Hilary Term
[2017] UKPC 9
Privy Council Appeal No 0044 of 2014

JUDGMENT

Archer and another (Appellants) *v* Fabian Investments Limited and others (Respondents) (Bahamas)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Mance
Lord Kerr
Lord Sumption
Lord Reed
Lord Hughes

JUDGMENT GIVEN ON

10 April 2017

Heard on 22 February 2017

Appellants	*Respondents* *(not participating)*
Paul Wallace Whitfield	
(Instructed by Wallace Whitfield & Co)	(Instructed by Maurice O Glinton & Co)

LORD REED:

1. These proceedings, which began in 1994, are brought in the name of Petroleum Products Limited ("Petroleum"), a company incorporated under the law of the Bahamas, and four individual plaintiffs, whom I shall refer to as the individual plaintiffs. They are the appellants Mr Oswald Archer and Mr Rupert Watkins (now deceased: the appeal has however been pursued by his estate), and two other individuals. The defendants include Gulf Union Bank (Bahamas) Ltd ("Gulf"), Mr Rawle Maynard, Fabian Investments Ltd ("Fabian") and Mr Maurice Glinton. The relief sought in the statement of claim includes, amongst other orders, an order declaring that the shares in Petroleum are beneficially owned by the individual plaintiffs.

2. In 2007 the Supreme Court ordered that the question of the ownership of the shares should be tried as a preliminary issue. After a trial at which the defendants did not appear, Adderley J held on 26 February 2009 that the individual plaintiffs were the holders of the shares, but were not their beneficial owners. The action was therefore dismissed. On appeal, the Court of Appeal held on 3 April 2013 that the shares were owned both beneficially and legally by Fabian, and made a declaration to that effect. The appeal was therefore dismissed. The appellants now appeal against that decision. The defendants have not taken part in the appeal.

3. The points to be decided in the appeal are quite short, and the answers to them are clear. They arise, however, against a background of events which are complicated and to some extent obscure, not least because some of the documents which are central to those events are not before the Board.

4. In addition to being addressed by counsel, the Board was also addressed by Mr Archer in person. Although it was apparent that he has a strong sense of grievance, and has felt frustration over the protracted history of these and related proceedings, Mr Archer addressed the Board with moderation and courtesy. Their Lordships thought it right to permit Mr Archer to address them on factual matters which are not directly relevant to the legal issues arising in the appeal, but form part of the background history. In order to understand the context in which the legal issues arise, it is necessary to make some reference to that history. It should however be emphasised that the Board cannot and does not make any findings of fact, and that it has heard only one side of the story.

The factual background

5. Petroleum was incorporated in 1958. In 1984 the individual plaintiffs purchased its issued share capital with a loan of $300,000 from Canadian Imperial Bank of

Commerce ("CIBC"). The shares were held in their names, apart from one share which was held in the name of a nominee. CIBC required as security the hypothecation of the shares. The share certificates were deposited with CIBC, with endorsed forms of transfer executed in blank. The individual plaintiffs became the officers and directors of Petroleum.

6. In 1986 Petroleum found alternative financing with Gulf. In that regard, Adderley J found that Petroleum borrowed $537,000 from Gulf. As security for the borrowings, Gulf obtained a mortgage over certain land owned by Petroleum, a debenture, and personal guarantees from Mr Archer and Mr Watkins, all dated 12 December 1986. Gulf then paid in full the debts owed to CIBC by Petroleum and the individual plaintiffs. On 13 February 1987 the share certificates were delivered by the attorneys acting for CIBC to Mr Maynard, who (as Mr Archer confirmed) was the attorney acting on behalf of Gulf.

7. Before the Board, it was maintained on behalf of the appellants that the mortgage deed dated 12 December 1986, in which the loan agreement was recorded, was a fraud: the amount of the loan as stated in the document had been altered from $537,000 to $437,000. This fraud, it was argued, vitiated everything which happened subsequently. In his submissions to the Board, Mr Archer explained that he had expected Gulf to repay debts to CIBC totalling $337,000, and to grant Petroleum overdraft facilities up to a total limit of $200,000, on the basis that repayments would be made in monthly instalments of $13,500. In other words, the "loan" stated in the agreement was an overdraft limit, rather than an advance, beyond the $337,000 used to repay CIBC. The amount of the actual borrowings would depend on the extent of the overdraft from time to time. If that is so, then it would follow that neither $437,000 nor $537,000 represented the amount actually lent. Mr Archer identified his signature on the agreement, in which the amount of the loan is stated as $437,000, repayable in monthly instalments of $13,500. The document bears no sign of the amount having been altered. He also identified his signature on another document, in generally similar terms to the agreement just mentioned, in which the amount of the loan is stated as $537,000. He could not recall why two documents had been signed, stating the loan at different amounts. Only the first document was stamped and registered.

