[2011] UKPC 8
Privy Council Appeal No 0076 of 2009

JUDGMENT

John Thompson and Janet Thompson

v

Goblin Hill Hotels Limited

From the Court of Appeal of Jamaica

before

Lord Phillips
Lady Hale
Lord Brown
Lord Kerr
Lord Dyson

JUDGMENT DELIVERED BY
Lord Dyson
ON

10 March 2011

Heard on 20 January 2011

Appellant	*Respondent*
Jeffrey Onions QC Charles Piper (Jamaican Bar) (Instructed by Myers, Fletcher & Gordon)	Dr Lloyd Barnett Gillian Burgess (Jamaican Bar) (Instructed by Simons Muirhead & Burton)

LORD DYSON:

The facts

1. Goblin Hill Hotels Limited ("GHHL") is the registered proprietor of 11 and a half acres of land known as Goblin Hill, in the Parish of Portland, Jamaica. The company was incorporated in 1969 for the purpose of the development of Goblin Hill in phases as vacation homes. The development was structured so as to achieve approved hotel enterprise status and thereby gain certain tax relief. For this reason, a Cayman Islands company called San San Investments Limited ("SSIL") was involved.

2. All the original purchasers of shares in GHHL were required to sign three documents. These included an "agreement for the sale of options for the purchase of shares and grant of lease" between SSIL, GHHL and the purchaser which (i) recorded the undertaking by GHHL to construct 33 villa units and to operate them as a hotel; and (ii) granted the purchaser the option to purchase shares in GHHL and enter into a lease of a villa unit on the terms of the attached draft. By clause 4B of the draft lease, if the lease option was exercised by the purchaser, the lessee agreed to permit the leased villa to be operated by GHHL as a hotel, but only during the "Incentive Period". The Incentive Period was defined as the period ending on the 20th anniversary of the date specified for the commencement of the development as an "approved hotel enterprise". Sykes J, the trial judge in these proceedings, found that this period ended in 1989.

3. There was no right in GHHL to raise assessments in respect of the cost of maintaining the villa units and the grounds on purchasers who exercised the option to buy shares and enter into leases during the Incentive Period. It was the expectation of the developers that these costs would be met from the hotel earnings and that, if there were any shortfall, this would be paid by the shareholders. By article 91(1) of the articles of association and clause 5(b) of the draft lease, however, GHHL was entitled to raise assessments after the end of the Incentive Period.

4. The authorised share capital of GHHL was J$54,000.00. This was divided into three classes of shares of J$1.00 each as follows: 30,600 A ordinary shares; 15,300 B ordinary shares and 8,100 C ordinary shares. The Class C shares represented 15% of the total authorised share capital. Article 4(1) provided that the Class A shares were to be held in blocks, so that each block was allocated to one of the villa units comprising the 70 apartment bedrooms in Phase 1 of the development. Shares numbered A1 to A19,976 related to 28 villa units comprising 44 apartment bedrooms and shares numbered A19,977 to A30,600 related to the villa units comprising the

remaining 26 apartment bedrooms. Article 4(2) provided that the Class B shares were to be held in blocks so that each block was allocated to one of the villa units to be erected by GHHL in Phase 2 of the development. Class A and B shares entitled the holders to participate in the earnings of GHHL as from the date of the construction of the villa units relating to the shares. Article 4(3) provided that the Class C shares numbered C1 to C3,564 entitled their holders to participate in the earnings of the company as from the date of completion of the construction of the 28 villa units to which the Class A shares numbered A1 to A19,976 were allocated; and the Class C shares numbered C3,565 to C8,100 entitled their holders to participate in the earnings of the company as from the respective dates of completion of the units to which the remaining Class A shares and the Class B shares were allocated. The purpose of the Class C shares (which were issued to the developers) was described by Rosalie Goodman at para 10 of her witness statement as being "designed as an incentive to the developers to remain active and interested in the project after selling off the shares".

