Privy Council Appeals Nos. 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53 and 54

Coast Securities No. 9 Pty. Ltd. *Appellant*

v.

Bondoukou Pty. Ltd and Another and other appeals *Respondents*

FROM

THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH DECEMBER 1986

Present at the Hearing:

LORD KEITH OF KINKEL
LORD TEMPLEMAN
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY
SIR IVOR RICHARDSON

*[Delivered by **Lord Oliver of Aylmerton**]*

There are before their Lordships ten appeals with the leave of the Full Court of the Supreme Court of Queensland from orders made by the Full Court on various dates in August, September and December 1985 and January 1986 dismissing with costs the appellant's appeals from orders made in the Supreme Court of Queensland ordering the repayment by the appellant with interest of moneys paid to the appellant pursuant to contracts for the sale and purchase of lots in buildings to be constructed at Currumbin. Since all ten cases raise precisely the same point, arising on facts substantially indistinguishable save as regards dates and amounts, the case of the respondent, Bondoukou Pty. Ltd., has been taken and argued as typical. The relevant facts in that case were as follows. The appellant is a development company which, in the year 1981, was engaged in a development project at Currumbin on the Gold Coast in Queensland known as the Currumbin Palms Project. The development consisted, so far as relevant to these appeals, of the construction of two multi-storeyed buildings to be known as "Royal Palm"

and "Princess Palm". In February 1982 the respondent, Bondoukou Pty. Ltd., entered into a written contract with the appellant for the purchase from the appellant of Lot 130, a unit intended to be constructed on the twenty-first floor of the proposed building "Royal Palm", at a price of $208,500. Under the terms of the contract a deposit of $31,275 was to be paid, as to $20,850 on execution and as to $10,425 on 31st October 1982. The balance of $177,225 was to be paid on settlement. The deposit thus exceeded 10% of the total purchase price.

At the date of the contract the appellant had already secured part at least of the finance to carry out the development by means of a Bill of Mortgage dated 11th September 1981 in favour of First Leasing and Finance Limited which was registered at the Real Property Office on 17th October 1981. The amount agreed to be advanced on the security of that mortgage was $9,250,000 and was for the construction of the Princess Palm building. On 1st June 1982 the appellant entered into what was described as a Deed of Variation with First Leasing and Finance Limited and a number of corporate and individual guarantors. That recited the Bill of Mortgage, that it was expressed to stand as security for all sums advanced by the mortgagee and that the appellant had requested a further advance of $18,300,000. It contained covenants for payment of principal and interest, a covenant to apply the advance to the construction of the "Royal Palm" building and provision for the money to be made available by the mortgagee in accordance with an agreed schedule of drawdown. Clause 10 was in the following terms:-

> "These presents are collateral to the said Bill of Mortgage and the monies hereby secured include the monies expressed in and intended to be secured by the said Bill of Mortgage and it is hereby agreed and declared by the Mortgagor and the Guarantors that the second said sum is included in the definition of the principal sum as more particularly set out in the said Bill of Mortgage."

On 16th January 1984 the respondent's solicitors gave notice purporting to rescind the sale agreement on grounds unrelated to the present appeal, but four days later gave a further notice in reliance on section 73 of the Property Law Act 1974 (as amended). On 20th February 1984 the respondent commenced proceedings in the Supreme Court of Queensland claiming a declaration that the sale agreement had been validly determined. Thereafter, on 3rd May 1984, there was registered in the Real Property Office the Building Units Plan for "Royal Palm" and on 10th May 1984 that office issued a certificate of title for Lot 130. The date for completion of the

sale agreement was 4th June 1984. On 11th January 1985 the appellant executed a Bill of Mortgage in favour of another financier, P.T. Ltd., over property which included Lot 130 and that Bill of Mortgage was duly registered on 13th March 1985. On 6th June 1985 the respondent by its solicitors gave yet a further notice of recission, claiming the further Bill of Mortgage as an infringement of section 73 of the Property Law Act entitling the respondent to rescind.

Turning to the relevant statutory provisions, the Property Law Act 1974-1978 contains in Part VI Division 4 a fasciculus of sections (71-76 (inclusive)) relating to instalment sales of land. Sub-section (2) of section 71 contains a number of definitions only three of which are relevant for present purposes. A "deposit" is defined as a sum which *inter alia* does not exceed 10 per centum of the purchase price payable under an instalment contract. An "instalment contract" is defined (by sub-section (2)(b)) as "an executory contract for the sale of land in terms of which the purchaser is bound to make a payment or payments (other than a deposit) without becoming entitled to receive a conveyance in exchange therefor". Finally, a mortgage is defined as including "any encumbrance or charge other than a charge attaching by the operation of any statutory enactment". Sub-sections (1) and (2) of section 73 are in the following terms:-

> "(1) A vendor under an instalment contract shall not without the consent of the purchaser sell or mortgage the land the subject of the contract.
>
> (2) Where land is mortgaged in contravention of this section -
>
> (a) the instalment contract shall be voidable by the purchaser at any time before completion of the contract;
>
> (b) the vendor shall be guilty of an offence against this Act and liable to a penalty not exceeding five hundred dollars."

