Hilary Term
[2017] UKPC 4
Privy Council Appeal No 0044 of 2016

JUDGMENT

Grove Park Development Ltd (Appellant) *v* The Mauritius Revenue Authority and another (Respondents) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Neuberger
Lord Wilson
Lord Sumption
Lord Carnwath
Lord Hodge

JUDGMENT GIVEN ON

27 February 2017

Heard on 8 February 2017

Appellant
Mrs Urmila Boolell SC
Ms Cristelle Parsooramen

(Instructed by ENSafrica
(Mauritius))

Respondents
Philip Baker QC
Rajeshsharma Ramloll SC
Imran S Afzal
(Instructed by Royds Withy
King)

THE JUDGMENT OF THE BOARD WAS DRAFTED BY LORD WILSON:

1. Grove Park Development Ltd ("the company") appeals against the order made by the Supreme Court of Mauritius (Caunhye and Fekna JJ) on 23 October 2015, by which it set aside the company's application for judicial review. By its application, the company had sought, in particular, that the court should quash a demand made by the second respondent, the Registrar-General, in a letter dated 28 October 2011 that the company should pay duties, taxes and penalties totalling Rs 45,285,600.

2. The issue before the Board originated in the world-wide financial crisis in 2008. The government of Mauritius sought to do all in its power to protect the island from it. In October 2008 it introduced what it described as a stimulus package of measures. But it soon resolved to introduce additional measures. It explained its proposals in a document entitled "Additional Stimulus Package: Shoring up Economic Performance" dated 20 December 2008.

3. In the document the government described one proposed additional measure as follows:

> "As an exceptional measure to help the construction industry, the land transfer tax and registration duty will be suspended for the period 1 January 2009 to 31 December 2010 for approved projects undertaken by developers to be registered with the MRA in respect of land for a development project, provided at least Rs 50m of construction works are *completed* before 30 June 2011."

The emphasis given to the word "completed" has been supplied by the Board, as will be any emphasis given to any word in any subsequent part of this judgment.

4. The additional measures proposed in the document were brought into law by the Additional Stimulus Package (Miscellaneous Provisions) Act 2009 ("the 2009 Act"). The recital to it explained in terms that its purpose was to provide for the implementation of the measures contained in the document. The 2009 Act implemented the particular measure described in the above quotation by section 8(b)(ii), which added new subsections, numbered (27) to (33), to section 161A of the Income Tax Act ("the Act").

5. The new subsection (27) provided that, if a company wished to secure exemption from liability to pay the tax and the duty, it should register with the Director-General of the first respondent, the Mauritius Revenue Authority ("the authority").

6. The new subsection (28) provided that registration should be subject to three conditions. The second, at (b), was that:

> "the total costs of construction of the buildings under the project exceed 50m rupees by 30 June 2011;"

The third, at (c), was that, at the time of registration, the company should submit specified details of the proposed development.

7. The new subsection (29) provided that the costs of construction which, by subsection (28)(b), were required to exceed Rs 50m by 30 June 2011 should not include the costs of ancillary infrastructure works such as roads, walls, drains, landscaping and utility services.

8. The new subsection (31) provided that, where a company was registered with the Director-General under subsection (27), he should issue to it a certificate of registration on such terms and conditions as he may determine.

9. The new subsection (32), headed "Monitoring costs of construction of building", provided that, following registration, the company should notify the Director-General of the date on which construction started and should

> "(b) submit to the Director-General, a report from a quantity surveyor certifying the progress of works and the costs of construction works *completed*, not later than 15 days after each period of six months from the beginning of the construction."

10. The new subsection (33) provided that the Director-General should notify the Registrar-General whether the company had or had not satisfied the condition specified in subsection (28)(b), (which the Board will describe as "the statutory condition").

11. The 2009 Act, by section 11(b), also added subsections (5) to (8) to section 45A of the Land (Duties and Taxes) Act.

12. The new subsection (5) provided that, if in 2009 or 2010 land was transferred to a company registered under section 161A(27) of the Act for the construction of a building, it should be exempt from land transfer tax and registration duty.

