



JUDGMENT

**Oceania Heights Limited (Appellant) v Willard
Clarke Enterprises Limited & others (Respondent)**

From the Court of the Commonwealth of the Bahamas

before

**Lord Neuberger
Lord Mance
Lord Wilson
Lord Reed
Lord Carnwath**

**JUDGMENT DELIVERED BY
LORD NEUBERGER
ON**

30 January 2013

Heard on 15 November 2012

Appellant
Fred Smith
Ruth Jordan
Roderick Dawson Malone

(Instructed by Simons
Muirhead & Burton)

Respondent
Harvey Tynes QC
Charles Mackay
Joseph Moxey
Elliot Lockhart

(Instructed by Stephenson
Harwood LLP)

LORD NEUBERGER:

The facts

1. Until 2000, Willard Clarke Enterprises Limited (“WCE”) was the owner of a parcel of land (“the land”) on Great Exuma, Bahamas, consisting of some 40 acres, which, in 1970, was subdivided into 121 lots. On 2 March 1970, the Permanent Secretary at the Ministry of Works wrote to Mr Willard Clarke, on behalf of WCE, stating that “subject to the payment of fees ... the Minister of Works is prepared ... to approve of the layout of the subdivision” (“the 1970 letter”).

2. This approval was given under the terms of section 3 of the Private Roads and Sub-Divisions (Out Islands) Act, Chapter 257. Section 3 precluded any person “without the approval of the Minister, [from] lay[ing] out any new road or any new sub-division”. It went on to provide that anyone seeking such approval should provide appropriate specifications to the Minister. Section 4 provided that “[n]o person shall, without the approval of the Minister, construct any new road in any new sub-division”, and it then went on to set out certain provisions with regard to the quality of any road approved by the Minister.

3. The 1970 letter also specifically referred to section 5 of Chapter 257. Section 5 provided that “[n]o owner shall ... convey [or] agree to convey ... any land in a new subdivision unless the approval of the Minister has been given under section 4 of this Act and either” an appropriate bond is furnished to the Minister or roads have been constructed “to the satisfaction of the Minister” and in accordance with “specifications approved by the Minister”. Section 7 precluded any person from conveying or agreeing to convey any lot in a new subdivision, unless it was shown on a survey plan which had been approved by the Minister. Section 9 provided that, by breaching section 5 or 7, a person committed a criminal offence, and would be liable to a fine not exceeding \$4,000 or \$200 respectively. The 1970 letter “remind[ed]” Mr Clarke “of the need to comply” with sections 5 and 7.

4. Following the 1970 letter, WCE, through a Mr Marshall, agreed to sell eleven of the 121 lots (“the eleven lots”) pursuant to six different contracts or similar arrangements (the details of which are unimportant for present purposes). On 25 September 1995, WCE agreed to sell to Oceania Heights Limited (“Oceania”), the whole of the land, excluding the eleven lots. Oceania subsequently conducted title searches and, on failing to discover any evidence of recorded agreements to sell, or conveyances of, the eleven lots, made further

enquiries. On 19 December 1995, the Ministry of Works wrote to Oceania, confirming that approval for the sale of the eleven lots had not been given by the Minister.

5. In the light of this information, negotiations took place between WCE and Oceania, which led to the conclusion on 5 January 1996 of two further agreements. Under the first of these agreements, which was backdated to 25 September 1995, WCE agreed to sell the entirety of the land (i.e. including the eleven lots) to Oceania. This agreement (the “1996 Agreement”) was stamped with a certificate dated 9 February 1996, signed on behalf of the Registrar General, stating that the 1996 Agreement had been “recorded in book 6609 pages 139 to 147 in accordance with the provisions of the Registration of Records Act, Chapter 193”.

6. Under the second of these agreements, Oceania and WCE agreed an indemnity in relation to the eleven lots (“the indemnity agreement”). The indemnity agreement recited the fact that, on behalf of WCE, Mr Marshall had negotiated contracts to sell the eleven lots to various “intended purchasers”, who had “paid various deposits” to Mr Marshall. The indemnity agreement went on to record that, if an intending purchaser brought proceedings in respect of the contract he or she had entered into and “provid[ed] proof of payment” of the deposit, “Oceania undertakes to be fully responsible for satisfying any such claim in cash”, and that Oceania would also

“be fully responsible for meeting all legal and other costs, liabilities and expenses incurred by [Mr] Marshall as a result thereof..., and if he is deemed to be liable in any manner to the intended purchaser then Oceania will pay any such liability or sum ordered or found due and payable”.

