

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No: HBC 271 of 2012.

IN THE MATTER of an application under section 169 of part XXXIV of the Land Transfer Act, Cap 131 for an Oder for Immediate Vacant Possession.

BETWEEN : **VISHWA NAND** of Kasavu, Nausori, Businessman.

PLAINTIFF

AND : **RAJENDRA KUMAR** of Lot 20 Vatoa Road, Narere, Joiner.

DEFENDANT

BEFORE : **Master Deepthi Amaratunga**

COUNSEL : **Ms. Raikaci N.** for the Plaintiff
Mr. Reddy J. for the Defendant

Date of Hearing : **24th January, 2013**

Date of Decision : **1st March, 2013**

DECISION

A. INTRODUCTION

1. The Plaintiff filed this action for eviction of the Defendant in terms of the Section 169 of the Land Transfer Act. The title to the Plaintiff is in pursuant to a protected crown lease and any dealing in the said land needed the consent of the Director of Lands in terms of Section 13 of the State Land Act. The

Defendant relies on an illegal verbal intimation of the Plaintiff to sell the land to Defendant, and he also alleges improvements to the property but in the case of Charmers v Pardoe [1963] 1 WLR 677 it was held that the Proprietary estoppel cannot be pleaded when it is clearly against the law requiring the consent of the Director of the land. It should be noted otherwise, proprietary estoppel can result a person obtaining possession in contravention of the express provision of law which made such arrangements null and void ab initio, and required the consent of the Director of Land to any dealings on the land which clearly makes Defendant's occupation illegal, in terms of the Section 13 of the State Land Act. The court cannot override express provision of law and sanction the possession of the Defendant as a person who has a right to possession in terms of Section 172 of Land Transfer Act.

B. FACTS LAW AND ANALYSIS

2. The Plaintiff state that Plaintiff and Defendant verbally intimated his desire to sell the property to the Defendant after allowing the Defendant to occupy the premises on good faith for some time. The Plaintiff also admits that Defendant had carried out improvements to the property and maintained the property and state that initial agreement was to allow the occupation without rent, on the condition that he will maintain the property in lieu of rent. According to the Plaintiff later, he verbally consented to sell the land, but this was illegal since there was no consent from the Director of Land.
3. The Defendant state that he obtained possession of the land before the Plaintiff obtained title to the land and also state that he came to the land after he was promised of the land by Plaintiff. **This is an allegation that it for the first time appear in the affidavit in opposition without any corroboration.** The Defendant had through its solicitors had written detailed replies to the quit notices sent, which are annexed as 'E' and 'G' to the affidavit in opposition and nowhere has suggested that he came to the possession before the Plaintiff obtained title. The fallacy of the said contention is how could Plaintiff agree to sell state land to Defendant before even obtaining a lease and any such arrangement cannot be even considered as an agreement due to lack of

authority. In any event in the analysis of the evidence that is contained later, in this decision I do not accept the Defendant's contention that he came to the possession before Plaintiff obtained the title.

4. The Defendant carried out improvements on the property without the consent of the Plaintiff or the Director of Land. The Plaintiff has issued quit notices to the Defendant to vacate the premises. **The issue before me is whether the Defendant has established a right to possession** and in this case the Defendant is claiming equitable remedy since he had improved the property.
5. Section 172 of the Land Transfer Act states as follows

“If the person summoned appears he may show cause why he refuses to give possession of such land and, if he proves **to the satisfaction of the judge a right to the possession of the land**, the judge shall dismiss the summons with costs against the proprietor, mortgagee or lessor or he may make any order and impose any terms he may think fit;”
(emphasis added)

6. In Morris Hedstrom Limited –v- Liaquat Ali CA No: 153/87, the Supreme Court of Fiji described the scope of the said provision contained in section 172. In the case of Morris Hedstrom Limited –v- Liaquat Ali CA No: 153/87, the Supreme Court said that:-

“Under Section 172 the person summonsed may show cause why he refused to give possession of the land if he proves to the satisfaction of the Judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under Section 169 procedure. That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence establishing a right or supporting an arguable case for such a right must be adduced.” (emphasis is mine)

