SHEILA MAHARAJ A

v.

JAI CHAND

Present at the Hearing: B

Lord Bridge of Harwich
Lord Templeman
Lord Oliver of Aylmerton
Lord Goff of Chieveley
Sir Robin Cooke

C

Delivered by Sir Robin Cooke (7th July 1986)

Native Land—Application for lease—representation therein as married to plaintiff-lease granted to him—erection of house on land leased—(Appellant) (Defendant) leaving her flat to live with him on understanding she could always stay there—indirect contribution to instalments on house—purely personal entitlement to stay thereby created—no dealing in land—no proprietary interest—plaintiff suing for possession of house/land—estoppel available against him. D

Sheila Maharaj (defendant) by special leave appealed against a judgment of the Fiji Court of Appeal which had reversed a decision of the Supreme Court (27 FLR 91) in her favour against the plaintiff who had been her "de facto" husband.

The parties had lived together for 12 years in a flat (1968-1980) (and before the erection of the house in question) which was hers, or she had an interest in it. They had one child of their own, she had had two children of a former union. E

The plaintiff had obtained land made available by the Housing Authority which was to be for married couples only. The land was Native land within the meaning of the Native Land Trust Act (the Act), s.12 thereof stated—

F

"12.—(1) Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void: G

A Provided that nothing in this section shall make it unlawful for the lessee of a residential or commercial lease granted before 29 September 1948 to mortgage such lease.
(Substituted by Ordinance 30 of 1945, s.8; amended by 29 of 1948, s.3.)

(2) For the purposes of this section "lease" includes a sublease and "lessee" includes a sublessee. Inserted by Ordinance 35 of 1943, s.2.)

B By s.4 of the Act control of Native Land was vested in the Native Land Trust Board (NLTB) to be administered by it for the benefit of Fiji owners. The land was leased by the Native Land Trust Board to the Fiji Housing Authority. The plaintiff was given and held the land under a registered sublease for 94 years 6 months 9 days from the Housing Authority approved by the Board from 21 November 1973.

C In his application to the Housing Authority the plaintiff indicated the parties were married and had two young children living with them. He undertook that the land would be used for the erection of a house to be used solely as a residence for himself and his family. Although the plaintiff financed the building of the home, the defendant used her modest earnings for the support of the family. Thus "there was an indirect significant contribution by her to the instalments payable to keep the
D property".

She was under the impression the plaintiff was providing a home for her and her children.

The plaintiff commenced an action in October 1981 for possession of the house which had been the family home. Rooney, J. refused the application; the effect of what he said being
E that the plaintiff was estopped from turning the defendant out; that the defendant could raise this estoppel inter partes notwithstanding the provisions of s.12(supra). The Court of Appeal reversed his decision and ordered the defendant to give vacant possession.

The issues which their Lordships considered arose were the effect of the section, and of estoppel apart from the section.
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The case for the appellant was never conducted on the basis of implied consent by the Native Land Trust Board. Section 12 is directed against alienating or dealing with the land but "neither the terms nor the spirit of the section are violated by an estoppel or equity operating solely inter partes".

G *Held:* The present case was concerned with a purely personal right, outside the purview of the section. A promissory estoppel such as set up here could not be described as a dealing with land.

The estoppel question had to take account of evidence including the evidence as to defendant leaving her own flat (or one in which she had an interest) to go to the house, being the house as the Judge at first instance found, which the plaintiff had
H told the defendant he was building for what was his (then) family.

Reference was made to *Gissing v. Gissing* (1971) A.C. 886 and *Grant v. Edwards* (1986) 2 All E.R. 426 where it was said:

"In such cases a contract or an express trust as at the time of the acquisition may not be established, because of lack of certainty or consideration or non-compliance with statutory requirements of writing; but a constructive trust may be established by an inferred common intention subsequently acted upon by the making of contributions or other action to the detriment of the claimant party.

And it has been held that, in the absence of evidence to the contrary, the right inference is that the claimant acted in the belief that she (or he) would have an interest in the house and not merely out of love and affection; see for instance *Grant v. Edwards* at page 439 per Sir Nicolas Brown-Wilkinson V-C."

It was possible that except for s.12 an equitable interest could have been established. If the facts do not go that far "they may satisfy the requirements for a promissory estoppel". The particular combination of facts in the present case has led to the estoppel.

Charles v. Pardoe distinguished. Limitations on the applicability pointed out.

Appeal upheld. Decision of trial Judge (27 FLR 91) restored.

Cases referred to:

Kulamma v. Manadan (1968) AC 1062; (1968) 2 W.L.R. 1074
Moses v. macferlan (1960) 2 Burr 1005, 1012
Plimmer v. Wellington Corporation (1884) 9 App. Cas. 699.
Chalmers v. Pardoe (1963) 1 W.L.R. 677; (1963) 3 All E.R. 552
Gissing v. Gissing (1971) A.C. 886
Grant v. Edwards (1986) 2 All E.R. 426.

