[2014] UKPC 28
Privy Council Appeal No 0066 of 2013

JUDGMENT

Jamaican Redevelopment Foundation Inc (Appellant) *v* The Real Estate Board (Respondent)

From the Court of Appeal of Jamaica

before

Lady Hale
Lord Clarke
Lord Wilson
Lord Carnwath
Lord Hughes

JUDGMENT DELIVERED BY

Lord Clarke

ON

3rd September 2014

Heard on 12 March 2014

Appellant
Sandra Minott-Phillips QC
Maurice Manning Esq
Tavia Dunn
(Instructed by Myers, Fletcher & Gordon Solicitors)

Respondent
Peter Knox QC
Dr Lloyd Barnett
(Instructed by MA Law (Solicitors) LLP)

LORD CLARKE:

Introduction

1. This appeal raises questions of some importance arising out of the Real Estate (Dealers & Developers) Act 1987 ("the Act") in Jamaica. The relevant part of the Act is set out in the Annex to this judgment. It sets out a detailed scheme for the development of land in Jamaica. The critical provisions of the Act are section 26, especially section 26(1)(b) and (2) and section 31, especially section 31(5). The most important question in the case is what is the true construction of section 31(5) of the Act, which must of course be construed in its context.

The facts

2. On 17 March 1994 New World Development Corporation Limited ("the mortgagor") applied to the respondent ("the REB") to be registered as a developer in respect of a development scheme in Jamaica in respect of certain land ("the land"). The mortgagor borrowed a total of $14,800,000 from Horizon Merchant Bank and Horizon Building Society under various loan agreements ("the loans"). The loans were secured by first legal mortgages over 24 acres of land of which the mortgagor was the registered proprietor. The mortgages in favour of the Horizon companies were registered in 1994, 1995 and 1996. The loans were not advanced in connection with the construction of any buildings or works on the land. In 1996 the mortgagor requested and was granted several splinter titles by The Registrar of Titles ("the Registrar"). The three mortgages were registered on all the splinter titles. Three of those splinter titles are relevant to this appeal. As the Court of Appeal observed, there is no evidence in respect of the others.

3. The Horizon companies both failed and in 1999 the mortgages were assigned to Refin Trust Limited ("Refin") pursuant to the assignment to it of the mortgagor's debt. The assignment was registered on the title to the land on 3 February 2000. Refin thereafter assigned the debt and the mortgages to the appellant ("JRF"). That assignment was registered on 29 October 2003. Thereafter JRF was the first and only mortgagee of all the land, having succeeded to all the mortgages previously held by the Horizon companies.

4. The mortgagor, as the Court of Appeal put it, pursuing its own interests, offered a number of lots which formed part of a sub-division for sale without first discharging the mortgages securing the loans. As a registered developer under the Act, the mortgagor entered into prepayment sale contracts with various purchasers for several

of the lots. Under the prepayment contracts the mortgagor collected monies from the purchasers towards the purchase price. It was common ground between JRF and the REB that, as explained below, both the mortgagor's invitation to treat and its entry into the prepayment contracts were in contravention of the Act. In addition, the contracts were not in keeping with the proposed financing and payment plan that the mortgagor had declared and provided to the REB when it applied to be registered as a developer for the purpose of the particular development scheme.

5. The mortgagor defaulted in the repayment of the loans and in September 2006 statutory notices were sent by JRF to the mortgagor and its guarantors demanding payment of the sums outstanding and threatening realization of the security for recovery of the debt if no payment was made. Without JRF's knowledge or consent the mortgagor purported to lodge a charge in favour of the REB over four of the 40 splinter titles, including the three titles mentioned above, pursuant to section 31 of the Act, and collateral to the prepayment contracts entered into between the mortgagor and the purchasers of those four lots. It seems likely that the reason for the creation of the charge was that under section 31(3) of the Act the mortgagor, as developer, could not access deposits made by prepayment purchasers without creating such a charge. On 7 February 2007 that charge was registered on the titles of the four lots in favour of the REB. As the Court of Appeal noted at para 10, the charge specified that it was subject to the mortgages, which by then were held by JRF. The duplicate certificates of title of all the unsold sub-divided lots were in JRF's possession throughout and, accordingly, the registration was then effected only on the original certificates of title, which were kept at the Office of Titles.

