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BRUCE DUNCAN GRAINGER LAWLOR

v.

TIMOCI DUAIBE

B

[SUPREME COURT, 1976 (Tuivaga J.), 17th, September]

Civil Jurisdiction

Licence—court proceedings compromised by settlement that squatter be allowed to remain on land for rest of life—whether owner subsequently entitled to possession—relationship between parties—whether licence protected by equity.

C

Estoppel—court proceedings compromised by settlement that squatter be allowed to remain on land—whether owner estopped from resiling from settlement—whether licence protected by equity.

D

For some years the plaintiff had been endeavouring to evict the defendant. In 1962 criminal proceedings were instituted against the defendant's wife and the plaintiff's son in the Suva Magistrate's Court following a shooting incident. These proceedings were subsequently withdrawn against both parties after a compromise had been reached which allowed the defendant to remain on the land for the rest of his life. The plaintiff in 1973 issued a notice to quit and followed this with an action for possession.

E

Held: Although there was no evidence upon which an actual tenancy could be inferred, the defendant did have a licence to remain on the land. This licence was not a bare licence but one protected by equity as there had been a contract made in 1962 to allow him to remain. The plaintiff was, therefore, estopped from resiling from the compromise reached in the Magistrate's Court.

Cases referred to:

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Thoday v. Thoday [1964] 2 W.L.R. 371; [1964] 1 All E.R. 341.

Booker v. Palmer [1942] 2 All E.R. 674.

Errington v. Errington [1952] 1 All E.R. 149; [1952] 1 K.B. 290.

Thomas v. Sorrell [1673] Vaugh 330.

Wood v. Leadbitter (1845) 13 M & W 838.

Thompson v. Park [1944] 2 All E.R. 477; [1944] 1 K.B. 408.

G

Winter Garden Theatre (London) Ltd. v. Millennium Productions Ltd. [1946] 1 All E.R. 678; (rvsd) [1947] 2 All E.R. 331.

Foster v. Robinson [1950] 2 All E.R. 342; [1951] K.B. 149.

Inwards v. Baker [1965] 1 All. E.R. 446; [1965] 2 Q.B. 29.

Action in the Supreme Court for possession of land.

B. N. Sweetman for the plaintiff.

H. M. Patel for the defendant.

TUIVAGA J.: [17th September 1976]

In this action the plaintiff seeks against the defendant an order for vacant possession of that piece of land in which the defendant and his family have been staying and which is part of Lot 1 on Deposited Plan No. 1980 at Tamavua containing 3 roods 39.4 perches and described as Certificate of Title No. 8320. The property was transferred by a Mr Caldwell in 1955 to the plaintiff in whose name the property is now registered. For convenience I shall hereinafter refer to the piece of land occupied by the defendant and his family as "the land" and the entire property as "the property".

The defendant who is 86 years of age has been living on the land since about 1907. Contrary to his pleadings the defendant in his evidence claims to be the sole rightful owner of the land. According to him the land was desolate and uninhabited and covered with thick bush when he moved in after obtaining permission to do so from a Ratu Aporosa, a high chief of Suvavou. The defendant and his family have for a good many years had their own houses built and food crops grown on the land.

Since the plaintiff became the owner of the property there has been continual friction between the parties arising from the plaintiff's attempts to get the defendant and his family out of the land. The defendant has shown no inclination to leave the land. He thinks he has every right to remain on the land in which he has lived for the best part of his life.

On the material before me, it is clear that the ownership of the land cannot now be seriously disputed. Whatever its earlier history might have been, the property has since been made subject to the provisions of the Land (Transfer and Registration) Ordinance (Cap. 136) which though later repealed, have been re-enacted and replaced by the Land Transfer Act, 1971. Since then the only legally acceptable method of obtaining title to the land was by registration under the provisions of the Ordinance or Act, as the case may be. As noted above the title to the property in this case was transferred and registered in the name of the plaintiff in 1955 from which time he became the legal owner thereof. Counsel for the defendant concedes the position so far as the plaintiff's title to the property is concerned.