8. The allegation of fraud was unequivocally rejected by the judge, and was implicitly rejected also by the Court of Appeal. There is no basis on which the Board could properly interfere with that finding of fact. As will shortly be explained, it appears that the 1986 agreement was in any event superseded, so far the issues in this appeal are concerned, by a rescheduling agreement entered into in 1988. It is the latter agreement which is the source of the obligations which Gulf sought to enforce against the individual plaintiffs.

9. The payments due to Gulf fell into arrears, and on 8 August 1988 Petroleum and the individual plaintiffs entered into a rescheduling agreement with Gulf. That

agreement is not among the papers before the Board. Their Lordships must therefore rely on the judge's findings as to the relevant terms. As the judge found, Petroleum covenanted to bring its payments up to date within six months from 24 July 1988, that is to say by 23 January 1989, and the individual plaintiffs bound themselves as primary debtors. In consideration of the agreement, the individual plaintiffs executed a guarantee in favour of Gulf (also not among the papers before the Board) which, as the judge found, provided that "in support of such guarantee [the individual plaintiffs] shall assign to [Gulf] their certificates of shares in [Petroleum] by way of deposit". The judge found that the nominee share was intended to be included as well. The share certificates were already in the possession of Gulf's attorney, Mr Maynard, as explained earlier. As the Board held in related proceedings:

> "Such a deposit, with endorsed transfers in blank, would have created an equitable mortgage with an implied power of sale: *Stubbs v Slater* [1910] 1 Ch 632, 639."

(*Archer v Registrar General* [2004] UKPC 31, 24 June 2004, unreported).

10. Petroleum defaulted in its obligations under the rescheduling agreement, and in February 1989 Gulf appointed Mr Maynard as receiver, exercising a power under the 1986 debenture. On 14 February 1990 Gulf agreed to sell the shares to Fabian. The sale was completed between 23 February and 13 March 1990. On the latter date the share certificates were sent by Mr Maynard's firm to Mr Glinton, who was Fabian's attorney. The covering letter recorded that it had been agreed that Mr Glinton would "do all further corporate work to effect the transfer of shares". On 5 December 1990 an annual statement was lodged with the Registrar General purportedly on behalf of Petroleum, stating that the individual plaintiffs and their nominee had been replaced as shareholders by Fabian and four nominees. A similar statement was lodged in at least one subsequent year.

11. In 1994 the plaintiffs brought the present proceedings. As explained earlier, they seek an order declaring that the individual plaintiffs are the beneficial owners of the shares.

The judgments below

12. The judge proceeded on the assumption that the plaintiffs were correct in their submission that the share certificates had been delivered to Mr Maynard in error in February 1987. Under the 1988 agreement, however, the individual plaintiffs agreed to assign their shares to Gulf. Since Gulf was entitled to specific performance of that obligation, the judge concluded that a beneficial interest in the shares passed to Gulf on 8 August 1988, with the consequence that from that date Mr Maynard, who was Gulf's attorney, held the share certificates to their order.

13. Following *Stubbs v Slater*, Gulf was entitled to exercise its implied power to sell the shares after the expiration of the date fixed for payment under the 1988 rescheduling agreement. The judge rejected a submission that Gulf had to give notice before exercising its power of sale: as he noted, such a sale must be on reasonable notice unless, as in this case, a fixed date for repayment has passed. He also rejected a submission that the sale was invalid because it had been effected by Mr Maynard as receiver of Petroleum's assets. As he found, the sale was by Gulf itself: the shares did not form part of Petroleum's assets, and were therefore not within the ambit of the receivership. Mr Maynard's involvement in the sale was therefore in the capacity of agent for Gulf, rather than receiver of Petroleum's assets.

14. The judge accordingly concluded that the individual plaintiffs had granted Gulf an equitable mortgage of the shares on 8 August 1988, that Gulf had lawfully sold the shares to Fabian and its nominees in early 1990, and that the effect of the sale was to transfer to them a beneficial interest in the shares. He also concluded, however, that a complete legal title to the shares could not be acquired without registration in accordance with Petroleum's articles of association.

15. The articles of association are not before the Board, but the articles which appear to be relevant are set out in the judgment:

> "Transfer of Shares
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> 13. The instrument of transfer of any share in the company shall be executed both by the transferor and the transferee and the transferor shall be deemed to remain the holder of such share until the name of the transferee is entered in the register thereof.
>
> 14. No transfer of any share shall be recorded, nor shall the same be valid or permitted to be entered in the register unless or until the share certificate has been surrendered and cancelled by one of the officers of the company."