7. The Defendant states that he made improvements to the property. He also state that he instructed a solicitor firm in Nadi to institute legal action against the Plaintiff to recover the damages for the said improvements. The affidavit in opposition attaches a letter from a solicitor firm, in Nadi to that effect marked 'C'. The said law firm 'Babu Singh & Associate' state that 'in recent flooding in March, 2012 the said invoices and receipts were destroyed in recent flooding in Nadi. The receipt and invoices were amounting to \$15,000.' Though the law firm could state the value of the invoices it does not state when the said invoices were given to them which is vital and also how they could ascertain the value of the invoices which were lost. Since the flooding that destroyed the said receipts was in March, 2012 according to the said letter, the receipts should have been given prior to March, 2012. The subsequent letters by the solicitors in July, 2012 and September, 2012 marked 'E' and 'F' respectively, to the affidavit in opposition, is silent on that issue of any intended litigation to recover damages or even a threat to that effect. In the proper analysis of evidence it is strange for the Plaintiff to seek a law firm in Nadi only for this intended litigation where his receipts for improvements were handed over. Since there was no flood in the area where the Plaintiff is living, the Plaintiff has gone to a significantly distant area, where flood prone, and placed his all receipts with a law firm situated in a flood prone area! This has to be accepted with a pinch of salt, in the application of accepted methods of analysis of evidence. It lacks spontaneity and probability and a reasonable person would not act in a similar manner.
8. The property in issue is a state land and the Plaintiff is a lessee subject to a protected lease. No dealing relating to the said land could be done without the consent of the Director of the Land this is contained in Section 13 (1) of the State Lands Act.

Section 13(1) of the State Land Act (Cap 131) stated

'....Any sale, transfer, sublease, assignment, mortgage or other alienation **or dealing effected without such consent shall be null and void.**'

9. The effect of such a dealing has to be considered as an illegal contract and no force in law even when the such dealing is in writing, which is another requirement under the Section 59 of the Indemnity, Guarantee and Bailment Act. So, the verbal intimation of the Defendant to sell the land to the Plaintiff cannot have any force in law as it is *ab initio* null and void. Such an agreement is clearly illegal and contrary to the law, otherwise parties will not apply for consent of the Director of Land which is a mandatory requirement for the lands covered in the said Act, and try to circumvent the mandatory provision of the law, by making private verbal and or written agreements contrary to express provision of law to satisfy their needs. This will invariably lead to parties obtaining possession, without the consent of the Director of Land which is a sine qua non for such a dealing. So, the courts will have to consider any such agreement to sell, whether written or verbal, as *ab initio* illegal and no right should derive from such action. **No right to possession which is required in terms of the Section 172 of the Land Transfer Act will arise from such illegal, null and void verbal agreement that contravenes Section 13 of State Lands Act.**
10. The Defendant also relies on Proprietary Estoppel, stating he has done improvements to the property. In Denny v Jessen [1977] 1 NZLR 635 at 639 Justice White summarized the **proprietary estoppel** as follows:

“In Snell’s Principles of Equity (27th ed) 565 it is stated that proprietary estoppel is “... capable of operating positively so far as to confer a right of action”. It is “one of the qualifications” to the general rule that a person who spends money on improving the property of another has no claim to reimbursement or to any proprietary interest in the property. In Plaimmer v Wellington City Corporation (1884) 9 App Cas 699; NZPCC 250 it was stated by the Privy Council that “...the equity arising from expenditure on land need not fail merely on the ground that the interest to be secured has not been expressly indicated.”(ibid, 713, 29). After referring to the cases, including Ramsden v Dyson (1866) LR 1 HL 129, the opinion of the Privy Council continued, “In fact the court must look at the circumstances in each case to decide in

*what way the equity can be satisfied” (9 App Cas 699, 714; NZPCC 250, 260). In Chalmers v Pardoe [1963] 1WLR 677;[1963] 3 All ER 552 (PC) a person expending money was held entitled to a charge on the same principle. The principle was again applied by the Court of Appeal in Inwards v Baker [1965] 2 QB 29; [1965] 1 All ER 446. **There a son had built on land owned by his father who died leaving his estate to others.** Lord Denning MR, with whom Danckwerts and Salmon L JJ agreed, said that all that was necessary;*

“... is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable so to do.”(ibid, 37,449).

