IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P. 73/94

BETWEEN: ROSITA MEREDITH of Savalalo, Sales Clerk, MICHAEL CHEUNG FUK presently of Vailoa, American Samoa, Mechanic and PATRICK CHEUNG FUK also of Vailoa, Pago Pago, American Samoa, Student

Applicants

A N D: PUALAGI PA'U of Fugalei, Workman

Respondent

Counsel: T. Malifa for Defendant in support of motion
P.A. Fepuleai for Plaintiffs to oppose

Hearing: 3rd May 1994

Decision: 5th May 1994

DECISION OF SAPOLU, CJ

This is a motion by the defendant to discharge the interlocutory injunction granted ex parte on 4 March 1994 against him to restrain him and any person acting by, under, or through him from preventing the plaintiffs from reclaiming certain land at Fugalei.

There is no doubt that this Court has jurisdiction to entertain a motion to discharge an interlocutory injunction which has been granted ex parte. Such motion to discharge an ex parte interlocutory injunction may itself be ex parte or it may be inter partes depending on the circum-

stances of the particular case : London City Agency Ltd v Lee [1969] 3 All E.R. 1376. The motion to discharge the interlocutory injunction in this case has been made inter partes and counsel for the defendant and the plaintiffs were present and made submissions. At the conclusion of counsel's submissions on 3 May 1994, I made the order to discharge the ex parte interlocutory injunction against the defendant. I told counsel I will prepare a formal decision with reasons and hand it to counsel in due course. That decision with reasons is now given.

It is to be noted that this is a preliminary matter and what is before the Court are only affidavits in support of the competing claims by the parties. There are also material conflicts between the plaintiffs affidavits and the defendant's affidavits. As what is before the Court at this preliminary stage are only affidavits which conflict in certain material particulars, I will refer to the circumstances of this case on the basis of the information disclosed in these affidavits without making any conclusive findings of fact. That is left until the substantive hearing when witnesses will be called and examined.

Now the land in dispute is part of the total land formerly owned by the plaintiffs father until 1993 when he gifted the total land to the plaintiffs. This is clear from the affidavit by the first-named plaintiff. The land is situated at Fugalei close to the centre of Apia and has been registered under the names of the plaintiffs since 1993. The first-named plaintiff in her affidavit says that the defendant's family came on to the part of the land they are now occuping as the defendant's mother in the past sought permission from her father to live on the land until the defendant's family purchased their own property in the Apia area. Her father gave

permission to the defendant's mother for her and her family to live on the land free of rent on the understanding that their stay will be for a short duration. The defendant's family then did some reclamation work to the land in order to make their living comfortable. They built their house on the land they reclaimed. After the land was conveyed to the plaintiffs in 1993, the first-named plaintiff says she approached the defendant and told him that the plaintiffs needed the land for their own development and the defendant would have to vacate the land. The defendant initially agreed but later changed his mind. When the plaintiffs started to reclaim a portion of the land which is not occupied by the defendant's family, the defendant interfered and prevented the plaintiffs reclamation work. It was on the basis of that information as submitted in the affidavit by the first-named plaintiff that the Court granted the ex parte interlocutory injunction on 4 March 1994 against the defendant.

At the hearing of the motion to discharge the interlocutory injunction, photographs of the land in dispute were produced to the Court by counsel for the plaintiffs. It is clear from those photographs that the land in dispute is already reclaimed land and adjoins the land on which the house of the defendant's family stands. What the plaintiffs have done is to bring in truckloads of soil and deposit them on this reclaimed land. That is the plaintiffs reclamation work which the defendant has prevented.

