



Michaelmas Term
[2024] UKPC 38
Privy Council Appeal No 0086 of 2023

JUDGMENT

**Belitza Marling Sagaray Silva (Appellant) v Replay
Destinations (Bahamas) Ltd (Respondent)**
(Bahamas)

**From the Court of Appeal of the Commonwealth of
The Bahamas**

before

Lord Sales
Lord Leggatt
Lord Stephens
Lady Rose
Lady Simler

JUDGMENT GIVEN ON
28 November 2024

Heard on 10 October 2024

Appellant

Michael Scott KC

Linda Hudson

Marnique Knowles

(Instructed by Simons Muirhead Burton LLP)

Respondent

Raynard Rigby KC

Asha Lewis

(Instructed by Stephenson Harwood LLP (London))

LORD SALES:

1. This appeal is concerned with a contract for the sale of a penthouse apartment. The appellant purchaser (“the purchaser”) contends that it became clear that the respondent vendor (“the vendor”) was unable to give good title to the apartment and that as a result she was entitled to rescind the contract, which she did. The vendor contends that it was able to give the title to the apartment which the purchaser had contractually agreed to purchase and that she had no right to rescind the contract. For its part, the vendor has treated the purchaser’s purported rescission of the contract as a repudiatory breach which it has accepted and it has kept the deposit which she paid, as it maintains it is entitled to do. The resolution of the dispute depends upon the proper construction of the contract.

Factual background

2. The dispute is concerned with the apartment at Penthouse 901, One Ocean Condo Place Condominium, Paradise Island, The Bahamas (“the Apartment”). The Apartment is on the top floor of a condominium building (“the Building”) comprising a number of apartments arranged over several floors.

3. The title to the Apartment is in the form of what is sometimes referred to as strata title, namely a special form of title to land created for ownership of apartments in multi-storey buildings. This form of real property interest is governed by the Law of Property and Conveyancing (Condominium) Act 1965 (“the 1965 Act”). Title of this kind is defined by registration of a declaration made pursuant to the 1965 Act, which comprises detailed plans of the relevant property from which it is possible to determine with precision which apartment in a building is covered by the statutory title so registered.

4. The development to construct the Building was commenced by a developer according to detailed plans which identified the apartments which it was then proposed should be included in the Building. Those plans were used to register the titles for each apartment in the Building, including the Apartment at issue in this case. The plans included in the declaration made pursuant to the 1965 Act in relation to the Apartment (“the Declaration”) showed it as comprising 4,801 sq ft of living space. They showed it as having a sloping mansard roof.

5. The original developer ran into financial problems and sold the land to the vendor. The vendor substantially redesigned the Building and constructed it according to the new design. In particular, according to the new design the roof of the penthouse apartments on the top floor was to be raised into a flat rather than a sloping roof. This meant that what had previously been an attic area according to the original plans was made into an additional area of living space. The changes in construction of the Apartment meant that its living space, reflecting the new design, was increased to 6,165 sq ft.

6. The Declaration establishing the title to the Apartment was not amended to reflect the new design and construction. In similar fashion, other apartments in the Building were the subject of declarations pursuant to the 1965 Act to establish title to them according to the original design, which were not amended at the time of the redesign and construction by the vendor. However, it was anticipated that in due course the registered titles could and would be amended so that they would accurately map onto the apartments which had actually been built.

7. The vendor advertised the Apartment for sale as having living space of 6,165 sq ft in the redesigned configuration with a flat roof, at a price of US\$4,100,000. The purchaser inspected the Apartment while it was still under construction according to the new design and decided she wished to buy it.

8. The purchaser and her advisers and the vendor all appreciated that there was a mismatch between the living space area shown in the existing title, as set out in the Declaration, and the living space area according to the dimensions of the Apartment as it had actually been constructed. It was expected that at some point the Declaration would be amended to bring it (and the title which it created) into line with the dimensions of the Apartment as it had actually been constructed. It was not anticipated that there would be any significant difficulty in doing that. However, it was clear that any contract for the sale of the Apartment would need to specify the title to be conveyed at completion and (if that was to be the title set out in the Declaration) would have to allocate the responsibility for, and any risk in relation to, the making of an application to amend the Declaration to create title to 6,165 sq ft of living space at the Apartment. If the title to be conveyed at completion was the title set out in the Declaration, clearly that responsibility and risk would fall to the purchaser.

