Easter Term

[2019] UKPC 23

Privy Council Appeal No 0004 of 2018

JUDGMENT

Angteeah (Appellant) vBathfield and others (Respondents) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Reed

Lord Lloyd-Jones

Lord Briggs

Lady Arden

Lord Kitchin

JUDGMENT GIVEN ON

20 May 2019

Heard on 9 April 2019

Appellant	Respondents (1 and 2)
Gavin Glover SC	Siddhartha Hawoldar
Priyal Bunwaree	Yanilla Moonshiram
(Instructed by Carrington and Associates)	(Instructed by Axiom Stone)

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Respondents:-

(1) Sylvia Bathfield

(2) Michael Bourgeois

Co-Respondent:-

Permanent Secretary of the Ministry of Housing and Lands

LORD BRIGGS:

Introduction

1.
This appeal concerns the effect in Mauritian law upon a written agreement for the sale of leasehold land of the non-fulfilment of a requirement in the agreement for the obtaining of permission from the lessor for the transfer of the leasehold rights from the vendor to the purchaser. The trial judge thought that the agreement remained enforceable once the vendor exchanged her lease for a fresh lease which contained no restriction upon assignment. The Court of Appeal held, to the contrary, that the agreement lapsed because the requirement for the obtaining of the lessor's consent was a "condition suspensive" which had not been satisfied, and that the new lease obtained by the vendor conferred different rights from those which she had agreed to transfer to the purchaser.

2.
The outcome of the appeal turns on the application of well-settled principles of Mauritian law to the particular facts, which the Board will now summarise.

The Facts

3.
The first respondent Ms Sylvia Bathfield was in 2006 the leasehold owner of land and a building thereon known as Lot 1, Pas Géométriques, The Vale, Mauritius ("the Property"), on the terms of a 20 year lease from the government of Mauritius expiring on 20 December 2013. Article 5A of the lease provided that the lessee had to seek the express written authorisation of the lessor prior to assigning her interest under the lease.

4.
By a written agreement, duly notarised and made on 18 April 2006 ("the Sale Agreement") Ms Bathfield agreed to sell the Property to the appellant Ms Mala Devi Angteeah for the sum of Rs 11,500,000. The Sale Agreement was written in French. The summary of its relevant terms which follows uses an agreed translation.

5.
Under the heading "PRICE" the purchase price of Rs 11,500,000 was apportioned as to Rs 5,000,000 for the "rights to the lease" and Rs 6,500,000 for the existing building, and recorded the payment by the purchaser of Rs 100,000 upon the making of the Sale Agreement.

6.
Under the heading "CONDITIONS" the Sale Agreement provided as follows:

"It has been expressly agreed between the parties as essential conditions to this present deed, without which they would not have entered into this agreement:

That the Ministry of Housing and of the Development of Lands gives its authorisation for the transfer of the above-mentioned rights of lease in the name of the purchaser, and this following the irrevocable request for transfer made this day to the Ministry and signed by the parties of which a copy will remain in the possession of each of them.

In case the said authorisation would not have been obtained within a delay of 15 MONTHS as from this day, the purchaser shall, if he so wishes, consider the present undertaking to sell as being terminated, by notifying the vendor as stipulated below, of his intention of waiving his obligations and this without there being any indemnity on either part and without the need for any formality, the

vendor shall then reimburse to the purchaser any sum of money which would have been paid to her on the price of the present undertaking to sell.

That the transfer of the ownership of the property and rights subject of the present deed and its finalisation are subordinate:

1o. To the receipt of the above-mentioned authorisation from the Ministry of Housing and Development of Lands;

2o. …"

7.
The parties duly applied to the Ministry for permission for the assignment of the lease to the appellant. Although the parties' notary Mr Leblanc later gave evidence that neither he nor his father (also a notary) could ever recall such an application for permission being refused, it was, in fact, never forthcoming in the present case. This was, in summary, because the government was at that time conducting a review of its leased land, including the Property, which led to a decision that, rather than permit assignments of leases such as the lease of the Property, it would, instead, offer leaseholders an option to take a much longer lease (in this case for 60 years) at a higher rent and for a premium, on terms which permitted free assignment by the lessee without the need to seek permission.

