Hilary Term
[2016] UKPC 3
Privy Council Appeal No 0103 of 2014

JUDGMENT

Hallman Holding Ltd (Appellant) *v* Webster and another (Respondents) (Anguilla)

From the Court of Appeal of the Eastern Caribbean Supreme Court (Anguilla)

before

Lady Hale
Lord Wilson
Lord Hughes
Lord Hodge
Sir Michael Briggs

JUDGMENT GIVEN ON

25 January 2016

Heard on 5 November 2015

Appellant	*Respondents*
Stephen Midwinter William Hare (Instructed by Forbes Hare LLP)	Tana'ania Small Davis Kerith Kentish (Instructed by Joyce Kentish & Associates)

LORD HODGE:

1. This appeal concerns an attempt to enforce an option to purchase land by an application for summary judgment. On 22 March 2013 Master Kimberley Cenac-Phulgence ("the Master") refused to grant summary judgment. The Eastern Caribbean Court of Appeal ("ECCA") upheld her decision in an oral judgment delivered on 3 December 2013. The appellant ("HHL") appeals with the permission of the ECCA.

The contract of sale

2. The land, which is the subject of the agreement containing the option, is approximately 2.5 acres in size and is described as Registration Section East End, Block 99315B, Parcel 71. It lies between land owned by HHL and the sea. The written agreement, dated 30 July 1984, which HHL entered into with the respondents ("the Websters"), narrated that HHL wished to purchase the land and set out the terms succinctly in three clauses. It was agreed:

> "1. That the Company [HHL] will enter into immediate possession of the said land for a period of 50 years from the date hereof on the payment of the sum of Forty Thousand Dollars United States Currency (US$40,000.00) (the receipt of which is hereby acknowledged by the Owners [the Websters]).
>
> 2. That the Owners will grant to the Company the option to purchase the said land at any time within the said period of 50 years upon the payment of the further sum of Ten thousand dollars United States Currency (US$10,000.00).
>
> 3. That the Owners will upon the exercise of the said option cause the said land to be registered in the name of the Company."

3. HHL promptly paid the initial sum of US$40,000 to obtain possession of the land and has not developed the land since then. In about 2011 HHL decided that it wished to exercise the contractual option to purchase the land but discovered that in 2005 a creditor of the Websters had registered a charge over the land for a debt of US$158,666.66. HHL wishes to force the Websters to disencumber the land.

4. In a letter to the Websters of 19 August 2011 HHL's attorneys stated that "the Company wishes to acquire and exercise the option to purchase the Property granted by the Option Agreement" and called on the Websters to remove the charge over the land within 28 days. HHL framed its legal claim on the basis that it had not yet exercised the option. There was some doubt whether HHL was asserting that it had exercised the option when the case was argued before the Master, but the position was clarified before the ECCA and confirmed before the Board. It is conceded that HHL has not exercised the option. HHL's decision not to exercise the option before it sought to force the Websters to remove the charge over the land has prevented it from adopting the much simpler course of seeking to enforce a binding contract for the sale of land.

The court proceedings

5. On 19 June 2012 HHL commenced proceedings in the High Court in Anguilla in which it sought an injunction requiring the Websters to remove the charge forthwith and an order requiring them specifically to perform the agreement. HHL averred that it wished to exercise the option and was willing and able to pay the purchase price. On 1 October 2012 HHL applied for summary judgment under rule 15.2 of the Civil Procedure Rules. That rule provides that:

> "The court may give summary judgment on the claim or on a particular issue if it considers that the -
>
> (a) claimant has no real prospect of succeeding on the claim or the issue; or
>
> (b) defendant has no real prospect of successfully defending the claim or issue."

6. HHL asked for summary judgment in the form of:

(i) an order requiring the Websters to cause the removal of the charge from the registered land;

(ii) an order for specific performance of the agreement "for the purposes of the granting of an option to purchase the land";

(iii) a declaration that if the Websters failed to cause the charge to be removed within 14 days, HHL could cause the removal of the charge, tender the purchase

price (subject to set off of the costs of the application) and be entered in the Land Registry as the legal owner of the land; and

(iv) a judgment on the Websters' liability for breach of contract with a later hearing to assess damages.

