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IN THE PRIVY COUNCIL No. 9 of 1983

ON APPEAL FROM THE COURT OF APPEAL
OF THE COMMONWEALTH OF THE BAHAMAS

Between

INVERUGIE INVESTMENTS (Defendants) Appellants

and

RICHARD HACKETT (Plaintiff) Respondent

Case for the Respondent

Definitions Record

1. In this Case:-

"Mr. Hackett" means the respondent tenant, the plaintiff in the action and successful appellant in the Court of Appeal
"Myra" means Myra Investments Limited (not a party to the proceedings) the former freeholder and mortgagor of the two apartment buildings involved
"the buildings" means those buildings
"Alliance" means Alliance Services Industrial and Commercial Corporation Limited, the mortgagee of the buildings, a third party in the action but not a party to this appeal
"the Lease" means the 99-year Lease dated 5th June 1970 by Myra to Mr. Hackett of 30 of the apartments in the buildings pp.202-216
"the 30 apartments" means those apartments which were located some in Building "A" and some in Building "B"
"Inverugie" means the appellant company, the defendant in the action and unsuccessful respondent in the

Court of Appeal, which purchased the buildings from Alliance, selling as mortgagee and

marginal references preceded by an "S" are to the Agreed Supplementary Bundle.

The Proceedings

2. This is an appeal from the judgment dated 8th July 1982 of the Court of Appeal of the Commonwealth of the Bahamas, who by a majority (Sir James Smith J.A. and da Costa J.A., Sir Joseph Luckhoo P. dissenting) allowed with costs an appeal by Mr. Hackett from the judgment dated 29th May 1981 of Blake J. and, on the basis that Alliance was estopped from questioning the Lease, pp.137-192 pp.88-125

Declared that Alliance be deemed to have consented to the Lease and that Inverugie was bound by it

Declared that Mr. Hackett was entitled to possession of the 30 apartments and

Ordered possession and an inquiry as to mesne profits and damages, including damages for trespass to Mr. Hackett's furniture in the 30 apartments.

3. Broadly stated, the main issues on this appeal are:-

(a) Whether Alliance

(i) acquiesced in or encouraged the Lease to Mr. Hackett in circumstances raising a duty to be active, speak out and intervene or alternatively

(ii) positively encouraged its grant so as (in either case) to be estopped and bound by the Lease

(b) Whether Inverugie in turn was bound by the Lease as a purchaser of the freehold from Alliance with notice.

The circumstances

4. In late 1969, when Myra granted its mortgage to Alliance Myra was, through contractors, constructing the buildings, together containing 144 apartments, at Silver Point, which is at the edge of the business section of Freeport on Grand Bahama. For 10 per cent. deposits and periodical payments p.90

Record

thereafter, Myra was selling apartments ahead, on a printed form in which it agreed to grant a 99-year lease of the apartment, possession to be given when the building was ready, but the formal lease not to be granted until the last instalment was paid. p.50 11.35-38 S p.38

5. Myra's plan was to finance the construction from these deposits and instalments, but they were insufficient, and in November 1969 Myra had to borrow from Alliance to continue to pay the contractors. Alliance lent Myra Can.$695,000 on a Mortgage of the buildings dated 15th November 1969. The Mortgage on its wording did not permit Myra to grant 99-year leases, or any lease at a premium. Even the statutory power to grant leases up to 21 years at the best rent (which precludes a premium) required Alliance's consent. This resulted from a standard clause being included in the Mortgage document. As collateral security at Alliance's request, Myra assigned to Alliance the benefit of the agreements for leases it had already entered into, and these were attached to the deed of Assignment, also dated 15th November 1969. (The agreements entered into are listed in a document in evidence.) p.90 11. 22-28 p.90 line 51 -p.91 line 8 pp.195-201 p.199 11. 21 - 25 S pp.29-31 S pp.32-36

6. The mortgage loan from Alliance was not enough to complete the buildings and Myra also fell into arrears with its mortgage payments. Myra therefore approached Alliance for an extension of time for the payments, which Alliance eventually agreed against another collateral assignment of agreements for "sale" based on an updated list of contracts. p.92 1.39 - p.98 1.16 pp.218-222

7. Myra also approached Mr. Hackett and on 5th June 1970, when they were 80 or 90 per cent built, Myra raised further money to finance their completion by granting the Lease of the 30 apartments for 99 years to Mr. Hackett for a premium of Bah. $300,000 which he was to disburse in paying the contractors and others to finish the job. This he did. He also took possession of the 30 apartments and furnished them at a cost of Bah.$90,000. Alliance did nothing to prevent him. p.92 11.12-38 p.108 1.36 - p.109 1.2 p.110 11.45-50 p.94 11.20-24 p.98 11.17-23

8. Subsequently, Alliance contracted as mortgagee to sell the freehold of the buildings to Gleneagles Investment Company, which assigned its rights under the contract to Inverugie, and Alliance conveyed the freehold to Inverugie direct. Clause 8 of the agreement with Gleneagles gave notice that "certain parties may be claiming leases on portions of the said hereditaments." Inverugie changed p.98 11.25-50

the locks on the apartments and took possession of them.