13. The new subsection (7) provided that, if he was notified by the Director-General that a company had not satisfied the statutory condition, the Registrar-General should claim from the company the duty and tax from which it had been exempted, together with penalties of 20% of their amount.

14. So in the present case the following steps were taken.

15. On 11 November 2010 the company registered with the Director-General a construction project, namely that on land at Sodnac, in Quatre Bornes, it would build apartment blocks to be known as Hillcrest Park Apartments.

16. On the same date the Director-General issued a certificate to the effect that the company's construction project had been registered. The certificate was expressed to be subject to conditions. Part of one condition represented a slight deviation from the requirement in section 161A(32)(b) of the Act and may have been prompted by the shortness of time between 11 November 2010 and 30 June 2011. It required the company to

> "submit to the Director-General, not later than 15 days after the end of every six months [a] report from a quantity surveyor certifying the progress of works and the costs of construction works *completed*, the first report being submitted after construction of the building has started."

The second condition provided:

> "if the company ... fails to satisfy the condition relating to the *completion* of Rs 50m of construction works ... on or before 30 June 2011, the Director-General shall [notify] the Registrar-General."

17. By letter dated 11 March 2011, consultants wrote on behalf of the company to Mr Mooroogan, a quantity surveyor, asking him to submit a fee proposal for providing quantity surveying services to the project. It said that one of his functions would be to

"Prepare QS Certificate of the total costs of construction for works *executed* as at 30 June 2011."

Mr Mooroogan's fee proposal was accepted.

18. In the middle of April 2011 the company began its works of construction at Sodnac.

19. By letter to the company dated 30 May 2011 the authority asked it to submit a quantity surveyor's report certifying "the progress of the works and the costs of construction works completed by 15 July 2011 at latest".

20. With a letter to the authority dated 12 July 2011 the company enclosed a certificate signed by Mr Mooroogan that, as at 30 June 2011, 14.33% of the project was completed and that, as at the same date, the cost of construction works was Rs 58,887,569.30 inclusive of VAT paid.

21. With a letter to the authority dated 21 July 2011 the company, responding to a request by the authority made perhaps by telephone, enclosed a breakdown prepared by Mr Mooroogan of the total figure which he had certified as the cost of the construction works. One component of the total figure was said to be "Materials on site ... [Rs] 10,091,880". It is easy to see that, were it necessary for that component to be deleted, the total would be less than Rs 50m.

22. By letter to the company dated 16 September 2011 the authority stated that the value of materials on site could not be included in the costs of construction as at 30 June 2011 and that the Director-General would notify the Registrar-General, as he soon did, that the company had not satisfied the statutory condition.

23. By letter to the company dated 28 October 2011 the Registrar-General made the demand to which the Board has referred in para 1 and which precipitated these proceedings.

24. A condition of the company's exemption from duty and tax, as set out in section 161A(28)(b) of the Act, was therefore that "the total costs of construction of the buildings under the project exceed 50m rupees by 30 June 2011". The question before the Board is whether the Supreme Court was correct to hold that the phrase "the total costs of construction of the buildings" did not include the cost of materials on site. If the phrase were, however, to include that cost, the Registrar-General's demand dated

28 October 2011, together with the decision of the authority set out in the letter dated 16 September 2011 upon which the demand was based, would fall to be quashed.

25. Mrs Boolell, on behalf of the company, stresses that the statutory condition does not state that construction of the buildings had to be "completed" before their costs could be included in the requisite computation. She says that the materials on site on 30 June 2011 had been duly purchased by the company for Rs 10,091,880 and were in due course to be used in further construction of the buildings, with the result that the cost of them was part of the cost of their construction.

