Privy Council Appeal No. 9 of 1983

Inverugie Investments Limited *Appellant*

v.

Richard Hackett *Respondent*

FROM

THE COURT OF APPEAL OF THE COMMONWEALTH OF THE BAHAMAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH DECEMBER 1984

Present at the Hearing:

LORD FRASER OF TULLYBELTON
LORD DIPLOCK
LORD ROSKILL
LORD TEMPLEMAN
SIR JOHN MEGAW

*[Delivered by **Lord Templeman**]*

This appeal raises the question whether the appellant Inverugie Investments Limited holds the Silver Sands Hotel, formerly known as Kismet, at Freeport Grand Bahama Island free from a lease of thirty apartments granted to the Respondent Mr. Hackett.

Myra Investments Limited ("Myra") acquired the fee simple of a site of 3.44 acres and undertook the development of the site as a residential complex including the erection of two main buildings comprising 144 apartments. During the year 1969 Myra entered into a number of purchase contracts in a standard form for the grant of leases of certain of the apartments in the buildings proposed to be erected. There was produced in evidence a photo-copy of a purchase contract in favour of a Mr. Madden. The purchase contract was in a printed form but the identity of the purchaser and the price and method of payment and the details of the apartment he was purchasing were of course typed in and differed as between different contracts. The purchase contract in favour of Mr. Madden, so far as material, contained the following provisions:-

[51]

"Purchase Contract and Deposit Receipt.

1. Myra Investments Limited, hereinafter called "The Vendor" hereby acknowledges receipt of the sum of $6,000 from Mr. Madden... hereinafter referred to as "The Purchaser".

2. The Vendor is in the process of constructing a complex named Kismet....

3. The Vendor is selling all the apartments in Kismet as a co-operative scheme, subject to the terms and conditions of paragraph 5.

4. This receipt as aforementioned is in respect of the purchase of the following apartments described as follows:-

Building	Apartment	Purchase Price	Required Down Payment	Deposit Received	Balance of Down Payment
B	306	$17,995	$6,000	$6,000	-

5. At the time of closing the Vendor shall execute a ninety-nine year lease in favour of the Purchaser which lease shall recite the purchase price as aforementioned and shall also provide for maintenance and ground rental charges.

6. The above mentioned apartment is being purchased in the following manner:-

(A) -

(B) The Purchaser may pay all cash, which will be due in the following manner:-

The balance due is $11,995.00 less 10% discount for cash, leaving $10,795.50 due as follows:-
First payment: $2,698.88 due on closing
Second payment: $2,698.88 due January 1st 1971
Third payment: $2,698.88 due June 1st 1971
Fourth payment: $2,698.88 due January 1st 1972

7. (Provision for payment of customs duty if any)

8. [Provision for the deposit of the down payment] "until such time as the Vendor commences construction. The Vendor hereby agrees that construction of the aforementioned apartments shall commence on or before the day of 1969... if commencement of construction is delayed for more than 90 days beyond the date stated above, the Vendor shall immediately and forthwith return all monies paid by the Purchaser to the Vendor ... and this contract shall become null and void...."

9. The time of closing should be no later than 60 days after the Vendor has notified the Purchaser in writing of the grant of a Certificate of Occupancy

by the Building Department of the Grand Bahama Port Authority Limited and if and in the event of the Purchaser fails to complete this agreement within the said 60 days period the Vendor shall then have the option to declare this agreement null and void and forfeit the deposit ..."

By a mortgage dated 15th November 1969 Myra mortgaged the site of the complex to Alliance Services Industrial & Commercial Corporation Limited ("Alliance") for $695,000 to be repaid as to $200,000 on 25th March 1970 and as to $495,000 on 30th June 1970 with interest at 10% per annum. The mortgage included the usual provision that the statutory power of leasing should not be exerciseable by Myra without the consent in writing of Alliance.

By an assignment also dated 15th November 1969 Myra assigned to Alliance the benefit of purchase contracts which had been entered into and the benefit of all monies payable thereunder as additional security for the advance of $695,000.

