Privy Council Appeal No. 4 *of* 1962

Nathaniel Stuart Chalmers – – – – – – – *Appellant*

v.

Lawrence Pardoe – – – – – – – – *Respondent*

FROM

THE FIJI COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST MAY 1963

Present at the Hearing:
LORD EVERSHED.
LORD HODSON.
SIR TERENCE DONOVAN.
[*Delivered by* SIR TERENCE DONOVAN]

This appeal arises out of two actions commenced in the Supreme Court of Fiji in the year 1958, the one by the appellant and the other by the respondent. The two litigants, the appellant and the respondent (to whom their Lordships will hereafter refer by their respective surnames as " Mr. Chalmers " and " Mr. Pardoe ") had apparently, until the beginning of the year 1957, been close friends and had also been concerned together in some property or business dealings.

The dispute before their Lordships is concerned with a piece of land measuring some 57½ acres in extent, being Native Land under the Native Land Trust Ordinance Chapter 104. Pursuant to that Ordinance a lease of the land was duly granted in the year 1943 by a Mr. Charlton as Director of Lands and member of the Native Land Trust Board to a Mr. Walker, the lease being numbered 7235, by which number their Lordships will hereafter refer to it. They will also refer to the Native Land Trust Board as " the Board ".

The use of the land was restricted by the lease to the purposes of a residence for the lessee, who was obliged indeed to build on the land a dwelling house at a minimum expenditure of £500 exclusive of any accessory outbuilding. He was prohibited by Condition 7 of the lease from building without the previous consent of the lessor, any other premises. The rent under the lease was £9 15 0 per annum and its term 50 years from the 11th May, 1940. The lease was assigned to Mr. Pardoe in December, 1955, and there appears to be no doubt that the assignment had the consent of the Board.

Shortly thereafter the story leading up to the present litigation begins. It appears that certain other property in Fiji in which Mr. Chalmers and Mr. Pardoe were interested was sold and one result was that Mr. Chalmers needed a new dwelling-house. Accordingly, with the consent of and by arrangement with Mr. Pardoe, Mr. Chalmers, in June, 1956, began building on a part of the land subject to lease No. 7235. By the end of 1956 Mr. Chalmers had completed the building of a residence for himself and also five other buildings appurtenant to that residence. The area of the land comprehended by these buildings was about three-quarters of an acre. The total sum expended by Mr. Chalmers appears to have been £2,600, of which £2,500 was expended on the buildings themselves.

At this stage it will be convenient to set out Section 12 of the Native Land Trust Ordinance, Chapter 104:

> " 12.(1) Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Ordinance 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:
>
> Provided that nothing in this section shall make it unlawful for the lessee of a residential or commercial lease granted before the 29th day of September, 1948, to mortgage such lease.
>
> (2) For the purposes of this section ' lease ' includes a sublease and ' lessee ' includes a ' sublessee '."

Whatever the details of the arrangement made between Mr. Chalmers and Mr. Pardoe which led to the erection of the aforesaid buildings by Mr. Chalmers it is clear that no consent was ever obtained from the Board under Section 12 of the Ordinance for what was thus done upon the land. Furthermore, Mr. Pardoe did not ask the consent of the Board as lessor to the erection of these additional buildings as he should have done under Clauses 7 and 8 of the conditions of the lease.

By letter dated 22nd November, 1956, addressed by the Manager of the Board to Mr. Pardoe, attention was drawn to this breach of Clause 7. Mr. Pardoe replied regretting the breach, and in a further letter to the Board dated 21st December, 1956, he wrote " I agree to surrender up to the Board for the purpose of leasing to Nathaniel Stuart Chalmers retired Solicitor as a building lease that small portion of my lease bounded as follows." The letter then goes on to describe the plot on which Mr. Chalmers had built. Thereafter more correspondence passed between both Mr. Chalmers and Mr. Pardoe on the one hand and the Board on the other and there also was some correspondence between Mr. Chalmers and Mr. Pardoe themselves. Their Lordships have been referred to all these documents and have read them all with care. From them it appears to be clear—

(1) that the Board as lessor eventually waived its rights under the lease by reason of the erection of Mr. Chalmers' buildings, upon the terms that the rent for the land subject to the lease No. 7235 should be increased from £9 15 0 to £20 per annum, and

(2) that until his final break with Mr. Chalmers which occurred in January 1958 Mr. Pardoe remained willing to apply to the Board under the Ordinance Chapter 104 for their authority either for a sublease to Mr. Chalmers of the appropriate part of the land or for a surrender by Mr. Pardoe of that part to the Board in order that the Board could then grant a lease of it direct to Mr. Chalmers. It also seems probable that had such application been made with the necessary particulars the Board would have given its consent.

Unfortunately, however, a quarrel occurred between Mr. Pardoe and Mr. Chalmers before any such application had been made, and the eventual result of the quarrel was that Mr. Pardoe declined, and still declines. to make any such application. Stalemate was thus produced for the Board could act only upon an application made in proper form by Mr. Pardoe or by someone acting strictly on his behalf.

