Michaelmas Term

[2018] UKPC 29

Privy Council Appeal No 0047 of 2017

JUDGMENT

Suppo (Appellant) v Jhundoo (Respondent) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Wilson

Lord Hughes

Lady Black

Lord Briggs

Sir Andrew McFarlane

JUDGMENT GIVEN ON

15 October 2018

Heard on 25 July 2018

Appellant	Respondent
Herve Duval SC	Rama Valayden
(Instructed by Axiom Stone)	(Instructed by R K Ramdewar, Attorney-at-Law)

LORD BRIGGS:

1.

This appeal from the Court of Appeal of Mauritius raises issues about the admissibility and validity of a document described as a "contre lettre" for the purpose of affecting (to use a neutral word) the terms of a notarised registered deed of purchase of real property. An unusual feature about the facts of this case, which led to the disagreement between the first instance judge and the Court of Appeal about the outcome, is that the deed and the supposed contre lettre are separated in time by 14 years.

The Facts

2.

The relevant facts may be shortly stated. The appellant Ms Suppo was until 2004 a French national. Beginning in December 1985, while on a visit to Mauritius, she formed a relationship with the respondent Mr Jhundoo, who is a Mauritian national. This led to their marriage in January 1992.

3.
By a notarised and registered deed ("the Purchase Deed") made in December 1987 Mr Jhundoo is recorded as having purchased 511 square metres of waste land in the district of Riviere du Rempart ("the Property") from members of the Chetty family for 50,000 rupees. The property was acquired for the purpose of building a home on it for Mr Jhundoo and Ms Suppo, who were by then a cohabiting couple.

4.
A bungalow was built on the Property, beginning in 1988, and a second bungalow, with swimming pool, between 1996 and 2001. By then the parties were living there as husband and wife.

5.
On 19 November 2001 the parties both signed another deed, drafted by a notary, ("the 2001 Deed"). The document takes the form of a declaration by Mr Jhundoo in the following terms, translated from French:

"CONTRE LETTRE

I, the undersigned, **SURESH KUMAR JHUNDOO,** of age, born on the 4 September 1962, act of birth No 255 of 1962, Pamplemousses, swimming instructor, residing at Morcellement Swan, Pereybere, married to Mrs **EMMA AURORE SUPPO** under the legal system of the community of goods and property on the 7 January 1992, act of marriage No 4 of 1992, Grand Baie, Riviere du Rempart, declare, to establish the truth that the acquisition made by me under the terms of a deed drawn up by Mr George Edmund Sinatambou, notary, on the 19 June and 14 December 1987, registered and transcribed in Vol 1812 No 19, containing receipt of the price of 50,000 rupees, of a land of the extent of 12 perches and ten hundredths of a perch or 511 square metres, situated in the district of Riviere du Rempart, place called Pereybere (being the fourth lot of the parcelling) as well the two blocks of apartments which have subsequently been constructed on that land belong in truth to my wife above named, the purchase price as well as the construction costs of those buildings having been entirely paid from her personal monies and I undertake to transfer those properties in the name of any person, firm or company whom she will indicate to me at her first requisition and to remit to her the sale price upon the signature of the documents witnessing the transfer.

Port Louis, this 19 November 2001."

6.
In April 2004 Ms Suppo acquired Mauritian nationality, but her relationship with Mr Jhundoo soured and they divorced in June 2006.

7.
In November 2006 Ms Suppo issued proceedings against Mr Jhundoo, claiming a declaration that she was the beneficial owner of the Property, having paid both for its purchase and for the erection of the two bungalows. She sought an order that Mr Jhundoo transfer the Property to her, or compensation in the alternative. She gave credit to Mr Jhundoo for 18,000 rupees contributed by him to the expenses of the purchase of the Property. Ms Suppo pleaded the 2001 Deed as an admission of her claim by Mr Jhundoo, and as containing an undertaking by him to transfer the Property to her order, which he had

thereafter refused to do. Particulars requested of her pleading, about whether she had documentary proof of who paid for the property, and for the erection of buildings upon it, were met by replies relying on the 2001 Deed.