After the date of the mortgage, Myra continued to enter into purchase contracts for leases of apartments in the buildings then under construction but Myra were unable to sell all the projected apartments. The resources of Myra, the advance of $695,000 from Alliance and the deposits and advance payments received from purchasers under purchase contracts were not sufficient to complete the construction of the buildings by 2nd June 1970. Purchasers could not be compelled to complete their purchases until the buildings were completed. If Alliance foreclosed or exercised their power of sale before the buildings were completed, the results might be unsatisfactory. It was in the interests of both Alliance and Myra that the buildings should be completed and as soon as possible but Alliance was unwilling and Myra unable to provide sufficient money for the purpose. All this appears from a letter dated 2nd June 1970 addressed to Myra and signed by Mr. Towers as President of Alliance in the following terms:-

".... We are agreeable to extending the time for repayment of this First Mortgage by one year from 1st July 1970 at an increased interest rate of 12% per annum payable monthly commencing 1st August 1970, provided however, that this extension is subject to the following strict conditions:

(1) That the sum of $200,000 be paid to us on or by 1st September 1970.

(2) That any and all monies received by you on the sale of suites, whether before or after the date of this letter (save and except the thirty apartments being sold to Richard Hackett) is to be repaid directly to us in reduction of the First Mortgage.

(3) That on the purchase of the thirty apartments by the said Richard Hackett for the sum of $300,000, that you direct him to make payment of the said sum of $300,000 on or by 15th July 1970 to the order of Messrs. Dupuch & Turnquest our attorneys herein, and this will be disbursed by our attorneys to bona fide sub-contractors, tradesmen, labourers, on proper written authorisation of Z.W. Radomski.

We would again stress that the said sum of $300,000 is in no way being used to reduce our First Mortgage but is being allocated towards the completion of the Co-operative Apartment building."

At the foot of that letter there is a receipt dated 2nd June 1970, signed by Mr. Radomski as President of Myra acknowledging and agreeing to the terms and conditions contained in the letter.

By a lease dated 5th June 1970, in consideration of $300,000, Myra demised to Mr. Hackett thirty specified apartments for a term ending on 4th June 2069. Mr. Hackett paid $300,000 to Myra as to $150,000 on 7th June 1970 and as to the balance of $150,000 by the end of August 1970 on proof by Myra of disbursements to contractors and others for work on the apartments. It is conceded by the appellant that the letter dated 2nd June 1970 was shown or communicated to Mr. Hackett and that the whole of Mr. Hackett's $300,000 was disbursed by Mr. Hackett for the purposes specified in the letter 2nd June 1970 towards the completion of the buildings. The buildings were completed about November 1970 and Mr. Hackett went into possession of his thirty apartments shortly thereafter. Between 1st January 1971 and the year 1974 Myra granted leases of other specified apartments to various purchasers but it still was not possible to sell all the apartments. On 29th June 1972 Alliance called in the mortgage. By contract dated 28th October 1974 Alliance agreed to sell the complex to Gleneagles Investment Company Limited for $720,000 in exercise of Alliance's power of sale as mortgagee. Clause 8 of the contract was in these terms:-

"8. It is understood that certain parties may be claiming Leases on portions of the said hereditaments. The Vendor hereby represents that these Leases have never received the Vendor's previous written consent and are therefore in breach of the said Mortgage between the Vendor and the said Myra Investments Limited."

Gleneagles assigned the benefit of that contract to the appellant and by a conveyance dated 5th November 1974 Alliance conveyed the complex to the appellant for $630,000. That conveyance was registered under

the Registration of Records Act on 7th November 1974. On 25th November 1974 the appellant ejected Mr. Hackett from his thirty apartments. On 27th November 1974 Mr. Hackett registered his lease under the Registration of Records Act. On 6th March 1975 Mr. Hackett issued the writ in these proceedings claiming possession of the apartments comprised in his lease, mesne profits and damages. By an order dated 29th May 1981 Blake C.J. dismissed Mr. Hackett's action. By an order dated 8th July 1982 the Court of Appeal of The Commonwealth of The Bahamas (Sir Joseph A. Luckhoo P., Sir James Smith and H.L. da Costa JJ.A.) allowed Mr. Hackett's appeal (Luckhoo P. dissenting). The appellant appeals with leave to Her Majesty in Council.

Their Lordships consider that thus far, the incontrovertible facts afford an example of estoppel by representation. By the letter dated 2nd June 1970, Alliance encouraged Mr. Hackett to expend $300,000 in building works for the benefit of the property constituting Alliance's mortgage security. The letter represented to Mr. Hackett that Alliance approved and were willing to be bound by a lease of thirty apartments to be granted to Mr. Hackett in consideration of his expenditure of $300,000. In reliance on that representation, Mr. Hackett spent $300,000 on the requisite building works. Alliance having encouraged and received the benefit of that expenditure became estopped from denying that Alliance were bound by the lease which was in fact granted. The appellant acquired the property from Alliance with its eyes open or with one eye deliberately shut and is subject to the same estoppel. Nevertheless, the appellant asserts that the conveyance of the property by Alliance to the appellant over-reached and destroyed Mr. Hackett's lease and that Mr. Hackett is not entitled to a lease or to repayment of the sum of $300,000 expended by him for the benefit of the property. These assertions are based on a number of different contentions.

