Privy Council Appeal No. 24 of 1988

Lancelot St. Elmo Balbosa *Appellant*

v.

Ayoub Ali *Respondent*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND APRIL 1990

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD ROSKILL
LORD BRANDON OF OAKBROOK
LORD OLIVER OF AYLMERTON
SIR ROBERT MEGARRY

*[Delivered by **Lord Oliver of Aylmerton**]*

Some sixteen years ago the respondent entered into a written agreement with the then owner of three freehold buildings known as Nos. 127, 127b and 127c Coffee Street, San Fernando, in the Island of Trinidad for the purchase from her of No. 127 at a price of $32,000. The agreement was dated 21st March 1974 and provided for a deposit of $2,000 to be paid on execution and for completion within ninety days thereafter. The deposit was duly paid but, for some reason which has not been explained, completion did not take place within the stipulated period of ninety days. Shortly after the expiry of that period, on 9th July 1974, the vendor died.

Thereafter there was a considerable delay in obtaining a grant of representation to her estate. The respondent's solicitors were pressing for completion to take place and on 4th February 1977 wrote offering to pay a further sum by way of deposit to assist with the payment of estate duty if, as appeared to be the case, the delay was due to difficulty in raising the sum required for that purpose. That offer was accepted in March 1977 and a further sum of $6,500 was paid by the respondent on 10th March 1977. At the same time the respondent's solicitors requested the execution by the

[16] appellant, who was in the process of applying for a

grant of letters of administration, of a supplemental agreement acknowledging the further deposit, providing for payment of the balance and execution of a conveyance within thirty days of the expected grant and otherwise confirming the continuing effect of the original sale agreement. That agreement was signed by the appellant on 26th March 1977 but before it was returned to the respondent's solicitors a further sum of $800 was requested to cover the remaining shortfall in the amount needed for the payment of duty. That was sent by the respondent's solicitors on 13th April 1977 and the supplemental agreement was endorsed with an appropriate acknowledgment of receipt. Letters of administration were finally granted to the appellant on 3rd June 1977. In the meantime the respondent had had the land surveyed and a plan showing the precise boundaries was prepared. This was sent to the appellant's solicitors for approval on 23rd May 1977 and on 15th June 1977 the respondent's solicitors tendered a draft conveyance for execution.

It seems fairly evident that the appellant, having made use of the sale agreement to the extent necessary to enable him to obtain a grant of representation, had by this time repented of the bargain. Despite pressure from the respondent's solicitors, no step was taken towards completion and on 11th November 1977 the respondent commenced proceedings for specific performance. By his defence dated 13th March 1978 the appellant, whilst admitting all the material allegations in the statement of claim, pleaded that the agreement was subject to a condition precedent which had not been fulfilled and accordingly was unenforceable. That was originally his only defence, but, by amendment, there were added pleas which, having regard to the facts already set out, can only be described as preposterous. These were to the effect that it was the respondent who had been guilty of delay in completing the agreement and that accordingly by reason of his laches it ought not to be enforced. By a further amendment added shortly before or at the trial before Edoo J. in January 1981 it was pleaded that the agreement was void for uncertainty, alternatively for illegality.

In a reserved judgment delivered on 10th March 1981 Edoo J. rejected all of the appellant's contentions and ordered that the agreement be specifically performed, but granted a stay of execution pending an appeal to the Court of Appeal. From that order the appellant appealed to the Court of Appeal. On 21st July 1986 that court (Bernard, des Iles and Persaud JJ.A.) dismissed the appeal.

Although the appellant by his notice of appeal sought to raise all the grounds relied upon in his re-amended defence, the primary ground relied upon before the Court of Appeal was that raised in the original defence

of an unperformed condition precedent rendering the agreement unenforceable. In his written case, the appellant has again formally raised all the grounds argued before the trial judge but Mr. Cottle, who appeared for the appellant before the Board, has - their Lordships think wisely - not sought to argue any ground of appeal other than that primarily argued before the Court of Appeal.

The argument advanced involves some consideration of the terms of the original sale agreement and of the Town and Country Planning Ordinance of Trinidad and Tobago (No. 29 of 1960). Clauses 4, 5 and 6 of the sale agreement provide as follows:-

"4. The sale shall be subject to the title being in order and the premises shall be sold free from all encumbrances.

5. The sale shall also be subject to vacant possession.

6. The sale shall also be subject to the obtaining from the Town and Country Planning Division of all the necessary approvals for the transfer of the premises described in the Schedule hereto."

It is also pertinent to refer to the parcels of the agreement which are contained in the Schedule and which refer to the plots sold as "the north western portion of a larger parcel of land assessed as Nos. 127, 127b, and 127c Coffee Street formerly known as No. 127 Coffee Street, more particularly described firstly in the Schedule to deed No. 7729 of 1969".

