Michaelmas Term
[2017] UKPC 35
Privy Council Appeal No 0095 of 2015

JUDGMENT

Rolle Family and Company Limited (Appellant) *v* Rolle (Respondent) (Bahamas)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Sumption
Lord Carnwath
Lord Hughes
Lord Hodge
Lord Briggs

JUDGMENT GIVEN ON

20 November 2017

Heard on 26 October 2017

Appellant
Thomas Dumont
Andrew Brown
(Instructed by Alan Taylor & Co)

Respondent
Andrew Mold

(Instructed by Tynes & Tynes and Harcus Sinclair LLP)

LORD SUMPTION:

1. This appeal arises out of a family dispute about title to two plots of land on Bimini, a group of islands in the Commonwealth of the Bahamas.

2. The facts can be shortly stated. On 24 May 2006, Emanuel Rolle conveyed three plots of land on Bimini to his daughter Ena by deed of gift. Some three and a half months later, on 8 September 2006, he executed two conveyances purporting to convey two of those plots, Lot 85 and a portion of allotment no 20, to the appellant company, Rolle Family & Co Ltd, for a consideration of US$100 each. The company is controlled by his son Paul, who is the majority shareholder and its President and director.

3. Under section 10 of the Registration of Records Act, Cap 187, successive conveyances of the same land take priority in the order that they are lodged and accepted for record in the Bahamas Registry of Records. On 22 May 2007, stamp duty was paid on the conveyances in favour of the company, and on the following day they were lodged and accepted for registration in the Registry. Ena stamped and lodged the deed of gift in her own favour eight weeks later on 18 July 2007. It follows that if the conveyances in favour of the company were valid, it has title in priority to Ena.

4. A conveyance, like any other deed, must be signed, sealed and delivered in order to take effect. Both deeds in favour of the company were expressed to have been signed, sealed and delivered on the date of execution, 8 September 2006. The problem arises from the fact that although on that date lawyers had been instructed to incorporate the grantee company, the formalities were not completed and the company did not come into existence until 12 September 2006, four days later. It follows that at the time when the conveyances were executed, there was no grantee in existence in whose favour the deed could be delivered. The general rule at common law is that a company cannot adopt or ratify a transaction purporting to have been made on its behalf before its incorporation: *Natal Land and Colonisation Co Ltd v Pauline Colliery and Development Syndicate Ltd* [1904] AC 120. In the ordinary course, the result would be that the conveyances in the company's favour were void.

5. The company seeks to avoid this result in two ways. First, it submits that the conveyances of 8 September 2006 were delivered as escrows, conditional on the incorporation of the company and taking effect as valid grants when that condition was satisfied. Secondly, the company relies on section 22 of the Companies Act, Cap 308, which validates pre-incorporation contracts on certain conditions. Both points have had a somewhat chequered procedural history. The company relied exclusively on the second point before the trial judge, who rejected it. In the Court of Appeal, it conceded

the second point and relied exclusively on the first, which had been neither pleaded nor argued at trial. The Court was not persuaded, and dismissed the appeal. In the result, the company has so far failed on both of its arguments.

Escrow

6. An escrow, in this context, is a deed delivered on the basis that it is not to become the deed of the party making it until some condition is satisfied. Whether it is delivered on that basis depends on the objectively ascertained intention of its maker, which may be (and commonly is) inferred from the circumstances. The condition is said in this case to be the coming into existence of the grantee.

7. The Court of Appeal declined to treat the transaction as a valid escrow on the ground that upon the satisfaction of the condition the grant was deemed to relate back to the date of delivery. Since the company did not exist at the date of delivery, the grant could not take effect at that date. In the Board's opinion, the Court of Appeal's decision cannot be supported on that ground. The doctrine of relation back of escrows is well established. The ordinary principle, as Farwell LJ put it in *Governors and Guardians of the Foundling Hospital v Crane* [1911] 2 KB 367, 377, is that an escrow is a "document delivered upon a condition on the performance of which it will become a deed, and will take effect as from the delivery". But it is equally clear that the grant does not relate back to the date of delivery for all purposes. As Lord Cross of Chelsea explained when delivering the advice of the Board in *Security Trust Co v Royal Bank of Canada* [1976] AC 503, at p 517, it is "taken to relate back to the date of its delivery … only for such purposes as are necessary to give efficacy to the transaction - ut res magis valeat quam pereat." Thus the effect of the doctrine of relation back is that no further delivery is required upon the satisfaction of the condition. And if the grantor dies after delivery but before the condition is satisfied, the deed will not fail. But the grantee will not be entitled to intervening benefits, such as rents accruing during the period when the deed is suspended. The doctrine cannot be deployed as the Court of Appeal deployed it, for the purpose of retrospectively invalidating the deed. Assuming for the moment that a deed can validly be delivered in escrow on the condition that the grantee comes into existence, it would be incoherent for the law to relate it back to a time when the grantee did not exist so as to defeat the escrow.