Section 74 confers on a purchaser under an instalment contract for the sale of land a right to enter a caveat and section 75 enables such a purchaser who is not in default but who has paid a third of the purchase price to call for a conveyance of the land to him conditionally upon his executing a mortgage for the balance. Section 76 enables a purchaser who is not in default to deposit "the title deed or deeds relating to the land the subject of the contract". Section 4 of Part I of the Act defines "land" as including "tenements and hereditaments, corporeal and

incorporeal, and every estate and interest therein whether vested or contingent, freehold or leasehold, and whether at law or in equity".

The other statutory enactment to which reference requires to be made at this stage is the Building Units and Group Titles Act 1980 which contains provisions for the horizontal and vertical sub-division of land into lots and the disposition of titles to the sub-divided lots. It is not necessary for present purposes to recite the provisions of the Act in any detail. It provides a system of title by registration under the Real Property Act of "units" in a "building units plan" having horizontal and vertical boundaries in a building, and it contains provisions for common property among the unit owners of so much of the parcel of land in the plan as is not comprised in any lots and for the regulation of relations between the lot owners. The only provisions which require specific mention are those of section 8 which so far as material are as follows:-

"(1) Land may be sub-divided into lots and common property by the registration of a plan in the manner provided by or under this Act. ...

(2) .....

(3) When a plan has been registered -

(a) each lot comprised therein may devolve or be transferred, leased, mortgaged or otherwise dealt with; ...

(b) .....

in the same manner and form as any other land held under the provisions of the Real Property Acts;

(4) A plan shall for the purposes of the Real Property Acts be deemed upon registration to be embodied in the register book; and notwithstanding the provisions of those Acts, a proprietor shall hold his lot and his share in the common property subject to any interests affecting the same for the time being notified on the registered plan and subject to any amendments to lots or common property shown on that plan.

(5) Upon registration of a plan a memorial thereof shall be entered on the deed of grant or certificate of title relating to the parcel and the Registrar of Titles shall thereafter be authorised to issue a separate

> certificate of title for each lot showing that the proprietor holds the share of the common property appurtenant thereto in accordance with the lot entitlement set forth in the plan."

The respondent's action came on for trial before Shepherdson J. who on 7th June 1985 held that the execution by the appellant of the Deed of Variation constituted an infringement of section 73 of the Property Law Act. He accordingly made a declaration that the respondent had validly avoided the agreement and entered judgment in the respondent's favour for the sum of $31,275 and interest.

The points taken by the appellant at first instance were the same as those argued before their Lordships. First it was argued that the agreement between the appellant and the respondent was not an instalment contract as defined in the Property Law Act 1974 because it was not a contract for the sale of land. That point was effectively concluded against the appellant by the decision of the High Court of Australia in *Chan v. Dainford Limited* (1985) 155 C.L.R. 533. Secondly it was argued that, even if the agreement was not an instalment contract, there had been no breach of the provisions of section 73 entitling the respondent to rescind, since the original Bill of Mortgage took place before the date of the contract and the Deed of Variation did not itself constitute a mortgage. That point too was effectively concluded against the appellant by the decision of the Full Court of the Supreme Court of Queensland in *Landers v. Schmidt* [1983] 1 Qd.R. 188. The third point raised was that certain provisions of the agreement between the appellant and the respondent, on their true construction, constituted a consent in advance to the land being mortgaged after the date of the agreement. Shepherdson J. rejected that argument as a matter of construction. The appellant appealed to the Full Court which, having regard to the fact that it was bound by *Chan v. Dainford* and *Landers v. Schmidt*, dismissed the appeal without giving reasons.