9. In the course of negotiations for the contract of sale, by an email dated 22 March 2018 the vendor's selling agent sent to the lawyers acting for the purchaser what were described in the email as "illustrative plans" of the Apartment to be used as Exhibit A in the contract of sale to be drawn up. The plans showed the Apartment as it had been constructed according to the new design, and indicated that it comprised a living space of 6,165 sq ft. The plans ("Exhibit A") did not set out detailed measurements of the property (as the plans attached to the Declaration had done). They bore a notice which stated "Important Note: All illustrations are conceptual and preliminary ... floor plans, elevations, designs ... and dimensions are subject to change without notice. Square footage and dimensions are estimated and may vary in actual construction ...". The indicative rather than definitive nature of Exhibit A was also apparent from their content, in that they showed a layout of amenities and furniture which was designed to inspire the imagination and to make the Apartment look attractive, but which would not be part of any sale of it.

10. By a contract of sale dated 19 July 2018 (“the Contract”), the purchaser agreed to buy the Apartment from the vendor and paid the vendor the stipulated deposit in the sum of US\$410,000. The Board refers to the relevant terms of the Contract later in this judgment. References below are to clauses of the Contract, unless otherwise indicated. In the Contract the Apartment was called “the Unit” (see clause 1(a)).

11. Clause 4(b) provided that the vendor was to provide a title insurance commitment from an identified insurance company, Insurance Data Management Inc (“IDM”), for the amount of the purchase price which was to “evidence that [the vendor] is vested with fee simple title to the Unit, free and clear of all liens, charges, encumbrances, exceptions, or qualifications whatsoever save and except for the Permitted Exceptions”, which were set out in Exhibit C to the Contract. Clause 4(b) made provision for the purchaser to object to the title insurance commitment if it had grounds to do so, according to a prescribed timetable, and to withdraw from the Contract.

12. On 15 August 2018 the purchaser, the vendor (acting by its agent) and IDM entered into an Undertaking & Gap Indemnity Agreement under which, in consideration of IDM’s promise to issue a title insurance policy upon completion as required by clause 4(c) of the Contract, the vendor undertook, among other things, to provide promptly “duly executed documents stamped and lodged for recordation with [the registrar of titles under the 1965 Act]” for amendment of the Declaration to reflect its actual construction according to the new design, and provide IDM with copies of them.

13. The Contract was due to be completed on 28 August 2018, but included provision for that time to be extended. The Contract was not completed by that date.

14. On 8 February 2019 the purchaser issued a notice to complete, identifying certain matters which she maintained needed to be sorted out for completion to proceed.

15. On 28 February 2019 the purchaser provided the vendor with a title insurance commitment document from IDM. This set out a commitment to insure title to the Apartment as set out in the Declaration, and was stated to be subject to satisfaction of various requirements. Those requirements included amendment of the Declaration “to incorporate physical changes to the [Building] and units”.

16. IDM then indicated that the latter requirement was not one which it wished to impose as part of its title insurance commitment. For reasons which are not clear to the Board, but which do not require investigation for the purposes of determining the appeal, this caused the purchaser to maintain that the vendor would not give good title to the Apartment on completion. By an email dated 1 March 2019 sent on behalf of the purchaser, she purported to rescind the Contract.

17. In response, the vendor maintained that it was willing and able to give good title to the Apartment, according to what had been agreed in the Contract, and that the purchaser was not entitled to rescind.

18. On 29 May 2019, the purchaser commenced these proceedings by issuing a claim for a declaration that she had validly rescinded the Contract and for repayment of the deposit. The vendor has defended the action by maintaining that the purchaser was not entitled to rescind the Contract and that it is entitled to keep the deposit.

19. In a separate development, the company which manages the Building sought to amend the statutory declarations setting out title to the apartments in the Building to bring them into line with the dimensions of the respective apartments as actually constructed according to the new design. For reasons which do not require to be investigated, the purchaser opposed such an amendment in relation to the Apartment. Legal proceedings ensued, resulting in an order being made for amendment of the respective declarations, including the Declaration, to reflect the dimensions of the actual construction: *One Ocean Association v Qamea Stanley Ltd* 2020/CLE/gen/00385, (unreported) 20 December 2021.

The proceedings below

20. The action was tried before Klein J. In a careful judgment dated 24 February 2022 he found in favour of the vendor and dismissed the purchaser's claim. He correctly observed that the case turned on the correct interpretation of the Contract, in particular clause 1(a). He held that, based on the natural and ordinary meaning of the words in that provision, the correct interpretation of the Contract was that the vendor contracted to convey to the purchaser its existing legal title in the Apartment, as defined in the Declaration. The vendor had at all times been ready, able and willing to convey that title.