The undisputed facts with regard to the land sold are that it consists of a separate building which, with its curtilage, forms the corner site of a larger area upon which there have, for many years, been two other buildings, Nos. 127b and 127c. All three buildings have for many years been separately let and occupied although the reversions on all three leases were vested in the vendor. It was established at the trial that the buildings had been separately rated and assessed for at least twenty-two years.

The appellant's contention is that the sale by the vendor to the respondent constitutes a development of the land for which a development permission is required under the terms of the Ordinance referred to. On 29th August 1977, some three weeks after the receipt by his solicitors of the letter from the respondent's solicitors pressing for completion, the appellant made an application for outline permission to sub-divide the land. This was refused on 28th October 1977. The application was not produced at the trial and the trial judge thought that there was reason to believe that the appellant had misled the planning authorities into

believing that he was applying for an outline permission to sub-divide for the purposes of a new development. It was his view that the permission was applied for in the knowledge that it would not be granted and in order to frustrate the conveyance to the respondent. Whether that is so or not, the refusal is relied upon as demonstrating that the permission was required and that it was not forthcoming. Accordingly, it is argued, there was a failure to comply with clause 6 of the agreement. That clause constituted a condition precedent to the agreement coming into effect at all and accordingly the respondent's claim for specific performance was misconceived and must fail.

Section 8(1) of the Town and Country Planning Ordinance provides that permission shall be required for any development of land carried out after the appointed day (1st August 1969). "Development" is defined in section 8(2) (so far as material) as "the carrying out of building, engineering, mining or other operations in, on, over or under any land, the making of any material change in the use of any buildings or other land, or the sub-division of any land ..."; and then there are some exceptions to this. Section 2(1) contains a definition of "sub-division" in the following terms:-

> '"sub-division' in relation to land means the division of any land other than buildings held under one ownership into two or more parts whether the sub-division is by conveyance, transfer, or partition, or for the purpose of sale, gift, lease, or any other purpose, and 'sub-divide' has a corresponding meaning."

The only other provision to which it is necessary to refer is section 16, which relates to the enforcement of planning control. Where development is carried out without the requisite permission the Minister may, within four years of such development being carried out, serve on the owner and occupier of the land an enforcement notice which may require specified steps to be taken for restoring the land to its condition before the development took place. Failure to comply with an enforcement notice may result in a fine.

There are, in their Lordships' view, at least two conclusive answers to the appellant's contentions, either of which is fatal to the argument. In the first place, it seems entirely clear on the undisputed facts that no planning permission ever was necessary for the sale to take place. Even assuming for the moment that "sub-division" is apt to describe the simple transfer or lease by the owner of part of his land to another person, on no analysis could the Ordinance apply to a sub-division which had already taken place before the appointed day. The definition of sub-division in terms embraces a sub-division for the purpose of lease and the land, having been occupied by separate lessees since well before the appointed day, was thus already sub-divided. A transfer of one of the sub-divided parts

effected no further sub-division. But in any event, as the trial judge held, it is necessary to give the Ordinance a sensible construction. "Sub-division" clearly relates to a sub-division for the purpose of some building development or change of user and to construe it in such a way as to require a planning permission before the owner of, say, an existing parade of shops can transfer or let any of them to another person is to reduce it to absurdity. Clause 6 of the agreement in terms refers to "necessary approvals" and since no approval was necessary the clause never operated at all.

Secondly, however, even if the appellant could surmount this hurdle, it is entirely clear that the clause is not, as a matter of construction of the agreement, a condition precedent. At the highest it is simply a term of the agreement and, if properly categorised as a condition, is clearly one inserted for the benefit of the purchaser and capable of being waived by him. Even if the validity of the appellant's construction of the Ordinance is assumed, the only effect of a conveyance without permission could be the service of an enforcement notice on the purchaser, as the owner and occupier. At the highest this could result in his being fined and whether he is prepared to take a conveyance subject to that peril is entirely a matter for him. If and so far, therefore, as the absence of a permission entitled him to refuse to complete, the condition was one which he could waive. If proof of waiver were needed, it is conclusively furnished by the letters calling on the appellant to complete and by the subsequent issue of a writ claiming specific performance. Mr. Cottle, who has gallantly and ably said everything that could properly be said in support of the appellant's case, sought to draw some comfort from the decision of Brightman J. in *Heron Garage Properties Limited v. Moss* [1974] 1 All.E.R. 421, but that was a very different case where the agreement contained an express provision that if planning permission was not obtained by a given date either side should be at liberty to withdraw.

In their Lordships' judgment, the defences raised to the respondent's claim are entirely devoid of any merit. The appeal is dismissed with costs.