In this state of affairs the first action was one begun by Mr. Pardoe in July 1958 against Mr. Chalmers claiming that Mr. Chalmers was a trespasser in respect of the land on which his recently erected buildings stood, and an injunction against further trespass. In October 1958 Mr. Chalmers began an action against Mr. Pardoe claiming to be entitled to an equitable charge or lien on Mr. Pardoe's land, the subject of lease No. 7235 for £2,600. In the latter action Mr. Pardoe counterclaimed for damages for negligence and conversion. The claim for negligence rested on an allegation that

Mr. Chalmers (who is a retired solicitor) had failed in his duty when acting (as Mr. Pardoe alleged) as Mr. Pardoe's solicitor. The claim for conversion related to certain fencing on Mr. Pardoe's land which Mr. Pardoe alleged that Mr. Chalmers had wrongfully removed.

The two actions were tried together before Mr. Knox-Mawer, acting puisne judge, who in effect, rejected all the claims and cross-claims on the part both of Mr. Pardoe and Mr. Chalmers. Indeed, of these various claims and cross-claims their Lordships are now concerned only with Mr. Chalmers' claims for an equitable charge or lien. The claim is based on the general equitable principle that, on the facts of the case, it would be against conscience that Mr. Pardoe should retain the benefit of the buildings erected by Mr. Chalmers on Mr. Pardoe's land so as to become part of that land without repaying to Mr. Chalmers the sums expended by him in their erection. For an exposition of this well-known equity the trial judge was referred to an article in the New Zealand Law Review in which several well-known cases were cited, including that of *Unity Joint Stock Mutual Banking Association v. King* before Sir John Romilly, M.R., reported in 25 Bevan 72.

There can be no doubt upon the authorities that where an owner of land has invited or expressly encouraged another to expend money upon part of his land upon 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 fulfil 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. That was in fact the Order in the *Unity Joint Stock Banking* case though it appeared in that case that the land-owner had never actually engaged or promised to make over the appropriate land. The facts of the case were most unusual and as Romilly, M.R., said: "The court must look at the circumstances in each case to decide in what way the equity would be satisfied."

At the trial the learned judge accepted the proposition their Lordships have endeavoured to state but after a long trial held that Mr. Chalmers had failed to prove to his satisfaction the necessary premise of fact in order to found an application of the equitable doctrine. The learned judge did not go into any details as to the facts or specify the particular matters in respect of which Mr. Chalmers had failed to satisfy him. He said, however, that Mr. Chalmers must be permitted to remove forthwith the buildings he had erected, and added that when they had been removed the Board ought in fairness to reduce Mr. Pardoe's rent to its former figure.

Both parties appealed to the Fiji Court of Appeal which, upon the matter now before their Lordships, decided adversely to Mr. Chalmers; but, as their Lordships understand on somewhat different grounds. The judgment of the Court of Appeal contained the following passage:—

> "The 'friendly arrangement' entered into between the Respondent and the Appellant amounted to granting the Appellant permission to treat a certain portion of the land comprised in the lease as if the Appellant were in fact the Lessee. Under this arrangement the Respondent gave the Appellant possession of part of the land. He granted to the Appellant permission to enjoy exclusive occupation of that portion of the land, and to erect such buildings thereon as he wished. Such an arrangement could we think be considered an 'alienation', as was argued in *Kuppan v. Unni* 4 F.L.R. 188. Whether or not it was an alienation it can, we think, hardly be contended that it did not amount to a dealing in land within the meaning of Section 12. It is true that the 'friendly arrangement' did not amount to a formal sublease of a portion of the land or to a formal transfer of the lessee's interest in part of the land comprised in the lease. The least possible legal effect which in our opinion could be given to this arrangement would be to describe it as a licence to occupy coupled with possession, granted by the lessee to the Appellant. In our opinion, the granting of such a licence and possession constitutes a dealing with the land so as to come

within the provisions of Section 12, Cap. 104. The consent of the Native Land Trust Board was admittedly not obtained prior to this dealing, which thus becomes unlawful and acquires all the attributes of illegality. An equitable charge cannot be brought into being by an unlawful transaction, and the Appellant's claim to such a charge must therefore fail." (The Court went on to allow Mr. Pardoe's appeal against the order of the trial judge granting Mr. Chalmers permission to remove the buildings.)

Before their Lordships Mr. Khambatta strongly relied on the language of the Court of Appeal as showing that it found (contrary to the view of the trial judge) that Mr. Chalmers had established the necessary premise for the application of the equitable doctrine. Mr. Khambatta went on to argue that the arrangement made between Mr. Chalmers and Mr. Pardoe, as found by the Court of Appeal, did not amount to any " dealing " with any part of the land according to the terms of Section 12 of the Ordinance and was not otherwise unlawful in the sense of being illegal or contrary to the law of Fiji. Their Lordships observe that Mr. Chalmers in both the Courts below founded his claim exclusively on his alleged right to an equitable charge. No claim on his part was made arising out of any contract express or implied—nor could such a claim in any circumstances now be entertained. As the case has been presented, Mr. Chalmers cannot now ask for an order based upon a contractual promise implicit in the alleged arrangement for Mr. Pardoe to apply to the Board for the necessary consent. For Mr. Chalmers to succeed it is essential for him to establish a right to an equitable charge on the subject matter of lease No. 7235 for £2,600.

