[2013] UKPC 12
Privy Council Appeal No 0086 of 2011

JUDGMENT

Thomas Townsend & Therese Townsend (Deceased) (Appellants) *v* Persistence Holdings Limited (Respondent)

From the Court of Appeal of the British Virgin Islands

before

Lord Neuberger
Lord Clarke
Lord Sumption
Lord Hamilton (Scotland)
Sir Malachy Higgins

JUDGMENT DELIVERED BY LORD NEUBERGER ON

7 MAY 2013

Heard on 19 February 2013

Appellant	*Respondent*
James Guthrie QC	Gerard Farara QC
(Instructed by Charles Russell LLP)	(Instructed by Clyde & Co. LLP)

LORD NEUBERGER:

1. This appeal raises the question whether the appellant vendors were entitled to determine a contract for the sale of land in the British Virgin Islands, on the ground that a licence was not provided within twelve months to enable the respondent purchaser to be lawfully registered as the proprietor of the land.

The relevant facts

2. Thomas Townsend and his wife Therese Townsend were registered in the Land Register ("the Register") as the absolute proprietors of a property ("the property") consisting of a house and land known as parcel 29 of Block 3641A in the Beef Island Group registration of the B.V.I. During the early part of 2000, they entered into discussions with Austin Lopez, a resident of the United States, with a view to selling the property to his company, Persistence Holdings Ltd, a Turks and Caicos Islands company. Those discussions reached a successful conclusion, which (as the trial judge found) involved an arrangement whereby (i) the Townsends would sell the property, together with its contents, to Persistence for US$500,000, and (ii) works were to be carried out to the house by Mr Lopez and a further $325,000 would be paid by Persistence to the Townsends for supervising and assisting those works.

3. An attorney, Terrance Neale of McW Todman & Co, was instructed to prepare the contract of sale, and, on 28 April 2000, the Townsends and Mr Lopez visited him with a view to entering into a formal contract to record the first part of the arrangement. Earlier the parties had executed a so-called "promissory note" ("the note") to deal with the second part of the arrangement. The note (which was actually dated 28 April 2000) identified the property, the Townsends as the "Vendor", and Persistence as the "Purchaser", and was in the following terms:

> "For services rendered and other valuable considerations relating to supervisory control of renovations and additions to the property …the Purchaser agrees to pay to the Vendor the sum of $325,000.00 U.S. Dollars upon the British Virgin Islands Government approval and issuance of the Purchaser's license to hold the above described property."

4. The reference to a "Purchaser's license" was attributable to the fact that Mr Lopez and Persistence were not resident in the B.V.I., and therefore were not "belongers" within the meaning of section 2(2) of the B.V.I. Constitution. Accordingly, unless and until a Licence (a "Licence") pursuant to the Non-Belongers Land Holding Regulation (Chapter 122), was obtained from the

Governor to permit Persistence to be registered as the owner of the property, it would be a criminal offence for it to be so registered or for someone to hold the property on trust for Persistence. Before a Licence could be granted, Chapter 122 required the property to be advertised in a B.V.I. newspaper for four consecutive weeks to enable a belonger to match the agreed terms.

5. When the parties attended on Mr Neale on 28 April 2000, they executed a contract ("the contract"), under which the Townsends were "the Purchaser", and Persistence (acting through Mr Lopez) was "the Vendor". Clauses 1, 2 and 3 recorded that the Townsends agreed to sell, and Persistence agreed to buy, the property for $450,000, and the contents for $50,000, and that any mortgage would be discharged prior to completion.

6. Clause 4 of the contract required the Townsends to advertise the sale of the property "in four (4) consecutive issues of a newspaper of general circulation in the [BVI]". Clause 5 was in these terms:

> "The Purchaser … shall within fourteen days of the last such advertisement … apply to the Governor of the [B.V.I.] for a Non-Belongers Land Holding Licence to hold the Property and thereafter shall use his best endeavours and proceed with utmost diligence to obtain same … PROVIDED that if within twelve (12) months from the date hereof such licence has not been granted upon terms reasonably acceptable to the Purchaser or has been refused either party may by notice in writing to the other at any time thereafter terminate this Agreement and in the event of such termination the said purchase price of US$500,000.00 shall be returned to the Purchaser and neither party shall have any further obligation to the other hereunder and this Agreement shall become void."