8.

An issue arose in the proceedings as to the admissibility of the 2001 Deed, which the judge, Angoh J, decided in Ms Suppo’s favour in a written ruling in June 2011. At the resumed trial the judge heard oral evidence from both parties, and from the notary who drafted the 2001 Deed. Mr Jhundoo’s case was that he had paid for the purchase of the Property and for the construction of the first bungalow, with his earnings and a contribution from his father. He said that the 2001 Deed had been obtained from him under unfair pressure from Ms Suppo.

9.

The judge roundly disbelieved Mr Jhundoo, and found that Ms Suppo had proved her case, both by her evidence and by the terms of the 2001 Deed, together with other corroboratory materials. He held that the arrangement between the parties at the time of purchase in 1987 was that Mr Jhundoo should hold the Property, from the outset, upon trust for Ms Suppo. He found that Mr Jhundoo had signed the 2001 Deed of his own free will after having had its contents read to him by the notary.

10.

The result was, in the judge’s view, that the purchase of the Property in 1987 was void, and the Purchase deed tainted by illegality, because it was a purchase by Mr Jhundoo on trust for Ms Suppo, effected in breach of a statutory prohibition of the acquisition of land by non-citizens, in the Non-Citizens (Property Restriction) Act 1975. Following Imhof v Boolakee [2006] SCJ 232, he ordered that the Property be sold by the Curator of Vacant Estate. Section 5(4) of the 1975 Act makes provision for the payment of the net proceeds of sale to the non-citizen or other person appearing to be entitled to them.

11.

On Mr Jhundoo’s appeal, the Court of Appeal decided that the 2001 Deed was not a valid contre lettre. There was no other written evidence to contradict the statement in the duly registered Purchase Deed that Mr Jhundoo was the purchasing owner of the Property. Therefore the Purchase Deed was not tainted by illegality, and Ms Suppo’s claim failed. The appeal was therefore allowed, and her claim dismissed with costs. This left the Property and the buildings on it, bought and constructed at her expense, in the hands of Mr Jhundoo.

The “contre lettre”

12.

It is convenient to begin with an understanding of the concept which the civil law of Mauritius, like French law, labels a “ contre lettre ”. It is easy for an English speaking, English lawyer to think that this phrase is just French for a “side-letter” or, at least, that it is essentially a document, whether or not in letter form. Counsel for both parties were agreed that such thinking is wrong. The essence of the concept is that of a transaction rather than a document, although it will frequently be recorded in writing. It may also be entered into orally: see Dalloz: Notes on the New Civil Code vol 3, p 397, note 68. But, if so, it may have to be evidenced in writing under the doctrine commencement de preuve par écrit : see note 70.

13.

A secret transaction (“ acte secret ”) which constitutes a valid contre lettre may be effective to controvert an open transaction (“ acte ostensible ”). But it must satisfy the condition that there is une simultanéité d’ordre intellectuel between the secret and the open transaction. Without attempting an English definition this broadly means that the two must be in the contemplation of the parties at the same time. This does not require the two transactions, or the documents (if any) recording them, to be simultaneous. Either may precede the other, even by years. But there must be a simultaneous meeting of minds, and a common intention which extends to both transactions. This is common ground and is fully supported by French commentaries.

Commencement de preuve par écrit

14.
Both French and Mauritian civil law prohibit the proof of many legal obligations, including those the subject of this dispute, by purely oral testimony, subject to a lower limit which, in Mauritius, is 5,000 rupees. But this prohibition is displaced where there is a commencement de preuve par écrit, that is, something in writing from the person alleged to be liable, which makes the fact alleged likely. As both counsel agreed, it is clear that, whether or not a valid contre lettre, the 2001 Deed is in principle capable of amounting to a commencement de preuve par écrit, because it is a written statement by Mr Jhundoo, against whom Ms Suppo’s claim was made, and contains an apparent admission by him that her claim is true.