5. Article 91 of the articles of association provided:

> "91. (1) After the twentieth anniversary of the date specified for the commencement of Goblin Hill San San as an approved hotel enterprise under the Hotel (Incentives) Act, 1968 the Directors shall at the beginning of each financial year or as soon thereafter as possible estimate the total sum of money required for the maintenance of the Company and the cost of carrying on the operation and performing the obligations of the Company with regard to the villa units or apartments at Goblin Hill San San and the grounds used therewith for the ensuing year and in particular but without prejudice to the generality of the foregoing words the amount of all water rates taxes rates insurance premiums and other outgoings and the cost of repairs and replacements and the necessary expenses of upkeep maintenance operation and any fees payable under any management contract entered into by the Company and in addition any amount to create a reasonable reserve for the purposes aforesaid and such amount as will meet any deficit incurred in any previous year of operations and the said total sum of money shall be borne by each member *in proportion to his shareholding in the Company* and the proportion of the annual cost estimated as aforesaid payable by each member shall be called 'an Assessment'. Each member shall pay the amount of the Assessment so made on him to the person and at the times and places and in the manner appointed by the Directors. An Assessment shall be deemed to be made when a resolution authorising such Assessment is passed (emphasis added).
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> (2) The Directors may from time to time make such further assessments upon the members as the Directors may deem necessary to meet any additional or unforeseen expenses of operating and/or

> maintaining the villa units or apartment and grounds as aforesaid and the said further sum of money shall be borne by each member in proportion to his shareholding in the Company and the proportion of the annual cost made as aforesaid payable by each member shall be called 'a Special Assessment'. Each member shall pay the amount of the Special Assessment so made on him to the person and at the times and places and in the manner appointed by the Directors. A Special Assessment shall be deemed to be made when a resolution authorising such Special Assessment is passed."

6. Article 12 provided that GHHL had a "first and paramount lien" on all shares held by any member of the company for all debts of such a member. Article 13 gave the company the right to sell any shares in respect of which it had a lien.

7. The leases between GHHL and those purchasers who took leases of the villa units were for 99 years at an annual rent of J$1.00. By clause 2(a), the lessee covenanted to pay the amounts of assessments and any special assessments made "on the days and times and in the manner from time to time directed". By clause 4B(i) the lessee covenanted to permit the leased villa to be operated by GHHL as part of the hotel enterprise during the Incentive Period. By clause 5(b) it was agreed that:

> "(b) After the end of the Incentive Period as hereinbefore defined the Company shall at the beginning of each financial year thereafter or as soon thereafter as possible estimate the total sum of money required for the maintenance of the Villa Units as a first class resort hotel for the accommodation of transient guests and the cost of carrying on the operation and performing the obligations of the Company with regard to the Villa Units and the grounds thereof for the ensuing year and in particular but without prejudice to the generality of the foregoing words the amount of all water rates taxes rates insurance premiums and other outgoing and the cost of repairs and replacements and the necessary expenses of upkeep maintenance operation and any fees payable under any management contract entered into by the Company and in addition any amount to create a reasonable reserve for the purposes aforesaid and such amounts as will meet any deficit incurred in any previous year of operation and the said total sum of money shall be borne by each lessee of a villa unit *in proportion to his shareholding in the Company* and the proportion of the annual cost estimated as aforesaid payable by each lessee shall be called 'The Assessment'" (emphasis added).

8. By clause 5(c) of the lease it was agreed that, if GHHL declared that it required funds in addition to the estimated total in clause 5(b) for the continued operation and maintenance of the villa units and grounds, then the company should estimate the

additional amounts required and "this amount to be called 'the Special Assessment' shall be paid by each lessee of a villa unit in proportion to his shareholding in the Company".

9. Clause 5(d) provided inter alia that "if any rental or assessment or special assessment or any part thereof shall be in arrear for more than sixty days" GHHL was entitled to forfeit the lease.

10. By 1972, share options relating to 28 of the villa units had been sold and the Class A shares relating to those units and the Class C shares relating to those shares had been issued. Phase 2 of the development has never been built. The options for the unissued shares were due to expire in 1984. They were renewed until 1994. On 30 May 1994, all the unissued shares (including the unissued Class C shares) were issued to the developer directors and (in the case of Trans Atlantic Holdings) a company controlled by Antony Alberga, one of the developers. These shareholders did not enter into leases with the company. One of them, Mrs Goodman, explains at para 13 of her witness statement that by 1994 "political and social conditions did not support the continued development during this time and the three developers decided to purchase the balance of share options at the price at which they were valued in the accounts, which they would hold jointly and severally until they were in a position to complete the development and sell the shares".

11. Amongst those who entered into the sale of options agreement and the associated agreements were Richard Jones and Robert Randall. They exercised the option in relation to villa unit 16 to buy the related 908 Class A shares and to enter into a lease in respect of the unit for 99 years from 1 January 1987. The lease was in the terms of the leases referred to at para 7 above. On 1 July 1994, the appellants agreed to purchase these shares from Messrs Jones and Randall and to take an assignment of the lease.