8.
Having become aware of this development, the first respondent wrote to Mr Leblanc on 13June 2006, in the following terms:

"Following the new budget it appears obvious that there will be no follow-up of new leases, therefore no transfer. This would handicap the sale of my bungalow at Pointe aux Cannoniers. Not having the means to subscribe to the conditions of new leases included in the budget, the solution that would benefit both parties, the Guillermic and myself, would be to deduct from the sale price the amount due for the new lease. This would allow me to settle the new lease and cause its transfer after the sale or before the sale, which seems not to cause any problem to the new owners of the bungalow.

Could you please keep me informed or make any suggestion that would allow to materialize the sale to the satisfaction of both parties."

The reference to the Guillermic is to the appellant and her family. It does not appear that this proposal elicited any written response from the appellant, if indeed it was communicated to her by the notary.

9.
In about February 2007, no permission having been forthcoming from the Ministry, both the appellant and the first respondent together visited the Ministry's offices to enquire as to the status of their application for permission to assign. They were told that the matter would be resolved within three or four weeks.

10.
On 19 May 2007 the Ministry made a written offer to the first respondent of an option to take a new lease of the Property for a term of 60 years at a premium of Rs 1,500,000 ("the First Option"), sending a copy to the notary.

11.
By a letter dated 29 May 2007 the notary duly informed the first respondent of the First Option, and sought to arrange an appointment with her to "determine the procedure to follow in order to

materialise and finalise the above-mentioned agreement" (English translation). The letter continued (in translation) as follows:

"During her recent visit in Mauritius Mrs Guillermic confirmed to me her intention to purchase your bungalow and also informed me of a new agreement reached between you, by virtue of which agreement you had accepted a partial payment of the sum of Rs 5,000,000 on the purchase price, in addition to Rs 100,000 already received by you, against payment of which sum Mrs Guillermic shall have the right of possession of the bungalow as from the date of payment of the said sum and moreover that you have undertaken to accept the offer to be made to you by the Government in order to conclude a new lease (which will thereafter be transferred in the name of Mrs Guillermic) and to pay the approximate 'premium' of Rs 1,500,000 - which will be claimed by the Government of Mauritius as mentioned in your letter dated 13.06.2006."

The above quotation comes from the agreed translation of that letter, but the phrase (in line 4) "you had accepted" might be better translated as "you would accept" and the phrase "you have undertaken" (in lines 9-10) might better be translated as "you would undertake". In manuscript at the top of the letter the notary added (in translation):

"Could you please in return confirm me by fax whether the contents of the letter are ok for you and reflect your agreement. Thanks."

12.
It does not appear what, if any, response the first respondent made to this letter, but it is clear that the sum of Rs 5,000,000 was not paid, the appellant was not let into occupation of the Property, and the first respondent did not exercise the First Option. To the contrary, it appears that, by this time, the first respondent had sublet the property to the second respondent, Mr Bourgeois, because the appellant discovered him carrying out works to the building on the Property. This was the casus belli which led to these proceedings, which began with the appellant's application for an interim injunction, granted on 3 July 2007, restraining the first respondent from disposing of the Property and the second respondent from carrying out works thereon. The appellant thereafter commenced formal proceedings in October 2007 seeking a declaration that she was the lawful owner of the Property, permanent injunctions in the form of the interim relief already obtained, damages, and an order directing the first respondent to sign a deed of sale, upon payment of the balance of the purchase price.

13.
In November 2007 the Ministry sent a further option ("the Second Option") for a new lease to the first respondent, for acceptance until 22 May 2008, thereby revoking the First Option. After obtaining one or more extensions of time under the Second Option, in December 2010 the first respondent was granted a new 60-year lease of the Property by the Ministry, on terms which permitted assignment without the need to seek permission.

The Law

14.
The law governing the sale and purchase of land in Mauritius is largely governed by the Mauritian Civil Code, with some amplification from decided cases in the Mauritian courts. The Mauritian Civil Code is largely based on the French Civil Code.

15.

The general rule is that a written agreement for the sale and purchase of land in Mauritius, which sufficiently identifies the land to be sold and the price, operates as an immediate transfer of ownership. This is reflected in article 1589 of the Civil Code, which provides (in translation) that:

“An agreement to sell amounts to a sale when there is consent on the part of both parties as to the subject matter and the price.”