8. The real objection to the supposed escrow is a more fundamental one, namely that a deed cannot validly be delivered in escrow on a condition as to the coming into existence of the grantee. This is because, although delivery of a deed in escrow suspends the effect of the deed as a grant until satisfaction of the condition, it creates legally binding obligations from the moment of delivery. The maker of the escrow cannot, for example, recall it before the condition is satisfied, or dispose of an interest in the land inconsistently with it. The principle was succinctly stated by Sir Denys Buckley in *Alan Estates Ltd v W G Stores Ltd* [1982] 1 Ch 511 (CA), at p 527F-G. The maker "cannot

resile from the terms and effect of the document which he has 'delivered' notwithstanding that he may have delivered it in circumstances which for the time being deprive it of operative effect and enforceability"; cf Lord Denning MR at pp 520-521. It follows, as Cross J pointed out in *Windsor Refrigerator Co Ltd v Branch Nominees Ltd* [1961] 1 Ch 88, 102-103, that if at the time of delivery the grantor lacks capacity to assume even a conditional obligation, for example because he is a minor, there cannot be a valid escrow, and it can make no difference that he acquired capacity by the time that the condition was satisfied. By the same token, if the grantee does not exist at the time of the purported delivery, there is no one to whom the grantor can be bound, even conditionally. Delivery is an essential condition for the effectiveness of a deed. It requires unequivocal words or conduct signifying an intention to be bound. A deed purportedly delivered to a non-existent party could never be more than a statement of intention, recallable at will, and could not therefore be said to have been delivered.

9. This makes it unnecessary to consider whether there is any sufficient reason to suppose that Emmanuel Rolle intended to deliver the deed in escrow, or whether in the absence of any pleaded case to that effect, the point should have been entertained at all.

Section 22 of the Companies Act

10. It is, as the Board conceives, because of the conceptual impossibility of assuming an obligation conditional upon the obligee coming into existence, that pre-incorporation contracts are commonly dealt with by specific statutory provision. Section 22 of the Companies Act is the relevant enactment in the Bahamas. It provides, so far as relevant:

> "**22.**(1) Except as provided in this section, a person who enters into a written contract in the name of or on behalf of a company before it is incorporated is personally bound by the contract and is entitled to the benefits of the contract.
>
> (2) Within a reasonable time after the company is incorporated, it may, by any action or conduct signifying its intention to be bound thereby, adopt a written contract entered into in its name or on its behalf before it was incorporated.
>
> (3) When a company adopts a contract under subsection (2) -
>
> (a) the company is bound by the contract and is entitled to the benefits thereof as if the company had been in existence at the date of the contract and been a party to it; and

> (b) a person who purported to act in the name of the company or on its behalf ceases, except as provided in subsection (4), to be bound by or entitled to the benefits of the contract."

11. The effect of these provisions is that an instrument which purports to be an agreement but is void because there is no counterparty in existence, is nonetheless deemed to be an agreement for the purpose of binding (i) the person who purported to make it on behalf of the company, and (ii) the company itself if it adopts the transaction in accordance with subsection (2) in place of that person.

