



Hilary Term
[2022] UKPC 3
Privy Council Appeal No 0048 of 2020

JUDGMENT

**Malik Momin (Respondent) v February Point Resort
Estates Ltd (Appellant) (Bahamas)**

**From the Court of Appeal of the Commonwealth of the
Bahamas**

before

**Lord Hodge
Lord Briggs
Lady Arden
Lord Sales
Lord Burrows**

**JUDGMENT GIVEN ON
21 February 2022**

Heard on 20 January 2022

Appellant

Candice Hepburn
(Instructed by Sheridans)

Respondent

Richard Wilson QC, LL.D
Christina Galanos
(Instructed by Howard Kennedy LLP)

LORD BURROWS:

1. Introduction

1. This case raises a short, but important, question of statutory interpretation. It concerns that aspect of the planning laws in The Bahamas dealing with what are referred to as subdivisions. In general terms, subdivisions are areas of land that have been divided into lots for the purposes of development and sale. By statute, approval is required from the relevant planning authorities for such subdivisions. The question that arises on the facts of this case may be expressed as follows: if the necessary planning approval for a subdivision has not been obtained, what effect does that have on an agreement to sell a lot (and the conveyance of a lot) in the subdivision?

2. The answer to that question principally turns on the correct interpretation of section 62 of the Planning and Subdivision Act 2010 (Bahamas) (“the 2010 Act”). It is therefore helpful to set out section 62 straightaway:

“62. Title to property

(1) Any conveyance made after the Act comes into effect regarding lots not granted prior Subdivision Approval shall be null and void.

(2) Notwithstanding subsection (1), where the beneficial owner of a lot in a subdivision prior to the commencement of this Act, conveyed or agreed to convey land within the subdivision but failed to obtain -

(a) the approval of the Town Planning Committee in accordance with section 8 of the Private Roads and Subdivision Act (Ch 256); or

(b) the approval of the Minister in accordance with section 4 of the Private Roads and Subdivision Act (Ch 256); and section 4 of the Private Roads and Subdivision (Out Islands) Act (Ch 257),

such agreement to convey or conveyance shall not be null and void due to the failure to obtain the approval under subparagraph (a) or (b) and any person who obtained title to a lot within the subdivision shall not be prejudiced by the failure of the owner of the subdivision to obtain the necessary approval under sub-paragraph (a) or (b).”

2. The factual background

3. Malik Momin, the plaintiff and respondent, is a citizen of the United States of America. February Point Resort Estates Ltd, the defendant and appellant, is a Bahamian company. On 18 February 2008, the defendant entered into an agreement with the plaintiff for the sale of a lot in a subdivision for \$895,000. The lot is No 36 Elizabeth Harbour Estates on the Island of Exuma, one of the islands of the Commonwealth of The Bahamas.

4. The price was payable by the plaintiff in instalments as follows: (i) an initial deposit of \$350,000 on the signing of the agreement, (ii) a subsequent payment of \$125,000 by 1 August 2008, and (iii) a further payment of \$120,000 by 1 February 2009. The balance of the purchase price of \$300,000 was to be paid in equal consecutive monthly instalments from 1 March 2008, carrying simple interest at 7%. By clause 5.11 of the sale agreement, the defendant was to retain rights and interest in the lot until all payments had been made.

5. The full price had been paid as of February 2013. A dispute then arose between the parties. The plaintiff purchaser argued that he was entitled to the return of the money he had paid because the defendant vendor had not obtained the Subdivision Approval required by the 2010 Act and, by reason of section 62(1), there could be no valid conveyance to him. The defendant argued that it was able and willing to convey the property to the plaintiff and that, applying section 62(2), that conveyance would not be null and void even though there had been a failure to obtain the necessary approval for the subdivision: the plaintiff was therefore not entitled to the return of the purchase price paid.

3. Other relevant statutory provisions

6. It is helpful to set out a number of other statutory provisions at this stage. The first few are in the 2010 Act.

“3. Purposes of the Act

(1) The objects and purposes of this Act are to -

(a) provide for a land use planning based development control system led by policy, land use designations and zoning;

(b) prevent indiscriminate division and development of land;

(c) ensure the efficient and orderly provision of infrastructure and services to the built environment;

(d) promote sustainable development in a healthy natural environment;

(e) maintain and improve the quality of the physical and natural environment;

(f) protect and conserve the natural and cultural heritage of The Bahamas;

(g) provide for planning processes that are fair by making them open, accessible, timely and efficient;

(h) recognize the decision making authority and accountability of the Government in land use planning; and

(i) plan for the development and maintenance of safe and viable communities,

within the policies, and by the means, provided under this Act.

