Privy Council Appeal No 13 of 2007

(1) Thomas Townsend
(2) Therese Townsend (deceased) *Appellants*

v.

Persistence Holdings Limited *Respondent*

FROM

THE COURT OF APPEAL OF
BRITISH VIRGIN ISLANDS

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JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL

Delivered the 5th March 2008

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Present at the hearing:-

Lord Bingham of Cornhill
Lord Scott of Foscote
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Neuberger of Abbotsbury

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[Delivered by ***Lord Neuberger of Abbotsbury****]*

1. This is an appeal from the Court of Appeal of the Eastern Caribbean, given on 20 January 2006, against the dismissal of an appeal brought by Mr Thomas Townsend and his wife, Mrs Therese Townsend, from an order of Rawlins J, made in the High Court of the British Virgin Islands on 6 May 2004. Mrs Townsend has died since the matter was before the Court of Appeal, so this appeal has been conducted on behalf of Mr Townsend alone.

2. The appeal arises out of an agreement between Mr and Mrs Townsend to sell a property ("the property"), situated on Great Camanoe Island in the British Virgin Islands, to the respondent, Persistence Holdings Limited ("Persistence").

3. On 28 April 2000, Mr and Mrs Townsend entered into two written agreements with Mr Austin Lopez, on behalf of Persistence. The first, headed "Agreement for Sale", provided that the Townsends would sell the property to Persistence for US $500,000, which was recorded as having been paid over in full to the Townsends. Clause 5 required Persistence to "apply to the Governor of the British Virgin Islands for a Non-Belonger's Land Holding Licence to hold the Property". It contained a proviso to the effect that if such a licence ("the licence") had not been granted by 28 April 2001, "either party may by notice in writing to the other or at any time thereafter terminate this Agreement", in which event the $500,000 was to be returned to Persistence.

4. The second agreement executed on 28 April was headed "Promissory Note" ("the Note"), and in it the Townsends were described as "vendor" and Persistence as "purchaser". In its operative part, the Note provided: "[F]or services rendered and other valuable considerations relating to supervisory control of renovations and additions to the property …. the purchaser agrees to pay to the vendor the sum of $325,000.00 …. upon the…issuance of the … licence".

5. The licence was not obtained by 28 April 2001 (although it was issued before judgment was given by Rawlins J). Accordingly, at least on the face of it, the proviso to Clause 5 of the Agreement for Sale became operative. Meanwhile, immediately after the execution of the Agreement for Sale and the Note, the Townsends permitted Persistence to carry out alterations for the property, and, towards the end of 2000, they permitted Persistence to enter into possession of the property. On 21 February 2002, purportedly pursuant to their right under the proviso to Clause 5 of the Agreement for Sale, the Townsends gave notice determining that agreement. Persistence retained possession of the property and, accordingly, on 6 June 2002, the Townsends issued proceedings for possession of the property and mesne profits.

6. In paragraph 2 of their Statement of Claim, the Townsends alleged that the sale agreement in respect of the property was "made partly orally and partly in writing" and was in an agreed sum of $825,000. The contention that there was, in reality, a single transaction involving a sale of the property for $825,000, rather then a sale agreed at $500,000, and a separate, if connected agreement as set out in the Note, was denied in paragraph 2 of Persistence's Defence and Counterclaim. Persistence not

only pleaded that the two agreements of 28 April 2000 evidenced the true arrangement between the parties, but also contended that, if what was stated in paragraph 2 of the Statement of Claim was correct, "which is denied", then it amounted to "violation of the Non-Belongers Land Holding Licence Act and accordingly [is] illegal and the claimants are not entitled to claim any relief based or founded on such illegality".

7. The matter came on for trial before Rawlins J. The parties' respective submissions were set out in very full skeleton arguments, which substantially reflected their respective pleaded cases. At the hearing, Mr Townsend said in evidence that the arrangement between the parties was effected by the two agreements of 28 April 2000 in order to satisfy Mr Lopez's requirements. Mrs Townsend was more specific in her evidence: she said that there was, in reality, a single transaction for the sale of the property at $825,000, and that the reason for the two agreements was to enable Persistence to pay stamp duty based on the assumption that the property was being sold for $500,000. In his evidence on behalf on Persistence, Mr Lopez denied this, and stated that the arrangement between the parties was accurately represented in the Sale Agreement and the Note.