7. In 1998, there were various exchanges between Oceania and WCE. These reveal a common understanding between the parties, or at least between their lawyers, in relation to two issues. (i) That the agreements to sell the eleven lots could not be executed until approval of the Minister had been granted. (ii) That the recording of the 1996 Agreement meant that WCE was not in a position to convey the eleven lots to the intending purchasers (or their successors).

8. On 29 February 2000, WCE conveyed to Oceania all the land excepting the eleven lots. Oceania accepted it without prejudice to any other rights. At some point, Oceania started to construct roadways and other items of infrastructure on the land. Meanwhile, on various dates between February 2000 and February 2001, WCE executed conveyances (“the Conveyances”) in respect of the eleven lots to the intending purchasers (or their successors). On 1 November 2005, the Ministry

wrote to Oceania to grant approval under section 4 of Chapter 257 for the sale of the sub-divided lots on the land.

The instant proceedings

9. On 17 May 2000, Oceania began the current proceedings against WCE, to which the purchasers under the Conveyances (“the purchasers” and together with WCE “the respondents”) were later joined, seeking an order for specific performance of the 1996 Agreement in so far as it had not been performed (i.e. for a conveyance, or conveyances, of the eleven lots) and damages. Oceania also sought a declaration that the Conveyances to the purchasers of the eleven lots were void and of no effect.

10. The action was heard by Lyons SJ. On 29 August 2008, he handed down judgment in which he concluded that Oceania was entitled to a conveyance of the eleven lots from WCE, on the ground that the Conveyances of the eleven lots and the contracts between WCE and the purchasers (or their predecessors) were “void ab initio”.

11. Lyons SJ reached this conclusion on the ground that the Conveyances to the purchasers (and the antecedent contracts) were void and ineffective by virtue of section 5 of Chapter 257. As the Conveyances to the purchasers, and the antecedent contracts, were executed in breach of section 5 (and, whilst not identified expressly by Lyons SJ, in breach of section 7) of Chapter 257, the Judge concluded that they were void, and that Oceania was entitled to have the eleven plots conveyed to it by WCE.

12. The respondents appealed that decision to the Court of Appeal. In a judgment given on 27 July 2010, the Court of Appeal (Blackman, Newman and John JJA) allowed the appeal, on the ground that the judge was wrong to conclude that the effect of Chapter 257 was to render the Conveyances (and the contracts pursuant to which those Conveyances were made) void. While the Conveyances and antecedent contracts were executed by WCE in breach of sections 5 and 7 of Chapter 257, and rendered WCE liable to prosecution and fines, the Court of Appeal held that those statutory provisions did not invalidate the Conveyances, which were therefore effective as against Oceania.

The issues on this appeal

13. Oceania now appeals to the Board. Although various other points were included in the written cases, only two substantive issues have been argued before

the Board, both raised by Oceania on its appeal. The first issue arises from Oceania's contention that the Court of Appeal was wrong to reverse the Judge's conclusion that the Conveyances were void: that point involves deciding whether the effect of sections 5 and 7 of Chapter 257 was to render void any conveyance executed in circumstances precluded by those sections.

14. The second issue arises from Oceania's contention that, even if the Court of Appeal was right in concluding that the Conveyances were otherwise effective, Oceania is nonetheless entitled to have the eleven lots conveyed to it. That argument is based on the fact that the 1996 Agreement had been recorded on 9 February 1996 as registered by the Registrar General. The effect of that registration, runs Oceania's argument, is that, pursuant to section 10 of the Registration of Records Act, Chapter 187, its right under the 1996 Agreement to have the whole of the land (including the eleven lots) conveyed to it took priority over the rights of the purchasers under their respective earlier contracts and the subsequent Conveyances. Apart from raising a conveyancing point of some significance, this issue also raises a procedural problem.

Oceania's argument based on Chapter 257: discussion

15. So far as the effect of sections 5 and 7 of Chapter 257 is concerned, the Board is satisfied that the view taken by the Court of Appeal was correct, and the conclusion reached by Lyons SJ was wrong. There is no doubt that, as at the time they were executed, the Conveyances constituted a breach of sections 5 and 7 by WCE. WCE was precluded from "convey(ing)" any of the eleven lots under those sections, because the conditions set out therein had not been satisfied. Each of the Conveyances would appear to have rendered WCE liable for a fine "on summary conviction" under section 9 of Chapter 257. So, too, the antecedent contracts to sell the eleven plots would appear to have rendered WCE liable for such a fine (assuming, as appears to have been common ground, and assumed in the indemnity agreement, Mr Marshall was effectively acting as WCE's agent when he entered into those contracts).