12. The first condition which calls for attention on this appeal is that the instrument should purport to be a "written contract". It is unnecessary to decide whether any deed is to be regarded as a contract for the purpose of the section. The Board is satisfied that the deeds in question on this appeal purported to be written contracts. In the case of Lot 85, there can be no real doubt about this. It provides for the company to assume an executory obligation to observe and perform an exception and reservation in the Crown grant from which the grantor's title is derived, and the instrument is signed by Paul Rolle, apparently on behalf of the company. The conveyance of allotment no 20 is not executed on behalf of the company, presumably because the company's only obligation under that transaction was the payment of the consideration of US$100, which is acknowledged to have been paid. But an agreement may be in writing notwithstanding the absence of a signature. The conveyance of allotment no 20 recites a prior unwritten agreement between the grantor and the grantee for the sale of the land in consideration of US$100. It then subsumes the terms of that agreement into the deed. It also acknowledges receipt of the US$100 from the company and thus the satisfaction of the company's obligation. In the Board's opinion, the transaction effected by the deed was a bilateral transaction involving mutual obligations. In other words it was a contract.

13. The next condition is that the company should have adopted the contract after its incorporation by some "action or conduct signifying its intention to be bound thereby." It was submitted that this formulation means that there must be some executory obligation by which the company would be bound upon adopting the transaction. In the case of Lot 85, there is such an obligation. But the Board would reject the submission in principle as regards both instruments, because the suggested limitation on the right to adopt a pre-incorporation contract would serve no purpose that can be related to the object of section 22 or sensibly be attributed to the legislature. It is entirely unclear why, for example, if the sole obligation of the company is to pay the price, it should be entitled to adopt the transaction where the price remained to be paid but not where it had already been paid. In the Board's opinion, the words quoted are simply intended to ensure that the company consents to being party to the transaction so as to assume whatever burden there may be, and not just the benefit. It does not imply anything about the incidence or extent of that burden. In the present case, the payment of stamp duty

and the lodging of the conveyance at the Registry in the company's name unequivocally signified its assent to be bound by the deed.

14. The main difficulty, as the trial judge perceived, lies in the third condition, that the transaction should be adopted "within a reasonable time after the company is incorporated." What is a reasonable time for the purpose of a statutory provision like this must depend on what falls to be done in that time. In the case of section 22, it means a reasonable time for the company to decide whether to adopt the transaction and to take the necessary steps to do so. There are practical reasons why the delay should be as short as is consistent with that object. The temporal limitation is not there for the benefit of the company. It is there for the benefit of third parties dealing with it. The decision whether to adopt a pre-incorporation contract affects the company's assets and liabilities, and thus the transactions which it is in a position to enter into with third parties. It affects the person who purported to enter into the transaction before the company's incorporation, who needs to know whether he is to remain personally liable and entitled under the contract or to have his rights and liabilities transferred to the company. It is no part of the purpose of the temporal limitation to allow time for the company to appreciate that there is a problem. If it were, there would be no effective limit of the time that might pass before the adoption of the transaction. The Board accepts that there is room for argument about how long was reasonably required, but it considers that the eight and a half months that elapsed between the execution of the conveyances and the stamping and lodging of the deed for registration was well beyond the limit of reasonableness. The trial judge dismissed the action on that ground. The Board considers that he was entitled to do so.

Consequences

15. It follows that the company does not have title to the two plots purportedly conveyed in September 2006.

16. That leaves unresolved the question who does have title. It will not necessarily be Ena, because it is arguable that since the transaction is void at common law and the company cannot claim title by adoption under section 22(2) of the Act, the legal owner is Paul by virtue of section 22(1). Another possibility is that Ena might derive rights from the fact that the failure of the company's claim leaves her as the only claimant on whose behalf any conveyance has been lodged for registration with the Register of Records. The Board is unwilling to express a view on these points, because Paul Rolle is not party to these proceedings, and the implications of the Board's conclusions have not been fully addressed in the arguments on this appeal. They would need to be properly considered as between Paul and Ena Rolle in proceedings to which both of them were parties.

17. The only question under this head which the Board thinks it right to address, arises out of a submission made on behalf of the company to the effect that if Paul Rolle has the legal title to the two plots by virtue of section 22(1), he would hold it on trust for the company. The Board cannot accept this, because it is not consistent with the statutory scheme. The scheme makes the company's interest in the transaction dependent on its adoption of the transaction within a reasonable time. Equity cannot intervene to create a trust inconsistent with the statutory principle.

Disposal

18. Accordingly, the Board will humbly advise Her Majesty that this appeal must be dismissed. Subject to any written submissions which may be addressed to the Board within 14 days, the company must pay Ena Rolle's costs of the appeal.