16.
This general rule is subject to any common intention of the parties to the contrary, to be gathered from the sale agreement. An example of such a contrary intention is where the obligation to sell is contracted subject to a suspensive condition, in French a “condition suspensive”. This is reflected in article 1181 of the Civil Code which provides (in translation) that:

“The obligation contracted subject to a suspensive condition is that which depends on a future and uncertain event or an event currently taking place but still unknown to the parties.

In the first case, the obligation cannot be executed until after the event.

In the second case, the obligation is effective from the day when it has been contracted.”

A condition suspensive is broadly equivalent to a condition precedent in English law.

17.
A condition suspensive is to be contrasted with a “terme suspensif”. Article 1185 of the Civil Code provides that a terme differs from a condition in that it does not suspend the existence of the obligation, but only delays its performance. An example of a terme suspensif is where performance is stated to be conditional upon the happening of a future but certain event, such as the death of a named person.

18.
An agreement for the sale of land which contains a condition suspensive may or may not contain express provision requiring satisfaction of the condition within a stated time. Both these alternatives are dealt with in article 1176 of the Civil Code which provides (in translation) that:

“When an obligation is contracted subject to an event taking place in a fixed time, this condition is deemed to have failed when the time has expired without the event having taken place. If no time has been fixed, the condition can always be fulfilled, and it is deemed to have failed only when it has become certain that the event will not take place.”

19.
Read literally, this provision might appear to suggest that a contract with no time limit for the satisfaction of a condition suspensive could continue indefinitely, but the parties in their submission to the Board, and both the courts below, were in agreement that this was not so. The judge described such an outcome as “preposterous”, and the Board agrees.

20.
A decision of the Cour d’Appel of Montpellier on 23 June 1948 noted in Dalloz (1948), at note 543, suggests that where a condition suspensive consists of the obtaining of an authorisation from the authorities, with no express time limit for its satisfaction, the parties may treat the condition as having become impossible once a normal and sufficient time to obtain that authorisation has elapsed without it being obtained. This was a decision which may be assumed to have been made under broadly equivalent provisions of the French Civil Code.

21.
In Nouvelle Société du Tamarind Falls v Three FeathersLtd (1977) MR 107 the parties made a contract for sale of part of the vendor's land in December 1972, the completion of which required a morcellement consent from government. Treating consent as a formality, the purchaser was allowed into immediate possession. Consent was formally sought in January 1974. No consent being forthcoming, in June 1975 the vendor began proceedings to recover possession of the property, upon the basis that the agreement for sale had lapsed due to the non-fulfilment of the condition suspensive constituted by the requirement to obtain morcellement consent. Sometime after the commencement of proceedings, in June 1976, consent was formally refused. Applying the Montpellier case (among others) the court held that the sale agreement had indeed lapsed, not merely in 1976 but prior to the commencement of proceedings in 1975.

22.
The Board is satisfied, notwithstanding the literal terms of article 1176, that there will readily be implied into a Mauritian contract for the sale of land subject to a condition suspensive a provision that satisfaction of the condition will be deemed to be impossible if it has not been satisfied within a reasonable time, in the absence of any express provision as to time for the satisfaction of that condition. In particular, the Board rejects the submission by Mr Gavin Glover SC for the appellant that, in such a situation, the agreement will not lapse until a party has obtained a declaration from the court to the effect that a reasonable time has passed without satisfaction of the condition. This is, in particular, reflected in the court's conclusion in the Tamarind Falls case, expressed as follows:

"We accordingly hold that, at the time it entered the present action, the plaintiff was entitled to treat the agreement as being at an end as it had become obvious that the 'condition suspensive' (namely obtaining the permit) would not materialise."

23.
In the Board's view, to require a party to obtain a declaration before treating a condition suspensive as incapable of being satisfied after the elapse of a reasonable time for its satisfaction, would be a recipe for expensive litigation, in circumstances where the parties are to be treated as having contracted that their agreement for sale was to lapse in such an event.

Analysis

24.
The first question is whether the requirement in the Sale Agreement to obtain consent to the assignment of the lease was a condition suspensive or a terme suspensif. In the Board's view, it was plainly a condition rather than a term. The grant of permission by the Ministry was plainly an uncertain rather than certain future event, however unlikely a refusal may have been regarded by the notary. Permission was, in fact, never obtained for the assignment of the then existing 20-year lease. Furthermore, the language of the Sale Agreement provided in the clearest terms for the subordination of the transfer of ownership of the Property to the receipt of the permission from the Ministry.