Judgment

By special leave granted by Her Majesty in Council to her as a poor person, the appellant, who was the defendant in an action in the Supreme Court of Fiji, appeals from a judgment of the Fiji Court of Appeal (Speight V. P., Mishra and O'Regan, J. J. A.) delivered by O'Regan J. A. on 30th March 1984. The plaintiff in the action is the former de facto husband of the defendant, the parties having lived together as man and wife for twelve years from 1968 to 1980; they had one child of their own and she had two children of a former union. In the action, commenced in October 1981, the plaintiff claimed against her an order for possession of the house which had been their family home.

The trial judge, Rooney, J., held in a judgment delivered on 26th August 1983 that the plaintiff was estopped from turning the defendant out and that the defendant could raise this estoppel inter partes notwithstanding the provisions of the Native Land Trust Act (Cap. 134) of Fiji, section 12, a section prohibiting dealings with certain land without the consent of the Native Land Trust Board.

The Court of Appeal reversed that decision and ordered that the defendant give the plaintiff vacant possession of the house. They held that section 12 was decisive in favour of the plaintiff. On that view it was unnecessary for the Court of Appeal to rule on whether there would have been an estoppel apart from the section, but they

said nothing to cast doubt on Rooney J.'s conclusion on that point. Indeed observations and citations in the judgment delivered by O'Regan J.A. favour the approach that, as he put it:

> "....the malleable principles of which Lord Mansfield spoke are being shaped to accommodate the needs of the day and to reflect the dictates of the social facts."

He cited *Moses v. Macferlan* (1760) 2 Burr 1005, 1012, and Canadian, New Zealand and New South Wales cases to which it becomes unnecessary for their Lordships to refer specifically.

Before their Lordships two points arise, namely the effect of the section and estoppel apart from the section. The points are linked inasmuch as the estoppel has to be defined to enable a decision to be reached on whether the section excludes it. There is some advantage, however, in considering the statutory point first, as it is of some general significance in Fiji and other countries where similar provisions are in force and upon it alone the courts below have differed. For this purpose it is enough to note that the effect of the trial judge's decision and the express contention advanced for the appellant before their Lordships is not that she has (or should be awarded) any legal or equitable interest in the land on which the house stands. It is simply that the plaintiff is estopped against her from denying that she has his permission or licence to live permanently in the house. The right is not put forward as one of exclusive possession against the plaintiff himself; nor is it claimed that the rights of third parties, such as the plainitff's lessor and mortgagee, are affected.

The Scope of the Statute

Section 12 of the Native Land Trust Act provides:

> "12. (1) Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his lease or transfer, sub-lease or other unlawful alienation or dealing effected without such consent shall be null and void:
>
> Providing that nothing in this section shall make it unlawful for the lessee of a residential or commercial lease granted before the twenty-ninth day of September 1948, to mortgage such lease.
>
> (2) For the purposes of this section 'lease' includes 'a sub-lease' and 'lessee' includes 'a sub-lessee'."

The land in question in this case is native land within the meaning of the Act. As such, by section 4 its control is vested in the Native Land Trust Board and it is to be administered by the Board for the benefit of the Fijian owners. The land is leased by the Board to the Fiji Housing Authority approved by the Board, for a term of 94 years 6 months 9 days from 21st November 1973. To finance the construction of the house, he mortgaged the leased land to the Authority in return for an advance of $11,200 and was required to raise $1,242 against his Fiji National Provident Fund contributions. The footwear company by which he was employed as a foreman also assisted him financially with the acquisition of the lease and the building project.

It seems that the Native Land Trust Board has never expressly consented to the defendant's living on the land, and her case has not been conducted on the footing

of an implied consent. Nevertheless their Lordships note that the contention that the limited right relied on by her is rendered null and void by the statute appears technical and somewhat lacking in merit. The evidence was that the Housing Authority made such land available to married couples only. In the application to the Authority, on which at some stage the name of the defendant was inserted as a co-applicant, the plaintiff indicated that they were married and had two young children living with them; and he undertook that the land would be used solely for the erection of a house and appurtenances to be used by him solely for himself and him family. What a least purports to be the signature of the defendant appears on the application, as well as the signature of the plaintiff. It seems unlikely that the Board would have been unaware of the Authority's policy of helping married people. While it is not certain what attitude the two public bodies would have taken if they had known that the defendant was only a de facto wife, that is nothing before their Lordships to suggest that the Board has any objection to the defendant's continuing to live on the property as long as the rent and mortgage payments are kept up.