6. The mortgagor did not repay the loans. So JRF exercised its power of sale under the mortgage in respect of the property comprised in the relevant certificate, which included the three lots. A sale agreement was concluded and a transfer executed and lodged with the Registrar on 13 November 2007. The Registrar refused to register the transfer and returned the documents to JRF on the ground that the consent of the REB was required. It was only then that JRF learned of the registration of the charge on the 4 lots in favour of the REB. The Registrar relied on section 31 of the Act and maintained that the charge to the REB ranked in priority to any of the other mortgages. The REB was unwilling to remove the charge or consent to the transfer unless JRF made arrangements to compensate the purchasers under the prepayment contracts. JRF then initiated these proceedings.

Sections 26 and 31 of the Act

7. Section 26(1)(b) and (2) and section 31(4) and (5) provide:

"26(1) A person shall not enter into a prepayment contract as a vendor in connection with any land which is, or is intended to be, the subject of a development scheme to which section 35 applies unless –

…..

(b) such land is free from any mortgage or charge securing money or money's worth (other than a mortgage or charge in favour of an authorized financial institution referred to in the proviso to subsection (5) of section 31); …

(2) Where a contract is entered into by a vendor in contravention of subsection (1) the purchaser or any person succeeding to the rights of the purchaser under the contract may, within such time as may be reasonable in the circumstances of each case, withdraw therefrom and recover from the vendor any moneys paid to him under the contract together with interest thereon computed from day to day at the prime lending rate of commercial banks in Jamaica for the time being prevailing as certified by the Bank of Jamaica, but without prejudice however to the provisions of section 44(2) (relating to the penalty for contravention of subsection (1) of this section).

31 …

(4) The charge mentioned in paragraph (b) of subsection (3) shall be a charge upon the land on which the building or works in question is being constructed in favour of the Board charging the land with the repayment of all amounts received by the vendor pursuant to the contract which shall become repayable by him upon breach by him of the contract.

(5) Such charge shall rank in priority before all other mortgages or charges on the said land except any charge created by statute thereon in respect of unpaid rates or taxes, and shall be enforceable by the Board by sale of the said land by public auction or private treaty as the Board may consider expedient:

Provided that where a mortgage or charge of the said land has been duly created in favour of an authorized financial institution to

> secure repayment of amounts advanced by that financial institution in connection with the construction of any buildings or works on the said land the charge created by this section shall rank *pari passu* in point of security with the mortgage or charge in favour of that authorized financial institution."

The decisions below

8. JRF succeeded before Mangatal J ("the judge") in the Supreme Court. In a judgment dated 12 May 2011 she found as a fact (at para 37) that the mortgagor infringed section 26(1) of the Act in that it entered into prepayment contracts at a time when the land was not free of JRF's mortgages, as required by section 26(1)(b). It followed that the mortgagor was prohibited from entering into a prepayment contract of sale. However, the judge held (at paras 40-41) that the contracts were not void because, under the express terms of section 26(2), the purchaser under such a contract has a power, within such time as may be reasonable in the circumstances of the case, to withdraw from it and recover from the vendor any monies paid under the contract together with interest. It is implicit (if not explicit) in that provision that, if the purchaser does not withdraw, the contract remains on foot. The judge held that the prepayment contracts were voidable but not void.

9. The judge further held (at paras 42-44) that the charge of the REB endorsed on the certificate of title was valid because none of the statutory exceptions to indefeasibility, such as fraud, had been alleged. It followed that JRF was not entitled to a declaration that the REB's charge was null and void or to an order that it be cancelled and struck off the register.

10. The question then arose whether the REB's charge ranked in priority to JRF's mortgage. The judge discussed this question in detail between paras 45 and 53 and held at para 52 that it did not. She made appropriate declarations. The REB appealed to the Court of Appeal. On 20 July 2012 the Court of Appeal unanimously allowed the appeal. Brooks JA gave the only substantive judgment, with which Harris P (Ag) and Dukharan JA agreed. The Court of Appeal made a declaration that the REB's charge ranked in priority to JRF's mortgage. On 27 May 2013 the Court of Appeal granted final leave to appeal to Her Majesty in Council.