4. Interpretation

(1) In this Act -

[...]

'owner', in relation to any land, means a person other than a mortgagee not in possession who, whether in his own right or as trustee or agent for any other person, has the freehold or the legal right to possession of the land and is entitled to receive the economic rent of the land or, where the land is not let at an economic rent, would be so entitled if it were so let and includes a person who is an owner with another person as joint tenant or tenant in common of a freehold estate;

[...]

49. Sale of land in new subdivision

(1) No lots shall be sold, agreed to be sold, conveyed, agreed to be conveyed, demised or agreed to be demised in any subdivision that has not received Subdivision Approval by the Committee in accordance with the provisions of this Act.

[...]

61. Offences and penalties

(1) Any person who contravenes the provisions of Part V of this Act [which includes section 49(1)] shall be liable on summary conviction to a fine of twenty thousand dollars or imprisonment for one year.

[...]"

7. The 2010 Act repealed the Private Roads and Subdivision Act (ch 256) and the Private Roads and Subdivision (Out Islands) Act (ch 257). But it remains useful to set out two provisions, section 5 and section 9(2), from the latter Act:

“5. Restriction on selling or disposing of lots in new subdivision

No owner shall sell, agree to sell, convey, agree to convey, demise or agree to demise any land in a new subdivision unless the approval of the Minister has been given under section 4 of this Act ...

9. Penalties

(1) [...]

(2) Any person contravening the provisions of section ... 5 of this Act shall be guilty of an offence against this Act and shall be liable on summary conviction to a fine not exceeding four thousand dollars and, in the case of a continuing offence to a further fine not exceeding forty dollars for each day during which such contravention continues.”

4. Pre-Act conveyances and agreements to convey and post-Act conveyances and agreements to convey

8. It is helpful to clarify that the date the 2010 Act came into force, repealing the Private Roads and Subdivision Act (ch 256) and the Private Roads and Subdivision (Out Islands) Act (ch 257), was, as regards most of The Bahamas, 15 January 2011 but, as regards certain islands, including the Island of Exuma, 1 December 2011. Therefore, those are the relevant dates for the purposes of the references in section 62(1) of the 2010 Act to “after the Act comes into effect” and in section 62(2) to “prior to the commencement of this Act”.

9. Throughout the rest of this judgment, we shall refer, for shorthand, to pre-Act conveyances and agreements to convey, on the one hand, and post-Act conveyances and agreements to convey, on the other hand. It follows from what has been said in the last paragraph that the relevant date for pre-Act and post-Act is, for Exuma, 1

December 2011 (or, for most of The Bahamas, 15 January 2011). On the facts of this case, it is clear that the relevant agreement to convey was pre-Act (it was made on 18 February 2008) and the conveyance in issue would be post-Act.

5. Decisions of the courts below

10. In the Supreme Court of the Commonwealth of The Bahamas, Charles J decided the issue in favour of the defendant vendor. She laid particular stress on section 62(2) which she interpreted as seeking to ensure that pre-existing rights were not affected by section 62(1). She drew support for this interpretation from the case of *Dalton v Lyford Cay Co* [1984] BHS J No 6, which concerned an agreement for the sale of land to a foreign person (the plaintiff) without a permit as required by the Immovable Property (Acquisition by Foreign Persons) Act 1981. That Act had come into force after the agreement for the sale of the land to the foreign person had been made but before conveyance of the title to the land. It was there held that, applying an express non-retrospectivity provision in the statute and the general principle against statutes operating retrospectively, the plaintiff was entitled to the conveyance of the legal title without needing a permit because he had already acquired an equitable title to the land. Charles J also drew some support from *Oceania Heights Ltd v Willard Clarke Enterprises Ltd* [2013] UKPC 3 ("*Oceania*") in which the Privy Council held that, despite necessary approvals not having been obtained for a conveyance of land on Exuma under the Private Roads and Subdivision (Out Islands) Act (ch 257), a conveyance could pass good title. In so doing the Privy Council upheld the Court of Appeal which had reversed the first instance decision that, without the necessary approval, a conveyance was null and void.

