IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 26 of 2013

IN THE MATTER of an Application under section 169 of the Land Transfer Act.

BETWEEN : AJIT VIAKSH SINGH of Lot 13 Laqere Stage 1, Fiji, Landlord.

PLAINTIFFS

AND : NAR DEO MISHRA of Lot 15, Koronivia Road, Nausori, Tenant.

DEFENDANT

BEFORE : Justice Deepthi Amaratunga

COUNSEL : Mr. Nand A. for the Plaintiff
Mr. Nemani Tuifagalele for the Defendant

Date of Hearing : 8th May, 2013
Date of Judgment : 30th May, 2013

JUDGMENT

Catch Words
Promissory Estoppel- Section 172 of the Land Transfer Act- right to possession- arguable case for a right to possession

A. INTRODUCTION

1. The Plaintiff filed this application on 4th February, 2013 for eviction of the Defendant in terms of Section 169 of the Land Transfer Act. The ownership of

the land is not in issue. The Defendant, who was the previous owner of the property, has transferred the same to the Plaintiff in 2011, but remained in possession of the said property. The Defendant states that though the entire property was transferred it was transferred on a promise by the Defendant to subdivide the land and to let the Defendant and his family to remain in possession. The subdivision was approved and was also registered prior to the transfer. There is no evidence of prior attempt to evict the Defendant and the Plaintiff who obtained a loan at commercial rate continued repayment of the loan for two years while the (previous owner) Defendant remained in possession of the premises.

B. ANALYSIS

2. The Plaintiff is the owner of the property more fully described in the originating summons. Admittedly the same was transferred by the Defendant to the Plaintiff in 2011, but the Defendant remained in possession of the property. There is no rent paid since the transfer and no explanation given by the Plaintiff for the occupation of the Defendant. The Defendant's contention is based on promissory estoppel. The Defendant states that though the entire property was transferred to the Plaintiff, the Plaintiff consented to a subdivision of the property and to transfer the area where the Defendant's dwelling is situated. The Defendant had produced the said surveyed subdivision marked NDM1 annexed to the affidavit in opposition. The said Deposited Plan bearing No 9837 was prepared in 2008 and the approval for subdivision was obtained by the Director of Town & Country Planning on 20th June, 2008 and Survey General had approved the said subdivision as surveyed on 9th August, 2008.

3. In the affidavit in reply to the said affidavit in opposition the Plaintiff does not deny the knowledge of the subdivision and the document marked NDM1, but had conveniently avoided the issue of his knowledge of the said scheme of subdivision, instead denied any promise or consent to transfer the portion subdivided in the scheme of subdivision which is approved and also registered. Considering the camaraderie that existed between the parties it is unlikely that Plaintiff was unaware of the said subdivision which was registered three years prior to the transfer to the Plaintiff in 2011. The Plaintiff's wife is a close relative

of the Defendant and had admittedly lived with the Defendant for some time prior to the marriage to the Plaintiff. In the circumstances the contention of the Defendant needs to be tested in a action filed on a writ of summon, as no person would spend money and energy in order to obtain a subdivision demarcating the building and area surrounding it with separate access unless for a specific purpose.

4. The entire settlement sum for transfer of property paid by the Plaintiff was utilized for the payment of two loans, namely the FNPF and the Housing Authority. This is evidenced from the annexed marked AS2 to the affidavit in reply to the affidavit in opposition. Admittedly the Defendant had let the Plaintiff to settle the charge on the property by FNPF and also to settle the mortgage to Housing Authority. It is evident that without the settlement of the same the property could not have been transferred to the Plaintiff. It is also clear that Plaintiff had also financed the sum paid to the FNPF and Housing Authority through a loan from ANZ Bank. So, any subdivision could not have eventuate in such a scenario, even if the parties had consented for such sub-division since the transfer and re-mortgage had happened simultaneously. So, the subdivision has to be with the consent of the mortgagee or after the discharge of the mortgage. The conduct of the parties substantiate the Defendant's contention, since Defendant remained possession.

5. At the oral hearing the counsel for the Plaintiff was unable to explain the delay of this proceedings for eviction since the transfer of the property was in 2011. The affidavits of the Plaintiff was silent on this issue. A person who had obtained a loan from a commercial bank, to obtain a property would under normal circumstances not wait for two years without even a formal or informal request to vacate the property he had bought from the occupier.

PROMISSORY ESTOPPEL

6. **Promissory estoppel** according to Snell's Equity (29th Edi-3rd impression 1994) at page 570 state as follows

> 'During the nineteenth century equity extended the doctrine of estoppel to cases where instead of a representation of an

existing fact there was a representation of intention or promise. More recently, this extension became prominent in a sequence of cases following the obiter statement by Denning J in Central London Property Trust Ltd v High Tree House Ltd[1]., though these cases "may need to be reviewed and reduced to a coherent body of doctrine by the courts."

