Trinity Term
[2024] UKPC 18
Privy Council Appeal No 0078 of 2020

JUDGMENT

Frederick Donowa and 3 others (Appellants) *v* Donridge Heights Ltd (Respondent) (Trinidad and Tobago)

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

before

Lord Hodge
Lord Briggs
Lord Hamblen
Lord Stephens
Lord Richards

JUDGMENT GIVEN ON
27 June 2024

Heard on 14 May 2024

Appellant
Navindra Ramnanan
Riaz P Seecharan
(Instructed by Navindra Ramnanan (San Fernando, Trinidad))

Respondent
Did not appear and was not represented

LORD BRIGGS:

Introduction – the Facts

1. This appeal from the Court of Appeal of Trinidad and Tobago raises a single issue as to the true construction, or classification, of a written agreement ("the 2006 Agreement") made on 19 May 2006, relating to 30 acres of development land at St Rose Estate, Maraval ("the Property"). It was made between the appellants, described therein as "the Owners" and Greenfield Properties Ltd, described therein as the "Development Company" but referred to in this judgment as "Greenfield". The short but decisive issue is whether by the 2006 Agreement the appellants constituted Greenfield as their agents for the sale to purchasers of plots within the Property, developed or to be developed.

2. The relevant facts may be shortly described. The appellants are the children of Marion Donowa who died in September 1999. By her will she left the Property to her children, as part of a larger 70 acre plot. They decided to sell it all. After some time during which they were unsuccessful in achieving a sale, they were approached in 2005 by a Mr Howard John with a proposal that his company Greenfield would acquire and develop the whole of the 70 acre plot, but in stages, starting with the Property.

3. The 2006 Agreement provided for the development and on-sale in lots of the Property, and also for the survey and subdivision of the whole 70 acre plot. The development of the Property is described in the 2006 Agreement as "Phase 1". It will be necessary to describe the terms of the 2006 Agreement in detail in due course but, in outline, it provided for the appellants to receive the following payments from Greenfield for their interests in the Property:

a. TT$1,000,000.00, payable as to 10% within seven days of signing the agreement, and 90% within 90 days of the provision of certain "legal documents";

b. The balance of the market value of the Property in its undeveloped condition, payable in equal half-yearly payments thereafter;

c. 55% of the net profits of the development of the Property, payable on the completion of the development and settlement of final accounts.

The 2006 Agreement provided for Greenfield to receive a 10% fee based upon the value of the development work from time to time, together with 45% of the net development profits. Provision was made in the 2006 Agreement for the appellants to make the

Property available to Greenfield for development, free from encumbrances, and to execute transfers of legal title to lots within the Property to "end-owners". For its part Greenfield undertook to plan, finance and execute the development of Phase 1 and to manage, market and enter into sale agreements with willing purchasers for the developed parts of Phase 1.

4. Following entry into the 2006 Agreement the appellants were duly paid the TT$1 million part of what the agreement described as their "compensation", but have received nothing further. Thereafter in June 2008 Greenfield entered into contracts for sale prior to development of seven lots within the Property ("the 2008 Agreements"), each with the same buyer, namely the Respondent, Donridge Heights Ltd ("Donridge"), which paid Greenfield deposits of about TT$2.034 million in aggregate.

5. Greenfield then defaulted on its obligations both under the 2006 Agreement and under the sale contracts to Donridge. Development work ceased and Greenfield has since disappeared without trace. Donridge then sued Greenfield for damages for breach of the 2008 agreements. Having obtained a worthless default judgment against Greenfield, Donridge amended its claim to join the appellants, on the basis that the 2008 Agreements had been made by Greenfield as their agent, so that they were liable for breach of those agreements. No other basis than agency was advanced by Donridge against the appellants, and nothing other than the 2006 Agreement was advanced as the basis for that allegation.

6. After a trial in which the appellants were the active but unsuccessful defendants, Donridge obtained an order from Rajkumar J in October 2014 that the appellants pay damages of TT$2,457,770 together with interest and costs. Their appeal to the Court of Appeal (Mendonca, Jones and Pemberton JJA) was dismissed in October 2019, with costs. Both the courts below construed the 2006 Agreement as appointing Greenfield as the appellants' agent for the sales of parts of the Property. By their appeal (as of right) to the Board, the appellants challenge that conclusion.

7. The appellants were represented before the Board by Mr Navindra Ramnanan of counsel. Donridge has, although duly served, taken no part in the appeal to the Board. Nonetheless the Board has had the benefit of reading the judgments of both the trial judge and the Court of Appeal which, had it appeared, Donridge would no doubt have wished to uphold. Despite enquiry the Board did not receive any explanation for Donridge's absence. Nonetheless it has entertained the appeal on the same basis as if it had been opposed.