Now the defendant and his sister who are still residing in Samoa have filed affidavits. Likewise his brothers and sisters who now reside in Auckland, New Zealand have also filed affidavits. Essentially what these affidavits say is as follows. The defendant's mother, who is now deceased, was a first cousin of the plaintiffs father. She was living with her family

up to 1966 in Sogi but then they had to leave Sogi to find another place to live. That was in 1966. The plaintiffs father then approached the defendant's mother at that time and told her not to go elsewhere but to come with her family and live on his land at Fugalei and made it their home. So in 1966, the defendant's mother and her family moved to Fugalei to live. At that time the area now occupied by the defendant's family was just soft mud, swamp and mangrove. At high tide the whole area was submerged in seawater. So deep was the seawater that people could swim in it or paddle a canoe on the water. One affidavit for the defendant says the water was as deep as 6 feet at high tide. So the defendant's family built an elevated house to keep themselves above water level especially during high tide. At that initial stage, one had to wade through the swamp to get to the house of the defendant's family from the main road during low tide. During high tide when the area was submerged in seawater a canoe was used to paddle from the main road to get to the house of the defendant's family. That state of affairs continued until the defendant's family built a passageway from the main road to their house.

Then there was the reclamation work. This was done mainly by the defendant's father and by the defendant and his brothers and sisters. Sometimes paid labourers were hired to help out with the reclamation work. All the affidavits for the defendant say that a great deal of time and strenous labour was spent by the defendant's family over many years in reclaiming the area they are now occupying. Quite often they worked six days a week trying to reclaim this area. Rocks, stones, shingles, logs, soil and all kinds of debris and rubbish were brought in to reclaim this area. Some of these were carried to the site by trucks and some were carried in a canoe that the defendant's family had. Spades and bush knives

were used to level all these items dumped at this area. Axes were also used to cut up the logs. At no time did the plaintiffs father or any of his family reproached the defendant's family or stopped them from carrying out the reclamation work they were doing all these years. In 1977 or 1978 when the plaintiffs father came from overseas he complimented the defendant's family for the work they were doing.

The affidavits for the defendant also say that the defendant's family at all times shared the belief that the land they were claiming was their own as a gift from the plaintiffs father. Their belief was based on these grounds. Firstly, that the plaintiffs father had always assured the defendant's mother that the land was for her and her children to have. On one occasions when the defendant's mother approached the plaintiffs father to have the land transferred to her, the plaintiffs father responded whether she doubted him as the land was hers and her children. Secondly, at no time did the plaintiffs father or any member of his family gave any indication that the defendant's family were living on the land on a temporary basis or that possession of the land will revest in the plaintiffs father. Thirdly neither the plaintiffs father nor any member of his family reproached or stopped the defendant's family while carrying out the reclamation work over all these many years. And fourthly, no rent was ever paid by the defendant's family for their occupation of the land so that they believed the land was a gift to their mother from the plaintiffs father.

The information now supplied by the defendant was not before the Court when the ex parte interlocutory injunction was granted. It is now to be decided whether in view of the information supplied by the defendant in his affidavits, considered together with the information supplied by the

plaintiffs, the interlocutory injunction should be discharged. There are two main grounds on which the motion to discharge is based. Firstly that the defendant has an agruable case for claiming title to the land in dispute. Secondly, if the interlocutory injunction is to stand, that will effectively allow the plaintiffs to take possession of the land before the determination of the substantive proceedings. Further the defendant says that if the interlocutory injunction is discharged the only inconvenience to the plaintiffs if they succeed at the substantive proceedings is that their proposed project has been delayed. However, if the interlocutory injunction remains and the defendant succeeds at the substantive proceedings, it may not be possible for the defendant to retake possession of the land for the plaintiffs have erected their project on it. In considering these grounds, I must reiterate that the Court is not making any conclusive findings of fact.

It seems to me that at the core of the first ground of the motion to discharge, is the claim that the circumstances relating to the occupation by the defendant's family of the land in dispute have given rise to an equity in favour of the defendant's family by way of a proprietory estoppel either by encouragement or acquiescence or a combination of both elements. In his counterclaim the defendant advances this proprietary estoppel as a cause of action. He also raises estoppel in his pleadings as a defence to the plaintiffs claim. Thus the defendant is using proprietary estoppel as both a **"sword"** and a **"shield"** to fight his case and to protect himself. As Lord Denning MR says in **Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd [1981] 3 All E.R. 577 at 584** :

> "The doctrine of estoppel is one of the most flexible and "useful in the armoury of the law".

