IN THE FIJI COURT OF APPEAL

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CIVIL JURISDICTION

CIVIL APPEAL NO. 40 OF 1992
(High Court Civil Action No. 462 of 1991)

BETWEEN:

JAMNADAS SPORTS (FIJI) LIMITED — **APPELLANT**

-and-

STINSON PEARCE LIMITED — **RESPONDENT**

Mr. H. K. Nagin for the Appellant
Mr. R. A. Smith for the Respondent

Date of Hearing : 12th May, 1994
Date of Delivery of Judgment : 24th May, 1994

JUDGMENT OF THE COURT

The appeal in these proceedings is against a judgment of Byrne J., given in respect a summons for summary judgment for possession, that the appellant immediately vacate and deliver up to the respondent certain commercial premises and an order that damages be assessed by the Chief Registrar. The appellant is seeking not only to have the judgment set aside but also an order that another action commenced by the appellant be consolidated with the action in which the judgment was given.

The grounds of appeal are:-

> *"1. THE Learned Judge erred in law and in fact in refusing to make an order for consolidation when High Court Civil Action Nos. 328 and 462 were between the same parties and raised the same issues.*

2. *THE Learned Judge erred in law and in fact in holding that the Appellant's Affidavit was self-contradictory.*

3. *THE Learned Judge erred in law and in fact in deciding the issue of credibility on Affidavit evidence.*

4. *THE Learned Judge erred in law and in fact in granting to the Respondent summary judgment when the Appellant had raised issues which should have been tried in open court.*

5. *THE Learned Judge erred in law and in fact in not considering the issue of the Appellant's counterclaim."*

Many of the facts in the action in which the judgment under appeal was given were not in dispute. In October 1982 the owner of the premises granted a 10-year lease of them to the respondent, the name of which at the time was Pacific Mercantile Co. Ltd. On 5th May 1983 the respondent sub-let the premises to the appellant for four years, with an option to renew the sub-lease for a further four years. The lease was renewed to 30th June 1991 and then expired. The appellant, however, did not vacate the premises or give possession of them to the respondent, in spite of having been informed some months earlier of the respondent's intention to resume possession and in spite of having been served with a notice requiring the surrender of vacant possession.

The respondent then commenced the action in which the judgment under appeal was given. It sought immediate vacant possession of the premises and damages. It also took out a summons for summary judgment under Order 14. The appellant

opposed the application and presented evidence by affidavit, sworn by its Managing Director, with a view to establishing that in 1983 the person who was then the General Manager of the respondent, Mr Ashby, had agreed with the appellant that, if the appellant carried out certain substantial building works at the premises, and if the head lease was renewed, the appellant's sub-lease would be renewed for a term equal to that of the extended head lease. As the deponent did not assert that the agreement was in writing, as doubtless he would have done had that been so, the evidence must be taken to be that it was made orally. The work was carried out and the head lease renewed. So, the appellant contended, the respondent was estopped from claiming to be entitled to immediate possession of the premises and from requiring the appellant to vacate them.

In July 1991, after the respondent had served on the appellant the notice to vacate the premises, the appellant commenced proceedings in the High Court, by writ of summons, claiming an order that it was entitled to "a further tenancy [of the premises] for the term equivalent to the new HeadLease (sic)". However, that writ was not served on the respondent until after the summons for summary judgment had been issued; counsel for the applicant stated at the hearing that that was because previously the parties had been negotiating to try to reach settlement of the matter (page 71 of the record). Counsel for the respondent acknowledged (at page 72) that negotiations were "proceeding".

Replying to the affidavit of the appellant's Managing Director, the respondent's group administration manager did not deny that Mr Ashby had been the respondent's General Manager at the relevant time or that he had been authorised to act on the respondent's behalf. What he said in respect of the agreement was expressed in the following terms:-

> *"The plaintiff has never before known or heard of any claim by the defendant or suggestion by Mr Ashby, that the defendant had made such unlikely arrangements with Mr Ashby. The first the plaintiff ever knew of the defendant's claim to having made these arrangements was when the plaintiff was served with the defendant's Affidavit in Reply on the 21st February 1992."*

No affidavit sworn by Mr Ashby was lodged nor any explanation given for that.

In his judgment His Lordship noted that, so far as the documentary evidence was concerned, the appellant's sub-lease expired on 30th June 1991 and the appellant should have vacated the premises immediately thereafter. On the question of estoppel by conduct alleged by the appellant to arise from Mr Ashby's assurances and the appellant's having acted on them, he came to the conclusion that, if the assurances were given, it was before the appellant executed the sub-lease. We understand his reasoning therefrom to have been that, if that was so, since the sub-lease provided only for an option to renew it once for four years and contained no other provision for its extension, the appellant had "not shown any plausible explanation for" the

matter not having been incorporated into the sub-lease. Estoppel, therefore, did not arise and the parties were bound by the terms of the sub-lease, so that the appellant had no defence. Accordingly, summary judgment was entered for the respondent.