16. Nonetheless, it is well established that the mere fact that a contract is entered into, or any other document is executed, in breach of a statutory prohibition, does not automatically render all consequences of that contract or document void. In the present case, for instance, there is no doubt that the contracts entered into with the purchasers (or their predecessors) would have been unenforceable, at least so long as WCE would have been in breach of section 5 or section 7 of Chapter 257 by executing the Conveyances. The court could plainly not have ordered WCE to convey individual lots in breach of a clear statutory prohibition.

17. However, that does not mean that if, as happened, WCE actually conveyed the eleven lots to the purchasers at a time when it was forbidden by sections 5 and 7, the Conveyances were thereby invalid, in the sense of not effecting transfers of the lots which they purported to convey.

18. As Kerr LJ explained in *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Limited* [1988] QB 216, 273,

“[W]here a statute merely prohibits one party from entering into a contract without authority, and/or imposes a penalty upon him if he does so (i.e. a unilateral prohibition) it does not follow that the contract itself is impliedly prohibited so as to render it illegal and void. Whether or not the statute has this effect depends upon considerations of public policy in the light of the mischief which the statute is designed to prevent, its language, scope and purpose, the consequences for the innocent party, and any other relevant considerations.”

19. In the Board’s view, all the factors identified in that short passage point in favour of the conclusion that a conveyance in breach of section 5 or section 7 of Chapter 257, while constituting a criminal act on the part of the vendor, would nonetheless be effective to vest the legal estate thereby conveyed in the purchaser. Mr Smith QC, who appeared before the Board for Oceania but did not appear below, emphasised the importance of the provisions of Chapter 257, and in particular the sanction contained in section 9. There is no doubt that the provisions of Chapter 257 were indeed thought to be important from the point of view of the public interest. However, conveying, or agreeing to convey, land in breach of a provision such as section 5 or 7 of Chapter 257 does not appear to the Board to constitute an act of such gravity as to lead to the conclusion that a purchaser under such a conveyance should lose the right to own the property thereby conveyed. This conclusion is reinforced when one bears in mind that, in such a case, the purchaser will no doubt almost always have paid a substantial sum to the vendor. The public policy behind sections 5, 7 and 9 of Chapter 257, and the way in which they are expressed, when viewed in the context of Chapter 257 as a whole, appear to the Board to support this conclusion.

20. While it was not relied on in terms by the respondents, the Board, to put it at its lowest, takes considerable comfort in reaching this conclusion from the terms of section 62 of the new Planning and Subdivision Act 2010, which came into force subsequent to the decision of the Court of Appeal, and, inter alia, repealed and replaced Chapter 257. Section 62(1) of the 2010 Act expressly provides that “[a]ny conveyance made after the Act comes into effect regarding lots not granted

prior Subdivision Approval shall be null and void”. Even more relevantly, section 62(2)(b) of the 2010 Act provides:

“Notwithstanding subsection (1), where the beneficial owner of a lot in a subdivision prior to the commencement of this Act, conveyed ... land within the subdivision but failed to obtain ... the approval of the Minister in accordance with ... section 4 of ...Chapter 257, such ... conveyance shall not be null and void due to the failure to obtain the approval ... 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...”

21. In these circumstances, subject to Oceania’s second point, the Board agrees with the Court of Appeal.

Oceania’s argument based on Chapter 187: introduction

22. The second point raised by Oceania depends on the fact that the 1996 Agreement was registered in February 1996. Section 10 of the Registration of Records Act Chapter 187 (“section 10”) provides:

“If any person after having made and executed any conveyance, assignment, grant, lease, bargain, sale or mortgage of any lands or of any goods or other effects within The Bahamas, 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 other such documents:

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

23. The substance of Oceania’s argument proceeds as follows:

(i) The 1996 Agreement, whereby WCE agreed to convey the whole of the land to Oceania, was registered in February 1996, and falls within the scope of section 10;

(ii) Even though the contracts between WCE, through Mr Marshall, and the purchasers (or their predecessors) were entered into before the 1996 Agreement, the effect of section 10 is to give priority to the 1996 Agreement over those contracts;

(iii) Even though the Conveyances entered into in 2000/2001 apparently conveyed the legal estate in the eleven lots to the purchasers, and were (according to what the Board was told by counsel) subsequently registered, the fact that the 1996 Agreement had been registered prior to the Conveyances means that the 1996 Agreement has priority over those Conveyances;

(iv) In these circumstances, Oceania is entitled (a) to a declaration that the Conveyances are void and to a conveyance of the eleven lots from WCE, or (b) to require the purchasers to convey the eleven lots to Oceania.

