Hilary Term
[2019] UKPC 13
Privy Council Appeal No 2016 of 0071

JUDGMENT

Maloo and others (Appellants) *v* Somar (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Kerr
Lord Carnwath
Lord Briggs
Lady Arden
Lord Kitchin

JUDGMENT GIVEN ON

25 March 2019

Heard on 5 March 2019

Appellants	*Respondent*
Anand Beharrylal QC Josh Hitchens (Instructed by Alvin Pariagsingh)	Krishendath Neebar (Instructed by Haresh Ramnath)

LORD BRIGGS:

1. The first appellant Deonarine Maloo was in 2007 the owner of a tract of open land with development potential on Thompson Trace in Chaguanas, Central Trinidad ("the Property"). He lived in Canada but his father Dularchand Maloo, the second appellant, lived in Trinidad and Tobago and dealt with the Property on his behalf. It was orally agreed that the first appellant should sell a portion of the Property (comprising 8 development lots) to the respondent Anthony Somar for $500,000, which the respondent duly paid to the second appellant, who received it on his son's behalf in December 2008.

2. On 15th January 2009 the parties reduced that oral agreement to writing in the form of a memorandum of sale ("the Memorandum") which identified the 8 lots with sufficient precision, acknowledged payment and receipt of the purchase price and contained this warranty:

> "The above land has a good marketable title to the said premises free from all encumbrances and discharge all outstanding rates, taxes and assessments."

3. It was known to both parties, when the agreement for sale was made and the purchase price paid, that the sub-division of the property by the separate sale of the 8 lots required planning permission. This is because, by section 8(2) of the Town and Country Planning Act (No 29 of 1960), the expression "development" is defined as including the sub-division of land. Whether a sub-division merely by conveyance, rather than by the carrying out of some visible form of physical division on the ground, constitutes development within that definition is a matter about which the Board expresses no view of its own. It was assumed, both by the trial judge Jones J and by the Court of Appeal that it did.

4. Planning permission for sub-division of the property had not been granted when, on 26 February 2010, and without the knowledge of the respondent, the first appellant transferred the whole of the Property, including the 8 lots, to his sister Sumatie Jhagroosingh, the third appellant, in exchange for $290,000. The judge found that the third appellant had notice of the agreement for sale between the first appellant and the respondent at the time of that transfer.

5. On finding out about the transfer to the third appellant shortly thereafter, the respondent issued proceedings against all three of the appellants for relief which

included damages for breach of contract, return of the purchase price and, in the alternative, the setting aside of the transfer to the third appellant and an order for specific performance.

6. The appellants' case as defendants at the trial in April 2011 included the putting forward of a version of the Memorandum (and of the oral agreement) which purported to contain an express term requiring the respondent to obtain planning permission by 1 August 2009, with provision for the forfeiture of $250,000 out of the purchase price paid to the vendor if the purchaser failed to obtain planning permission. The judge found that this version of the agreement was false, and the copy of the Memorandum produced in support of it in effect a forgery, that the agreement and Memorandum contained no express term about planning permission, but that it contained an implied term which required planning permission for sub-division to be obtained, before completion, by the first appellant as vendor. The judge found that the sale agreement had been breached by the first appellant, that the respondent was entitled to damages, to be assessed, including damages for loss of bargain in lieu of specific performance which, she concluded, could not be ordered because of the absence of planning permission for sub-division. She also declared that the land (by which she meant the 8 lots) was held on trust by the third appellant for the respondent and made provision for the transfer of the 8 lots by the third appellant back to the first appellant, upon request by the respondent. This was, as the judge put it:

> "to ensure that the claimant receive the fruits of his judgment against a defendant who is resident abroad and if the evidence of the claimant is to be believed, as I do, has boasted of no assets within the jurisdiction."

7. The respondent had, prior to trial, sought to obtain planning permission for sub-division of the Property but without success. Nonetheless the respondent did receive a grant of planning permission for the development of the Property (or part of it) divided into 11 residential lots and one further lot for public open space, in July 2011. The judge duly assessed the respondent's damages at $2,035,400 in April 2012, relying upon expert evidence tendered on behalf of the respondent which valued the land agreed to be sold upon the basis that planning permission for its development was by then available.

8. An appeal by the appellants was heard and dismissed in February 2016 by the Court of Appeal. In an extempore judgment Mendonca JA said this:

> "We agree with the judge that it is a term that, in any event, would be implied by law, and we think that the way the judge dealt with it is correct, in that it is the obligation of the vendor to show or to

> pass a good and marketable title, and if the law provides that land is not to be subdivided unless permission to subdivide is first obtained, then it seems to us that that goes to the ability to pass a good marketable title and, in the absence of any contrary agreement, that must be on the vendor to obtain that permission as part of his obligation to pass a good and marketable title."

9. The main issue raised by the appeal to the Board (for which permission was granted only in limited terms) was whether the judge and the Court of Appeal had been right to identify an implied term within the agreement for sale which placed the burden of obtaining planning permission for sub-division upon the vendor. Additionally, or alternatively, it was argued that the contract was never more than conditional upon the obtaining of planning permission so that, when it was refused, the only entitlement of the respondent was to a return of the purchase money.

10. The Board considers that the judge, the Court of Appeal and also the parties have gone a little astray in focusing their attention upon the presence or absence of an implied term. On the judge's findings of fact (which are not now in dispute) there was no express term about the obtaining of planning permission for sub-division at all, whether as an obligation of one or other of the parties, or as a condition for the coming into existence, or the completion, of the contract. Nor does any term need to be implied. As the Court of Appeal observed, the first appellant as vendor was under an express obligation to convey the 8 lots to the defendant, with good marketable title. If that required planning permission for sub-division to be obtained, then the vendor needed to obtain it, not as a matter of separate contractual obligation, but so as to be able to perform his primary obligation under the agreement for sale.

11. In the event, the first appellant chose to commit a repudiatory breach of the contract, not by failing to seek planning permission but by transferring the 8 lots as part of the Property to his sister. The respondent did not, initially at least, accept that as a discharge of the contract by repudiation, because he sought, in the alternative to damages, specific performance of it. Nonetheless discharge by repudiatory breach was the outcome, once the judge decided (not challenged on appeal) that specific performance was unavailable due to the absence of planning permission for sub-division.

12. The result was that the respondent was entitled to substantial damages, including damages for loss of bargain, by reason of the first appellant's repudiatory breach, rather than entitled merely to the return of the purchase price, upon the failure of a condition.

13. Mr Beharrylal QC for the appellants sought valiantly to put in issue before the Board the judge's assessment of damages, as described above, upon the supposed basis

that the property agreed to be sold still lacked planning permission in April 2012, when damages were assessed. But permission to raise this essentially factual question before the Board was neither sought nor granted and cannot therefore be entertained.

14. It follows that this appeal should be dismissed.