8. The hearing at first instance lasted over six days between September 2003 and February 2004, and Rawlins J gave judgment on 6 May 2004. Having set out the facts, he turned to consider the first issue which he identified as: "What was the agreed purchase price?" He dealt with that issue in paragraphs 19 to 28 of the judgment, where his conclusions included these findings:

> "I do not believe the evidence of the Townsends that the Note was intended to secure an additional sum for the purchase price that was stated in the Agreement. The evidence of Mr Lopez on this aspect of the case, which I believe, and even that of Mr Townsend, is that he (Mr Lopez) was being put into immediate possession of the property on behalf of Persistence. This was for the purpose of effecting the improvement works on the unfinished house…The Townsends carried out some of their obligations under the Note. They provided invaluable advice and directions…
> The evidence is that the Townsends endeavoured to carry out the supervisory work particularly in the initial stages of the project….
> In addition I believe the evidence that Mr Lopez gave that $500,000 was a reasonable price for the property at the time,

> given its location, the comparable value of properties in that location and the unfinished state of the property."

9. In paragraph 24 of his judgment, the Judge stated that he did not

> "believe that Mr Lopez caused the Townsends to sign the Note in order to induce them to enter into the Sale Agreement. I believe the evidence of Mr Lopez that the Townsends were quite aware of the terms of the Note and agreed to those terms."

10. The next issue the Judge went on to consider was: "Is the Note a valid promissory note?" In paragraphs 29 to 34 of his judgment he concluded that it was not a valid promissory note, because the promise to pay was "conditional upon the issuance of the licence by the Government to Persistence", which "was an uncertain event that created a contingency". Paragraph 34 of the judgment ended with the conclusion "illegality is not a live issue that is to be considered in this judgment."

11. In paragraphs 35 to 62 of his judgment, the Judge considered whether the Townsends had validly determined the Agreement for Sale pursuant to the proviso to Clause 5. In summary, his conclusion was that, while they would otherwise have been within their rights to have determined the Agreement for Sale, the Townsends were estopped from doing so, essentially on the ground that the parties had so conducted themselves as to render it inequitable for the Townsends to rely on the proviso as they sought to do.

12. In these circumstances, the Townsends' claim was dismissed and specific performance of the Agreement for Sale was ordered. The Judge decided to make no order for costs.

13. Mr and Mrs Townsend issued a Notice of Appeal on 4 June 2004. In that Notice, the "Facts Appealed Against" were limited to the finding that the Townsends "were not induced to enter into an agreement with the [Persistence]…by the delivery to them of the document entitled 'Promissory Note'". The "Findings of Law" stated to be challenged were only that the Townsends were "estopped from enforcing their legal rights to rescind". The "Details of Mixed Fact and Law that are Challenged" were simply stated to be the finding that the Townsends' "mere silence and inactivity" amounted to "tacit approval, comfort and encouragement of [Persistence's] endeavours". The "Grounds of Appeal" in the Notice were threefold, namely that the Judge had erred (a) in holding that the Townsends were estopped from determining the Sale Agreement, (b) "in failing to properly consider the issue whether [Persistence] was estopped

from denying the validity of the…Promissory Note…", and (c) in not assessing a *quantum meruit* payment in respect of the work that the Townsends actually did.

14. Persistence issued a Counter-Notice of Appeal on 22 July 2004, challenging the Judge's order that the parties should bear their own costs, and seeking instead an order for the costs of the action in its favour against the Townsends.