11. The general rule, however, is that *“liabilities are not to be forced upon people behind their backs”* and four conditions must be satisfied before proprietary estoppel applies. There must be an expenditure, a mistaken belief, conscious silence on the part of the owner of the land and no bar to the equity ...*“Conscious silence”* implies knowledge on the part of the defendant that the plaintiff was incurring the expenditure and in the mistaken belief that there was a contract to purchase and that here defendant *“stood by”* without enlightening the plaintiff. In short the plaintiff must establish fraud or unconscionable behavior. The rule based on the cases cited, is stated in Snell (op cit) 566 as follows:

“Knowledge of the mistake makes it dishonest for him to remain willfully passive in order afterwards to profit by the mistake he might have prevented. The knowledge must accordingly be proved by “strong and cogent evidence”

This passage was adopted by Megarry J in *Re Vandervell’s Trusts (No 2)*[1974] Ch 269,301[1974] 1 All ER 47, 74”.

12. The above, was quoted in the case of HBC 40 of 2009 in the High Court Fiji at Labasa in the case of Wilfred Thomas Peter V Hira Lal and Frasiko by Justice Anjala Wati and stated

'I must analyse whether the four conditions have been met for the defense of proprietary estoppel to apply. The four conditions are:

- i. An expenditure;
- ii. A mistaken belief
- iii. Conscious silence on the part of the owner of the land; and
- iv. No bar to the equity

13. Snell's Equity (29th Edi 3rd impression 1994) on **Proprietary Estoppel** states as follows (p 573)

'Proprietary estoppel is one of the qualifications to the general rule that a person who spends money on improving the property of another has no claim to reimbursement or to any proprietary interest in the property. Proprietary estoppel is older than promissory estoppel. It is permanent in its effect, and it is also capable of operation positively so as to confer a right of action. The term "estoppel", though often used, is thus not altogether appropriate. Yet the equity is based on estoppel in that one is encouraged to act to his detriment by the representation or encouragement of another so that it would be unconscionable for another to insist on his strict legal rights.'

14. Western Fish Products Ltd v Penwith District Council and another [1981] 2 All E.R. 204 is a case where the Defendant is a city council and the Plaintiff is suing it on a claim based on proprietary estoppel as he has carried out some construction upon the assurance of the approval from the Council and the

issue was when the approval is refused whether the planning authority can be estopped from exercising statutory discretion, where it held that an estoppel could not be raised to prevent a statutory body exercising its statutory discretion or performing its statutory duty and it was held that proprietary estoppel could not be based on illegal act. This could be clearly distinguished from the decision of in Inwards v Baker [1965] 2 QB 29; [1965] 1 All ER 446 where the father invited a son to build on a land belonging to the father and later desired to evict the son. There was no illegal act in the agreement between the father and son and the land was not a protected one as in the present case. So, the ratio in said case in Inwards v Baker [1965] 2 QB 29 is not applicable when any dealing on the land needed a prerequisite of consent of the Director of Lands.

15. Nathaniel Stuart Chalmers Vs Lawrence Pardoe [1963] 1 WLR 677. This is a decision of Privy Council delivered by Sir Terence Donovan upon a decision of the Supreme Court of Fiji, regarding a native lease. The grant of the claim by the plaintiff clearly not only violated the native lease, but also the Native Land Trust Ordinance (chap 104) as the plaintiff's action was considered as a 'dealing' in terms of Section 12 which needed the mandatory consent of the Director of Land, which the Plaintiff has not obtained and clearly the mandatory requirement of consent enshrined in Section 12 of the said ordinance was held paramount over the equitable relief and held that no proprietary estoppel could be claimed in such instances since it is not equitable to grant such relief.
16. In Mohammed v Nasir [1994] FJHC 211; [1994] 40 FLR 145 (16 September 1994) Pathik J held

'In the defendant's situation, if he institutes proceedings he would perhaps be entitled to compensation for the expenditure etc incurred by him if he proves it. Here the defendant knows that the plaintiff is the registered proprietor of the land and never ceased to be so. In a similar situation on a Summons under s. 169 for an order for possession after trial in **Ram Narayan s/o Sahadeo Singh** (*supra*) as already stated compensation was awarded. In that case the defendant married the plaintiff's

daughter. He lived on the land in question for about twenty years. He spent time and money building the house in which he lived, in putting a fence round the area and planting fruit trees and growing vegetables. The dispute was between the plaintiff and defendant as to who contributed to the building and the extent of each's contribution. There evidence was adduced, full hearing took place and Dyke J made certain findings of fact and in his judgment stated and held as follows:-