The judge found that there was no evidence that such registration had occurred. In particular, the Registrar General's receipt and stamping of the annual statements could not serve as verification of their accuracy (*Archer v Registrar General*). It followed that the individual plaintiffs still held the legal title to the shares.

16. The Court of Appeal upheld the judge's reasoning on all issues other than the legal title to the shares. In relation to that issue, Blackman JA, with whose judgment Allen P and John JA agreed, considered that it followed from the principles set out in *Stubbs v Slater* at p 639 that Fabian had acquired both the legal and the beneficial

interest in the shares. He described the judge as having strayed from the issue for determination when he concerned himself with the mechanics of share transfers.

The present appeal

17. A number of points have been raised in the present appeal. First, it was argued that since the defendants had not taken part in the appeal, the appellants were entitled to succeed by default. The case is however one in which the appellants seek a declaration that the shares are beneficially owned by the individual plaintiffs. In such a case, the court cannot make the order sought by default: it has to be satisfied that the order is one which it would be proper to make.

18. Secondly, as already mentioned, it was argued that the 1986 mortgage deed was fraudulently altered, and that the result was to vitiate all subsequent arrangements. As previously explained, however, the allegation of fraud was rejected by the courts below, and there is no basis on which the Board could properly interfere with their finding. Furthermore, as previously explained, whether the amount stated in the mortgage deed should properly have been $537,000 or $437,000 is in any event of no apparent significance to the present issue. What is significant is that there was a default in payment under the 1988 agreement, entitling Gulf to exercise the implied power of sale conferred upon it under the arrangements entered into at that time, in accordance with the principle in *Stubbs v Slater*.

19. Thirdly, emphasis was placed, as it had been below, on the facts that there had not been a formal assignment of the shares to Gulf, and that they were not in Gulf's physical possession. The agreement to assign them by way of deposit (and thereby create a mortgage with an implied power of sale, following *Stubbs v Slater*) was, however, sufficient to transfer to Gulf a beneficial interest in the shares by way of security, as the judge rightly held. As was said in *Palmer v Carey* [1926] AC 703, 706-707, "a contract for valuable consideration to transfer or charge a subject matter passes a beneficial interest by way of property in that subject matter if the contract is one of which a court of equity will decree specific performance." Since the agreement was specifically enforceable, it conferred on Gulf a beneficial interest in the shares by way of security, in accordance with the agreement. On the expiry of the period fixed for payment, Gulf was then entitled to realise its security, by selling the shares to Fabian. Gulf did not require a legal (as distinct from beneficial) title to the shares in order to exercise a power of sale. Nor was Gulf's physical possession of the shares essential, but in any event they were in the possession of its agent, Mr Maynard.

20. Fourthly, it was argued that the courts below could not override an earlier decision of the Court of Appeal in these proceedings in 2005, in which it had allowed an appeal against a decision that the action should be struck out on the ground that the statement of claim disclosed no reasonable cause of action. There is, however, no inconsistency between that decision and the decision now under appeal. The Court of

Appeal's decision that the action should be allowed to proceed to trial did not entail that it should succeed at trial.

21. Fifthly, it was argued that the shares could not be sold by the receiver of Petroleum's assets, since they did not form part of those assets. That is true, but it is not inconsistent with the decision under appeal. As the judge held, the shares were sold by Gulf. The involvement of Mr Maynard's office in the delivery of the shares could only have been in the capacity of agents acting on behalf of Gulf.

22. On the other hand, their Lordships have concluded that the judge was correct to hold that the individual plaintiffs remained the legal owners of the shares, in the absence of any evidence that the transfer of title to Fabian and its nominees had been registered in accordance with Petroleum's articles of association. What Cozens-Hardy MR said in *Stubbs v Slater,* in the passage cited by Blackman JA, was that a deposit of shares in security was "a transaction of mortgage, in which there was no express power of sale given, but which by law involves and implies a right in the mortgagee to sell after giving reasonable notice". But the person to whom the shares are sold takes them subject to the articles of association of the company in question. If the articles require the change in ownership to be registered before it can be recognised and given effect, then a complete legal title to the shares cannot be acquired without registration (*Société Générale de Paris v Walker* (1885) 11 App Cas 20, 28, where the Earl of Selborne contrasted "a merely inchoate title by an unregistered transfer" with "a legal estate in the shares").

Conclusion

23. The result is that the Board will humbly advise Her Majesty that the appeal should be dismissed, with the qualification that the declaration made by the Court of Appeal that Fabian was both the legal and the beneficial owner of the shares should be limited to refer only to its being the beneficial owner.