It is clear from his pleadings by which he is bound that the defendant relies on the terms of a settlement reached between the parties in 1962 for giving him the right to remain in possession of the land. Paragraphs 7 and 8 of the statement of claim which have been admitted by the defendant in his defence are relevant in this connexion. Paragraph 7 states that on the 18th day of April 1962 the defendant instituted a criminal prosecution of the wife of the plaintiff. Paragraph 8 which I think is very significant is set out in full below:—

"8. The said criminal action was withdrawn and a criminal action against the defendant's son not proceeded with as a result of a settlement reached between the parties involved which was recorded by the magistrate in Criminal Action No. 1244 of 1962 as under:

The old man Timoci Duaibe and the people living with him will be permitted to remain in the present house or houses now erected on the land of Mr Lawlor until the death of Timoci and the remainder of his family undertakes to vacate the land within a reasonable time to be decided by the parties after the case. They will be permitted to remove the crops now growing on Mr Lawlor's land as they mature and that they will not plant on Mr Lawlor's land but will use other

A land. Mr Lawlor will re-erect his fence with a track of access from the house, land to be agreed upon by the parties, that the private prosecution be withdrawn and the police be requested to offer no evidence in the police prosecution against the accused in the police case. There will also be a Fijian ceremony through Uraia Koroi. Rest of it a year for the portion of land on which the houses are built and provision to use the track."

B It appears that following a shooting incident on the property involving the plaintiff's wife and the defendant's son and arising no doubt from the continuing personal differences between the parties concerning the land, court proceedings were brought against the plaintiff's wife and the defendant's son in the Suva Magistrate's Court. However, these proceedings were compromised and withdrawn in both cases after a settlement was reached between the parties. The terms of settlement were recorded by the presiding magistrate and as noted above, are not disputed on either side.

C On behalf of the plaintiff it is contended that the settlement had never been signed by either party nor its terms complied with by the defendant. It is therefore claimed that the settlement has no binding force and the defendant is precluded from relying on its terms as creating a life tenancy in the land in favour of the defendant. According to the plaintiff, the defendant has never paid any rent on the land which he has been occupying as a squatter. According to the plaintiff a notice dated D 28th June 1972 (Ex. 19) to quit the land was duly served on the defendant but the defendant has failed or omitted to comply with such notice.

E On behalf of the defendant it is contended that the said settlement gave the defendant a life tenancy in the land which is irrevocable and binding upon the plaintiff. It is said that the agreed terms of the settlement between the parties constituted an estoppel *per rem judicatam* so that the plaintiff could not now deny the existence of the defendant's life interest in the land. In support of his contention on the question of estoppel by judgment counsel for the defendant relies on the case of *Thoday v. Thoday* [1964] 1 All E.R. 341. It is further said that if the plaintiff had desired to repudiate the settlement as being illegal or vitiated in any way his proper course should have been to seek a declaration to that effect from the court. However, as he has not done so, it is too late for the plaintiff to now say that the settlement reached between the parties has no legal validity. Furthermore, counsel for the F defendant says that the notice to quit served on the defendant was bad and in ineffectual to terminate the defendant's tenancy.

G Whether or not the terms of the settlement pertaining to the defendant's occupation of the land gave the defendant a life interest in the land must depend on the intention of the parties. This intention may be gathered from the language used in the settlement and the surrounding circumstances. In *Booker v. Palmer* [1942] 2 All E.R. 674 Lord Greene at page 676 explained how the matter should be approached in these words:

"Therefore, what we have to decide is whether there was any evidence upon which a tenancy between the respondent and Mrs Goldsmith could be inferred.

H In my opinion, there is no evidence from which any such inference could be drawn. Whether or not parties intend to create as between themselves the relationship of landlord and tenant, under which an estate is created in the tenant and certain mutual obligations arise by implication of law, must in the last resort

be a question of intention. Where the parties enter into a formal document the intention to enter into legal relationship is obvious; but when all that happens is a quite casual conversation on the telephone, it is very much more difficult to infer that the parties are really contemplating entering into any legal relationship at all in particular, such a special relationship as that of landlord and tenant.”

In my opinion the settlement concluded between the parties in the present case effected an alteration in their relationship concerning the land. Whatever may have been the position between them before the settlement, the defendant could not thereafter be regarded as squatter on the land. However, I do not think that their relationship was one of landlord and tenant. The facts of this case cannot support an inference of tenancy. The settlement was not signed by the parties nor was any rent ever paid by the defendant to the plaintiff. In my view what the settlement merely did was to give the defendant (and his family) a licence to remain on the land until the defendant's death. In other words, the relationship as between the parties was in fact one of a licensor and licensee. This is clear in my opinion from the nature of the words used in the settlement, namely:

“The old man Timoci Duaibe and the people living with him will be permitted to remain. . . on the land of Mr Lawlor until the death of Timoci. . .”