21. The purchaser appealed. She contended that the judge had been wrong in his construction of the Contract and that, properly interpreted, the vendor contracted to convey an expanded title to the Apartment (to be reflected in amendments to the Declaration) which corresponded with its actual construction and the plans in Exhibit A. The vendor was not in a position to convey such a title, therefore she had been entitled to rescind the Contract and her deposit should be repaid.

22. In her grounds of appeal the purchaser included further points which had not been raised before the judge. She sought to argue that the Declaration was invalid, according to the terms of the 1965 Act, because it reflected a markedly smaller living space than that of the Apartment as it had actually been constructed; therefore, the vendor could not give good title by reference to the Declaration. She also sought to argue that insofar as the Contract was to be construed as allowing the vendor to avoid giving good title at completion to the Apartment as constructed and as shown in Exhibit A, and as permitting

the vendor to forfeit the deposit, it would be unenforceable against the purchaser pursuant to the Unfair Terms in Consumer Contracts Act (Chapter 337B).

23. On the principal issue in the case, regarding the interpretation of the Contract, a majority of the Court of Appeal (Isaacs and Crane-Scott JJA) upheld the judge's judgment. The President, Sir Michael Barnett, dissented: in his view, on the proper construction of the Contract, it provided for sale of the Apartment as shown in Exhibit A (with living space of 6,165 sq ft), and the vendor was unable to give good title for that because its only title was that in the Declaration, which was for a lesser area of living space (4,801 sq ft).

24. The Court of Appeal dismissed the purchaser's further grounds of appeal on the basis that the points covered by them had not been raised before the judge.

The issues before the Board

25. The purchaser has raised six grounds of appeal before the Board. The first two concern the same point as was in issue before the judge, namely the proper construction of the Contract. The third and fourth grounds seek to raise the issue of the validity of the Declaration, which was not an issue before the judge and which the Court of Appeal held could not be relied on before them. The fifth ground seeks to raise the issue of the application of the Unfair Terms in Consumer Contracts Act, which likewise was not an issue before the judge and which the Court of Appeal held could not be relied on before them. The sixth ground seeks to raise a new point, which was not raised before either the judge or the Court of Appeal, namely that those courts ignored the fact that a decree of specific performance was not available to the vendor as it did not have a good and marketable title for the Apartment as represented in Exhibit A.

26. The vendor objected to the introduction of the third to sixth grounds of appeal at this late stage. The purchaser required the permission of the Board to introduce on appeal any issue not raised at first instance and, for that reason, not permitted to be raised in the Court of Appeal or, in the case of the sixth ground, not raised in either court.

27. Mr Michael Scott KC, for the purchaser, did not set out any submissions in his written case as to why the purchaser should be permitted to raise the third to sixth grounds of appeal before the Board. Nonetheless, at the outset of the hearing the Board gave him the opportunity to make an application for permission to do so. He advanced no sound reasons why permission should be granted. Therefore, the Board refused his application and indicated that the appeal would be limited to the question of the proper construction of the Contract, as was covered by the first two grounds of appeal.

28. As regards the third to fifth grounds of appeal, these were not pure points of law, but would have required further investigation of the facts at trial, so that it would have been inappropriate and unfair to the vendor to allow them to be raised as issues on the appeal. In addition, they sought to raise matters of local law on which the Board would have benefited by having full judgments from the lower courts; so again it was not appropriate to allow them to be raised on the appeal to the Board.

29. Mr Scott accepted that the sixth ground was entirely dependent on the purchaser being successful on her case in relation to the construction of the Contract, so in the Board's view it was inappropriate to allow it to be raised on the appeal both because it had not been raised at all in the lower courts and it was far too late to raise it at this stage, and because it was an unnecessary distraction which on analysis added nothing to the purchaser's case.

30. Therefore the appeal proceeded to examine the sole relevant issue, namely the proper construction of the Contract.

Analysis

31. The critical term of the Contract is clause 1(a). Clause 1 has the heading "Purchase and Sale". Clause 1(a) sets out what is being bought and sold. It provides:

"For the consideration and subject to the terms and conditions set forth herein Purchaser agrees to purchase from Seller, and Seller agrees to sell to Purchaser the fee simple estate in possession of, in, and to Unit 901, ('the Unit') in One Ocean Condominium, Paradise Island in the Commonwealth of The Bahamas ..., together with an appurtenant 2.06% unit entitlement in the common property of the Unit the location, layout, configuration and dimensions of which Unit are shown on the several plans and diagrams attached hereto as Exhibit 'A'. The legal description of the Unit shall be in accordance with the plans attached to the Declaration of Condominium ('the Declaration of Condominium') for Ocean Place on the Harbour Condominium. The Declaration of Condominium is available for review at the sales and marketing office of the Seller."