11. Charles J said the following at para 25:

“[S]ection 62(1) expressly provides that any conveyance made after the Act came into effect regarding lots not granted prior Subdivision Approval shall be null and void but section 62(2) was enacted to preserve the validity of the Agreement for Sale and prohibits any party from cancelling the said Agreement due to its enactment. The Act is clear and unambiguous and provides that not only any Agreement to convey or conveyance would not be null and void but also that any person who obtained title to the lot within the subdivision shall not be prejudiced. It seems pellucid to me that the intent of section 62(2) was to ensure that the effects of section 62(1) would not interfere with those who were

already in a contractual relationship for the sale of any property.”

She added at para 29:

“[I]t would have been nonsensical or illogical for Parliament to preserve an Agreement for Sale under the Act but to thereafter consider a Conveyance made pursuant to that Agreement null and void.”

12. Charles J’s decision was reversed by the Court of Appeal of the Commonwealth of The Bahamas (Evans JA, Isaacs JA and Jones JA). The judgment of the Court was given by Evans JA. His essential reasoning can be summarised as follows:

(i) Section 62(1) makes clear that post-Act conveyances of lots, where there has been no subdivision approval, are null and void.

(ii) Section 62(2) makes clear that pre-Act conveyances and agreements to convey lots, where there has been no subdivision approval, are valid and not void.

(iii) The requirement to obtain subdivision approval applied under the old law (prior to the 2010 Act) as well as under the new law (laid down in the 2010 Act). Under both the new law and the old law, it is and was a criminal offence for the vendor not to obtain subdivision approval before agreeing to sell or conveying a lot in a subdivision. In the light of that criminalisation of the vendor’s conduct, section 62(2) should not be interpreted in such a way as to protect the vendor. Section 62(2) was enacted for the protection of the purchaser and not the vendor.

(iv) Section 62 should be interpreted to further Parliament’s purpose in enacting the legislation of preserving regulatory control over the development of subdivisions.

13. It is helpful to set out in full some of the relevant passages from Evans JA’s judgment:

“39. ... Section 62(1) made it clear that Parliament did not intend that any conveyance regarding lots not granted prior subdivision approval made after the Act came into effect would have any legal effect. They were specifically declared to be null and void. However, understanding that there were persons who had already received conveyances or had entered into agreements to purchase the same and had invested funds section 62(2) was enacted.

40. Section 62(2) in our view does two specific things. Firstly, it mandates that any agreements or conveyances executed without subdivision approval and prior to the enactment of the new Act would be valid. Secondly, it provides that any person who obtained title to a lot within the subdivision shall not be prejudiced by the failure of the owner of the subdivision to obtain the necessary approval under subparagraph (a) or (b) of the Old Act.

41. With this understanding it is clear that section 62(2) was enacted for the protection of the purchaser and not the vendor. It would be nonsensical to think that Parliament would make provision for a vendor who acts in breach of legislation and is thereby guilty of a criminal offence. It must be remembered that under the Old Act and the New Act the vendor/developer has an obligation to obtain subdivision approval and failure to do so constitutes a criminal offence. There has been no change in that regard.

42. The rationale in preserving the validity of Agreements entered into prior to the passage of the New Act is evident. A purchaser is normally required to pay a deposit on signing Agreements and so he has a vested interest in the property although not full title. It was clearly also recognized that those Agreements could be completed without loss to either party by the vendor simply complying with the law and obtaining subdivision approval. As such the prejudice to the purchaser was avoided and the vendor cannot be seen to complain that requiring him to follow what has always been the law is prejudicial to him.

43. We note that the learned judge seems to have been beguiled by [counsel for the defendant's] submission that it would have been illogical for Parliament to preserve an agreement for sale under the Act but to thereafter consider a conveyance made pursuant to that Agreement null and void. However, it must be noted that Parliament's primary intent is to ensure compliance with the law and to preserve regulatory control over the development of subdivisions. The validating of the Agreements preserves the parties' rights while at the same time ensuring that both parties comply with the law. There is nothing illogical about requiring persons to obey the laws enacted by Parliament, where they still have an opportunity to do so."

14. The Court of Appeal therefore reversed Charles J's decision and ordered the defendant to pay back the purchase price paid with interest (although rather oddly, it gave the defendant "one final opportunity to provide the necessary subdivision approval" (para 46) by making that payment order conditional on the defendant not having obtained subdivision approval within 30 days). It also ordered the defendant to pay the plaintiff's costs.