But it must not be overlooked that the "sword" used here is proprietary estoppel. I leave open (as it has not been raised) the question of whether proprietary estoppel, estoppel by encouragement and estoppel by acquiescence are now subsumed under a boarder principle which may be broadly described as what would be "unfair or unjust" or "unconscionable", in the circumstances : see Crabb v Arun District Council [1975] 3 All E.R. 365 per Scarman L.J.; Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd (supra) per Lord Denning MR; Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd [1981] 1 All E.R. 897, 915-917 per OliverJ; the decision of the Privy Council in Attorney-General of Hong Kong v Humpheys Estate (Queen's Garden) Ltd [1987] 2 W.L.R. 343; and Westland Savings Bank v Hancock [1987] 2 NZLR 21.

The defendant's affidavits show that the plaintiffs father by oral representations led the defendant's mother and family to believe that the land in dispute belonged to them and for them to live on permanently. On that belief the defendant's family expended money and considerable strenuous labour to reclaim the disputed land. The defendant's affidavits also show that the plaintiffs father encouraged the defendant's family to carry on with the reclamation work over many years and at times passively stood by and allowed the defendant's family to carry on with the reclamation work. Perhaps it is a question of emphasis which element, encouragement or acquiescence, was predominant at which point in time in the sequence of events during the period of 27 years that the defendant's family has been in occupation of the disputed land. Whichever element, encouragement or acquiescence, was predominant at which point in time in this sequence of events and for how long, it appears to me that both encouragement and acquiescence are implicit in the concept of proprietary estoppel. In this case the defendant seems to say that encouragement was the overall predominant element.

Now there is no doubt that estoppel can be used as a defence, but can it also be used as a cause of action. I think there is no doubt that proprietary estoppel can also be used as a cause of action. There are numerous authorities to confirm that is the position. It will be sufficient to refer to only some of these authorities. In Crabb v Arun District Council [1975] 3 All E.R. 365 Lord Denning MR says :

> "....it is commonly supposed that estoppel is not itself a "cause of action. But that is because there are estoppels "and estoppels. Some do give rise to a cause of action. "Some do not. In the species of estoppel called proprie- "ary estoppel, it does give rise to a cause of action".

In Beech v Beech [1978-1982] 1 NZCPR 454, Jeffries J says :

> "There is agreement on a very important issue and it is "this : proprietary estoppel can found a cause of action "not fulfilling an exclusively defensive role".

It is also clear that estoppel by encouragement or by acquiescence can give rise to a cause of action. In Pascoe v Turner [1979] 2 All E.R. 945, the English Court of Appeal says :

> "The relevant principle is expounded in Swell on Equity "in the passage under the heading 'Proprietary Estoppel', "and is elaborated in Spencer Bower and Turner on "Estoppel by Representation in the chapter entitled "'Encouragement and Acquiescence'. The cases in point "illustrating that principle in relation to real "property are Dillwyn v Llewelyn, Ramsden v Dyson and "Plimmer v Mayor of Wellington. One distinction between "this class of case and the doctrine which has come to "be known as 'promissory estoppel' is that where estoppel "by encouragement or acquiescence is found on the facts "those facts give rise to a cause of action. They may "be relied on as a sword and not merely as a shield".

In Thomas v Thomas [1956] NZLR 785 Gresson J in referring to the case of Dillwyn v Llewelyn [1861-73] All E.R. Rep. 384 says :

> "If [it] is a case of equitable estoppel by acquiescence "(and it is susceptible of being so regarded) it is an "authority for the use of that doctrine as a sword and "not merely as a shield".

From the last two cases, it is clear that even if the defendant's counter-claim is phrased in the terminology of estoppel by encouragement or estoppel by acquiescence, such a cause of action will still be maintainable in law. And the defendant's affidavits clearly suggest elements of both encouragement and acquiescence.