Upon application by a plaintiff for summary judgment, pursuant to Order 14 rule 3 the Court may give such judgment unless-

(a) it dismisses the application, or

(b) the defendant satisfies it that there is an issue or question in dispute which ought to be tried, or that for some other reason there ought to be a trial.

So far as (a) is concerned, the application is to be dismissed if the plaintiff has failed to establish the preliminaries prerequisite for summary judgment to be given under Order 14 or the case does not come within the scope of Order 14 (see **Dhiraj Lal Hemraj and Another v. Vinod Kumar Ramanlal Patel**, Civil Appeal No. 19 of 1993: 24th February, 1994). In the present case there were no grounds for dismissing the application for summary judgment. What is in issue is whether the Court should have been satisfied by the appellant that there was an issue or question to be tried, as referred to in (b). The only issues or questions raised by the appellant were whether there was an oral agreement such as the appellant alleged and, if so, whether the respondent was estopped from obtaining possession of the premises during the period for which the head lease was renewed.

So far as the first of those issues or questions is

concerned, the existence of the agreement was sworn to by the appellant's Managing Director. None of the respondent's affidavits asserted expressly that Mr Ashby did not enter into the agreement; nor, a matter of some significance, did it deny that the appellant had carried out extensive work to the premises at a time when it held a sub-lease for only four years, with an option of renewal for another four years. In our view, therefore, although the failure to incorporate the terms of the agreement in the sub-lease as executed was strong evidence against there having been such an agreement, if any useful purpose would have been served by trial of the first issue or question, the learned trial Judge should have been satisfied that it ought to be tried. However, no useful purpose would have been served by trying that issue or question if, regardless of the finding made in respect of it, no estoppel would have arisen.

We turn, therefore to consider the second issue or question. The relevant part of the affidavit of the appellant's managing director was as follows:-

> *"(ii) Prior to entering into the said Sub-Lease the Plaintiff and the Defendant had several discussions;*
>
> *(iii) The Defendant needed to carry out substantial works to the demised premises. A plan of the works is annexed hereto and marked with the letter "A";*
>
> *(iv) Because of the extensive works to be carried out on the premises I requested the Plaintiff's then General Manager Mr David Ashby to give me an assurance that I would not be evicted from the premises*

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and that if the Plaintiff's Lease for the ground floor was renewed then the Defendant's sub-lease would be similarly renewed;

(v) *Mr Ashby did give me that assurance and undertaking and the Defendant moved into the said premises and carried out the substantial works on the premises on that basis and the Plaintiff is now therefore estopped from claiming vacant possession of the said premises as its Lease has been renewed."*

Although the deponent does not expressly state that the agreement was concluded before the sub-lease was executed, if it was not, he should have stated so clearly. Since he did not do so the *contra proferentem* rule requires that the affidavit be understood as asserting that the agreement had been concluded before the sub-lease was executed. As required by section 54 of the Land Transfer Act (Cap 131), the lease was granted by an instrument in writing, signed and sealed on behalf of the appellant and the respondent.

Generally evidence of an oral agreement reached during negotiations for a lease is not admissible to show that the lease as executed did not represent the true intention of the parties (**Henderson v Arthur** [1907] 1 K.B. 10). However, in some cases evidence of a prior oral agreement as to a matter collateral to the lease has been admitted (e.g. **City and Westminister Properties (1934) Ltd v Mudd** [1959] 1 Ch 129. But, the prior oral agreement must be in respect of a matter entirely collateral

to the lease and must not contradict the terms of the lease **(Henderson v Arthur (supra))**.

The oral agreement alleged by the appellant in the present case went to a vital stipulation of the lease, that is to say its term. It cannot possibly be categorised as having been only collateral to it. That being so, the evidence could not have been admitted to show that the intentions of the parties when they executed the lease were different from those disclosed by the terms of the lease.

However, that does not preclude the possibility that the evidence might have raised the issue of whether, by reason of either or both of the equitable doctrines of estoppel known respectively as promisory estoppel and proprietary estoppel, the appellant had a defence to the claim for possession. We have, therefore, to consider whether, if the facts asserted by the appellant's Managing Director were correct, the appellant had an arguable case on the basis of one or other, or both, of those doctrines.