7. Clause 8 provided for completion of the contract to take place "within 30 days of receipt by the Purchaser … that his application for [a] … Licence has been approved". Clause 9 of the contract stated that, on completion, (i) the Vendor would execute a transfer to the Purchaser or its nominee, (ii) all "taxes and other charges and outgoings referable to the property shall be apportioned … as at the date of completion", and (iii) title to the contents of the property would be "deemed to have been transferred ... to the Purchaser or his nominee" at the date of completion.

8. At the same meeting on 28 April 2000, three other documents were created. The Townsends executed and handed over to Mr Lopez two transfers of the property; one identified the transferee as Persistence and the other left the transferee's name to be inserted. These transfers were undated, although Mr Neale's attestation of the signatures on them was dated 28 April 2000. At that

meeting, the Townsends also signed a caution, which was in due course entered against the property on the Register, and Mr Lopez gave the Townsends a draft for $500,000, which in due course was used, in part, by the Townsends to pay off a charge over the property.

9. The sale of the property was duly advertised in accordance with the requirements of the legislation and clause 4 of the contract; no belonger came forward, and so an application for a Licence was made to the Governor.

10. Immediately after 28 April 2000, Mr Lopez embarked on a programme of substantial works ("the works") to the house, using a contractor recommended by the Townsends. Initially, the Townsends remained in occupation. However, Mrs Townsend fell ill, and she and her husband decided to go the United States so that she could have medical treatment. On 1 November 2000, the Townsends gave Mr Lopez a "Letter of Authorization" ("the authorisation"), which started by referring to the fact that the Townsends would be absent from the B.V.I. It then authorised Mr Lopez "to observe and direct the finishing construction phase of our home". It also permitted "Mr Lopez [and] his immediate family and friends [to] reside on [the property] during this time". The authorisation was said to be "effective as of November 1, 2000 until our return to the B.V.I. or transfer of ownership to Mr Lopez". The authorisation also referred to the fact that Mr Lopez and Persistence had applied for a Licence.

11. Thereafter, it appears that Mr Lopez moved into the property (although he remained based in the United States). He removed much of the furniture, selling some of it, with the Townsends' knowledge. He continued with the works; at the trial he told the judge that he estimated that he had spent around $1.25m on them.

12. No Licence was granted by 28 April 2001, when the year referred to in the proviso to clause 5 of the contract ("the proviso") expired, but things carried on much as before. From time to time, bills became payable in respect of the property, and they were paid by Mr Lopez, often following a direct request from the Townsends. For example, Indigo Association Limited, the company which managed the estate on which the property was situated, sent a demand to all residents for payments of management charges in respect of "the fiscal year 1 June 2001 to 31 May 2002", seeking $1464 from the Townsends; this demand was forwarded to Mr Lopez in May 2001, who agreed to pay it, and then no doubt did so. Having had his name added to the Townsends' insurance policy over the property, Mr Lopez renewed the insurance in his own name when it expired in August 2001.

13. On 29 October 2001, Mr Lopez wrote a fairly detailed letter to the Townsends, complaining about certain defects in the original construction of the property, and in the quality of the works. He suggested that the issues which he was raising were sufficiently grave to justify lawyers being instructed.

14. This led the Townsends to write to Mr Neale on 15 November 2001 stating that they "wish[ed] to revoke [their] consent to close on the sale of [the] property" in the light of "the lapse of more than twelve months time in acquiring [a Licence]". This letter also referred to the fact that Mr Lopez had "become dissatisfied with the property". The Townsends repeated their position to Mr Neale in a letter dated 2 January 2002. It is not clear if either of these two letters came to the attention of Mr Lopez or Persistence. However, a subsequent "notice of Termination" dated 21 February 2002, signed by lawyers acting for the Townsends, and formally seeking to implement the right of determination contained in the proviso, was undoubtedly received by Persistence and Mr Lopez a few days after it was written. This letter also (i) required Persistence and Mr Lopez to vacate the property and gave them 30 days to do so, and (ii) sought compensation from Persistence for the cost of reinstating the property.