Denning L.J. (as he then was) referred to the distinction between a tenancy and a licence in *Errington v. Errington* [1952] 1 All E.R. 149. At page 154 he said:

“The classic definition of a licence was propounded by Vaughan C.J. in the seventeenth century in *Thomas v. Sorrell* (1673) Vaugh. 330 at 351:

‘A dispensation or licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful.’

The difference between a tenancy and a licence is, therefore, that in a tenancy an interest passes in the land, whereas in a licence it does not.”

From the history of personal antagonism which had marked the relationship between the parties from the time the plaintiff acquired the property, it was certainly highly unlikely that the plaintiff should ever intend to give the defendant a legal interest in the land under the settlement of 1962. It is clear that from the beginning the plaintiff had been trying to get the defendant to vacate the land. I am sure the plaintiff would have continued to do so if criminal proceedings had not interposed in the meantime which affected both parties and which gave rise to the settlement already referred to. In these circumstances, I do not think it is possible to infer from the settlement anything higher than a licence to the defendant to stay on the land.

The next question that arises is whether this was a bare licence which could be revoked at any time or whether it was a licence protected by equity. The law on the subject was explained by Denning L.J. in *Errington v. Errington* (supra) at page 155 in these words:

“Applying the foregoing principles to the present case, it seems to me that, although the couple had exclusive possession of the house, there was clearly no relationship of landlord and tenant. They were not tenants at will, but licensees. They had a mere personal privilege to remain there, with no right to assign or sub-let. They were; however, not bare licensees. They were licensees with a con-

A tractual right to remain. As such they have no right at law to remain, but only in equity, and equitable rights now prevail. I confess, however, that it has taken the courts some time to reach this position. At common law a licence was always revocable at will, notwithstanding a contract to the contrary: *Wood v. Leadbitter* (1845), 13. M. & W. 838. The remedy for a breach of the contract was only in damages. That was the view generally held until a few years ago: see, for instance, what was said in *Booker v. Palmer* [1942] 2 All E.R. 674 at 677; *Thompson v. Park* [1944] 2 All E.R. 477 at 479. The rule has, however, been altered owing to the interposition of equity. Law and equity have been fused for nearly eighty years, and since 1948 it has become clear that, as a result of the fusion, a licensor will not be permitted to eject a licensee in breach of a contract to allow him to remain: see *Winter Garden Theatre (London) Ltd. v. Millennium Productions Ltd.* [1946] 1 All E.R. 678 at 780, per Lord Greene M.R. [1947] 2 All E.R. 336, per Viscount Simon; nor in breach of a promise on which the licensee has acted, even though he gave no value for it; see *Foster v. Robinson* [1950] 2 All E.R. 342 at 346 where Sir Raymond Evershed, M.R. said that as a result of the oral arrangement to let the man stay, he "was entitled as licensee to occupy the cottage without charge for the rest of his days..." This infusion of equity means that contractual licences now have a force and validity of their own and cannot be revoked in breach of the contract. Neither the licensor nor anyone who claims through him can disregard the contract except a purchaser for value without notice.

D It will be noted that the licence granted to the defendant under the settlement was made subject to certain supposed conditions but unfortunately these were couched in the most loose language that it is impossible for this court to draw any legal conclusions from them. In any event the conditions were apparently not considered important enough by the plaintiff because despite certain alleged breaches thereof no legal action was taken concerning the matter when it might have been incumbent upon him to do so. The matter was left in the air for over 10 years, that is, until the present proceedings were instituted. No satisfactory explanation has been given. From all this the only conclusion I can draw is that the plaintiff had for several years after 1962 found no reason at all to resile from his arrangement with the defendant. This arrangement was in my view clearly contractual in nature because it was a direct product of the compromise of criminal proceedings affecting both parties. In these circumstances, I feel constrained to hold that the defendant's licence was not a bare licence but one protected by equity. The defendant was in 1962 led to believe that he could remain on the land until his death. In my opinion the plaintiff is now estopped from resiling from his arrangement with the defendant whereby the latter was permitted to remain on the land (see *Inwards v. Baker* [1965] 1 All E.R. 44). I am satisfied that on the facts of this case the defendant has a contractual licence to stay on the land which having regard to the special circumstances could only be terminated upon his death or by some other supervening arrangement.

For the reasons I have given this action must fail and is dismissed with costs.

Action dismissed.