good case for utilising the services of a disinterested mediator. Mr Elrington has done himself no favours by his vehement approach as epitomised in the following paragraphs 22 and 26 of his witness statement which did not stand up to scrutiny.

“22. The Claimant at no time retained me or the Firm of Pitt & Elrington for any purpose whatsoever since its incorporation and specifically not for the purpose of processing transfer of title documents for the transfer of sixteen properties located in the Progresso Heights Registration Section. The Claimant never sent nor caused to be delivered to me any transfer of title documents whatsoever.

26. At no time whatsoever and particularly not since the month of September 2009 has the Claimant ever sent any closing documents to me or any member or employee of the Firm of Pitt & Elrington. Neither has the claimant ever sent to me or the Firm of Pitt & Elrington any closing costs or fees required by the Government of Belize, inclusive of Belize Stamp Duty, Government of Belize Registration Fee and Government of Belize Certificate fee.”

Interim Disposition of the Case

[42] The appeal was allowed and the order of the Court of Appeal set aside. In the event that the relevant documents have been misplaced and could be found if a thorough search were undertaken by the Respondents, we gave them 30 days from the date of the hearing held on 21st July 2017 to deliver up all closing documents including transfer of title documents, certificates of title and receipts in the Respondents' possession or control for properties sold by the Appellant to various purchasers over the period September 2009 to June 2010. We also gave the parties liberty to apply thereafter.

/s/ A. Saunders

The Hon Mr Justice A Saunders

/s/ J. Wit

The Hon Mr Justice J Wit

/s/ D. Hayton

The Hon Mr Justice D Hayton

/s/ W. Anderson

The Hon Mr Justice Anderson

/s/ M. Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee