

1. MANI LAL
2. VRAJ LAL
3. MAHESH KUMAR

A

v

SATYA NAND

[HIGH COURT, 1994 (Byrne J), 27 June]

B

Civil Jurisdiction

Land-state land-option to purchase-essential requirements for-nature of equitable proprietary estoppel-State Lands Act (Cap 132) Section 13.

In answer to proceedings for possession of state land the Defendant claimed to possess an option to purchase. Rejecting the defence the High Court discussed the nature of such an option and the proof of its existence. The nature of an equitable proprietary estoppel was also examined.

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Cases cited:

- Ballas v Theophilos* (1985) V.R. 576
Chalmers v Pardoe [1963] 3 All E.R. 552
Court Brothers (Furnishers) Ltd v Sunbeam Transport Ltd 15 FLR 206
D.B. Waite (Overseas) Ltd v Sidney Leslie Wallath (1972) 18 F.L.R. 141
Griffith v Pelton [1957] 3 All ER 75
Laybutt v Amoco Australia Pty Ltd (1974) 48 ALJR 492
Mahend Pratap Singh v Jacqueline Ehny N'Yuert (Action No. 44 of 1993)
Murray v Scott [1976] 1 NZLR 643
Phalad v Sukh Raj (1978) 24 F.L.R. 170
Ramsden v Dyson (1865) L.R. 1 H.L. 129
United Scientific Holdings Ltd v Burnley Borough Council [1978] A.C. 904

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V. Kapadia for the Plaintiffs
R. Chand for the Defendants

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Byrne J:

This is yet another application for possession of land held by the Plaintiffs under a lease under the Crown Lands Act. The proceedings began by a Writ of Summons issued on the 23rd of June 1993 on which a Statement of Claim was endorsed.

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The Statement of Claim alleges that the Plaintiffs are the lessees of all the land described and comprised in Approval Notice of Lease reference L.D.4/14/2650 issued by the Director of Lands dated 22nd January 1985 for a term of 99 years from 1st of March 1984. On or about 21st June 1990 the Defendant

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paid a sum of \$2,500.00 as deposit for the purchase of the property from the Plaintiffs.

A On about 12th October 1990 the Plaintiffs wrote to the Defendant advising the Defendant that "subject to Crown Approval we agree to transfer the title in your favour for a sum of \$20,000.00 (Twenty Thousand Dollars)". These allegations are admitted by the Defendant.

B The Statement of Claim continues that after payment of the said sum of \$2,500.00 the Defendant entered into possession of the property and that thereafter there were no further communications or correspondence from the Defendant to the Plaintiffs in respect of the transaction. The Statement of Claim continues that no application for Consent to Transfer the property was made to or obtained from the Director of Lands and that consequently the purported sale is null and void and the Defendant is therefore in unlawful occupation of the property.

C On or about 29th April 1991 the Plaintiffs received a letter from the Director of Lands advising them, inter alia, that the Plaintiffs were not utilising the land for industrial purposes for which the Approval Notice was given and further that an undersized building had been built on the land. The letter further advised the Plaintiffs that they had sub-let the land to another person without the consent of the Director of Lands and that the Director of Lands intended to cancel the Plaintiffs' lease by re-entry.

D On or about 12th November 1991 the Director of Lands issued a Notice under Section 57 of the Land Transfer Act Cap. 131 and Section 105 of the Property Law Act Cap. 130 by virtue of which the Director of Lands was deemed to have re-entered and taken possession of the said land.

E Thereafter the Plaintiffs applied to this Court in Civil Action 341 of 1992 seeking, inter alia, relief against forfeiture.

F Subsequent to the filing of that application there were further discussions between the Plaintiffs and the Director of Lands who on the 25th of November 1992 gave the Plaintiffs a further six months in which to comply with the terms and conditions of the construction of the building.

G On the 20th of April 1993 the Director of Lands gave the Plaintiffs through their solicitors a further twenty-one days in which to comply.

On receipt of these notices from the Director of Lands the Plaintiffs informed the Defendant of the same and requested the Defendant to vacate the land to enable the Plaintiffs to comply with the requirements of the Director of Lands. The Plaintiffs allege that the Defendant has refused to vacate the land.

The Plaintiffs claim that if the Defendant does not give vacant possession of the property to them then they will not be able to comply with the terms and

conditions on which they were granted an extension by the Director of Lands and will thereby lose the land and suffer financial losses.

On the 15th of July 1993 the then solicitors for the Defendant filed an Acknowledgement of Service of Writ of Summons indicating that the Defendant intended to contest the proceedings and to apply for a stay of execution against any judgment entered by the Plaintiffs.

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The Plaintiffs' response to this was to issue an application for summary judgment under Order 14 Rule 2 of the High Court Rules 1988 alleging in a supporting affidavit by the Third-named Plaintiff, Mahesh Kumar that the Defendant has no defence to the Plaintiffs' claim.

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On the 12th of August 1993 the Defendant swore an Affidavit in Reply annexing to it a proposed Statement of Defence.