6. The different interpretations put forward and the Board's reasoning as to the correct interpretation

15. The essential submissions of Candice Hepburn, counsel for the defendant and appellant, February Point Resort Estates Ltd, were to the effect that Charles J's reasoning was correct. In contrast, the essential submissions of Richard Wilson QC, counsel for the plaintiff and respondent, Malik Momin, were to the effect that the reasoning of the Court of Appeal was correct.

16. More specifically, in line with Ms Hepburn's primary submission (we consider her alternative submission based on equitable title at paras 21-24 below), the best way of explaining the interpretation put forward on behalf of the defendant is as follows. The word "notwithstanding" at the start of section 62(2) means that section 62(2) is an *exception* to section 62(1). That exception applies to pre-Act conveyances and agreements to convey. That exception means that those pre-Act conveyances and agreements to convey are valid and not null and void. On these facts, therefore, as the agreement to convey was pre-Act, the requirement to obtain the necessary approval has no impact on the contractual rights or the conveyance provided for by that agreement. In other words, there is no need, as a matter of contract law or property law (as opposed to criminal law) for the conveyance to have the necessary approval.

The purchaser is therefore bound to accept, and is in breach of contract if he does not do so, a conveyance from the vendor even though the subdivision does not have the necessary approval. In so far as the purchaser then has any problems by having acquired a lot for which there has been no subdivision approval, the purchaser has no redress against the vendor. However, Ms Hepburn suggested that, in that situation, the purchaser, as well as all those who took pre-Act conveyances, would be protected from any prejudice because of the last part of section 62(2).

17. Those submissions are in line with the essence of the interpretation taken at first instance by Charles J who regarded it as absolutely clear that it was the correct interpretation. Ms Hepburn submitted that it is supported by the further argument, favoured by Charles J, that it is illogical to treat the agreement made prior to the Act as valid and then to argue that the conveyance made pursuant to that agreement is null and void.

18. The Board rejects those submissions. We consider, in line with Mr Wilson's submissions, that the correct interpretation focuses on what section 62(1) plainly lays down which is that any post-Act conveyance of a lot made without the necessary approval is null and void. As regards a post-Act conveyance, it does not matter whether the agreement to convey was made before or after the Act because any post-Act conveyance without the necessary approval is invalid. It is only pre-Act conveyances that are valid under section 62(2). Nothing is expressly laid down in section 62 as regards the validity or invalidity of post-Act agreements to convey lots where there has been no subdivision approval but section 62(2) lays down that pre-Act agreements to convey without the necessary approval are valid. However, although a pre-Act agreement to convey without the necessary approval is valid, there can be no valid post-Act conveyance under such an agreement because of section 62(1).

19. On this correct interpretation, therefore, titles under pre-Act conveyances remain valid. A pre-Act agreement to convey is a valid contract so that (subject to any express term to the contrary) the purchaser may recover damages for breach against the vendor for not having obtained the necessary approval (this may be regarded as the breach of an implied term in the contract of sale); and the purchaser may be able to terminate the contract for breach and to be granted restitution of the purchase price paid for a total failure of consideration (which is what the plaintiff in this case is seeking). The purchaser is also entitled to call upon the vendor to perform the contract by seeking the necessary approval (or perhaps to take steps itself to obtain the necessary approval) and the vendor cannot raise the defence that the contract is invalid. However, it would seem that the Court of Appeal was not wholly correct in saying that section 62(2) works only for the protection of the purchaser. The validity of

the pre-Act agreement may give the vendor the contractual right still to obtain the necessary approval and, if obtained, to hold the purchaser to the contract.

20. The Board's main reasons for regarding that as the correct interpretation are as follows:

(i) "Notwithstanding" at the start of section 62(2) does not mean "as an exception to section 62(1)" but is rather contrasting post-Act conveyances, which are dealt with in section 62(1), with pre-Act conveyances and agreements to convey that are dealt with in section 62(2). In other words, "notwithstanding" is pointing to a contrast not an exception. It is as if there were words saying "Even though that is the position for the future, the position in the past is different".

(ii) The wording of section 62(2) indicates that there is no carry-through from a valid pre-Act agreement to convey to a valid post-Act conveyance. This is because the word "such" in relation to the conveyance makes clear that the relevant conveyance that is valid is one made pre-Act, ie it is not validating post-Act conveyances.

(iii) That section 62(2) is not talking about validating post-Act conveyances is further supported by the use of the words "obtained title to a lot". If it were talking about post-Act conveyances the more appropriate wording would be "obtains title to a lot" (ie the full appropriate wording would be "obtained or obtains title to a lot").

(iv) This interpretation is supported by the purpose of the Act in several respects. First, it would be contrary to the criminalisation, imposed by sections 49(1) and 61(1) of the 2010 Act (see para 6 above), for the purchaser to be contractually required to accept the conveyance where no subdivision approval has been obtained. For that to be a contractual requirement would constitute the law condoning or assisting a crime by the vendor who commits a criminal offence by failing to obtain the necessary approval. Secondly, it is clear from the specific purposes of the 2010 Act set out in section 3 (see para 6 above) that two general purposes of the Act are the protection of the environment and reinforcing planning controls. For the purchaser to be contractually required to accept a conveyance that does not have the necessary approval would contradict those purposes. Thirdly, at the time of the debates about, and passing of, the 2010 Act (on 16 March 2010), the first instance decision in *Oceania* had been laid down on 29 August 2008 (before it was overruled by the

Court of Appeal, on 27 July 2010). As we have pointed out at para 10 above, this first instance decision was to the effect that, where approvals had not been obtained under the Private Roads and Subdivision (Out Islands) Act (ch 257), conveyances did not pass good title. As was indicated by Evans JA at paras 38 and 39 of his judgment (and this was not in dispute between the parties) it was against the background of the *Oceania* litigation that Parliament sought to reform and/or clarify the law on the validity of conveyances made without the necessary approval; and the interpretation here put forward is consistent with there being a reform to the law, as it was then thought to be by reason of the decision in *Oceania* at first instance, because section 62(2) laid down that pre-Act conveyances validly passed title rather than being void.

7. An alternative interpretation based on equitable title

21. Ms Hepburn put forward an alternative submission based on equitable title. This was to the effect that it was not disputed that, under section 62(2) of the 2010 Act, conveyances of title prior to the commencement of the Act were valid despite the necessary approval for the subdivision not having been obtained. She submitted that, even though legal title had not been conveyed, equitable title had been. She emphasised that the final words of section 62(2) supported that interpretation because the need to protect a person who obtains title against prejudice from there having been no subdivision approval applied equally to a person having equitable, as well as legal, title.

22. The Board rejects that submission for three main reasons. First, the heading of section 62 “Title to property”, and the references made in section 62 to both an agreement to convey and a conveyance, strongly indicate that one is concerned throughout section 62 with legal, not equitable, title. A reference to “title to property”, without any further amplification, would normally refer to legal title only; and a conveyance, when contrasted with an agreement to convey, marks the point at which, along with any necessary registration, legal, not equitable, title passes to the purchaser.

23. Secondly, there are two references to “owner” in section 62(2); and section 4, the “interpretation” section in the 2010 Act (see para 6 above) defines an owner, at its core, as a person having the “freehold or the legal right to possession of the land”. There is no indication at all in the definition in section 4 that owner goes beyond a legal owner to include an equitable owner.

24. Thirdly, the underlying explanation for why a purchaser acquires an equitable title at the time of an agreement to buy land (that is, that there is a constructive trust for the purchaser's benefit from that moment) rests on the premise that the contract is specifically enforceable: see, generally, *Holroyd v Marshall* (1862) 10 HL Cas 191, 209; *Lysaght v Edwards* (1876) 2 Ch D 499, 506-510; *Megarry and Wade, The Law of Real Property*, 9th ed (2019), paras 14-051-14-055; Robert Chambers, "The Importance of Specific Performance" in *Equity in Commercial Law* (eds Simone Degeling and James Edelman (2005), pp 431-462 (cf in the same book, William Swadling, "The Vendor-Purchaser Constructive Trust", pp 463-488). But in this context, where conveying legal title and the very making of an agreement to sell, without the necessary approval, is a criminal offence under sections 49(1) and 61(1) of the 2010 Act - and was also an offence under sections 5 and 9(2) of the Private Roads and Subdivision (Out Islands) Act (ch 257) (see para 7 above) - there is, and was, no prospect of the contract for sale being specifically enforced. It follows that section 62(2) must be concerned with legal, and not equitable, title.

8. Conclusion

25. For these reasons, the Board will humbly advise Her Majesty that the appeal should be dismissed. Lest there be any doubt, we see no good reason to grant February Point Resort Estates Ltd any further indulgence in terms of obtaining the necessary subdivision approval and, therefore, February Point Resort Estates Ltd should now repay to Malik Momin the purchase price paid plus interest.