26. One might conclude that the phrase "construction of the buildings" in the statutory condition referred to buildings which had been constructed. But, to the extent that there is any doubt about the meaning of the condition when considered alone, it is banished by construing it in its statutory context and, in particular, by reference to subsection (32)(b). The heading of subsection (32) indicates its subject to be the role of the Director-General in monitoring "construction of building"; and, to that end, a registered company was required to submit to him periodic certificates in relation to the progress of the work and to "the costs of construction works *completed*". Mrs Boolell fails to explain why the Director-General was, on her analysis, to be supplied with the costs only of more limited construction work than was the subject of the statutory condition.

27. One of Mrs Boolell's main arguments relates to the uncontested evidence that, when issuing a certificate for the purpose of obliging an employer to make an interim payment to a building contractor pursuant to their contract, it is approved practice for the quantity surveyor to include in it the cost of materials on site intended to be used in the contractual works. But the purpose of Mr Mooroogan's certificate was different; and the only question is whether his inclusion of the cost of materials on site fell within the costs identified in the statutory condition.

28. The conclusion that the statutory condition refers to the costs of construction works completed by 30 June 2011 is, fortunately, consonant with all the other material placed before the Board. The government's document dated 20 December 2008 had in terms articulated the proposed condition of exemption as being that at least Rs 50m of construction works be completed before 30 June 2011. The certificate of registration issued to the company by the Director-General included a condition relating to "the completion of Rs 50m of construction works". Note also that section 161A(31) of the Act conferred on the Director-General a discretion to determine the conditions of a certificate so, even if (which it was not) the condition included in the certificate issued to the company was more onerous than the statutory condition, it would nevertheless have been valid. Finally, the letter written on behalf of the company to Mr Mooroogan dated 11 March 2011 showed that it understood the condition to relate to "the total costs of construction for Works executed as at 30 June 2011".

29. In setting aside the company's application the Supreme Court construed the statutory condition in part by reference to a subsidiary point which the Board respectfully adopts. The point relates to the exclusion, mandated by section 161A(29) of the Act, of the costs of ancillary infrastructure works from the costs to which the condition referred. Were the costs of materials on site to be eligible in principle for inclusion in the costs to which the condition referred, the Director-General would have been required somehow to differentiate between materials to be used in the course of infrastructure works, the cost of which would not be eligible for inclusion, and materials to be used in constructing the buildings, the cost of which would be so eligible. It is hard to conceive that Parliament would have regarded it as practicable for him to perform any such duty.

30. Suppose (said Lord Sumption to Mrs Boolell in the course of her submissions) that by 30 June 2011 the company had not constructed any building on the site but that on 29 June 2011 it had purchased and placed on the site materials costing Rs 51m. Mrs Boolell was constrained to accept that, by reference to her suggested construction of the statutory condition, the company would in that event have satisfied it.

31. The Board is satisfied that the cost of materials on site was not permitted to be included in the costs to which the statutory condition referred. The company failed to satisfy the condition and the Registrar-General's demand was validly made. The appeal is dismissed and the company must pay his costs and those of the authority in respect of the appeal.

32. By way of postscript, the Board records a contention that, even in the event that its construction of the statutory condition was to prove adverse to the company, it should allow the appeal on the ground that, by its decision in the letter dated 16 September 2011, the authority had acted unfairly towards it. Under this rubric Mrs Boolell brings a scattergun approach to the task of advocacy. She contends that the decision had been irrational; that it had been brutal; that it had been in breach of the rules of natural justice; that it had been unexplained; that there had been no level playing-field; that the authority had misused its power; that it should have sought clarification of Mr Mooroogan's breakdown of the figures; that it had had a discretion when deciding whether the condition had been satisfied; that in this respect it should have been guided by Mr Mooroogan and any quantity surveyor instructed by itself; that it had failed to act transparently; that its decision had frustrated the purpose behind the 2009 Act; and that it had defeated a legitimate expectation on the part of the company that it would be taken to have satisfied the condition.

33. The trouble is that there was no arguable foundation for any of these contentions.