The Issues

15.
The Court of Appeal decided that the 2001 Deed could not be a valid contre lettre because the judge had failed to test its validity by reference to the question whether there had been a simultaneous meeting of minds between Mr Jhundoo and Ms Suppo in 1987 which comprehended both the Purchase Deed and the 2001 Deed. After reviewing the evidence, the Court held that there had been no such meeting of minds.

16.
Mr Herve Duval SC for Ms Suppo (who did not appear below) did not challenge the finding that the 2001 Deed was not a valid contre lettre . Rather, his submission was that the 2001 Deed had been a perfectly good commencement de preuve par écrit , so that there was nothing in that finding of invalidity which impeached the judge’s fact-finding based upon it, including his conclusion that there had been a common intention from the outset, evidenced in part by the 2001 Deed, that the Property should be held upon trust for Ms Suppo, sufficient to taint the purchase with illegality so as to require it to be sold, as he had ordered. That common intention was, he submitted, a “ pacte secret ” , capable of being an unwritten contre lettre in its own right.

17.
For his part Mr Rama Valayden for Mr Jhundoo submitted that Ms Suppo had always based her claim squarely on the 2001 Deed as a valid contre lettre , that this was correctly rejected by the Court of Appeal, that the doctrines of commencement de preuve par écrit and pacte secret had never been asserted on her behalf until this appeal to the Board, and that it would be manifestly unjust for the Board now to entertain it.

Analysis

18.

As between the judge and the Court of Appeal, this case has the worrying appearance of ships passing in the night. In the Board's view the judge plainly relied upon the 2001 Deed as written evidence strongly supportive of a factual finding that there was a sufficient intention in 1987 that the Property was immediately to be held upon trust for Ms Suppo, so as from the outset to taint the purchase of the Property with illegality. He never had to decide whether the 2001 Deed was, viewed on its own, a valid contre lettre. The only obligation which it contained was Mr Jhundoo's obligation to transfer the property at Ms Suppo's direction. Since the purchase was void from the outset, that obligation was, in the Board's view, both irrelevant and unlawful. It was irrelevant because the property was to be sold, and the net proceeds of sale distributed in accordance with section 5(4) of the 1975 Act. It was unlawful because it flowed from an illegal scheme by a non-citizen to acquire a beneficial interest in real property.

19.
In the Court of Appeal, the whole focus of the court, and of the argument, was upon the validity of the 2001 Deed as a contre lettre. There was no consideration at all of the judge's finding that there had been a trust of the Property from the outset, regardless of the validity or otherwise of the 2001 Deed as a contre lettre. There was no consideration of the question whether the 2001 Deed was sufficient commencement de preuve par écrit of Ms Suppo's pleaded case that she had been a beneficial owner of the Property from 1987. There was, in truth, no meeting of minds between the two courts.

20.
The Board sees no reason to doubt the Court of Appeal's finding that the 2001 Deed was not, viewed on its own, a valid contre lettre . During cross examination at trial Ms Suppo had said that, in 1987, she was much too deeply in love with Mr Jhundoo to give any thought to the need for a written acknowledgment from him about her financial contribution to the purchase of, and her interest in, the Property. That need occurred to her many years later.

21.
But equally, the Board can envisage no basis whereby, leaving aside Mr Valayden's submission about injustice, the judge's factual finding that there had been a common intention trust of the Property from the outset can be faulted. It was squarely based upon the written and oral evidence, including the 2001 Deed, and he both had, and made full use of, his unique advantage of seeing Mr Jhundoo and Ms Suppo cross-examined. The 2001 Deed was, in the Board's view, plainly a sufficient commencement de preuve par ecrit to displace the usual prohibition on purely oral proof.

22.
Nor does the Board consider that there was or is any injustice in approaching the case upon a consideration of the 2001 Deed as written proof rather than merely its validity as a contre lettre. Starting at the beginning, Ms Suppo plainly pleaded that she acquired beneficial ownership of the Property in 1987. Para 9 of her Plaint, speaking clearly about 1987, alleged that:

"it was understood between plaintiff and defendant that the said plot of land was a 'bien propre' of the plaintiff."

In para 19 she describes the 2001 Deed as containing admissions by Mr Jhundoo.