32. It can be seen that clause 1(a) refers to two sets of plans: those attached to the Contract as Exhibit A and those attached to the Declaration. Those plans set out different

areas of living space. The question is, which set of plans defines the title which the vendor contracted to sell to the purchaser?

33. In the Board's view, in agreement with the judge and the majority in the Court of Appeal, on a proper objective construction of clause 1(a) the obligation of the vendor to convey title to the Apartment is defined by reference to the plans attached to the Declaration, not those in Exhibit A. This is clear from a number of matters:

(i) Clause 1(a) expressly states that "the legal description" of the Unit (that is, the Apartment) shall be in accordance with the Declaration plans. In the Board's view, "the legal description" refers to the precise legal parameters of the legal title which the vendor has agreed to sell and the purchaser has agreed to buy.

(ii) The use of the future tense in the second sentence of clause 1(a) ("the legal description of the Unit shall be in accordance with the plans attached to [the Declaration]") indicates that it is directed to defining the title which the vendor is obliged to convey to the purchaser when the time for completion comes. It marries up with clause 1(c), which states "[i]t is agreed that the Seller will convey the fee simple estate in the Unit to the Purchaser subject to and in accordance with this agreement on the Closing Date ...". By contrast, the first sentence of clause 1(a) is in the present tense and serves only to give a general description of what is agreed to be bought and sold.

(iii) The reference in the second sentence to "the plans attached to [the Declaration]" is clear and precise as to what is being referred to, as one would expect in an elaborate and lengthy document such as the Contract, drafted by lawyers. By contrast, the reference to Exhibit A in the first sentence is more vague and imprecise ("the several plans and diagrams attached hereto as Exhibit A"). Given the choice which has to be made between them as to which set of plans defines the precise obligation assumed by the vendor, it is clear that the plans attached to the Declaration are those which the parties understand have the requisite precise form.

(iv) That impression is also supported by reference to the respective sets of plans. Those attached to the Declaration are survey plans which give precise dimensions, as appropriate for a document providing a formal definition of title pursuant to the 1965 Act. Those which form Exhibit A are not survey plans and do not set out precise dimensions. Further, as the parties to the Contract knew, when the Exhibit A plans were provided they were described as being "illustrative", which would be an inappropriate description of a document intended to provide a precise definition for the purposes of setting out the legal obligation of the vendor. Moreover, they were marked on their face as being "conceptual and preliminary"

and subject to change; and they were clearly illustrative by their nature and content: see para 9 above.

34. The high point of the purchaser's case is that clause 1(a) includes reference to the plans in Exhibit A. But, as noted, clause 1(a) refers to two different sets of plans, only one of which can be authoritative to define the extent of the vendor's obligation assumed under the Contract. In the Board's view, since that choice has to be made, it is clear that the plans attached to the Declaration are those which fulfil that definitional purpose. It is difficult to see what other purpose is served by the reference to the Declaration plans in clause 1(a).

35. On the other hand, the reference to the Exhibit A plans serves different relevant purposes in the context of the Contract. First, they identify in general terms the Apartment which is being sold so as to make it clear that, if and when the Declaration is amended to reflect the dimensions of the Apartment as it has been constructed, it is the purchaser who will be entitled to hold that amended title. That is very different from saying that the vendor had an obligation to secure amendment of the Declaration before completion of the Contract, so as to be able on completion to convey title according to a formally registered new Declaration which had created such an expanded version of title. Secondly, the Exhibit A plans identify the construction works in relation to the Apartment in respect of which the vendor gives warranties of quality under clause 7.

36. As mentioned above, the parties were aware at the time of making the Contract that there was a mismatch between the living space area shown in the title document registered in the form of the Declaration and the living space area of the Apartment as constructed. The purchaser could therefore have insisted upon incorporating terms in the Contract which imposed obligations on the vendor to procure amendment of the Declaration in advance of completion and then to convey the amended title upon completion. But there was nothing to that effect. The natural objective reading of clause 1(a) against this background is that the vendor agreed that at completion it would convey the title it had as set out in the Declaration, as explicitly referred to in the clause, which was that which was already in existence and hence available for review at the office of the vendor as stated in the final sentence of clause 1(a). But the parties expected that in due course after completion the purchaser would be able to arrange for amendment of the Declaration, thereby creating a new title to the Apartment showing the extended living area, and that the purchaser would be entitled to that title without further payment or any argument or claim being made in respect of any part of it by the vendor.