15. This notice precipitated a letter from attorneys instructed by Persistence and Mr Lopez, effectively challenging the Townsends' right to determine the contract.

16. To complete the recital of the relevant facts, a Licence was finally issued by the Governor of the B.V.I. to Persistence on 13 August 2002.

The procedural history

17. Meanwhile, on 6 June 2002, the Townsends issued proceedings, alleging that the reality of the transaction was that the purchase price was $825,000, and that they were prepared to repay the $500,000 which had been paid, and seeking possession of the property on the ground that the contract had been validly rescinded as a result of their invoking the proviso.

18. Persistence defended the claim, contending in its defence that the transaction was as stated in the contract and the note, and challenging the right of the Townsends to possession of the property on various alternative grounds, including that title had in reality passed to Persistence on 28 April 2000, and that the Townsends had lost the right to rely on the proviso. Persistence also counterclaimed for completion of the contract, and registration as proprietor of the property.

19. The proceedings came before Rawlins J, who heard them over six days spread between September 2003 and February 2004. He gave a full and careful judgment on 6 May 2004. His conclusions were (i) the contractual arrangement was, as Persistence contended, accurately reflected in the contract and the note, (ii) subject to any question of estoppel, the Townsends were entitled to determine the contract in accordance with the proviso, and they did so in February 2002, but (iii) in all the circumstances, the Townsends were estopped from invoking the proviso. Accordingly, he dismissed the Townsends' claim, and gave judgment for Persistence on its counterclaim.

20. The Townsends appealed, and Persistence cross-appealed. Sadly, Mrs Townsend died before the appeal came on, and Mr Townsend continued the proceedings on his own. The Court of Appeal (Alleyne, Gordon and Barrow JJA) took the view that the whole proceedings were based on an illegality, as the arrangement contained in the note was a device to evade tax. Accordingly, without considering the substantive arguments, they gave judgment on 18 January 2006, dismissing both the appeal and the cross-appeal.

21. Mr Townsend appealed this decision to the Board, which, on 5 March 2008, advised that his appeal should be allowed, and that his appeal from the judge and Persistence's cross-appeal should be remitted to be heard by a differently constituted Court of Appeal – [2008] UKPC 15.

22. The appeal and cross-appeal were then heard by a Court of Appeal composed of Edwards, Baptiste and Thomas JJA on 20 July 2009. The Court of Appeal gave its judgment on 13 September 2010, effectively agreeing with the judge's analysis and his conclusions, for reasons clearly articulated by Edwards JA.

23. With the permission of the Court of Appeal, Mr Townsend now appeals to the Board.

The issues other than estoppel

24. Mr Townsend's appeal raises one point, namely that the judge and the Court of Appeal were wrong to conclude that the Townsends were estopped from invoking the proviso. However, on behalf of Persistence, Mr Farara QC raised two other arguments for supporting the ultimate conclusion reached by the courts below that Persistence was entitled to be registered as proprietor of the property. Those two arguments should logically be taken first.

25. Mr Farara's first argument was that, construed in its context, the proviso did not entitle the Townsends to determine the contract "at any time" once the 28 April 2001 passed without a Licence having been issued.

26. That argument faces the obvious problem that the plain and natural meaning of the proviso is that, if no Licence had been issued by 28 April 2001, then "at any time" thereafter, either party could determine the contract. The Board accepts that this plain and natural meaning can be said to result in rather harsh consequences for Persistence if, as was contemplated and indeed happened, it carried out work to the property (unless it would be entitled to recover compensation for any consequent increase in the value of the property). However, despite Mr Farara's arguments to the contrary, the Board is unable to accept that any other meaning can properly be given to the proviso.

27. His principal contention in this connection was that the proviso does not refer to a Licence being unforthcoming in the twelve-month period: it merely refers to a Licence being refused or a Licence being granted on terms unacceptable to Persistence. It seems to the Board clear, however, that if no Licence is granted, then (i) as a matter of ordinary language, "licence has not been granted upon terms reasonably acceptable to the Purchaser", and (ii) as a matter of commercial common sense, the parties cannot have intended that the completion of the contract could be extended indefinitely.