8. Both here and in the courts below the issue has been presented and argued as if the court had a binary choice of classifying the 2006 Agreement as either an agency agreement or a sale agreement. Mindful that there might be an undistributed middle

between those two polar opposites the Board briefly raised with Mr Ramnanan the question whether the 2006 Agreement might be classified as a partnership agreement for the development of the Property, or as some form of joint venture. His response, which the Board accepts, was that the assertion of liability against the appellants for breach of the 2008 Agreements has only ever been pleaded and advanced by Donridge on the basis of agency, so that it would now be too late for Donridge to advance an alternative claim based upon partnership, even if it were here to do so.

9. That said, the allegation of agency does not necessarily cover the whole of Greenfield's activities under the 2006 Agreement. It would be sufficient for the purpose of imposing joint liability upon the appellants (with Greenfield) for breach of the 2008 Agreements if the effect of the 2006 Agreement were to constitute Greenfield their agent for the making and performance of the 2008 Agreements. But that question cannot sensibly be addressed otherwise than by reference to the whole of the 2006 Agreement, properly construed.

The 2006 Agreement in Detail

10. For a substantial property development project the 2006 Agreement is surprisingly brief in its terms, and may conveniently be set out in full. Clause 1 contained the following recitals:

> "1.a) In August 2005, The Owners negotiated with the Developer, to develop 30 acres more or less of the property described in the Schedule Deed No. 1428/30 (attached), situated at St. Rose Estate, Maraval.
>
> b) Following several months of discussions between the Owners and the Developers, an agreement has been reached; and as a result of which substantial planning and positioning activities were undertaken by the Developers to secure key statutory approvals for the project.
>
> c) Both parties have agreed to engage the services of the Attorney David Hannays to formalise the said agreement, and to provide advice and possible support in the preparation of other documentation necessary for the execution of the project."

The operative part of the 2006 Agreement continued as follows:

“2. OWNERS OBLIGATIONS

The Owners shall:

a) Make the property available to the developer for development, free from all encumbrances, consistent with Town and Country Planning Approvals for Phase 1

b) Provide the Developers with the relevant legal instruments enabling them to effectively fulfil their obligations under this agreement.

c) Execute the transfers of the developed property to the end owner and all other documents necessary to achieve (a) and (b) above.

3. DEVELOPER’S OBLIGATION

The Developers shall:

a) Survey and subdivide the entire parcel of land consisting of 70 Acres

b) Conceptualise a development plan for the 30 Acres more or less, hereinafter referred to as Phase 1

c) Prepare and acquire approvals for Architectural and Engineering designs for Phase 1

d) Secure financing for the execution of the entire project

e) Execute the development works for Phase 1

f) Manage, market and enter into sale agreements with willing purchasers for the developed property in respect of Phase 1

4. COMPENSATION FOR THE OWNERS

- A sum of money equivalent to the market value of the land in its present undeveloped condition

- 55% of all net profits realized from the sale of the developed property after all costs associated with the development and sales have been accounted for and deducted and the accounts have been certified by a qualified independent accountant (hereinafter called the 'Net Profits')

N.B. all activities involved in the project will be costed at established market rates and validated by independent authorities/experts including the market value of Phase 1.

5. COMPENSATION FOR THE DEVELOPERS

- A development fee equivalent to 10% of the total project cost

- 45% of the net profits

6. PAYMENT FRAMEWORK

To the Owners:

a) An initial payment of TT$1,000,000.00 on the value of the property in its undeveloped state to be paid as follows:

(i) 10% within 7 days of signing of this Agreement

(ii) 90% within 90 days after the Developers receipt of the legal document referred to in Clause 2(b) above, which will enable them to proceed with their obligations under this agreement, time being of the essence

b) Five (5) equal half-yearly payments over the next two and a half (2 1/2) years, representing the agreed balance of the purchase price due to the Owners on the value of Phase 1 commencing 6 months from the date of payment as set out in a (ii) above

c) 55% of the net profit to be paid within 90 days of the final added accounts being recovered by the parties.

To the Developers:

a) The Developer will submit to the appointed Quantity Surveyor from time to time during the life of the project invoices for work done to date

b) The developer shall be entitled to a fee of 10% of the approved value of the work done to date on the project

c) 45% of the net profit to be paid within 90 days of the final added accounts being recovered by the parties.

IN WITNESS etc."

There follow two Schedules. The first describes the Property. The second appears to be a simple draft parcels clause for use in sub-sales of developed lots within the Property. Nothing turns on their content.