37. This natural reading of clause 1(a) is supported by other features of the Contract, whereas the contrary interpretation proposed by the purchaser is not supported by any other significant matters:

(i) Clause 1(a) refers to the purchaser acquiring an appurtenant 2.06% unit entitlement in the common property of the Unit (meaning in that context the Building). Such a unit entitlement is calculated pro rata according to the ratio of the unit's area to the area of the Building as a whole. It is agreed that the 2.06% entitlement reflects the area of the Apartment reflected in the Declaration plans (and that is expressly explained in clause 11(f)(ii)), not the area reflected in the Exhibit A plans. This would make no sense if the obligation of the vendor was to convey title according to the Exhibit A plans.

(ii) Clause 3 includes the statement, "(v) Purchaser acknowledges that the [Declaration] may be subject to amendment and that Purchaser will be bound by any such amendments, which in many instances may be effected whether or not Purchaser has consented to the amendment". This provision contemplates amendment of the title set out in the Declaration after completion and stipulates that the purchaser accepts she will be bound by such later changes in the formal statement of title in respect of the Apartment. That supports the vendor's case that it is the title according to the Declaration which is to be conveyed at completion, with amendment of the title to bring it into line with the dimensions of the Apartment as constructed to follow thereafter. It is a provision which has no purpose and makes no sense on the purchaser's proposed interpretation of the Contract.

(iii) The final sentence of clause 3 states, "Upon taking title to the Unit, Purchaser agrees to be bound by and comply with the terms, conditions and obligations set forth in [the Declaration]". This plainly contemplates that the title to the Apartment which is to be conveyed at completion is that in the Declaration, not in an amended form of declaration as the purchaser contends.

(iv) Clause 4(a) states that at completion the vendor shall convey to the purchaser "good fee simple documentary title to the Unit" subject to, among other things, "those title exceptions and other matters set forth in Exhibit 'C' to this Agreement". Exhibit C sets out a list of permitted exceptions which includes the items "Survey Plan" and "Declaration of Condominium" (ie the Declaration). Both exceptions mean that the obligation of the vendor with regard to completion is defined by reference to the Declaration and the plans attached to it, since the only candidate to be the "survey plan" is the detailed survey plan attached to the Declaration.

(v) By clause 11(f)(i) the purchaser acknowledged and agreed that "the area of the Unit set forth in [the Declaration] may immaterially differ from the actual area of the Unit as a result of variation during the construction of the ... structure of [the Building]". This shows that the parties contemplated that there was a difference between the area shown in the title document and the actual area of the

Apartment as constructed and regarded this as acceptable; and since the parties knew about and contracted on the basis of the actual mismatch between the living area shown in the Declaration and the living area of the Apartment as it was constructed the difference between them was not to be regarded as material for the purposes of the Contract.

(vi) Clause 11(f)(iii) provided that if there were “(in Seller’s opinion) a marked variation with respect to the discrepancies mentioned in clause 11(f)(i) ... then the stated Unit area and Unit entitlement as contained in [the Declaration] shall prevail”. This indicates that the Declaration was to provide authoritative guidance regarding the area of the Apartment under the Contract for some purposes, which would not make sense if the intention had been for the Declaration to have been superseded by a new, amended version by the date of completion, as would be the case under the purchaser’s proposed interpretation of clause 1(a).

(vii) The summary of terms set out at the beginning of the Contract, headed “Schedule of General Terms”, describes the condominium unit being sold as that which “is described on the plans attached to [the Declaration]”. Such a specific designation of the property being sold by reference to the Declaration supports the vendor’s proposed interpretation of clause 1(a).

38. Against these points, Mr Scott sought to rely on matters which had occurred after the making of the Contract, including what had been done pursuant to clause 4(b). The Board is by no means persuaded that such matters would, if relevant, support the purchaser’s case on construction of the Contract. For example, it appears that the insurance commitment provided by the vendor pursuant to clause 4(b) was framed by reference to the title set out in the Declaration, not by reference to any new and extended version of it: para 15 above. Also, the undertaking referred to in para 12 above contemplated that at completion it would be the title set out in the Declaration which was conveyed, with amendment of it to follow thereafter. But it is not necessary to examine these matters in detail, because according to the orthodox approach to interpretation of a contract, events occurring after the making of the contract are not relevant to determining its meaning.

39. In the Board’s judgment, the text of clause 1(a) and all the other textual indications in the Contract point clearly to the conclusion that the interpretation of clause 1(a) given by the judge and the majority in the Court of Appeal is correct.

Conclusion

40. For the reasons given above, the Board will humbly advise His Majesty that the appeal should be dismissed.