Contentions

9. Alliance knew when it made the mortgage loan on 15th November 1969 (para. 5 above) that Myra had been "selling" 99-year leases of apartments, because the existing printed agreements were attached to the collateral Assignment of the same date. Alliance also expected Myra to go on doing so. This was how Myra hoped mainly to finance the construction and repay the loan and see paragraph (2) of Alliance's letter to Myra of 2nd June 1970 ("the 2nd June letter"), which shows a continuing expectation of such sales.

p.91 l.45-p.92 l.6
S p.30
p.90 ll.22-26
p.14 ll.1-6

10. Alliance must also be taken to have known that its Mortgage did not permit 99-year leases, or indeed any lease on which a premium was taken, which would breach the "best rent" provision of s.20 of the Conveyancing and Law of Property Act.

The trial judge's finding to this effect was not challenged, was approved by Sir Joseph Luckhoo P. and da Costa J.A. and was also silently adopted by Sir James Smith J.A.

p.113 ll.11-21
p.146 ll.41-4
p.182 ll.41-5

11. No "purchaser" would embark thousands of dollars of deposit and instalments on a lease which could be destroyed on a sale by Alliance. Each of the "purchasers" must have thought he or she was getting a lease good against all the world, including any such mortgagee as Alliance. That is so obvious that Alliance must have realized it.

12. Accordingly each "purchaser" made his or her deposit or premium payments in the mistaken belief that they were for a lease good against the world, and Alliance knew that "purchasers" were making such payments under that mistake, but stood by in silence and acquiesced.

13. Specifically, from before 5th June 1970, when Mr. Hackett took the Lease of the 30 apartments, and before he disbursed his $300,000, Alliance knew, if only from paragraph 2 of the 2nd June letter, that the 30 apartments were "being sold" to Mr. Hackett for $300,000, and that he must have been expecting the Lease to be good against the world. But Alliance still stood by in silence and acquiesced. p.14 11.1-4

14. Further or alternatively, as da Costa J.A. correctly deduced from the circumstances, Alliance actually knew that Mr. Hackett was making the disbursements at the time they were made, that is between 5th June and August 1970. The conclusion of the trial judge and Sir Joseph Luckhoo P. that there was no evidence that Alliance knew Mr. Hackett was spending money on the property was erroneous. Such knowledge can and should be deduced from the circumstances which were in evidence or judicial knowledge and were mentioned in this connection by da Costa J.A. p.185 1.23 - p.186 1.14; p.119 11.11-40; p.151 11.49-51; p.185 1.23 to p.186 1.14

15. If necessary the Respondent will go further and contend that Alliance actually encouraged Mr. Hackett to lay out his $300,000 on the property, as follows. On 3rd or 4th June 1970 Mr. Hackett went to see Mr. Radomski, the leading director and shareholder in Myra and Mr. Capps, its attorney, at Myra's office, which was in the same building as Mr. Capps'. (He was then in charge of the Freeport office of the well-known Bahamian attorneys E. Dawson Roberts and Co.) There Mr. Hackett saw the 2nd June letter with its insistence on Messrs. Dupuch and Turnquest disbursing his $300,000. He disagreed with this and insisted on disbursing his money himself. Mr. Radomski and Mr. Capps then left him at Myra's office while they went to see Mr. Tower. (He was President or Vice-President of Alliance and he was in charge of the nearby Freeport office of Alliance's attorneys the well-known Bahamian firm of Dupuch & Turnquest above. Alliance was a lending vehicle owned by a Canadian client of Dupuch & Turnquest and had no real presence in the Bahamas.) Mr. Capps gave evidence that Mr. Tower and Mr. Radomski agreed that if Mr. Radomski produced to Mr. Tower receipts of payment signed by the various contractors Mr. Tower would accept them as evidence of payment and treat the sums paid as coming out of the $300,000. Though the trial judge thought more had been said at the meeting with Mr. Tower than Mr. Capps affected to remember, p.14 11.7-17; p.109 11.38-49; p.52 11.32-41

he accepted his account of Mr. Tower's agreeing to the revised arrangements for disbursing the $300,000. Alternatively, Alliance took no part in the proceedings and Mr. Capps's evidence was uncontradicted, and inferentially supported by Mr. Hackett's evidence, and should be accepted as far as it goes. Sir Joseph Luckhoo P. was in error in stating that there was no admissible evidence that Mr. Tower agreed to the revised arrangement. Mr. Tower must have intended the revised arrangement to be communicated to Mr. Hackett by Mr. Radomski and Mr. Capps. It therefore amounted to an encouragement on behalf of Alliance, through Messrs. Radomski and Capps as intermediaries, to disburse the $300,000 in the revised fashion.