I turn now to the nature of the estoppel in this case. It seems to me that the principles that apply in this field appear to have come down from Dillwyn v Llewelyn [1861-73] All E.R. Rep. 384 and Ramsden v Dyson (1866) L.R., HL 129. These principles have been discussed and expressed in a number of ways in a number of authorities. These authorities include Thomas v Thomas [1959] NZLR 785, Pascoe v Turner [1979] 2 All E.R. 945 and Beech v Beech [1978-1982] 1 NZCPR 454 which were cited by counsel for the applicant. To the list may be added De Bussche v Alt (1878) 8 Ch D 286, Willmot v Barker (1880) 18 Ch D 96., Plimmer v Wellington Corporation (1884) 9 App Cas 699, Chalmers v Pardoe [1963] 3 All E.R. 552, Crabb v Arun District Council (1975) 3 All E.R. 5, Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd (1981) 1 All E.R and Spencer Bower and Turner Estoppel by Representation, 3rd ed., para 307 (pp303-306). The list goes on but I need not overburden this decision with further citations.

I am content for the purpose of this decision to quote two passages from two of the decisions already cited which appear to express the essential flavour of the estoppel relied on by the defendant. In De Bussche v Alt (1878) 8 Ch D 286, 314, Thesiger L.J says :

> "If a person having a right, and seeing another person
> "about to commit, or in the course of committing, an
> "act infringing upon that right, stands by in such a
> "manner as really to induce the person committing the
> "act, and who might otherwise have abstained from it,
> "to believe that he assents to its being committed,
> "he cannot afterwards be heard to complain of an act".

In Chalmers v Pardoe [1963] 3 All E.R. 552, 555, Sir Terence Donovan in delivering the judgment of the Privy Council on an appeal from the Fiji Court of Appeal says :

> "There can be no doubt on the authorities that where an
> "owner of land has invited or expressly encouraged another
> "to expend money on part of his land on the faith of an
> "assurance or promise that that part of the land will
> "be made over to the person so expending his money a
> "court of equity will prima facie require the owner by
> "appropriate conveyance to fulfill his obligation; and
> "when, for example for reasons of title, no such
> "conveyance can effectively be made, a court of equity
> "may declare that the person who has expended the money
> "is entitled to an equitable charge or lien for the
> "amount so expended".

Sir Terence Donovan goes on to accept that a court will look at the circumstances of each particular case to see how the equity would be satisfied. Even though the passage just cited refers only to the expending of money, it must include labour as well, or an expending of both money and labour. That is what the defendant in this case says his family has done to the land in dispute for the last 27 years with either the acquiescence or encouragement or both from the plaintiffs father. Such acquiescence or encouragement or a combination of the two, according to the defendant, has created an equity by way of a proprietary estoppel in favour of the defendant and his family.

It is therefore clear that the defendant has an arguable case for proprietary estoppel and it is a very strong case if the factual allegations in his affidavits turn out at the substantive hearing to be true. The defendant has also indicated in his affidavits and the memorandum by his counsel that it will be argued at the substantive hearing that the plaintiffs being volunteers or voluntary transferees take the disputed land as a gift from their father subject to the equity which has arisen in favour of his family. The defendant also says that the disputed land should therefore be conveyed to his family, or at the very least the Court should declare that his family is entitled to an equitable charge or lien in the land. Given the present state of the authorities, I am of the view that these matters raised by the defendant are arguable. At least the plaintiffs did not contend otherwise.

In a situation of this kind, I am satisfied that the status quo should stand. If the ex parte interlocutory injunction is to remain the plaintiffs will continue with their proposed project which may involve expenditure of a substantial amount of money and will also involve taking possession of the disputed land before the substantive hearing takes place. However if the defendant succeeds at the substantive hearing, the pain and loss to the plaintiffs in having to dismantle what has been built will be so great that more arguments will be likely to arise whether they should vacate the land. All this outweigh any inconvenience to the plaintiffs which may result from the delay from the discharge of the interlocutory injunction if it turns out they are successful at the substantive hearing.

I have therefore come to the view, which I had already expressed on 3 May 1994, that the ex parte interlocutory injunction should be discharged. It is accordingly discharged.

T F M Fatiaki

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CHIEF JUSTICE