Mr. Pardoe gave evidence before the trial judge which has an important bearing upon this matter. He said that he told Mr. Chalmers that he could build provided he got the necessary consent and permission. Mr. Pardoe was here clearly referring to the consent and permission of the Board. He added that the arrangement was that Mr. Chalmers should himself seek such consent and permission as Mr. Pardoe did not want to be worried about it. He was willing for Mr. Chalmers to have a sublease of the land affected, or a direct lease of such part following a surrender by him—Mr. Pardoe. Mr. Pardoe went on to refer to an occasion when Mr. Chalmers in the presence of a third party brought up the matter of this land. Speaking to the third party Mr. Pardoe said, inter alia, ' I gave him the land for nothing '. Throughout he was prepared to surrender the land, so that Mr. Chalmers' position could be regularised, and remained so prepared even after their relations became strained. Not until 11th January, 1958, did he change his mind, and then only because he received a letter which led him to believe that Mr. Chalmers was trying to get a larger area than had been agreed.

In the face of this evidence by Mr. Pardoe himself it is not clear to their Lordships just what the trial judge had in mind when he said that Mr. Chalmers had failed to prove facts which would justify the intervention of Equity for the purpose of preventing Mr. Pardoe from taking the buildings for nothing. To them it seems reasonably clear that Mr. Pardoe agreed to sublease the land in question to Mr. Chalmers or alternatively to surrender it to the Board, so that the Board could lease it to Mr. Chalmers direct. Even though Mr. Pardoe left to Mr. Chalmers the getting of the necessary consent by the Board, it is implicit in the evidence given by Mr. Pardoe that he would co-operate as necessary, and certainly that he would not frustrate the agreement by refusing to sign the application for consent. When, upon the faith of the arrangement thus come to regarding title in the land for Mr. Chalmers, the buildings were erected by him, it seems to their Lordships that unless there is some special circumstance which precludes it, Equity would intervene to prevent Mr. Pardoe from going back upon his word and taking the buildings for nothing.

Counsel for Mr. Chalmers, arguing the case before the Court of Appeal, spoke of the arrangement between the two men as a " friendly arrangement " which did not involve alienating or dealing with the land. Repeating this term, but without necessarily adopting it, the Court of Appeal held, as their

Lordships have already indicated, that the *least* legal effect which could be given to the " friendly arrangement " was that of a licence to occupy coupled with possession. Their Lordships think the matter might have been put higher. " I gave him the land for nothing " said Mr. Pardoe. And again " He could get anything—a sub-lease or a surrender, which was perfectly correct . . ." And so on. In their Lordships' view an agreement for a lease or sublease in Mr. Chalmers' favour could reasonably be inferred from Mr. Pardoe's evidence.

But even treating the matter simply as one where a licence to occupy coupled with possession was given, all for the purpose, as Mr. Chalmers and Mr. Pardoe well knew, of erecting a dwelling house and accessory buildings, it seems to their Lordships that, when this purpose was carried into effect, a " dealing " with the land took place. On this point their Lordships are in accord with the Court of Appeal: and since the prior consent of the Board was not obtained it follows that under the terms of Section 12 of the Ordinance No. 104 this dealing with the land was unlawful. It is true that in *Harnam Singh and Backshish Singh v. Bawa Singh* Civil Appeal No. 10 of 1957, the Court of Appeal said that it would be an absurdity to say that a mere agreement to deal with land would contravene Section 12, for there must necessarily be some prior agreement in all such cases. Otherwise there would be nothing for which to seek the Board's consent. But in the present case there was not merely agreement, but, on one side, full performance: and the Board found itself with six more buildings on the land without having the opportunity of considering beforehand whether this was desirable. It would seem to their Lordships that this is one of the things that Section 12 was designed to prevent. True it is that, confronted with the new buildings, the Board as lessor extracted additional rent from Mr. Pardoe: but whatever effect this might have on the remedies the Board would otherwise have against Mr. Pardoe under the lease, it cannot make lawful that which the Ordinance declares to be unlawful.

Their Lordships after full and anxious consideration of the whole matter have reached the same conclusion as the Court of Appeal namely that a dealing in the land took place here without the prior consent of the Board as required by Section 12 of the Ordinance: that the dealing was accordingly unlawful: and that in these circumstances Equity cannot lend its aid to Mr. Chalmers. Their Lordships will, therefore, humbly advise Her Majesty that the appeal should be dismissed.

(87789) Wt. 8052/97 75 6/63 Hw.

In the Privy Council

NATHANIEL STUART CHALMERS

v.

LAWRENCE PARDOE

DELIVERED BY
SIR TERENCE DONOVAN

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