"The question now is whether equity would compel the plaintiff to give right or title to the land to the defendant. This issue is not on all fours with ***Badal v Bhim Sen***, Civil action 251/76 on which the defendant greatly relied. It is much closer to the case of ***Ramsden v Dryson*** (1866) L.R. 1 H.L. 129 and ***Unity Bank v King*** [1858] EngR 303; 25 Beav. 72.

In such case equity will not act to give the defendant a right or title that he never had, and was never made to believe that he had, but it may or may not act to give him the benefit of money he has expended in erecting buildings on the land." (emphasis added)

17. The Defendant cannot claim proprietary estoppel on illegal verbal intimation of the Plaintiff to sell, since the Privy Council in UK in Nathaniel Stuart Chalmers Vs Lawrence Pardoe [1963] 1 WLR 677 held that when the consent of the Director of Land is required and improvements without such consent does not derive a proprietary estoppel. It was from an appeal from Supreme Court of Fiji and had unequivocally held that when such grant of possession contravenes a statutory provision it is against the equity and equitable remedy cannot be utilized to justify any claim. The Defendant relies on the improvements that he had incurred, to the property in pursuant to a verbal intimation of the Plaintiff to sell the property. The Defendant categorically state that he came to possession on the said assurance by the Plaintiff. The Plaintiff though accepted that he had at some time intimated the desire to sell the land to the Defendant

denied the rest of the allegation. The Defendant also stated that Plaintiff obtained the title for the lease after he went in to possession, this would not make the things different. The Plaintiff has a title to the land and he can proceed to an action in terms of Section 169 of the Land Transfer Act, and what the Defendant has to establish is a right to possession in terms of Section 172 of the Land Transfer Act. As I have stated the occupation of the Defendant without a consent of the Director of the Land in a protected lease is illegal and no right can be established to occupy such land without the consent of the Director of Land. Even any prior arrangements between the parties would be null and void from the date of the issue of the lease to the Plaintiff, and the contention of the Defendant that he agreed to purchase the land cannot hold any water as Plaintiff could not have agreed or consented to sell a state land, to Defendant, prior to the lease ! In any event there is no evidence substantiate the allegation of such prior agreement before the lease was granted to the Plaintiff and detailed letters from the solicitors marked 'E' and 'G' are also silent on that issue indicating that it is an untenable contention to circumvent the illegality.

C. CONCLUSION

18. The Plaintiff has established the title to the land. It is a protected lease and without the consent of the Director of the Land no dealing of the said land could be done. In terms of the Section 13 to the State Lands Act if any such dealing is done without the consent is void. The verbal intimation of the Plaintiff to sell the land to the Defendant is illegal and cannot grant any right to Defendant. Defendant state that the Plaintiff agreed to sell the land even before he obtained title for a state land. This contention I have rejected, but even if am wrong the time of the verbal intimation to sell will not change the illegality since we are dealing with state land. Without the consent of the Director of the Land no dealing on the said land can attach a right since by operation of law such dealing without the consent of the Director of the Land are null and void. If the contention of the Defendant is accepted any prior arrangement before the lease is granted, should be able to circumvent the mandatory provision contained in Section 13 and this requirement will be a dead letter and will lead to opening of flood gates to deal with such land without the consent of the Director of land stating that the agreements were reached prior to the grant. This cannot be

accepted and no right derived to the Defendant to possess the land in issue. The Defendant cannot claim proprietary estoppel and should be evicted from the land, but considering the circumstances of this case I will grant 4 months for the Defendant to find a suitable place, while granting the orders in term of the summons for eviction. I do not wish to grant any cost.

D. FINAL ORDERS

- a. The Plaintiff is granted vacant possession of the land described in the summons.
- b. Considering the circumstances of the case I would stay the execution of the said order till 1st July, 2013.
- c. No Cost granted.

Dated at **Suva** this **1st** day of **March, 2013**.

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Master Deepthi Amaratunga
High Court, Suva