28. Furthermore, while the effect of the proviso may have turned out to be harsh on Persistence, it is by no means clear that that is how it would have seemed to the parties when they entered into the contract. They both may well have thought it very likely indeed that a Licence would be forthcoming within a year, and each of them may well have been prepared to take the chance that the other would not invoke the proviso if it took longer than a year. Mr Lopez may have considered that the Townsends would not want to forego their right to $325,000 under the note by determining the contract, and the Townsends may have thought it unlikely that Mr Lopez would be prepared to risk losing the benefit of the money he had put into the property by paying for the works of improvement.

29. Mr Farara's second point was more fundamental. He contended that the parties had, in reality, completed the sale and purchase of the property on 28 April 2000, or, if they had not, the transaction was in reality completed on 1 November 2000. Given that legal title remained in the Townsends (as they remained registered as proprietors from 28 April 2000) this argument really involves saying that there was an unconditional obligation on the Townsends to transfer the property to Persistence on 28 April or 1 November 2000.

30. It is true that the two traditional essential features of completion, namely the execution of the transfer and the payment of the purchase price, were effected on 28 April 2000. However, it seems to the Board clear that the parties intended the transfer of the property should only take place in accordance with clause 9 of the contract, and that this would not occur unless and until after the Licence had been obtained, a point which was also quite clear from clause 5, and indeed the terms of the note. If there had been an absolute obligation on the Townsends to transfer the property on 28 April 2000, it would have rendered clauses 5 and 9, and in particular the proviso, as well as the closing words of the note, meaningless. As the proviso makes clear, the $500,000, handed over on 28 April 2000 was to be returned by the Townsends if the contract went off. And the execution and handing over of the transfers provided Persistence with security for its contingent right to have that money returned.

31. As for what was agreed on 1 November 2000, it appears to the Board to reinforce, rather than to undermine, this conclusion. The terms of the authorisation made it clear that the Townsends, rather than Persistence, enjoyed the right to possession of the property, and that Persistence and Mr Lopez could only remain

in occupation until either the Townsends wanted to resume occupation, or the contract was completed. That is quite inconsistent with the property being held on a bare trust for Persistence, which is what Mr Farara's argument involves. It is also worth mentioning that, if the arrangement had involved the property being held on trust for Persistence from 28 April or 1 November 2000, that would have been technically unlawful under Chapter 122.

32. Accordingly, in agreement with the judge and the Court of Appeal, it seems to the Board that the only basis upon which Persistence can succeed in these proceedings is by establishing that the Townsends were estopped from exercising their right to invoke the proviso and put an end to the contract, as they purported to do on 21 February 2002.

The estoppel issue

33. There is no dispute as to the principles applicable to the argument in this case that the Townsends were estopped from invoking the proviso. The type of estoppel raised is estoppel by convention. Both parties accept that the Court of Appeal was right to cite Lord Steyn's summary of the relevant law in this connection in *Republic of India v India Steamship Co (No 2) ("The Indian Grace")* [1998] AC 878, 913E-F:

> "It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption … . It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted … that a concluded agreement is not a requirement for an estoppel by convention."

34. Mr Farara contended that the application of this approach to the present case justifies the conclusion reached by the courts below that the Townsends were estopped from invoking the proviso. However, Mr Guthrie QC contended that there was simply nothing in the evidence which justified that conclusion.

35. If one considers the period up to 1 November 2000, it seems to the Board that there was nothing which could begin to justify an estoppel argument. It is true that Persistence must have expended a substantial amount on the property in that period, but there was no possible basis upon which it could be said that this justified its raising an estoppel, as it was specifically contemplated that this would happen when the parties made their agreement, which included clause 5 of the contract and the proviso. The fact that Persistence paid over the full purchase price and the Townsends executed the transfers cannot help the estoppel argument

either: there can be no logical basis for saying that either, or both, of the parties were thereby disabling themselves from relying on the proviso, particularly as repayment of the $500,000 was specifically catered for in the proviso.

36. From 1 November 2000, things changed to the extent contemplated by the authorisation. However, it is impossible to contend that any of the terms of that document could give rise to an estoppel such as that found by the courts below. All it amounted to was a collateral arrangement whereby Persistence was permitted to occupy the property beneficially as a licensee, and a variation of the arrangement contemplated by the note, in that Mr Lopez was to supervise the works. The authorisation does not in terms say that the right of occupation could be determined if the contract determines, but it appears clear that this was the effect of the authorisation, as it would otherwise be perpetual. (Indeed, while it is unnecessary to decide the point, the right of occupation may well have been terminable at any time).