The Defendant denies that he ever received a letter from the Plaintiffs dated 12th October 1990 under which the Plaintiffs agreed to sell the property for \$20,000.00. However the Defendant admits that he paid a deposit of \$2,500.00 to the Plaintiffs. He alleges that he had been given an option to purchase the property by the Plaintiffs and admits that on or about 12th November 1991 the Director of Lands by issuing the relevant notice was deemed to have re-taken possession of the land.

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The Defendant alleges that it was orally agreed between himself and the Plaintiffs that the balance of the purchase price of \$33,000.00 was to be paid within eighteen months from the date of payment of the purchase price although I presume that the Defendant really means the payment of the deposit.

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The Defendant claims that it was a term of the oral agreement that it would be reduced to writing by the Plaintiff's solicitors and that the consent of the Director of Lands would be obtained by the Plaintiffs' solicitors.

The Defendant then claims that in about July 1990 he informed the Plaintiffs that he intended to build an industrial building on the property for the purpose of operating a Plumbing Firm. The Defendant alleges that acting on representations by the Plaintiffs he invested money in the land and has incurred substantial and continuing expense in respect of the up-keep of the land.

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The Defendant says that when the Director of Lands proceeded with re-entry action against the Plaintiffs on 12th November 1991 the Defendant refused to pay the balance of the purchase price of \$33,000.00 for fear of losing both his money and land.

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The Defendant claims an interest in the land by virtue both of a constructive trust and an equitable estoppel. He states that he has at all times been keen to complete his purchase and is financially able to do so. In the counter-claim the Defendant alleges a conspiracy by the Plaintiffs to cause him harm and injury

A by attempting to prevent him acquiring the property. He therefore prays that the Plaintiffs' claim be dismissed, a declaration that he is entitled to specific performance of the agreement and general damages and costs.

B So far no reply to that defence has been delivered by the Plaintiffs who however in a supplementary affidavit sworn and filed on the 24th of January 1994 state that the Director of Lands has given them a further extension until the 30th of June 1994 to comply with his letter of 25th November 1992 - a copy of that letter is annexed to the affidavit.

C Although the draft statement of defence pleads various defences it is clear to me that the Defendant's principal defence to this action is that he had an option to purchase the property. The Plaintiffs of course allege that no consent of the Director of Lands was obtained to the transfer of the property to the Defendant under Section 13 of the Crown Lands Act Cap.132 and that, all other things being equal, this is fatal to any claim the Defendant might have to an interest in the land. This claim has been considered on numerous occasions by the Courts here and the Plaintiffs rely primarily on the Privy Council decision of Chalmers v. Pardoe [1963] 3 All E.R. 552. This decision was followed in Phalad v. Sukh Raj (1978) 24 F.L.R. 170 and D.B. Waite (Overseas) Ltd. v. Sidney Leslie Wallath (1972) 18 F.L.R. 141.

D The Defendant denies that these cases apply to the present claim on the ground that no consent of the Director of Lands was necessary because as the Defendant says in his Affidavit in Reply "there was only an option to purchase made".

E I shall discuss this claim and with it the basic requirements of an option to purchase in a moment but before doing so will deal with a submission on behalf of the Defendant that the Plaintiffs have "only an Approval Notice of Lease" and not an actual Lease so that, according to the Defendant, the requirements of Section 13 of the Crown Lands Act do not apply here. This submission must be rejected for the simple reason that Clause 1 of the Approval Notice dated 22nd January 1985 states inter alia, "This is a protected lease under the provisions of the Crown Lands Act". The Crown Lands Act is therefore very relevant to these proceedings and in the absence of any consent by the Director of Lands to the transaction between the Plaintiffs and the Defendant must render the Defendant's occupation of the land void unless he can establish an arguable defence based on his having an option to purchase the property or some other defence.

G There is no evidence of any consent by the Director of Lands in the material before me.

I now turn to the claim by the Defendant to have an option to purchase the land. In several cases which have come before me in the last twelve months this defence has been raised in similar proceedings and in an attempt to guide solicitors for Defendants who consider pleading or alleging such defence I

conditions on which they were granted an extension by the Director of Lands and will thereby lose the land and suffer financial losses.

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propose now to set out briefly the essential requirements of an option to purchase. I touched on some of these in my judgment in Action No. 44 of 1993 Mahend Pratap Singh v. Jacqueline Ehny N'Yuert where a tenant holding over claimed the right to do so because she allegedly had an option to purchase the land from which the Plaintiff sought to evict her. At pages 5 and 6 of my judgment I discussed four of the numerous cases on the subject beginning with the judgment of Gibbs J. in the High Court of Australia in Laybutt v. Amoco Australia Pty Ltd. (1974) 48 ALJR 492 at 497-499. There His Honour expressed the view that an option to purchase is a conditional contract of sale.

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In Murray v. Scott [1976] 1 NZLR 643 at p.655 Cooke J. stated that the most commonly accepted theory in New Zealand is that the option to purchase comprises an offer to sell coupled with a contract not to revoke the offer which is the view apparently accepted in the United Scientific Holdings Ltd. v. Burnley Borough Council [1978] A.C. 904. I then continued that, whatever be the juridical nature of an option to purchase, one thing is certain, that no particular form of words is necessary in order to exercise an option effectively. As is said in Voumard's The Sale of Land, Third Edition at pp11-12 all that is required is that the document relied on as constituting the exercise should show that the holder of the option has made a clear and unequivocal election to acquire the property upon the terms specified in the option.