23.
Her reliance upon the 2001 Deed as evidence became even clearer in her replies to a Request for Particulars. She was asked what documentary evidence she had of her allegations that she paid for the purchase of the Property, and for the construction of the buildings. Her reply in each case was:

“Please refer to the ‘contre-lettre’ annexed to the plaintiff’s Plaint with Summons.”

She was clearly using the phrase “contre-lettre” as shorthand for the 2001 Deed, as written evidence, rather than making a point about its validity or legal consequences.

24.
At an early stage in the trial counsel for Mr Jhundoo objected to the admissibility of the 2001 Deed. This was resolved by the judge’s ruling that it was admissible, on 9 June 2011. This ruling was not itself appealed, and the judge was careful in that ruling not to pronounce upon its legal effect. There was then a substantial adjournment before the trial resumed, which gave ample time for Mr Jhundoo to prepare his case, which he later deployed with force, that he had paid for the purchase and building works.

25.
It is true that there does not appear anywhere in the case papers before the appeal to the Board an express reference either to the doctrine of commencement de preuve par écrit, or to “pacte secret”. But the question whether the 2001 Deed could be deployed as written evidence of Ms Suppo’s claim was addressed both in the pleadings and in the judge’s interim ruling. The Board is satisfied that Mr Jhundoo was fully on notice, and in good time, that use was to be made of the 2001 Deed as written evidence, and that there is nothing in the submission that, if it had been raised earlier, he might have called more witnesses in rebuttal. As for “pacte secret”, this elegant phrase really adds nothing to the question of substance which the judge had to decide, which was whether in fact the Property was purchased upon trust for Ms Suppo in 1987. If it was, then, following the Imhof case, it could not be allowed to stand.

26.
Mr Valayden submitted that the Imhof case was distinguishable, because there had in that case been a contemporaneous written contre lettre providing for the land in question to be held upon trust by the purchaser for her non-citizen brother. So there was. But, in the Board’s view, the principle established by the Imhof case is that any purchase of land by a citizen on trust for a non-citizen renders the purchase illegal. If the trust can be proved by admissible evidence (with the requisite written admission by the defendant, as there was in this case) it matters not that the written admission is not itself a valid contre lettre.

27.
It is possible that the Court of Appeal thought otherwise, since its conclusion that the 2001 Deed was invalid as a contre lettre led directly to its conclusion, without further explanation, that the Purchase Deed could not be impugned. If so, the Board respectfully disagrees, for two reasons. The first is that it sees no reason why a serious illegality cannot be proved by any ordinary process of proof, provided that it complies with the general law about written evidence, including commencement de preuve par écrit. The second is that for this purpose there was no need to impugn the Purchase Deed, in the sense of contradicting it. All that was needed was to taint it. A trustee may execute a deed which recites his purchase of the legal estate, and describes the purchase price paid, and then make a declaration of trust in relation to the beneficial interest. Neither contradicts the other. But if the beneficiary under the trust is a non-citizen who thereby acquires a beneficial interest in real property, and the purchase and the creation of the trust are simultaneous in planning or in execution, then both are tainted. In the present case the trust was, according to the judge’s findings, a common intention trust, rather than one made by a written declaration. But that does not affect the principle. Both were simultaneous in planning and execution. Nor is the likely outcome, that Ms Suppo will receive most of

the proceeds of a sale under the 1975 Act, some kind of enforcement of the trust. The trust was as tainted as the purchase. Payment of the net proceeds of the statutory sale to the non-citizen is simply what the Act, rather humanely, provides.

Outcome

28.
The Board's conclusion is therefore that nothing which happened in the Court of Appeal truly impacted upon, still less impugned, the factual basis upon which the judge found that the purchase of the Property was tainted by illegality. The Court of Appeal was wrong to decide otherwise. The appeal should therefore be allowed and the judge's order for sale restored. Nothing in this judgment says or implies anything about how the net proceeds of sale are to be apportioned between Ms Suppo and Mr Jhundoo or whether, now that she enjoys Mauritian citizenship, she should be permitted to bid in the sale as a purchaser.