12. When Messrs Jones and Randall assigned the lease and sold their shares to the appellants, they discharged all outstanding assessments and special assessments relating to the villa unit. The amount assessed by GHHL at that time in respect of that villa unit was a fixed sum of J$13,495 per month. Between 1994 and 2000, GHHL calculated the amount of the assessments and special assessments by reference only to the shareholdings of those members of the company who also had leases of villa units, rather than by reference to the whole of the issued shares of the company. These assessments were challenged by the appellants on a number of grounds including that, as they argued, the assessments should have been calculated by reference to all of the shareholdings and not only those held by leaseholders. They continued to pay the sum of $13,495 per month.

13. On 11 January 2002, GHHL forfeited the appellants' lease and sold their shares.

The proceedings

14. On 16 January 2002, the appellants started these proceedings in the Supreme Court of Jamaica claiming declarations that (i) the assessments and special assessments made by GHHL in the years 1994 to 2001 were excessive, because they had not been calculated in accordance with the lease and articles of association of the company properly construed and (ii) the company had wrongfully forfeited their lease and sold their shares. By a judgment given on 6 November 2006, Sykes J accepted the appellants' interpretation of the lease and articles, set aside the assessments and special assessments and declared that the forfeiture of the lease and sale of the shares had been unlawful. GHHL appealed. On 19 December 2008, Morrison JA (with whom Smith and Dukharan JJA agreed) rejected Sykes J's interpretation of the lease and the articles of association and allowed the appeal.

15. The main issue that arises on the appeal is a comparatively narrow question of the true construction of article 91 of the articles of association and clause 5(b) of the lease. The question is whether (as the appellants contend and Sykes J held), the assessments were to be determined by reference to the whole of the issued shareholding of GHHL or (as the respondents contend and the Court of Appeal held) they were to be determined only by reference to the issued shareholdings of those who were also leaseholders.

Discussion

16. Prima facie, the plain and ordinary meaning of the articles and the lease provides decisive support for the appellants' case. The respondent must confront two linguistic difficulties in relation to article 91(1). First, the article provides that the total sum of money assessed to be paid "shall be borne by *each* member" (emphasis added). As a matter of ordinary language "each member" means exactly what it says: each shareholder of each class of shares is liable to pay. Article 4 provides that there are three classes of shares. These include the Class C shares which, it is common ground, were not issued to leaseholder shareholders, but to the developers. The phrase "each member" on the face of it, therefore, includes the Class C shareholders. Even if the articles made no provision for Class C shares, the phrase "each member" must, as a matter of ordinary language, also include any shareholder to whom the Class A or B shares have been issued, but who have not become leaseholders. On the respondent's construction, the phrase "each member" has to be construed as if it reads "each member who has entered into a lease in respect of a villa unit".

17. The second difficulty (which arises both in relation to article 91(1) of the articles and clause 5(b) of the lease) is that the amount assessed is to be borne by each member "in proportion to his shareholding in the Company". As a matter of plain and ordinary language, this must mean that the amount is to be borne in the proportion that a member's shareholding bears to the *entire* issued share capital of the company. If the respondent is right, "in proportion to his shareholding in the Company" means "in the proportion which his shareholding bears to the shares issued to those members who have entered into a lease in respect of a villa unit".

18. In the opinion of the Board, the plain and ordinary meaning of the words used in article 91(1) and clause 5(b) can only be displaced if it produces a commercial absurdity: see, for example, per Lord Diplock in *Antaios Cia Naviera SA v Salen Rederierna AB, "The Antaios"* [1985] AC 191, 201: "if a detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense."

19. The Court of Appeal was persuaded by the respondent to reject the plain and ordinary meaning of article 91(1) in part, at least, because they considered that meaning to be "so far removed from good business sense, in the context of what was after all designed as a business venture, that I cannot imagine that this was the intention of the parties. It certainly does result in commercial absurdity" (per Morrison JA at para 52). This conclusion was reached for two reasons. First, it was said that it was absurd that shareholders who derived no benefit from the villas and the extensive grounds (including gardens, tennis courts and a swimming pool) and had no right to participate in the earnings of the company should be liable to bear the costs of maintaining the villas. Secondly, if the literal interpretation were correct there would be likely to be "chronic underfunding" of the company since shareholders who were not also leaseholders would be unlikely to pay and, being unable to forfeit a lease, the company would have no effective remedy to enforce payment.