In terms section 12 is directed against alienating or dealing with *the land* without the consent of the Board. Manifestly the section is intended to ensure that the Board's power of control and the beneficial interests of the Fijian owners are not to be prejudiced by unauthorised transactions. Neither the terms nor the spirit of the section are violated by an estoppel or equity operating solely inter partes.

According to the plaintiff's evidence, he left the property in 1980, terminating his relationship with the defendant and telling her to stay there without mentioning any time limit. But by written notice in March 1981 he required her to quit. The Court of Appeal thought that when he left he conferred a licence on her, and that they were bound by *Chalmers v. Pardoe* [1963] 1 W.L.R. 677 to hold that such a licence was caught by the section.

Their Lordships agree with Rooney J. that *Chalmers v. Pardoe* is distinguishable. That was a case between two former friends and business associates, one of whom as lessee of native land had consented to the building by the other (the appellant) of a house and appurtenant buildings, which were in fact erected in accordance with that consent. The case proceed on the assumption that the Native Land Trust Board's consent had not been obtained. The appeal to the Judicial committee was concerned only with the appellant's claims to an equitable charge of lien, for which he relied on the kind of proprietary estoppel exemplified by *Plimmer v. Wellington Corporation* (1884) 9 App. Cas. 699. There is a dictum in the judgment of the Privy Council, delivered by Sir Terence Donovan, that even treating the matter simply as one where a licence to occupy coupled with possession was given for the purpose of erecting a dwelling house, when this purpose was carried into effect an unlawful "dealing" with the land took place. The decision that the appellant there was not entitled to an equitable charge or lien does not assist in determining whether the present appellant, who now makes no such claim, can resist the present respondent's action for possession. *Chalmers v. Pardoe* was not concerned with purely personal rights in a family context, nor even with whether it would be inequitable to grant an order for possession to the registered proprietor.

Counsel for the plaintiff properly drew the attention of their Lordship to *Kulamma v. Manadan* (1968) AC 1062 a case apparently not cited to the Court of Appeal. Had that court enjoyed the advantage of considering that case the result might well have been diffirent. *Kulamma's* case concerned, a share farming agreement which was claimed to be void under section 12. In a judgment delivered by Lord Wilberforce the Judicial Committee distinguished *Chalmers v. Pardoe,* holding that merely because an agreement can in certain of its aspects be described as a licence, it is not necessarily to be described as a *dealing with* the land; rather the decision has to be based upon an analysis of the particular agreement. Lord Wilberforce analysed the agreement

there in issue as in its whole effect "one of a purely contractual and personal character, which, even in the most general sense, could not be said to amount to a dealing with the land".

The present case likewise is concerned with a purely personal right. In the opinion of their Lordships such a right is outside the purview of section 12. The context of the section and the purpose of the Act contain nothing to suggest that the words of the section bear other than their natural and ordinary meaning. In the natural and ordinary sense a promissory or equitable estoppel such as is set up in this case would not be described as a dealing with land.

Estoppel

The conclusion that the statutory point taken for the plaintiff fails makes it necessary to decide the question which did not arise on the view of the Act taken by the Court of Appeal: whether the trial judge was justified in finding an estoppel. In this part of the case some further facts have to be taken into account.

The association of the parties began after the defendant obtained work in the footwear factory where the plaintiff was employed. He was then living with his parents. The child of the parties was born in 1970. For some time they lived in the house of the plaintiff's brother. The trial judge found that in 1973 the defendant moved to a flat in Nabua. Apparently she had their child and one or both of her other two children with her. She gave evidence that the plaintiff came to stay with her there. He denied that in his evidence, saying that he used to visit her there but that they did not set up house together until they moved to the house at Kinoya with which the case is concerned. Relying partly on the evidence of a neighbour, Rooney J. rejected the plaintiff's evidence, finding that the parties had already lived as man and wife at Nabua. What is equally noteworthy, however, is that the plaintiff maintained in evidence that the flat was the defendant's. Evidently the judge accepted that the defendant had at least an interest in the flat, for he said in his judgment, when referring to the move to Kinoya:

> "Her present situation, in which she stands in peril of being put out on the street might never have come about if the plaintiff had made it clear to her at the relevant time that she could never have any expectation of a permanent home with him".