The doctrine

(a) The rule, Where by his words or **conduct** one party to a transaction freely makes to the other an unambiguous promise **or** assurance which is intended to affect the **legal relations between them** (whether contractual or otherwise) a, and before it is withdrawn, the other party acts upon it, altering this position to his detriment, the party making the promise or assurance **will not be permitted to act inconsistently with it**. It is essential that the representor knows that the other party will act on his statement. Yet the conduct of the party need not derive its origin only from the encouragement of preparentation of the first; the question is whether it was influenced by such encouragement or representation." (emphasis is added)

7. In Central London Property Trust Ltd v High Tree House Ltd (supra) at p258-259 Lord Denning held ;

'If I consider this matter without regard to recent developments in the law there is no doubt that the whole claim must succeed. **This is a lease under seal, and at common law, it could not be varied by parole or by writing, but only by deed; but equity has stepped in, and the courts may now give effect to a variation in writing** (see *Berry v Berry*, [1929] 2 KB 316). That equitable

[1] [1956] 1 All ER 256

doctrine could hardly apply, however, in this case because this variation might be said to be without consideration.

As to estoppel, this representation with reference to reducing the rent was not a representation of existing fact, which is the essence of common law estoppel; **it was a representation in effect as to the future**—a representation that the rent would not be enforced at the full rate but only at the reduced rate. At common law, that would not give rise to an estoppel, because, as was said in *Jorden v Money* (1854) (5 HL Cas 185), a representation as to the future must be embodied as a contract or be nothing. So at common law it seems to me there would ne no answer to the whole claim.

What, then, is the position in view of developments in the law in recent years? The law has not been standing still even since *Jorden v Money*. There has been a series of decisions over the last fifty years which, although said to be cases of estoppel, are not really such. **They are cases of promises which were intended to create legal relations and which, in the knowledge of the person making the promise, were going to be acted on by the party to whom the promise was made, and have in fact been so acted on. In such cases the courts have said these promises must be honoured.** There are certain cases to which I particularly refer: *Fenner v Blake* ([1900] 1 QB 426), *Re Wickham* (1917) (34 TLR 158), *Re William Porter & Co Ltd* ([1937] 2 All ER 361) and *Buttery v Pickard* (1946) (174 LT 144). Although said by the learned judges who decided them to be cases of estoppel, all these cases are not estoppel in the strict sense. They are cases of promises which were intended to be binding, which the parties making them knew would be acted on and which the parties to whom they were made did act on. *Jorden v Money* can be distinguished because there the promisor

made it clear that she did not intend to be legally bound, whereas in the cases to which I refer the promisor did intend to be bound. In each case the court held the promise to be binding on the party making it, even though under the old common law it might be said to be difficult to find any consideration for it. The courts have not gone so far as to give a cause of action in damages for breach of such promises, but they have refused to allow the party making them act inconsistently with them. It is in that sense, and in that sense only, that such a promise gives rise to an estoppel. The cases are a natural result of the fusion of law and equity; for the cases of *Hughes v Metropolitan Ry Co* (1877) (2 App Cas 439), *Birmingham & District Land Co v London & North Western Ry Co* (1888) (40 Ch D 268), and *Salisbury v Gilmore* ([1942] 1 All ER 457), **show that a party will not be allowed in equity to go back on such a promise. The time has now come for the validity of such a promise to be recognized.** The logical consequence, no doubt, is that a promise to accept a smaller sum in discharge of a larger sum, if acted on, is binding, notwithstanding the absence of consideration, and if the fusion of law and equity leads to that result, so much the better. At this time of day it is not helpful to try to draw a distinction between law and equity. They have been joined together now for over seventy years, and the problems have to be approached in a combined sense.'

8. The said case was decided in 1946 and Lord Denning had commented on the change of winds during that time and the development of estoppel to create a right recognized in law. Much water had gone under the bridge since then. The principles recognized in the Central London Property Trust Ltd v High Tree House Ltd [1956] 1 All ER 256 was re- affirmed in Brikom Investments Ltd v Carr and others [1979] 2 All ER 753 nearly 30 years after the said *Central London Property Trust* (supra) case and the principle enunciated is a trite law.

9. In the judgment of Lord Denning MR in Moorgate Mercantile Co Ltd v Twitchings [1975] 3 All ER 314 at 323, it was held:

> '**Estoppel is not a rule of evidence. It is not a cause of action.** It is a principle of justice and of equity. It comes to this. When a man, by his words or conduct, has led another to believe in a particular state of affairs, he will **not be allowed to go back on it when it would be unjust or inequitable for him to do so**. Dixon J [in Grundt v Great Boulder Pty Gold Mines Ltd (1937) 59 CLR 641 at 674] put it in these words: "The principle upon which estoppel in pais is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations." In 1947, after the High Trees case [Central London Property Trust Ltd v High Trees House Ltd (1946) [1956] 1 All ER 256, [1947] KB 130], I had some correspondence with Dixon J about it, and I think **I may say that he would not limit the principle to an assumption of fact, but would extend it, as I would, to include an assumption of fact or law, present or future.** At any rate, **it applies to an assumption of ownership or absence of ownership**. This gives rise to what may be called proprietary estoppel. There are many cases where the true owner of goods or of land had led another to believe that he is not the owner, or, at any rate, is not claiming an interest therein, or that there is no objection to what the other is doing. In such cases it has been held repeatedly that **the owner is not to be allowed to go back on what he has led the other to believe.** So much so that his own title to the property, be it land or goods, has been held to be limited or extinguished, and new rights and interests have been created therein. **And this operates by reason of his conduct—what he had led the other to believe—even though he never intended it.**'