20. The Board does not agree with this reasoning. As regards the first reason, it is not right to say that the Class C shareholders had no right to participate in the earnings of GHHL. That is contrary to the express language of article 4(3). The Board accepts, however, that it was envisaged that the company would only have earnings during the Incentive Period whilst the villa units were being used as a hotel.

21. As regards the second reason, it is wrong in principle to determine the meaning of a document on the basis of an assumption (it can be no more) that an obligor will not comply with its contractual obligations and by reference to the consequences of such non-compliance. If any assumption is to be made, it should be that the parties intend to perform their obligations. But the Board does not see how an assumption as to whether the parties will or will not discharge their obligations can shed light on the

proper interpretation of an instrument. Further and in any event, the Court of Appeal were wrong to assume that there would be likely to be chronic underfunding on the basis that GHHL would have no effective remedy against shareholders who did not also have leases. The company could issue proceedings to recover any unpaid sum as a debt.

22. The Board therefore rejects the reasons given by the Court of Appeal for their conclusion that the literal interpretation of article 91(1) results in a commercial absurdity. The question nevertheless remains whether it would be commercially absurd for shareholders who did not have leases (and did not therefore have the use of villa units or the grounds) to be liable for any part of the cost of carrying on the operation and performing the obligations of the Company in relation to the villas and the grounds.

23. This question can be considered by reference to the facts of this case. There is no difficulty about the position of the developers to whom the Class A and B shares were issued on 30 May 1994. As Mrs Goodman has explained, they took a commercial decision to buy these shares and keep them until, as they hoped, market conditions improved when they would be able to sell them at a profit. It is to be assumed that anyone who bought those shares might consider that they were a good long-term investment, despite the obligation to pay the assessments and special assessments in the meantime.

24. The position with regard to the Class C shareholders is less clear. It was envisaged at the outset that GHHL would only be operating a hotel during the Incentive Period and that thereafter it would not be trading for profit, but merely managing the development. It was said in argument before the Board that, if the Class C shareholders were liable to pay assessments during the currency of the 99 year leases granted to the Class A and B shareholders, and they were liable for 15% of the costs of maintaining the villas and grounds for 79 years after the end of the Incentive Period, that is a very bad bargain for the Class C shareholders to have made and one they are unlikely to have made. But it should not be overlooked that on 30 May 1994, the developers bought all the unissued Class C shares. They must have had their own commercial reasons for doing so, notwithstanding that this was after the expiry of the Incentive Period, so that there was no longer the prospect of GHHL deriving earnings from the hotel. The evidence adduced in these proceedings does not say what these reasons were. In the view of the Board, since it is the respondents who are seeking to displace the plain and ordinary meaning of article 91(1) on the grounds that that meaning produces a commercial absurdity, it is for them to demonstrate the absurdity. In some cases, commercial absurdity is patent and clear on the face of the instrument that has to be construed. But in other cases, the absurdity is less obvious and can only be demonstrated by an explanation of the relevant background facts. In such cases, it is for the party seeking to contend that the literal interpretation produces a commercial absurdity to prove the absurdity.

25. For the reasons given, this has not been demonstrated in the present case in relation to article 91(1). Clause 5(b) was plainly intended to reflect the terms of article 91(1). Like the article, the clause should be given its plain and ordinary meaning.

26. Dr Barnett submits in the alternative that a term should be implied in article 91(1) and clause 5(b) that the assessments should be borne only by each shareholder who is also a leaseholder and in the proportion that his shareholding bears to those to whom villa units have been allocated. Morrison JA was "inclined to think" that such an implied term was permissible as a "purely constructional implication", ie one derived from the language of the instruments and not from any extrinsic circumstances.

27. In the judgment of the Board, this argument fails for the same reasons as the construction argument fails. In *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988, Lord Hoffmann, delivering the judgment of the Board, reviewed many of the authorities on implied terms and said at para 21:

> "It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean".

28. For the reasons already given, even when read against the relevant background, article 91(1) and clause 5(b) can only reasonably be understood to bear their literal meaning.

29. Accordingly, the Board will humbly advise her Majesty to allow this appeal. It is common ground that in these circumstances the cross-appeal does not arise.

30. The parties have 28 days in which to put in written submissions as to costs.