In 1973 they also decided to apply to the Housing Authority for land. On 29th November 1973 the plaintiff completed a form of tender for residential allotments, declaring that he was married, and his tender of $2,400 for the land in question was accepted. A cheque of $30 for deposit was drawn on a joint bank account which the parties had opened in 1970: at the request of the Housing Authority both parties endorsed the cheque. Subsequently, as already mentioned, the plaintiff obtained the lease in his own name but on representations that the defendant was his wife and that the property was for a house for them and their family. The defendant remembered going with the plaintiff to the Housing Authority Offices and signing a form. The plaintiff said in evidence, "When I got the property I got it for myself and the defendant, we talked on that line". The judge found:

> "I have no doubt that when the plaintiff obtained the land and later set about constructing a house he told the defendant that he was building it for what was in fact his family at that time. It is possible that he was entirely sincere in this purpose. I have no reason to disbelieve the defendant when she said that she

was under the impression the plaintiff was providing a home for her and her children. As she is uneducated, she took no steps to protect her interest. Whether or not the Housing Authority would have granted the sub-lease if they had known of the true relationship between the parties, I do not know. The fact remains that the plaintiff obtained the sub-lease with the support of the defendant's children and on the premise that they and two of the defendant's children constituted a family until eligible to receive an allocation of land."

The house was completed in 1978 or 1979 and the family then moved in. It is not in dispute that the plaintiff financed the acquisition of the lease and the building of the house from borrowed monies and his own savings, and that the defendant made no direct contribution to the cost. But the judge was satisfied that the defendant as a working housewife used her modest earnings for the support of the family as a whole. In that way there was an indirect but significant contribution by her to the instalments payable to keep the property. She was also a contributor to the Provident Fund and that money was not drawn on for the house; but the suggestion made in argument that in some way this should tell against her defence to the claim for possession is without substance.

Relations between the parties deteriorated, and in 1980 the plaintiff left the house, leaving the defendant there with the three children. She has looked after them at all maternal times. The plaintiff has since married and has a child of the marriage; but he did not suggest in evidence that he wanted the house for the occupation of his new family. Be that as it may, his prior obligations are to his first family.

As to the principles of law to be applied to those facts, reference were made in argument to cases where constructive trusts, carrying beneficial interests in land, arise between parties who are man and wife, whether de jure or de facto, on or after the acquisition of their home. The authority now classic is the speech of Lord Diplock in *Gissing v. Gissing* [1971] A.C. 886, 903–911, and later English cases are reviewed in the judgments of the Court of Appeal in *Grant v. Edward* [1986] 2 All E.R. 426, which concerned an unmarried couple. In such cases a contract or an express trust as at the time of the acquisition may not be established, because of lack of certainty or consideration or non-compliance with statutory requirements of writing; but a constructive trust may be established by an inferred common intention subsequently acted upon by the making of contributions or other action to the detriment of the claimant party. And it has been held that, in the absence of evidence to the contrary, the right inference is that the claimant acted in the belief that she (or he) would have an interest in the house and not merely out of love and affection: see for instance *Grant v. Edward* at page 439 per Sir Nicolas Browne-Wilkinson V—C.

It is possible that, but for section 12 of the Native Land Trust Act, the defendant here could have made out an entitlement to an equitable interest in the land on the principles just mentioned. In the face of the section, however, no such interest is contended for and none was found at first instance. The finding and the contention are more limited, and justifiably so. No matter whether or not the facts of a given case go far enough to establish an equitable interest in land, they may satisfy the requirements for a promissory estoppel. The doctrine of promissory estoppel is now firmly established although its frontiers are still being worked out. For present purposes it enough to refer to the account in *Spencer Bower and Turner on Estoppel by Representation,* 3rd Edition (1977) Ch. XIV, pp. 367–401.

The present case fairly satisfies the requirements. On Rooney J.'s findings, at the time of the acquisition of the land and the the building of the house the plaintiff represented to the defendant that it would be a permanent home for her and her children. Indeed the representation was that she would be treated as living there as his wife. In reasonable reliance on the representation she acted to her detriment by giving up the flat. Moreover she supported the application to the Housing Authority, she used her earnings to pay for household needs, and she looked after her de facto husband and the children as wife and mother. A sufficient relationship had previously existed between the parties. It is not possible to restore her to her former position.

In these circumstances it would plainly be inequitable for the plaintiff to evict her. It is right to hold that as against him she has in effect permission to reside permanently in the house, on the basis that the children may be with her for as long as they need a home. As had already been noted, it is a personal right not amounting to a property interest diminishing the rights of the plaintiff's lessor and mortgagee. It has not been contended for the defendant that the plaintiff is under any obligation to her to continue to pay the rent or the mortgage interest. The appeal raises no question regarding the plaintiff's ability to assign the sublease. In any event that is subject to the control of the Native Land Trust Board under section 12.

Their Lordships add the caveat that they are far from saying that whenever a union between an unmarried couple comes to and end, one who is the sole owner in law and equity of the property hitherto their home should not be able to obtain an order for possession against the other. It is the particular combination of facts which has led to the estoppel in the present case.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed and the dismissal of the action by the trial judge restored. There should be no order for costs before their Lordships' Board or in the Fijian courts.

Appeal allowed.

(*Editor's note:* This case is also reported at 1986 1 A.C. 898)