In our view, this was not a case where the doctrine of promisory estoppel could have assisted the appellant. Although in **Evenden v. Guildford City Association Football Club Ltd** [1975] QB 917 at page 924 Lord Denning M.R. expressed the view that promisory estoppel was not limited to cases where the parties were already bound contractually to one another, the other Judges who constituted the Court of Appeal for that appeal were silent

on the question. The doctrine, enunciated initially by Denning J. (as he then was) in **Central London Property Trust v. High Trees House Ltd** [1947] KB 130 developed from the judgment of the House of Lords in **Hughes v. Metropolitan Railway Co** (1877) 2 App. Cas. 439, where a notice to repair houses was held to have been suspended by letters written subsequently.

The requirements of the doctrine are described as follows in Chitty on Contracts, 26th edition, 1989, at paragraph 210 of the volume dealing with General Principles:-

> *"For the equitable doctrine to operate there must be a legal relationship giving rise to certain rights and duties between the parties; a promise or a representation by one party that he will not enforce against the other his strict legal rights arising out of that relationship; an intention on the part of the former party that the latter will rely on the representation; and such reliance by the latter party. Even if these requirements are satisfied, the operation of the doctrine may be excluded if it is, nevertheless, not "inequitable" for the first party to go back on his promise. The doctrine most commonly applies to promises not to enforce contractual rights, but it also extends to certain other relationships."*

At para 211 the learned editors state:-

> *"It has, indeed, been suggested that the doctrine can apply where, before the making of the promise or representation, there is no legal relationship giving rise to rights and duties between the parties, or where there is only a putative contract between them e.g. where the promisee is induced to believe that a contract into which he had undoubtedly entered was between him and the promisor, when in fact it was between the promisee and another person. But it is*

> *submitted that these suggestions mistake the nature of the doctrine, which is to restrict the enforcement by the promisor of previously existing rights against the promisee. Such rights can only arise out of a legal relationship existing between these parties before the making of the promise or representation. To apply the doctrine where there was no such relationship would contravene the rule (to be discussed in & 217 below) that the doctrine creates no new rights."*

We believe the current state of the law in respect of promisory estoppel to be correctly stated in those paragraphs.

Proprietary estoppel may arise in a variety of situations. One category of cases in which it arises is where one person is encouraged by a landowner to do work on the landowner's land and to believe that, by doing so, he will acquire an interest in the land that will be legally recognised (**Combes v. Smith** [1986] 1 W.L.R. 808). The work must have been done in reliance on the landowner's promise. In many cases the work has benefited the landowner (e.g. **Dillwyn v. Llewillyn** (1862) 4 D.F. & G.517) and the doctrine has been regarded as being based on the need to prevent unjust enrichment. However, in some cases the work has not resulted in any benefit to the landowner (e.g. **Canedian Pacific Railway v. The King** [1931] A.C. 414). In some such cases, the learned editors of the 26th edition of Chitty suggest at para. 248, the remedy of the person who has acted on the landowner's promise may have had a basis in contract rather than equity. Nevertheless, they point out that in not all such cases is there evidence of an intention to contract or of certainty of

the subject matter. The remedy granted in those cases appears to have had no basis except in equity.

That being so, we think that no legal consequences which might prevent the remedy of estoppel being granted result from the fact that the negotiations during which the promise by Mr Ashby was allegedly made took place before the lease was executed. That is not to say, of course, that that fact may not be of significance when the evidence is assessed in order to decide whether or not the promise was made.

We have come to the conclusion that the facts asserted by the appellant's Managing Director in his affidavit might possibly give rise to the remedy of proprietary estoppel. The learned trial Judge should, therefore, have been satisfied that the issues raised by the evidence in that affidavit ought to be tried. He erred in law in failing to be so satisfied.

Since Civil Action No. 328 of 1991 concerns the same matter as the action in which summary judgment was entered, and as, we understand, its result will depend on precisely the same issues, it is clearly in the best interests of the parties and of the administration of the judicial system that the two actions should be consolidated and tried together.

The appeal must be allowed and the matter remitted to the High Court for rehearing.

ORDERS

Appeal Allowed.

Judgment of the High Court set aside.

Matter remitted to the High Court for hearing.

Civil Action No. 328 of 1991 to be consolidated and tried with Civil Action No. 462 of 1991.

The Respondent to pay the Appellant's costs of this appeal and of the application to the High Court for summary judgment.

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Sir Mari Kapi
Judge of Appeal

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Mr. Justice Gordon Ward
Judge of Appeal

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Mr. Justice I. R. Thompson
Judge of Appeal

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