HHL submitted that there was an implied term in the agreement either that the Websters would not part with the land or permit it to become encumbered during the 50 year period of the agreement or, if the land became encumbered, that the Websters would remove the encumbrance once HHL had indicated that it wished and was able to exercise the option.

7. The Websters' defence, so far as now relevant, was that there was no such implied term and that HHL had not exercised any option. In his supporting affidavit in reply to the application for summary judgment, Mr James Webster asserted that HHL had not exercised the option and that the contested matters should be determined only after a trial.

8. On 22 March 2013 the Master dismissed the application, holding that there were matters of law and matters of mixed law and fact which could not be dealt with summarily and without a trial and that the defence was neither fanciful nor one with no realistic prospect of success. In para 54 of her judgment she added:

> "The mere fact that the claimant and defendants have divergent views on the interpretation of the Agreement seems to suggest that summary judgment is inappropriate at this stage."

9. Chief Justice Pereira delivered an oral judgment of the ECCA at the end of the hearing on 3 December 2013. She dismissed the appeal, agreeing with the Master that the application raised matters which could not be decided by the summary judgment process and holding that in any event the Master had acted within her discretion in refusing the application.

Discussion

10. Initially there was little between the parties on the interpretation of the express terms of the contract. The Websters accepted that clause 2 gave HHL the option of purchasing the land at a price of US$10,000. But in their submissions to the ECCA the Websters adopted a new approach, arguing that clause 2 gave HHL the right to purchase

an option for US$10,000 and meant that, if that option were purchased, the parties thereafter would have to negotiate a price for the sale of the land.

11. Neither party has pleaded as the relevant factual matrix any background facts which existed in 1984, when the contract was made. When a party wishes to rely on relevant background facts known to the parties at the time of an agreement, it must plead them. An estimate of the current value of the land with vacant possession, which was mentioned in the hearing before the ECCA and before the Board, is not relevant to the circumstances when the contract was made. There is no dispute of fact which prevents the Board construing the agreement without an inquiry into the facts. Each clause must be read in the context of the whole contract. Clause 1 confers a right to possess the land for 50 years. While the use of the word "will" in clause 2 could support a view that the price of US$10,000 was to be paid for obtaining the option if clause 2 were read on its own, that construction looks very strained when clauses 2 and 3 are read together, as they ought to be. So read, the contract makes no provision for the negotiation of a purchase price for the land but requires the Websters to transfer the land to HHL on the exercise of the option. As there is no doubt that the parties to the agreement intended that it should have legal effect, the Board does not favour an interpretation which would render it ineffective. The court must therefore look for the construction of the agreement which maintains its efficacy.

12. HHL's interpretation requires the court to treat the word "will" in clause 2 as inelegant or as surplusage but does no violence to the agreement. The Websters' interpretation (a) involves an uncommercial arrangement by which money is paid for an option to negotiate a price, which is no more than an agreement to attempt to agree, and (b) either ignores the effect of clause 3, which specifies the consequence of the exercise of the option, or requires additional words to be read into that clause to make the agreement of the terms of the option a precondition of the obligation to transfer the land. In the Board's view only HHL's interpretation is consistent with business common sense: *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, para 21 per Lord Clarke of Stone-cum-Ebony and *Arnold v Britton* [2015] AC 1619, paras 14-23 per Lord Neuberger of Abbotsbury.