10. So, what is paramount is not what was intended by the Plaintiff, but what he had led the Defendant to believe through his conduct. The Plaintiff will not be allowed to go back on what he had led the Defendant to believe. I cannot decide these issues only through affidavit evidence which barely address vital facts. In the circumstances the facts and circumstances alleged in the affidavits needs to be tested in a court of law through cross examination to establish the truth in them to determine the issue of estoppel and right based on that. The Defendant alleges that the transfer of the property was only for a subdivided part though it was executed for the entire property based on the trust and close relationship between the parties. Since the property was mortgaged prior to the transfer as well as after the transfer any subdivision needs the consent of the mortgagee and whether this was requested from the respective mortgagees is not clear from the evidence. It is unlikely considering the close relationship between the parties due to the marriage of the Defendant's brother's daughter who also had resided in the same premises, the existence of the subdivision which was also approved and also registered in 2008. The intention of the Defendant to sell a portion would have known to the Plaintiff either at the time of the transfer or before the purchase considering the evidence before me. Assuming that fact was known to the Plaintiff, and the conduct after the transfer establishes an arguable right to possession based on estoppel.

11. If an unequivocal promise was made by the Plaintiff to transfer a part of the premises it should be honoured and this can be establish only through a trial and the summary manner laid down in the Section 169 of the Land Transfer Act is not suitable for such determination. Oral evidence of the parties are essential for the determination of the issue relating to promissory estoppel. Though neither party relied on promissory estoppel the hearing, the facts alleged in the affidavits and the annexed documents and the conduct of the Plaintiff indicate that the court has to determine the issue of promissory estoppel. Neither party filed any submissions supporting their respective positions. The Plaintiff was unable to explain why he waited for more than 2 years from the transfer of the property to seek eviction of the Defendant who remained in possession despite it being transferred to the Plaintiff. The Plaintiff who obtained the said property through a mortgage from a commercial bank, presumably continued to pay the mortgage for more than two years without

obtaining eviction of the Defendant from the dwelling that was situated on the premises. This is highly unusual behaviour of a person unless there was some outside arrangement or promise and this cannot be elevated to a promissory estoppel without considering the oral evidence of the parties.

12. In the case of Morris Hedstrom Limited –v- Liaquat Ali CA No: 153/87, the Supreme Court of Fiji held that:-

> *"Under Section 172 the person summonsed may show cause why he refused to give possession of the land if he proves to the satisfaction of the Judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under Section 169 procedure.* ***That is not to say that final*** *or incontrovertible proof of a* ***right to remain in possession must be adduced****.* ***What is required is that some tangible evidence*** *establishing a right* ***or supporting an arguable case for such a right*** *must be adduced."* (emphasis is mine)

13. What the Defendant has to satisfy is not a final proof of a right to remain in possession but some **tangible evidence supporting an arguable case for a right** to remain in possession and the affidavits of the parties, supported by the conduct of the Plaintiff and its failure to explain vital issues of this case creates an arguable case for a right to remain in possession, based on promissory estoppel which needs elucidation or further evidence and testing the veracity of the statements made by the parties.

C. CONCLUSION

14. The Plaintiff is married to Defendant's brother's daughter, who had also lived for some time in the said premises prior to the marriage. The Defendant who was the previous owner of the property obtained a subdivision of the property

and it was approved and also registered in 2008. The settlement sum of the property was paid to settle the previous mortgage under the Defendant and also the registered charge to FNPF during the ownership of the Defendant. The Plaintiff also obtained a loan from commercial bank to settle the said dues in order to transfer the property to his name in 2011, but remained dormant for more than two years and filed this action seeking eviction of the Defendant. The Plaintiff is unable to explain the two year delay since the transfer of the property. The Defendant alleges that though the entire property was transferred the promise was to transfer the part of the property excluding the dwelling where Defendant resides. The approved and registered subdivision supports this contention and even the conduct of the parties indicate a promise or arrangement between the parties that precludes eviction in terms of the Section 169 of the Land Transfer Act. The issue is the determination of promissory estoppel and whether the Defendant has established a right to possession based on promissory estoppel. Evidence before me as well as the oral submissions supports an establishment of arguable case fro the Defendant to remain in possession of the said property based on promissory estoppel. The application for eviction is dismissed and I will not award any cost considering the facts of the case.

D. FINAL ORDERS

a. The Summons seeking eviction of the Defendant is struck off.
b. No costs.

Dated at **Suva** this **30th day** of **May, 2013**.

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Justice Deepthi Amaratunga

High Court, Suva