25.
The second question is whether the Sale Agreement lapsed due to the non-fulfilment of the condition suspensive, so that the first respondent was relieved from the obligation to transfer the Property to the appellant and if so, when. The Sale Agreement contained an express time limit for the obtaining of permission upon the expiry of which the purchaser could treat the sale as having lapsed, but no express time limit enabling the vendor to do the same. It follows from the foregoing analysis of the law that the vendor could treat the sale as having lapsed if permission to assign was not forthcoming

within a reasonable time. There is no suggestion that the vendor did anything to impede the grant of permission by the Ministry.

26.
The trial judge appears to have thought that the condition constituted by the obtaining of the Ministry's permission to assign remained capable of fulfilment until it became irrelevant upon the grant of the new 60-year lease, under the Second Option, as late as December 2010. By contrast the Court of Appeal concluded that consent to the assignment of the 20 year lease was never going to be obtained once the government had changed its policy in favour of offering options for new, longer, leases, which the available evidence demonstrated had occurred by May 2007 at the latest, when the First Option was offered to the first respondent.

27.
Mr Glover submitted that this was a factual question upon which the Court of Appeal should not have departed from the conclusion of the trial judge. But the trial judge's analysis was undermined, in the Board's view, by two errors of law. First, the judge treated the requirement for the Ministry's permission as a terme suspensif rather than as a condition suspensive. For the reasons already given, this was plainly wrong. Secondly, the trial judge appears to have thought that the surrender of the 20 year lease in return for the grant of a new 60 year lease which did not require permission for assignment was a means whereby the term or condition might either be satisfied or treated as dispensed with. Again, in the Board's view, that cannot be right. This is because, as the Court of Appeal observed, the subject matter of the Sale Agreement included the assignment of the modest unexpired residue of the existing 20 year lease (which could not be further assigned without Ministerial consent) rather than a new 60 year lease, at a different rent and with no restriction upon assignment. Furthermore, since the vendor needed to pay a premium of Rs 1,500,000 to obtain the new lease, which the Sale Agreement did not require her to pay, this reduced by the same amount the price which she was to obtain from the completion of the sale.

28.
It follows in the Board's view that the Court of Appeal was entitled to re-examine the facts upon a correct application of the relevant law, and entitled to conclude, as it did, that the Sale Agreement lapsed due to the non-fulfilment of the condition suspensive by the time when these proceedings were commenced.

29.
The Board has considered whether the Sale Agreement was saved by an agreed variation which substituted the requirement for the Ministry's consent to the assignment of the existing 20 year lease with the obtaining of a new 60 year lease by the exercise of the First (or Second) Option, and its assignment to the appellant, so as to confer upon her leasehold ownership of the Property, with the premium being paid to the Ministry out of a further advance of Rs 5,000,000 on account of the purchase price. This is, in substance, what the notary told the first respondent that the appellant had told him had been agreed between the parties as a solution to the difficulty in obtaining consent from the Ministry, in his letter dated 29 May 2007, in the extract quoted above. In the Board's view, this solution to the appellant's difficulties faces insuperable obstacles.

30.
First, the notary's letter described what can have been no more than an oral arrangement, rather than the substantial variation of the Sale Agreement which would have needed to have been made with due formality. Secondly, if that variation had been duly made, the first step in its performance would have

been the payment of a further Rs 5,000,000 by the appellant to the first respondent in part-payment of the purchase price, which never occurred. Nor was the appellant let into possession. Thirdly, no such variation of the Sale Agreement was ever pleaded or relied upon by the appellant in the courts below.

Conclusion

31.
It follows from the above analysis that this appeal must be dismissed. The Board notes in passing that a large number of procedural points were raised in the appellant's grounds of appeal and printed case, and traversed at length in the first respondent's case. At a late stage the Board was informed that, sensibly in its view, those matters were not to be pursued at the hearing of the appeal. Accordingly the Board finds it unnecessary to deal with them, save to conclude that they would, even if pursued, have been of no avail to the appellant.