13. Accordingly, the contract provides that on HHL's exercise of the option, the Websters come under an obligation to transfer the land to HHL in exchange for the purchase price of US$10,000. HHL does not have to pay that sum in order to exercise the option. HHL gave consideration for both possession and the option in the sum paid in clause 1. All that is required is an unequivocal exercise of the option and a request that the Websters transfer the land. It is well established that, in the absence of a stipulation to the contrary, a contract for the sale of land obliges the vendor to give the purchaser a good marketable title free from encumbrances: *Megarry & Wade: The Law of Real Property* (8th ed 2012) paras 15-074 and 15-075, and the recent judgment of the Board in *Mungalsingh v Juman* [2015] UKPC 38 (Trinidad and Tobago). Thus once HHL brings into being the obligation to sell by exercising the option (*Megarry & Wade*,

para 15-012), the Websters are obliged to remove the charge over the land in order to give a good marketable title in exchange for the stipulated price of US$10,000. There is thus no need for the implied term or terms upon which HHL founded its application for summary judgment.

14. The Board is satisfied that the Master was correct in exercising her discretion to refuse summary judgment. The defence, that the terms set out in para 6 above should not be implied into the contract, had more than a fanciful prospect of succeeding. In the Board's view the defence was bound to succeed because the conditions for the implication of those terms into the contract did not exist. It has long been established that, in order to imply a term into an ordinary business contract such as this, the term must be necessary to give business efficacy to the contract; it must be so obvious that it goes without saying; it must be capable of clear expression; and it must not contradict any express term of the contract. As well as the classic statements in *The Moorcock* (1889) 14 PD 64, 68 per Bowen LJ, *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592, 605 per Scrutton LJ and *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, 227 per MacKinnon LJ, more recent judicial pronouncements have included the Privy Council case of *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 282-283 per Lord Simon of Glaisdale, *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472, 481 per Sir Thomas Bingham MR and *Marks & Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72; [2015] 3 WLR 1843, paras 14-32 per Lord Neuberger.

15. In the Board's view the parties' contract would be coherent and effective without the implied term or terms which HHL asserts. When vendors are obliged to remove a charge or other encumbrance by a contract of sale which is created by the exercise of an option, there is no basis for implying into the option agreement a term requiring the earlier removal of encumbrances in order to give the agreement business efficacy. HHL has conceded that its expression of a wish to exercise the option (para 4 above) did not amount to the exercise of the option. HHL has relied on *In re Crosby's Contract* [1949] 1 All ER 830 in support of the implication of its proposed terms. But the case does not assist HHL because it concerned the implication of a term into a contract once the tenant had exercised his option and thus created a contract for the sale of the premises. The implied term imposed no restriction on an owner from burdening the title before the option was exercised, but it obliged the owner to provide an unencumbered title when implementing the contract of sale. In order to get a contractual right to an unencumbered title HHL must first exercise its option.

16. As HHL's application for summary judgment depended on the implication of the implied terms which it asserted, the Board concludes that the Master was correct to refuse summary judgment and the ECCA was correct to uphold her judgment.

17. That is sufficient to dispose of the appeal. But it is appropriate to comment briefly on three matters. First, the Board considers that it will often be appropriate to determine a dispute about a short point of law or the construction of a simple contract by summary judgment, where the legal issue between the parties is straightforward and the court is satisfied that there is no need for an investigation into the facts which would require a trial: *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 Ch, para 15 propositions (v) – (vii) per Lewison J. Where, in the absence of any factual dispute, more complex legal issues arise, including difficult issues of contractual construction, they may be determined on an application for a preliminary issue, for example by seeking a declaration as to the meaning of the contract, as the Chief Justice suggested at p 664 of the Record. Secondly, if HHL exercised the option and asserted a right to receive an unencumbered title relying on the term usually implied into contracts for the sale of land (para 13 above), the Board sees no reason why that claim could not be determined by summary judgment. That is because, thirdly, the Board sees no realistic prospect for a defence in the Websters' other assertions (a) that the contract has not been stamped, when they have admitted both its existence as a written contract and its terms and (b) that HHL had not taken possession of the land, because that is irrelevant.

Conclusion

18. The Board will humbly advise Her Majesty that the appeal should be dismissed. The Board considers that the Websters are entitled to their costs arising out of this appeal.