The issues

11. The parties agreed that the Board should consider three issues as follows: (1) whether prepayment contracts entered into in contravention of any of the prohibitions set out in section 26 of the Act are illegal and, if so, whether they are void ab initio and unenforceable by either party, leaving the purchaser with the remedy provided by

section 26(2) of the Act; (2) whether prepayment contracts entered into in contravention of the Act can be the subject of a valid charge in favour of the REB; and (3) whether, on the facts of this case, the Act has the effect that the charge registered in favour of the REB and created subsequent to JRF's registered mortgage ranks in priority to that mortgage.

Issue (1) - Are illegal prepayment contracts void?

12. Both the judge and the Court of Appeal answered this question in the negative. It is submitted on behalf of JRF that they were wrong to do so. It relies in particular on section 26(1) of the Act, which prohibits a prepayment contract which does not comply with paragraphs (a), (b), (c) and (d) of that subsection. It also relies upon section 44(3), which provides that any person who, as the vendor, enters into a contract prohibited by section 26(1) commits a criminal offence for which he is liable on indictment to a fine or to imprisonment for a term not exceeding five years or both. It is therefore submitted that such a contract cannot have legal effect and must be both illegal and void.

13. The Board sees the force of that submission but is unable to accept it, essentially for the reason given by the judge. Both sections 26(1) and 44 are directed at the vendor of prepayment contracts. Section 26(2) proceeds on the express basis that, unless and until the purchaser or any person succeeding to the rights of the purchaser, withdraws from the contract, it is binding as between the purchaser and the vendor. The Board does not see how it can be held that, where the purchaser chooses not to exercise the right to withdraw, the contract is binding only on the vendor and not the purchaser. It must be binding on both. It certainly cannot be void ab initio.

Issue (2) – Can prepayment contracts entered into in contravention of the Act be subject to a valid charge in favour of the REB?

14. Section 70 of the Registration of Titles Act 1889 provides, so far as relevant:

> "Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land

> under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser:
>
> Provided always …."

15. In accordance with that provision, the ordinary position is that, subject to fraud (and any other statutory exception), mortgages rank in the order in which they are registered on the title. On the face of section 70, construed without reference to the Act, which was of course enacted many years later, the charge in favour of the REB is valid unless it was tainted by fraud. In the opinion of the Board, save in a case of fraud prepayment contracts entered into in contravention of the Act can in principle be subject to a valid charge in favour of the REB.

16. In all the circumstances, the Board answers the question posed by issue (2) in the affirmative. If the answer to issue (1) is correct and the answer to issue (3), namely that the mortgage in favour of JRF ranks in priority to that of the REB, is also correct, there is no reason why, in circumstances where the purchaser chooses not to exercise their right under section 26(2) so that the contract is valid (for the reasons given above), a chargee in the position of the REB should not be able to rely upon the charge, provided of course that it is not tainted by fraud.

Issue (3): Does the Act have the effect that the charge registered in favour of the REB and registered subsequent to JRF's registered mortgage ranks in priority to that mortgage.

17. The judge answered this question no, whereas the Court of Appeal answered it yes. It is common ground that, in considering the true construction of a statutory provision the starting point is the ordinary and natural meaning of the language used. The point made by the Court of Appeal and supported on behalf of the REB is that the language of section 31(5) is clear. It expressly provides that the REB's charge "shall rank in priority before all other mortgages or charges on the said land" and, while it identifies some exceptions, none of them applies here. On its face, that is a compelling submission.

18. It is submitted on behalf of JRF that it is not quite as simple as that. It is correctly submitted that all statutory provisions must be construed in their context and that the court must have regard to the statutory purpose both of the statute as a whole and of the specific provision in particular. It is submitted that section 31 must be construed in the

context of the statutory scheme created by the Act and, in particular in the context of section 26(1)(b), which expressly refers to section 31(5).