p.109 l.33 - p.110 l.44

p.151 ll.19-21

16. Alternatively, Alliance induced or encouraged Myra to believe that Alliance would join in or consent as necessary to the grant of leases of apartments in the buildings as the last instalments of their purchase prices were paid, or in Mr. Hackett's case in the grant of the Lease. It would be inequitable and unconscionable in all the circumstances if Myra were left liable to all the "purchasers" of apartments for breach of its contract to grant a valid lease when the last instalment was paid. The "purchasers", including Mr. Hackett, can rely on the estoppel arising from this.

17. Inverugie was on notice from Clause 8 of the sale agreement between Alliance and Gleneagles Investments Co. Ltd. of which it was assignee, and from Mr. Hackett's possession of the 30 apartments, that he was entitled to the Lease and Alliance was estopped from denying its validity.

p.98 ll.19-23

18. The appeal should be dismissed.

Reasons

19. It should be dismissed for the reasons given by da Costa J.A. and Sir James Smith J.A. for allowing the appeal below, and for the reasons in the following paragraphs.

pp.175-190
pp.158-166

20. All five of the classic probanda of Fry J. (Wilmott v. Barber (1880) 15 Ch.96 at pp.105-106) are established, and therefore Alliance was estopped from questioning the validity of the Lease.

21. The fourth and fifth probanda are established quite generally by the fact that Alliance stood by and acquiesced though it knew when it made its mortgage loan that Myra was continuing to "sell" 99-year leases for premiums prevented by its Mortgage and that the "purchasers" were expecting them to be valid.

22. It is enough for such acquiescence that Alliance knew of Myra's intention to continue to sell leases. This imposed a duty on Alliance to be active and intervene before Myra "sold" any of the apartments: Ramsden v. Dyson (1866) L.R. 1 H.L.129 at pp.140-141 per Lord Cranworth, Crabb v. Arun D.C. [1976] Ch. pp.189D-E, 197-8. It was not necessary for Alliance to know of any particular "sale", because it had created a trap for any "purchaser".

23. Further or alternatively the fourth and fifth probanda are established as regards the Lease by the fact that Alliance stood by and acquiesced in its grant to Mr. Hackett and his disbursement of his $300,000, in effect on Alliance's security, though it knew (from the 2nd June letter and otherwise) that he was intending to take the Lease and disburse the money and would expect the Lease to be valid.

24. To establish either the general or specific acquiescence it is enough that Alliance must have supposed that any purchaser, or specifically Mr. Hackett, would be acting under a mistake: Dann v. Spurrier (1802) 7 Ves. 231 at pp.235-236 per Lord Eldon L.C., or that Alliance would have supposed this if it had turned its mind to it: Taylor Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd. Olds & Campbell Ltd. v. Liverpool Victoria Friendly Society [1982] 1 Q.B. 133 at p.158 H, [1981] 1 All E.R. 897 at p.921 h, alternatively that Alliance must be taken to have supposed that Mr.Hackett or any "purchaser" would expect his or her lease to be valid and this turned out to be mistaken: s.c. [1982] 1 Q.B. at p.153 G, [1981] 1 All E.R. at p.917 f per Oliver J.

25. Alternatively, Alliance actually encouraged Mr. Hackett to disburse his $300,000 under the revised arrangements, so he did not have to establish the fourth and fifth probanda to estop Alliance: Ramsden v. Dyson (1866) L.R. 1 H.L. 129 at pp.170-171 per Lord Kingsdown, Plimmer v. Mayor of Wellington (1884) 9 App.Cas. 799, Sarat Chunder Dey v. Gopal Chunder Lala (1892) 19 L.R. Ind. App. 203, Crabb v. Arun D.C. [1976] Ch. 179.

26. Further or alternatively it would in all the circumstances be unjust and inequitable for Alliance to question the validity of the Lease and that is enough to raise the equity against it: the Taylor Fashions and Olds & Campbell cases above, and the authorities there cited by Oliver J.

27. Alternatively, Alliance and Mr. Hackett acted upon an agreed assumption that the Lease when granted would be valid and accordingly each is estopped by convention from denying it: Amalgamated Property Co. v. Texas Bank [1982] 1 Q.B.84.

29. As Inverugie bought with notice it is bound by the estoppel.

W.J. MOWBRAY

Dated the 18th day of May 1984

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CASE FOR THE RESPONDENT

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