24. Two questions arise in relation to this line of argument. The first is whether Oceania should be allowed to pursue the argument before the Board. The second question is whether the argument is a good one.

Oceania's argument based on Chapter 187: can the point be taken?

25. It was strongly argued on behalf of the respondents that Oceania should not be entitled to mount its argument based on section 10 of Chapter 187, on the basis that it was not taken or argued below. This is a contention with which the Board has considerable sympathy, but which it has ultimately decided to reject.

26. Oceania's original Statement of Claim was comprehensively amended, and, in its penultimate paragraph, alleged that the 1996 Agreement was binding on the respondents and had been "duly lodged for record at the Registry of Records". Although no express reference was made to section 10 giving priority to Oceania's rights in that pleading, that is the natural meaning of the paragraph, and most of the respondents seem to have regarded it as raising that issue, as they pleaded fraud in answer to it, no doubt relying on the proviso in the last sentence of section 10. (The fraud allegation, which was based on undue influence, is no longer pursued.)

27. The Board was also shown the written argument of some of the respondents before Lyons SJ, and it actually quotes section 10 and seeks to explain why it did not apply. No reference to any argument based on section 10 or, indeed, on priority rights, can be found in the judgment of Lyons SJ, but it may well be that, in the light of his conclusion on the Chapter 257 issue, he did not see any reason to refer to it.

28. When the respondents appealed to the Court of Appeal against that conclusion, it would have been open to Oceania to raise the section 10 point by way of a respondent's notice, but it did not do so. Nonetheless, although the Court of Appeal did not deal with the point further, when setting out the issues in his judgment, Blackman JA referred to the fact that counsel then acting for Oceania did argue that, quite apart from the Chapter 257 point, the 1996 Agreement had priority due to its having been recorded. The transcript of the hearing suggests that the point was indeed raised, but only very briefly, and exchanges between Newman JA and counsel then acting for Oceania seem to have proceeded on the basis that the Chapter 257 point was the only issue on that appeal.

29. On Oceania's appeal to the Board there appears to have been no reference to the Chapter 187 point in the notice of appeal, and that is also true of the Statement of Facts and Issues agreed between counsel. Nonetheless, the point was clearly taken by Oceania's counsel in their written case, and has been responded to by the respondents in their written case.

30. In the Board's view, the Chapter 187 point is one which Oceania should be allowed to argue for a combination of four reasons. First, as explained in the next section of this judgment, it is determinative of this appeal, which means that if it cannot be argued, the wrong party would win. Secondly, if the point can be argued, the outcome of this appeal is just, when viewed overall (see para 43 below). Thirdly, although Oceania can be criticised for not pressing the issue in either court below, and for not raising the point in a respondent's notice in the Court of Appeal or at the preparatory stages of this appeal, it was raised in Oceania's pleaded case and (briefly) in argument in both courts below, and it was squarely identified in Oceania's written case before the Board. Fourthly, although the respondents have objected to the point being raised before the Board, none of them has identified any prejudice which would be caused to them as a result of the point not having been raised as clearly as it should have been below.

31. This fourth reason is crucial, and it is based on the point that the Chapter 187 issue simply involves an issue of interpretation of section 10. The Board was concerned that some point of Bahamian Registry or conveyancing practice might arise, upon which the views of the Bahamian courts would be of special value.

However, it has not been suggested that any such point would arise on this appeal, if the issue can be argued.

Oceania's argument based on Chapter 187: discussion

32. Oceania's case has been summarised in para 23 above. It is based on the proposition that the registering of, inter alia, an agreement for sale of land ("the relevant agreement") under section 10 will enable the relevant agreement to obtain priority over a subsequent conveyance of that land, even if that conveyance was effected pursuant to a contract entered into before the relevant agreement, provided that those contracts were not registered, or, if they were, that the relevant agreement was registered before those contracts. That raises a number of potential disputes.

33. The first dispute is whether section 10 applies to contracts to sell (or to lease or to grant interests in) land or whether it is limited to actual conveyances (or leases, or grants). The Board considers that the section does extend to such contracts. First, the natural meaning of the word "bargain" in section 10 is, or at least includes, a contract. The natural meaning is reinforced by the fact that it is hard to think what else would be covered by the word, given the other documents mentioned in the section. It is true that "bargain ... of any lands" is not a very happily worded expression if it is intended to cover a "bargain to convey any lands", but the expression is unhappily worded whatever its meaning.