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To support this statement the author cites a number of cases including Ballas v. Theophilos (1958) V.R. 576 at p.581 affirmed on appeal in the High Court of Australia in 98 C.L.R. 193 at pp.196, 205.

In Hinde McMorland & Sim "Land Law" (1978) at p.994 the authors describe an option to purchase as a right to pre-emption, or "first refusal", which gives the grantor the initial choice whether he wishes to sell before the grantee may decide whether to buy. The authors then continue; "A right of pre-emption implies that an offer of the first refusal must be made in writing with all its terms and conditions incorporated in the written document including the monetary value thereof or, if is not stated however it is to be ascertained and the duration of the option stating the period for which it is to be open and the manner in which it is to be exercised".

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I note that in paragraphs 7 and 8 of the Defendant's Affidavit in Reply he does not elaborate on his claim to have an option to purchase. In my judgment as a matter of law the Defendant should "condescend upon particulars" in respect of his claim to have an option to purchase and since he has not done so I reject his submission on this question.

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Counsel for the Defendant refers me to two cases, Griffith v. Pelton [1957] 3 All E.R. 75 and Court Brothers (Furnishers) Limited v. Sunbeam Transport Limited 15 FLR 206. In my opinion both cases can be distinguished on their facts from the present.

In Griffith v. Pelton the question before the Court was whether a lessee could

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assign an option to purchase to the assignee of the lease which is not the question for decision here.

A Similarly in Court Brothers (Furnishers) Limited v. Sunbeam Transport Limited the Court held that there was an option to purchase but that this did not amount to a dealing to any land within the meaning of Section 13(1) of the Crown Lands Act.

B In my judgment the Defendant has not given sufficient evidence of having an option to purchase so that the judgment of the Court in Court Brothers (Furnishers) Limited v. Sunbeam Transport Limited does not assist me.

C In any event I consider the position is covered by Section 59(d) of the Indemnity, Guarantee and Bailment Act (Cap.232) which states that no action shall be brought upon any contract or sale of lands or any interest in them unless the agreement upon which such action is brought or a memorandum thereof is in writing. No such writing is in evidence here.

D Before going to the Defendant's final submission as to the existence of an equitable estoppel I must state, only for the purpose of rejecting it, a submission by the Defendant that he has evidence to prove that the Plaintiffs after taking the deposit of \$2,500.00 from the Defendant applied for consent to transfer the property to another purchaser, Visama Rice Mills. I observe that the Defendant's affidavit does not contain any such allegation as it might be expected to if it were part of the defence. For this reason I reject the submission.

E I finally pass to the Defendant's argument of equitable estoppel. In this regard counsel cites the dissenting judgment of Lord Kingsdown in the case of Ramsden v. Dyson (1865) L.R. 1 H.L. 129 which always has been considered one of the most useful statements on equitable estoppel. His Lordship said at p.140:

F "If a man under a verbal agreement with a landlord for a certain interest in land or what amounts to the same thing under the expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation with the knowledge of the landlord and without any objections by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation."

G Also at p.140 Lord Cranworth L.C. said:

"If a stranger begins to build on any land supposing it to be his own and I perceiving his mistake, abstain setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land in which

he had expended money on the supposition that the land was his own.”

I reject this argument because I am satisfied that the Defendant must have known that no consent of the Director of Lands had been obtained to his occupation. Before taking possession of the land he was under a duty to make all relevant enquiries as to the Plaintiffs’ title and since the land in question obviously was not freehold in my judgment one of the first steps he should have taken was to enquire whether the Director of Lands had given his consent to the transaction. If the Defendant proceeded to erect a building on the land either knowing that the Director of Lands had not given his consent or oblivious to the lack of such consent he cannot hold this against the Plaintiffs.

Spry in his “Principles of Equitable Remedies” 4th Edition 1990 page 179 sets out the basic principles of equitable proprietary estoppel as follows:

- “1. The Plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship.
2. The Plaintiff has induced the defendant to adopt that assumption or expectation.
3. The plaintiff acts or abstains from acting in reliance on the assumption or expectation.
4. The defendant knew or intended him to do so.
5. The plaintiffs’ action or inaction will occasion detriment if the assumption or expectation is not fulfilled.
6. The defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise.”

In this case the Defendant has produced no evidence of any option to purchase the land nor any inducement from the Plaintiffs that he should purchase it. Since going into occupation in 1990 the Defendant has taken no steps against the Plaintiffs to legalise his occupation and therefore in my judgment he can not now seek assistance from a Court of Equity to legitimise his occupation and so avoid an order for vacant possession.

For these reasons I am not satisfied that the Defendant has an arguable defence

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A to this action and I therefore make an order for final judgment in favour of the Plaintiffs against the Defendant for immediate vacant possession of the land described in the Statement of Claim. I also order the Defendant to pay the Plaintiffs' their costs.

(Judgment for the Plaintiff.)

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