19. Under section 26(1)(b), a vendor is prohibited from entering into a prepayment contract unless the relevant property is free of any mortgage or charge. It seems to the Board that there were a number of policy reasons behind that prohibition. It would protect purchasers because they would have possession of property which was not encumbered by a prior mortgage or charge and it would protect existing mortgagees and chargees because they would have to be paid off in order that section 26(1)(b) could be satisfied.

20. The expression "all other mortgages or charges" in section 31(5) cannot be limited to all subsequent mortgages and charges because the exception in section 26(1)(b) excludes mortgagees and charges referred to in the proviso to section 31(5), which are those duly created in favour of authorized financial institutions to secure amounts advanced in connection with the construction of any buildings or works on the land. The purpose of the proviso is that claims under such mortgages and charges should rank pari passu with the charge conferred on the REB by section 31(4).

21. The effect of a construction of section 31(5) which demotes the priority of JRF's mortgage so that it ranks behind that of the REB is that it penalizes JRF without any identifiable justification. This would, in the opinion of the Board, be contrary to the scheme of the Act, which was that any mortgagee who had not advanced money in connection with the construction of any buildings or works on the land would be paid out in full before any prepayment contract was made. In these circumstances, the Board concludes that the expression "all other mortgages and charges" in section 31(5) means such charges as may (consistently with the scheme of the Act) remain to be considered but not those which section 26(1)(b) requires to have been discharged.

22. It appears to the Board that this approach receives some support from section 33 of the Act. By para (c)(ii) of section 33, the Act provides that, if the REB sells the land in order to enforce its charge, after applying the proceeds of sale (after expenses) in satisfaction of its own charge and that of any authorized financial institution with a charge which ranks pari passu (ie under the proviso to section 31(5)), it must thereafter apply the balance rateably to the person legally entitled thereto pursuant to the prepayment contracts. It appears to the Board that this is a further demonstration of the assumption made by the statute that a section 31(4) chargee such as the REB in this case would never be in competition with a mortgagee like JRF. That can only be achieved by construing section 31(5) as set out in para 21 above. The result is that such a mortgagee retains its priority under section 70 of the Registration of Titles Act 1889 quoted above.

23. In reaching the opposite conclusion the Court of Appeal, relied upon the statement of Lord Diplock, giving the judgment of the majority of the Board in *Baker v The Queen* [1975] AC 774 at 782E-G:

> "Where the meaning of the actual words used in a provision of a Jamaican statute is clear and free from ambiguity, the case for reading into it words which are not there and which, if there, would alter the effect of the words actually used can only be based on some assumption as to the policy of the Jamaican legislature to which the statute *was* intended to give effect. If without the added words, the provision would be clearly inconsistent with other provisions of the statute it falls within the ordinary function of a court of construction to resolve the inconsistency and, if this be necessary, to construe the provision as including by implication the added words. But in the absence of such inconsistency it is a strong thing for a court to hold that the legislature cannot have really intended what it clearly said but must have intended something different. In doing this a court is passing out of the strict field of construction altogether and giving effect to concepts of what is right and what is wrong which it believes to be so generally accepted that the legislature too may be presumed not to have intended to act contrary to them."

24. The Court of Appeal held (at paras 40-50) that this is a case in which that approach applied because the actual words used are clear and free from ambiguity and that none of the considerations which might have led to a different construction applied here. The Board respectfully disagrees. As already stated, section 31(5) must be construed in its context, which comprises the statutory scheme, especially section 26(1)(b). For the reasons given above, the Board is of the opinion that, unless section 31(5) is construed so that the expression "all other mortgages and charges" in section 31(5) means such charges as may (consistently with the scheme of the Act) remain to be considered but not those which section 26(1)(b) requires to have been discharged, it will be contrary to scheme of the Act and will also be inconsistent with the express provision in section para (c)(ii) of section 33 discussed in para 22 above.

25. For these reasons the Board will humbly advise Her Majesty to allow the appeal. At present the Board concludes that the order of the judge should be restored, but it invites the parties to agree a form of order to include the issue of costs. In the absence of agreement the parties should make written submissions on the form of order and costs within 21 days of the judgment being delivered.