11. It is convenient now to describe what, had it been performed, the 2006 Agreement would have achieved for its parties. For the appellants (as Owners) it secured a disposal of the Property at a formula price consisting of the undeveloped market value of the Property (the 30 acres described as Phase 1) plus 55% of the net profit derived by the development of Phase 1 by Greenfield (as Developer), all payable in instalments following the making of the agreement. All those amounts other than the 55% profit share were payable pursuant to a time-frame which did not depend (in law at least) upon the achievement of any sub-sale of developed lots. Although not expressly stated it is clear that liability for those payments rested with Greenfield. By contrast payment of the 55% profit share depended on the carrying out of the development of the property, its division into lots and the sale of those lots to sub-purchasers. It also secured the survey and subdivision of the larger 70 acre plot, of which the Property formed part, but no disposal or development of it.

12. For Greenfield the 2006 Agreement secured access to the Property for a development of their choosing, the ability to subdivide it and sell it to sub-purchasers of their choosing, at prices also chosen by them. It committed the appellants to providing all necessary documents for that purchase, such as conveyances by way of sub-sale to buyers of the individual developed lots. The proceeds of the sub-sales were to be credited to the development fund from which the net profits of the development of Phase 1 were to be derived and shared, with Greenfield obtaining 45%, in addition to their 10% development fee. It is not clear that the appellants incurred any personal liability to pay anything to Greenfield. In the Board's view the 10% development fee was to come out of the development fund, ahead of the calculation and sharing of net profits.

13. It may be asked why the 2006 Agreement did not provide for a simple outright sale of the Property to Greenfield, leaving it free to achieve on-sales to sub-purchasers as they wished. The Board was told that this structure was designed to minimise the incidence of Stamp Duty, in particular on the sale of undeveloped land.

14. Standing back, (and leaving aside as unpleaded the possibility of partnership or joint venture), the relationship between the appellants and Greenfield constituted by the 2006 Agreement looks much more like that of vendor and purchaser than that of principal and agent. The appellants were achieving a disposal of their valuable development land for a price to be determined by a valuation formula coupled with a 55% net profit overage if Greenfield secured profitable sub-sales. Greenfield was achieving, up front, complete control over the Property, both for its development and on-sale, in return for paying a substantial part of the purchase up front, by instalments, ahead of any sale. All the risks of the development (including any net losses) were for Greenfield's account. Leaving aside the credit risk associated with payment of the purchase price by instalments (for which, apart from the 55% net profit share, they would have the benefit of an unpaid vendors' lien), the only risk for the appellants was that their 55% net profit overage might (as it did in the event) turn out to be worthless.

15. The tasks in clause 3 are stated as obligations and were imposed to create the possibility of a net profit. The clause did not confer powers which might point to agency. The conferring upon Greenfield of the task of contracting for sub-sales looks most unlike an agency, even if viewed on its own. Greenfield were apparently to have complete control over the selection of purchasers, the timing of sub-sales, the type and detail of the lot by lot development necessary to achieve the sub-sales and the fixing of the sub-sale prices. Nor was Greenfield accountable to the appellants for the proceeds of the sub-sales, save only by the net profit share.

16. Although the 2006 Agreement is not expressly labelled a contract of sale, or of agency, there are a number of tell-tale indications within it that it is in substance a sale, in addition to the clear impression to that effect derived from looking at the

consequences for the parties of its performance. Thus clause 2(a) requires the appellants to make the Property available to Greenfield free from encumbrances. This would be unnecessary if Greenfield was to be a mere agent. All that would be needed would be possession. Clause 2(c) requires the appellants to execute transfers of lots to end-owners. This is redolent of sub-sale rather than selling as beneficial owners. Above all, clause 6(b) refers to the "balance of the purchase price due to the Owners", a phrase clearly consistent with sale rather than agency.

17. An important feature of the 2006 Agreement is the insulation of the appellants from risk. The trial judge thought that, by contrast with agency, a sale would expose the appellants to the risk of non-payment by Greenfield but, with respect, he does not appear to have taken into account the protection afforded to the appellants by way of unpaid vendors' lien: see paras 16-21 of his judgment. This appears to have been a main ground for his finding of agency rather than sale.

18. Much of the reasoning of both the judge and the Court of Appeal appears to be reliant upon an assumption that, having retained legal title to the property, and not having been paid for it in full, the appellants must be taken to have clothed Greenfield with their authority to sell lots to end-users, thereby necessarily constituting Greenfield as their agent for that purpose. But the Board prefers the analysis that, despite deferment of part of the purchase price, the 2006 Agreement conferred immediate beneficial ownership of the Property upon Greenfield, which was free to develop, divide and on-sell it to sub-purchasers, like any buyer of land can do under an uncompleted contract for sale, with power (expressly confirmed by clause 2(c)), to direct to whom the appellants should transfer legal title, subject to their unpaid vendors' lien.

19. For those reasons therefore, the Board allows this appeal.