37. The fact that some of the chattels in the property were then disposed of by Mr Lopez with the knowledge of the Townsends may have involved a small implied amendment to the contract, but it cannot take the estoppel argument any further.

38. Once the 28 April 2001 came and went, Persistence's case becomes a little more attractive, at least in terms of commercial reality. Nonetheless, the plain effect of the language of the proviso was that, at least until a Licence was obtained, it would be open to either party at any time to determine the contract. Persistence was therefore "at risk", and could be said to have been a little rash, or optimistic, in continuing to carry out the works. Once again, any estoppel argument faces the problem that what happened is precisely what the contract envisaged would, or at least could well, happen.

39. One passage in the judgment of Rawlins J suggests that he may well have thought that the Townsends were under a duty to warn Mr Lopez of the risk that he was running in continuing the works after 28 April 2001. There can be occasions when one party to a contract has a duty to warn the other, but they are very unusual, and there appears to be no basis for imposing or implying such a duty on the Townsends in the present case. They had said or done nothing to lead Persistence to believe that they had abandoned, temporarily or permanently, their rights under the proviso, and they had no reason to think that Mr Lopez believed that they had. Not only was there no evidence or finding to suggest otherwise, but Mr Lopez never suggested that he believed that the Townsends had abandoned their rights under the proviso.

40. Mr Farara placed reliance on the payments which Mr Lopez or Persistence had made in respect of the property with the knowledge, or at the request of, the Townsends. In the Board's opinion, the fact that Persistence or Mr Lopez made those payments is plainly attributable to the fact that, under the authorisation,

Persistence had been permitted beneficially to occupy the property, albeit only as licensees. Because of that, it seems entirely sensible that Persistence should be responsible for the outgoings on the property during its period of occupation. There is therefore no basis for contending that the payments somehow justify the conclusion that the Townsends were estopped from invoking the proviso.

41. A variant on this argument was that, because, for instance, the management charges which Mr Lopez was asked to pay, and did pay, were for the year ending on 31 May 2002, the Townsends were estopped from implementing the proviso until that date. There is nothing in that point. As already explained, as between Persistence (or Mr Lopez), and the Townsends, the charges were reasonably payable by Persistence while the authorisation was in force. As the charges were due as an annual sum in advance, it was perfectly sensible for Persistence to pay the annual sum, no doubt on the basis that, if it had to vacate and the Townsends retook possession before 31 May 2002, they would refund a pro rata proportion of the charges. In any event, as already mentioned, no evidence was given by or on behalf of Persistence to suggest that it believed that the proviso would not be implemented by the Townsends for a period, let alone at all, as a result of Mr Lopez or Persistence having made these payments, or indeed for any other reason.

42. Accordingly, as Mr Guthrie submitted, there were simply no grounds for concluding that the Townsends were estopped from determining the contract as they did on 21 February 2002.

Conclusion

43. The courts below clearly had sympathy for Persistence, given the substantial amount of money which had been spent on the works. However, if there were any remedy available to Persistence, it would not lie in the estoppel found by the courts below. It may be that there would be, or would have been, a remedy in the form of a claim based on unjust enrichment (or restitution), in a sum equal to the increase in the value of the property attributable to the works carried out at the expense of Mr Lopez or Persistence.

44. It should be emphasised, however, that there may be substantive and procedural problems in relation to such a claim. Substantively, it is by no means clear, at least on the basis of the very brief argument advanced before us on the point, that, on facts such as those in the present case, a restitutionary claim could, as a matter of principle, succeed. Procedurally, it may well be that, given that such a claim has not so far been advanced, it would be barred on the grounds of issue estoppel, limitation, or laches.

45. As it is, the Board will humbly advise Her Majesty that Mr Townsend's appeal must be allowed. If they are unable to agree, the parties should make submissions in writing as to the terms of any order, including as to costs. However, it appears to the Board that the substantive part of the order should provide that, in

exchange for the repayment of US $500,000, Mr Townsend is entitled to possession of the property, as no other remedy is now sought.