Mr. Davies, Queen's Counsel, who has argued the case for the appellant with skill and ingenuity, has had to surmount at the first hurdle the formidable difficulty that he is seeking to persuade their Lordships to differ from a decision of the High Court of Australia which, whilst it may not strictly bind their Lordships, does, so far as any future case in Australia is concerned, represent the law of Queensland and will bind the courts of that State. Their Lordships would require considerable persuasion before taking that step in present circumstances, even if they could be persuaded to entertain any doubt about the correctness of the decision in

Chan v. Dainford. In fact, however, their Lordships are, respectfully, of the view that that decision, which is indistinguishable from the instant case, was plainly right. The argument before the High Court was the same as that advanced before their Lordships, that is to say, that inasmuch as, at the date of the contract, there were no lots in existence, the subject-matter of the sale was not "land". That argument is expressed in two different ways. First, it is said that a lot in a building units plan is not land within the meaning of the Property Law Act. Their Lordships are unable to accept that argument. In the first place, as appears from the definition already quoted, "land" is defined in the Act in the widest terms. Secondly, the terms of section 8(3) of the Building Units and Group Titles Act 1980 which have already been referred to make it perfectly plain that, once the plan is registered, each lot is capable of being dealt with as land and, to use the statutory words, "in the same manner and form as any other land".

The second way in which the principal argument is sought to be supported is by the suggestion that, because some of the provisions of Division 4 (notably sections 74 to 76) are not capable of being taken advantage of by a purchaser of a lot in a building for which no building units plan has yet been registered, it follows that the land in section 73 must mean land which is in existence at the time of the contract. Their Lordships are no more impressed with that argument than was the High Court in *Chan v. Dainford* and they do not feel that they can improve upon the following passage from the judgment of the High Court in that case (at page 537):-

> "The respective contracts were not contracts for the sale of the spaces in which it was proposed to construct the respective home units; they were contracts for the sale of lots. Although the lots were not in existence when the contracts were made, they were to be in existence at the time stipulated for their sale. The primary meaning of sale is an exchange of property, the subject of the sale, for money. A sale occurs at the time when the title to the subject of the sale is conveyed or transferred. A 'contract for the sale of land' within the meaning of those words in the definition of 'instalment contract', is a contract pursuant to which a sale is to occur in the future - a contract whereby the purchaser will become 'entitled to receive a conveyance' of the land sold at a time subsequent to the making of the 'payment or payments (other than a deposit)' mentioned in the definition. A contract for the sale of land is an agreement to sell land, but it is not a sale."

Turning then to the argument that there was no infringement of the prohibition in section 73 because the Deed of Variation did not constitute a "mortgage" occurring after the date of the contract but was merely a consensual variation of the pre-existing Bill of Mortgage, their Lordships find themselves wholly unpersuaded that this proposition is tenable quite apart from authority. It is true that the Bill of Mortgage secured all sums becoming due to the lender but it is, in their Lordships' view, quite unarguable that the advance, pursuant to the Deed of Variation, of a further $18,300,000 to cover the cost of a new building did not constitute a further charge on the land and thus a mortgage as defined in section 71(2)(c) of the Act. Prior to the Deed of Variation the land was not charged with this sum. Afterwards it was. This hardly requires to be supported by authority but if any is required it is to be found in the decision of the Full Court of the Supreme Court of Queensland in *Landers v. Schmidt* which is, in all material respects, indistinguishable from the instant case. The point is, in any event, academic because the subsequent charge to the second financier was clearly a mortgage. It was submitted on behalf of the appellant that because this took place after the date fixed for completion of the contract, although the contract had not in fact been completed, the respondent's right to avoid the contract "at any time before completion of the contract" was excluded. "Completion", it was argued, meant the date fixed for completion and it was not open to a purchaser, by delaying completion, to extend the period during which the inhibition in section 73(1) endured. That argument is, in their Lordships' judgment, hopeless simply as a matter of construction of the section. It was rejected by the trial judge and plainly he was right to reject it.

The final point taken is that provisions in the sale contract for securing, on settlement, that the lots sold would be released from any outstanding mortgage, constituted a consent in advance to a mortgage of the land by the appellant. The trial judge thought it perfectly plain that these provisions were no more than a recognition of the commercial probability that the land under development would be subject to an outstanding mortgage at the date when the various lots were agreed to be sold and could not possibly be construed as a consent to the raising of further charges at a subsequent date. Their Lordships agree.

The appeal in the case of Bondoukou Pty. Ltd. must therefore fail and it has not been suggested that there is any relevant feature in any of the other nine appeals which distinguishes them from that case. The only material factual difference arises in the case of Donnelly Pty. Limited (No. 54 of 1986) where

the contract for sale was entered into prior to the Bill of Mortgage of 11th September 1981 so that the respondents in that case had no need to rely upon the Deed of Variation in support of their claim to avoid the contract.

Their Lordships will accordingly humbly advise Her Majesty that all ten appeals should be dismissed. The appellant must pay the respondents' costs before their Lordships' Board in each case.