First it is said that Alliance never became bound by Mr. Hackett's lease because Mr. Hackett did not expend his $300,000 by 15th July 1970 and did not make payment through Alliance's solicitors as required by the letter dated 2nd June 1970. But when Mr. Hackett produced $300,000 which were wholly employed in payment towards the cost of completing the building works, Mr. Hackett provided the full consideration demanded by Alliance and Myra for the grant of the lease. If Myra's purchase contract with Mr. Hackett had expressly required payment of the purchase price of $300,000 to be made on or before 15th July 1970 and to be made to the solicitors of Alliance, in the very terms of the letter dated 2nd June 1970, neither the time nor the method of payment

would have been the essence of the bargain. Neither Alliance nor Myra could have denied the right of Mr. Hackett to a lease once his $300,000 had been expended on the building works on the trivial grounds that payment was not completed until August 1970 and was made through Myra and not through Alliance's solicitors.

Next, it is said that by the letter dated 2nd June 1970 Alliance imposed three conditions. Condition (1), which required Myra to pay $200,000 in reduction of the monies secured by the mortgage by 30th September 1970, was not complied with and therefore Alliance ceased to be bound by the lease to Mr. Hackett. This argument confuses the conditions which Alliance imposed on Myra with the conditions which Alliance imposed on the grant of the lease to Mr. Hackett. In chronological sequence, the letter required Myra first to procure that Mr. Hackett spent $300,000 on building works by 15th July 1970 in the manner indicated, secondly to hand over to Alliance all monies paid by other purchasers under their purchase contracts and, thirdly, to reduce the mortgage debt by $200,000 by 30th September 1970. If all these conditions were complied with, Alliance promised not to call in the mortgage or to exercise its powers as mortgagee before 1st July 1971. If Myra failed to comply with any one or more of the three conditions in any way, then Alliance became free to exercise its rights and remedies as mortgagee without waiting until 1st July 1971. But the only conditions which Alliance imposed on the grant of the lease to Mr. Hackett were, first, that Mr. Hackett should provide $300,000 towards the building costs and secondly, that Myra should remain liable to repay the whole of the monies advanced by Alliance. Their Lordships consider that on the true construction of the letter dated 2nd June 1970 Alliance agreed to be bound by a lease to Mr. Hackett provided only that Mr. Hackett expended $300,000 on the building costs.

The trial judge relied on his notes of the cross-examination of Mr. Hackett which took place more than ten years after the events of 1970. In the course of that cross-examination Mr. Hackett said he thought that his lease was in danger unless Myra paid $200,000 in reduction of the mortgage monies. But it is inconceivable that Mr. Hackett, who was careful to ensure that his $300,000 were expended on the building works, was willing to accept, without further enquiry as to Myra's finances, that his lease granted on 5th June 1970 would cease to bind Alliance if Myra failed to pay $200,000 by 30th September 1970. Mr. Hackett ran the risk that Myra would not be able to find the money, which Mr. Hackett thought might amount to $100,000, required in addition to Mr. Hackett's $300,000, to complete the building works; but the letter dated 2nd June 1970 did not impose any

further risk on Mr. Hackett. The rights and liabilities which resulted from that letter and from the events of 1970 are not susceptible of alteration by the confused and confusing answers of Mr. Hackett in cross-examination. Their Lordships observe that the appellant neither pleaded nor called evidence to support the contention that Mr. Hackett became, in effect, guarantor for the mortgage obligations of Myra.

Next, it is said, on the basis of some passages in the evidence of Mr. Capps, the solicitor acting for Myra, that the letter dated 2nd June 1970 was repudiated on the same day by Mr. Radomski, the President of Myra, because he did not think Myra could produce $200,000 in reduction of the mortgage by September 1970. There is no evidence that Alliance or Myra repudiated or that either of them intended to resile from the agreement that if, Myra procured Mr. Hackett to employ $300,000 in payment for building works, Mr. Hackett would be entitled to a lease of thirty flats. Indeed, whatever disagreements may have arisen between Alliance and Myra about conditions (1) and (2) of the letter dated 2nd June 1970, the interests of both Alliance and Myra required that Mr. Hackett should provide $300,000 pursuant to condition (3), thus alone enabling the building to be completed and enabling the monies payable under all the extant purchase contracts to be collected and also facilitating the sale of the unsold apartments. On any footing it was vital that the building should be completed, it was vital that Mr. Hackett should be prevailed upon to provide $300,000 for that purpose and he could not be expected to do so unless he received for his money the lease of thirty flats.