15. The appeal came before the Court of Appeal (Alleyne CJ (Ag), Barrow and Gordon JJA) on the afternoon of 17 January 2006. About an hour into his submissions on behalf of the Townsends, Mr Bennett QC was asked why his clients were proceeding with the matter given that the licence now had been granted. The transcript then records the following exchange:

> "MR. BENNETT: I should really put the whole thing in perspective. The arrangement between the parties was that the respondent paid $500,000, and he entered into a conditional agreement for sale …. By the terms of that agreement, $500,000 was repayable immediately if the condition was not fulfilled. The respondent also gave the appellant a promissory note for $325,000. This promissory note was to be automatically payable on the issue of licence to…. the appellants. So the appellants agreed into conditional agreement and they executed transfers and permitted the respondent to go into the premises and carry out changes to it because they had $500,000 in their hand and a promissory note for $325,000. And as far as they were concerned, as soon as the licence was issued, they would get the $325,000, the respondent would be entitled to register.
> HON. JUSTICE GORDON: Let's not put too fine a point upon it. The reality was the price of the property was $825,000, so there was, in fact, conspiracy to default the Government.
> MR BENNETT: That's the fact. But the court didn't accept that, but that's really what happened. And what they are saying is simply this, give us our --- at the time when they are saying we are not going to pay $325,000 the time had passed. And what really triggered the litigation was this, the realisation that even if they got the licence they wouldn't pay the balance anyway. That's what happened. Because what the parties' agreement contemplated was that at the time the licence was issued, the money would be automatically payable and the transfers registered."

16. At this point, Alleyne CJ said that the Court would rise for a few minutes and, when the Court reconvened half an hour later, Alleyne CJ said that it would adjourn until the following morning.

17. At the start of the resumed hearing next morning, the parties asked for time to talk. When the matter resumed in the afternoon, the Court was told by Mr Farara that "efforts had not been fruitful." Alleyne CJ's response was to say without further ado that Barrow JA "will declare the disposition of the court".

18. The transcript shows that Barrow JA then gave judgment to this effect:

> "In the course of submissions, counsel for the appellants stated that his clients' position was that the true purchase price for the property was $825,000 and not $500,000 as was stated in the agreement between the parties. Counsel accepted that that meant that the parties had defrauded the revenue by paying stamp duty on a lesser figure and, therefore, in a lesser amount then that on which stamp duty should have been paid. This appeal represents the appellants invoking the jurisdiction of this court to assist it in this transaction. But the appellants having asserted that the transaction was an illegality, it is contrary to public policy for this court to render any assistance to an acknowledged wrongdoer. Accordingly, this court refuses to entertain further hearing of this appeal. The appeal is dismissed.
> In view of the alleged illegality, the court makes no order as to costs."

19. Mr Townsend now appeals to their Lordships, pursuant to leave granted by the Court of Appeal. In a nutshell, the complaint put forward on his behalf by Mr Guthrie QC, who did not appear below, is that the appeal was disposed of by the Court of Appeal in a way which was unfair and cannot be justified. The Board agree.

20. It is true that an allegation had been raised by the Townsends in their pleaded case to the effect that, in reality, there had been a single agreement for the sale of property for $825,000, and that it had then been artificially structured so that it appeared that the sale price was $500,000, and what was in reality the balance of the payment was falsely re-characterised in the Note. It is also true that the issue of illegality had been raised in Persistence's Defence and Counterclaim, and that Mrs Townsend said in her evidence that the reason for the artificial structuring of the agreement was to reduce the amount of stamp duty which

Persistence would have to pay. However, there are three points which can be made about that.

21. First, although there was an allegation of fraud on the tax authorities made by the Townsends (albeit not in specific and clear terms until Mrs Townsend gave her evidence), it was rejected by the Judge for reasons which, at least on their face, appear to be rational. That the Judge rejected the contention that the two agreements of 28 April 2000 represented an artificial structuring of a single sale transaction appears to be beyond dispute.

22. Secondly, this finding of the Judge does not seem to have been the subject matter of an appeal by the Townsends in their Notice of Appeal, let alone of a cross-appeal by Persistence in its Counter-Notice of Appeal. On behalf of Persistence, Mr Farara contended that the point had been somehow resurrected in paragraph (b) of the Grounds of Appeal in the Townsends' Notice of Appeal, but, at least on the basis of the arguments presented to the Board, that contention does not appear to withstand scrutiny. The argument raised in that paragraph was that the Judge had wrongly refused to accept that Persistence was estopped from contending that the Note was not a promissory note. That argument was reflected in the "Facts Appealed Against", which in turn sought to challenge the finding made in paragraph 24 of the judgment of Rawlins J. It does not appear to have anything to do with the question of whether the Judge was right to reject the Townsends' contention, or (at any rate in the case of Mrs Townsend) their evidence, that there was a single transaction which was dishonestly structured to evade stamp duty. If that had been part of the Townsends' case on appeal, it would have to have been one of the "Facts Appealed Against" or "Details of Mixed Fact and Law that are Challenged" in their Notice of Appeal, which it was not.