34. Further, the 1996 Agreement in this case was recorded as registered by the Registrar General, and Mr Smith told us that contracts under which the prospective purchaser pays instalments, and completion only occurs when the last instalment is paid, are not uncommon in The Bahamas, and they plainly need to be protected by being recorded at the Registry, and they regularly are.

35. The second potential dispute (which was not raised by the respondents) is whether section 10 gives priority to a sale contract entered into after an earlier sale contract (which was itself not registered), and which is registered before the earlier sale contract is completed. That would seem to depend on the interpretation of section 10. In the Board's view, section 10 is worded in such a way as to demonstrate that priority is accorded to the first sale contract to be registered rather than the first sale contract to be executed. That seems to follow in particular from the phrases "such of the said conveyances [or] bargains ... as shall be first lodged ... shall have priority or preference", and "the estate [or] right ... of the vendee [or] grantee ... claiming under such conveyance [or] bargain ... so first lodged ... shall be deemed ... valid and shall in no wise be ... affected by reason of priority in time of execution of any other such documents".

36. The third potential dispute (which again was not raised by the respondents) is whether that conclusion applies to a case where the earlier sale contract is, as in this case, actually completed, albeit after the later sale contract has been recorded as registered. The Board finds it difficult to see how section 10 could, as a matter of language or logic, not apply to give the later sale contract priority. If the later contract has priority over the earlier contract before the earlier contract is completed, it is hard to see why that completion should make any difference. The Board refers again to the language of section 10 set out in the preceding paragraph, and notes that “bargains” and “conveyances” seem to be treated in an identical manner by section 10.

37. The Board would expressly leave open the question of what would have been the outcome in this case if the 1996 Agreement had not been registered until after the Conveyances had been completed – i.e. if the later contract was not recorded as registered until after the earlier contract had completed but before the consequent conveyance is recorded. The logic of the analysis so far would suggest that the 1996 Agreement would have priority, but that may be taking the literal interpretation of section 10 too far.

38. Whatever the correct analysis of section 10, the effect of the Board’s conclusion is that anyone who has (i) entered into a contract for the sale, lease or grant of an interest in or over land, or who has (ii) bought, leased or been granted an interest in or over land, would be well advised at once to register their contract, conveyance, lease or grant.

39. Reverting to the facts of this appeal, the Board considers that it follows from the above analysis of section 10 that, because it was recorded as registered before the Conveyances were entered into by the purchasers, and in the absence of registration of the contracts of sale into which they or their predecessors had entered, the 1996 Agreement has priority over the Conveyances.

40. The Board will accordingly humbly advise Her Majesty that Oceania’s appeal should be allowed on this ground.

Concluding remarks

41. One point which was not fully argued or considered is the precise effect of the Board’s conclusion in relation to section 10. In view of the language of section 10, the effect of the Board’s conclusion might be said to be that, as against Oceania, the Conveyances are ineffective or even void, with the result that WCE is obliged to convey the eleven lots direct to Oceania, in order to complete the 1996

Agreement. The alternative view would be that the Conveyances were effective, but that they were executed, and are now to be treated as, subject to the rights of Oceania under the (duly registered) 1996 Agreement. If the latter view is correct, then it is for the purchasers to convey their respective lots to Oceania directly.

42. In the absence of the point having been argued, the Board does not think it right to express a concluded view on this point. The order for specific performance will be made against WCE and the purchasers, and the most appropriate way of conveying the eleven plots to Oceania can no doubt be agreed between the parties, failing which any dispute will have to be resolved by Lyons SJ or another judge.

43. Viewed more broadly, the outcome of this appeal appears to the Board to be just. If the Court of Appeal's decision had stood, the purchasers would have acquired the eleven lots at a price which assumed that they were not served by any infrastructure, whereas the lots would be fully served by infrastructure installed at the expense of Oceania, who had done that work on the basis that it would own the eleven lots. In the light of the indemnity agreement, however, Oceania is effectively bound to compensate the purchasers for any damages which WCE (or Mr Marshall) would be obliged to pay them as a result of the breach of the contracts to convey the eleven lots (with good title), as Mr Smith was realistically and fairly disposed to accept.

44. Finally, although Oceania has succeeded on this appeal, the Board's provisional, albeit fairly clear, view is that there should be no order for costs. Although Oceania has won this appeal, not only did it lose on the point decided by the Court of Appeal, but the point upon which it has succeeded was not properly raised in a respondent's notice in the Court of Appeal or in the Statement of Facts and Issues before the Board. Accordingly, the Board's present view is that there should be no order for costs on this appeal, but if the parties wish to make submissions in support of a different costs order, they are free to do so.