Next it is said that, in view of Myra's alleged repudiation of condition (2) of the letter dated 2nd June 1970, Alliance ceased to encourage Mr. Hackett to spend $300,000 and did not acquiesce in such expenditure. Again the appellant failed to call any evidence from Alliance alleging that Alliance did not expect Mr.Hackett to spend $300,000, was unaware that he was doing so and was surprised eventually to discover that he had done so. On behalf of the appellant it was submitted that it was not required to call evidence because the onus of proving estoppel lay on Mr. Hackett. But the incontrovertible facts raised the inference that Alliance were well aware that Mr. Hackett would spend $300,000 on the property in consideration of a lease binding on Alliance. The facts raised the further inference that Alliance were well aware the buildings were being completed and were completed with the help of $300,000 provided by Mr. Hackett and the inference that Alliance between 1971 and 1974 assumed, correctly, that Mr. Hackett had been granted a lease in return for his

expenditure and was in possession or occupation of the demised apartments. For obvious reasons, the appellant did not seek to rebut these inferences. In the view of their Lordships, Alliance were estopped by acquiescence as well as by encouragement from denying the validity of Mr. Hackett's lease.

Next, if Alliance were estopped, the appellant contends that though it had notice of Mr. Hackett's lease, it had no notice of the fact that Alliance was estopped from denying that the lease bound Alliance. Clause 8 of the contract dated 28th October 1974 merely contained a denial by Alliance that Alliance had given written consent to the leases claimed by "certain parties" and gave no notice of any fact which might constitute estoppel. Their Lordships consider that the argument is disingenuous. Any honest and prudent purchaser presented with a draft of clause 8 would have made inquiries as to the identity of the "certain parties" as to the claims put forward and as to the alleged reasons for such claims. Inquiries would have been bound to reveal the claim by Mr. Hackett based on estoppel. The appellant did not call evidence to show that in ignorance it was not alerted by clause 8 and it did not call any expert evidence designed to convince the court that the appellant was entitled to ignore clause 8.

Finally, the appellant relies on section 10 of the Registration of Records Act. That Act provides for deeds to be recorded in the Registry maintained by the Registrar General's Department. The deed of conveyance dated 5th November 1974 whereby the property was conveyed by Alliance to the appellant was recorded on 7th November 1974. Mr. Hackett's lease dated 5th June 1970 was not recorded until 27th November 1974. Section 10 of the Registration of Records Act provides that:-

> "If any person after having made and executed any conveyance, assignment, grant, lease, bargain, sale or mortgage of any lands .... or of any estate, right or interest therein, shall afterwards make and execute any other conveyance, assignment, grant, release, bargain, sale or mortgage of the same, or any part thereof, or any estate, right or interest therein; such of the said conveyances, assignments, grants, releases, bargains, sales or mortgages, as shall be first lodged and accepted for record in the registry shall have priority or preference; and the estate, right, title or interest of the vendee, grantee or mortgagee claiming under such conveyance, assignment, grant, release, bargain, sale or mortgage, so first lodged and accepted for record shall be deemed and taken to be good and valid and shall in no wise be defeated or affected by reason of priority in time of execution of any such other documents:

Provided that this section shall not apply to any disposition of property made with intent to defraud."

Section 10 is expressed to apply where one person makes and executes two inconsistent dispositions. The lease to Mr. Hackett was made and executed by Myra. The conveyance to the appellant was made and executed by Alliance. Their Lordships are of the opinion that section 10 does not in these circumstances defeat the lease as against the conveyance because the lease and the conveyance were not made and executed by the same person. On behalf of the appellant it was submitted that Myra made and executed the lease on behalf of Alliance. But Myra were not authorised to make or execute any deed on behalf of Alliance and Myra did not purport to make and execute the lease on behalf of Alliance. The lease was made and executed by Myra alone; for the reasons already advanced, Alliance were estopped from contending that the lease was not binding on Alliance but estoppel does not constitute a disposition which falls within section 10.

Accordingly their Lordships will humbly advise Her Majesty that the appeal should be dismissed and that Mr. Hackett is entitled to the reliefs set forth in the judgment of H.L. da Costa J.A. in the Court of Appeal. The appellant must pay the Respondent's costs of the appeal to this Board.