23. The third point which arises is that, even if it was part of the Townsends' case on appeal that there had been a single transaction which was dishonestly structured, the question of whether or not that should have disentitled the Townsends from seeking relief from the Court of Appeal was plainly one which called for argument. It is simply a denial of justice to dismiss an appeal on the basis of a point which has not been argued or put to counsel for the appellant, so that he can deal with it before it is decided. Particularly so, when the law relating to the point is not straightforward: the principles upon which, and the circumstances in which, the court should refuse relief to a party to a transaction with actual or alleged illegal aspects is not easy – see for instance *Tinsley v Milligan* [1994] 1 AC 341 and *Hall v Woolston Hall Leisure Limited* [2001] 1 WLR 225.

24. If the Court of Appeal was concerned, as it plainly was, that Mr Bennett, on behalf of the Townsends was, or might be, still contending, and possibly relying on the contention, that there was a single transaction which had been dishonestly structured to evade stamp duty, then the proper course would undoubtedly have been to invite submissions from Mr Bennett (and, indeed, from Mr Farara) on the three issues identified above, namely:

> 1) Whether the Townsends were still in fact submitting that there was a single transaction which had been dishonestly structured despite the Judge's finding to the contrary.
> 2) If the Townsends were so submitting, whether it was open for them to do so in the light of the clear and reasoned finding by the Judge to the contrary, and of the terms of their Notice of Appeal.
> 3) If so, what the consequences should be so far as the appeal, and indeed the cross-appeal, was concerned.

25. The fact that the Court of Appeal proceeded to dismiss the Townsends' appeal without even ventilating these issues with their counsel, let alone giving him any opportunity to consider these issues and make submissions on them, renders it inevitable, in their Lordship's view, that this appeal must be allowed, and that the matter must be remitted to a differently constituted Court of Appeal for the Townsends' appeal, and indeed for Persistence's cross-appeal, to be properly argued and resolved.

26. It is only fair to the Court of Appeal to record that their task was not assisted by the submissions of counsel then acting for the Townsends. His answer to Gordon JA's suggestion "that there was, conspiracy to defraud the Government", namely "That's the fact", at least read or heard on its own, might indeed have been interpreted as suggesting that that is what he was arguing. However his next sentence, namely "But the court didn't accept that", seems to indicate at least the possibility that he was really saying that his clients' case had been that there had been illegality, but that the Judge had disposed of that issue against them. It is also fair to say that his submissions prior to the exchanges quoted above do appear to have been somewhat muddled and, at least on one reading, to have been consistent with the view that he was maintaining the contention that illegality was involved, albeit only inferentially.

27. In all these circumstances, the Board will humbly advise Her Majesty that this appeal should be allowed, that the appeal and cross-appeal from Rawlins J should be remitted to be heard by a differently constituted Court of Appeal so that any grounds of appeal or cross-appeal against the Judge's decision can be reconsidered *ab initio*. The Board

would add that both Mr Townsend and Persistence might be well advised to reconsider their respective Notices of Appeal and arguments.

28. As to costs, the decision of the Court of Appeal that there be no order for costs should stand, and that there should be no order for costs before the Board. Persistence was not to blame for the wrong turning taken by the Court of Appeal, and it could be said that the Townsends, through their counsel, could attract some criticism in that connection. On the other hand, before the Board it could be said that, once Persistence had seen the grounds of appeal, it should have appreciated that there was little point in defending the decision of the Court of Appeal. But Mr Townsend would still have had to appeal, and Persistence would no doubt have felt a need to protect its interests by having some representation before the Board. In all these circumstances, leaving costs where they lie before the Board and before the Court of Appeal seems to meet the overall justice of this unfortunate case.