IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO: 255/93

17-02-95

BETWEEN : GOSMAN LIMITED

AND : ALLAN WAGNER

Mr. Michael Parkinson for the plaintiff
Mr. Pierre Lamontagne Q.C. with Mrs. Eileen Nervik for defendant

ORDERS

Schofield J.

This case presents a sorry story which results, it seems, from the parties' neglect to involve attorneys at an early stage in their transactions. The plaintiff is the registered owner of certain property known as West Bay North West Block 3 D parcel 136 which it purchased in March 1988. The intention of the plaintiff's director, Gossett P. Mitchell, who was at that time in medical college in New York, United States of America, was to develop a six-unit condominium complex on the land. Building work commenced on the property, somewhat strutteringly because of cash flow problems, and work on the practically completed complex ceased in early 1990.

Mitchell then decided to attempt to sell the property, but due to

lull in the property market it had still not been sold when the defendant responded to an advertisement for its sale in or around October 1992.

Negotiations for the sale of the property to the defendant commenced between the parties. Part of those negotiations were oral and part of them in writing. I need not recite the stages in those negotiations or the parties' understanding of them; it is sufficient here to record that it is now common ground between them that negotiations, which still continued after this suit was filed,never resulted in a contract being completed. Nevertheless the defendant entered into the property and recommenced the building work on the condominiums. The only evidence I have as to the amount of work the defendant carried out is the defendant's assertion, in his affidavit of 8th December 1993, that he paid a sum of approximately US$15000 for such work. The defendant also paid to the plaintiff a total of US$26952.38 in three installments, US$16000 on 21st January 1993, US$5952.38 (CI$5000) on 2nd July 1993 and US$5000 on 12th August 1993. An added complication is that on the 11th September 1993 the plaintiff executed a transfer of land form RL1 which was forwarded to the Registrar of Lands. This form indicates that the plaintiff transfers the property to the defendant "In consideration of One Hundred and Twenty eight Thousand dollars CI. to be finance (sic) (the receipt whereof is hereby acknowledged)". Of course the CI$128,000 was not paid and it was not the intention of the plaintiff for that transfer to be effected until the negotiations between the parties had concluded . Mitchell asked the Registrar of Lands , by telefaxed transmission, not to send the transfer form to the defendant for

signature until the Registrar received written authority from him. The transfer form was never sent to be signed by the defendant. Nor did he pay the relevant stamp duty upon registration of the transfer. Nevertheless I am told that the Registrar of Lands may hold the defendant responsible for duty on the document which, with late charges, has been computed at CI$13770.

Had the defendant paid duty and signed the transfer form the Registrar would have registered the transfer of the property to the defendant. Although it seems that the defendant did not intend to do this and has during the course of these proceedings indicated that negotiations were never concluded between the parties, the plaintiff at one stage feared that the defendant would register the transfer and sell the property. He therefore sought and obtained from this Court orders restraining the defendant from selling, transferring, leasing, charging or otherwise disposing of or parting with possession of the property, and directing the Registrar of Lands to register an inhibition on the title of the property inhibiting the registration of any dealing with the property. These orders were made on the 15th June 1993. By reason of the defendant's indicating his stance that he had no intention of registering the transfer the orders became redundant and they were discharged on 9th January 1995.

The plaintiff has now found a purchaser for the property and entered into a contract with Brac Construction Ltd on 21st December 1994 for the sale thereof for the sum of US$135,000. The defendant applied to the Registrar of Lands to register a caution against the title to the property claiming an interest to it as beneficiary under a trust for sale. The Registrar of Lands amended the form of caution

unilaterally and registered the caution indicating that the defendant's interest was as contacting purchaser. Nothing rests on that. The plaintiff now seeks an order from me removing that caution. The defendant argues that the caution should remain in place until the plaintiff has refunded the deposits paid on the abortive transfer of US$26952.38, has paid the defendant for the work he performed on the condominiums in the sum of US$15000 and has secured the defendant's potential liability to the Registrar of Lands for duty in the sum of CI$13570.

Let me first recite the relevant portions of the Registered Land Law. That portion of Section 127 of the Law dealing with the lodging of cautions, relevant to this application, reads:

> "127. (1) Any person who -
> (a) claims any unregistrable interest whatsoever, in land or a lease or a charge;...
> may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned an the making of entries affecting the same."

Section 129 of the Law deals with the withdrawal and removal of cautions. Only subsection (1) concerns us. It reads:

> "129 (1) A caution maybe withdrawn by the cautioner or removed by order of the Court, or subject to the provisions of subsection (2), by order of the Registrar."

Two points are immediately apparent from these provisions. First, that the defendant cannot maintain this caution if he has no unregistrable interest in the land. Second, that the discretion of the Court to remove a caution is unfettered by the wording of the statute.

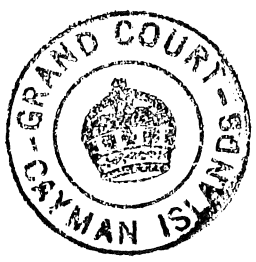
The defendant maintains that his interest in the land arises out of proprietary estoppel. He says that he acted to his detriment in paying deposit monies and making expenditures on the condominiums; that the plaintiff encouraged him in his activities and that he was led into an expectation that the property would be transferred to him. All of this, he says,gives rise to an equity, effect to which must be given in the most appropriate way (see Snell's Equity, Twenty-ninth edition p 577). The defendant argues that the most suitable remedy is a trust for sale because the plaintiff has no funds with which to repay him.

The plaintiff's argument is that any interest which the defendant may have is a monetary interest. He may have,as against the plaintiff, an action in damages for return of his deposits and for the money expended on the condominiums,but he does not have an interest in the land so as to support a caution under section 127 of the Registered Land Law. Furthermore that the two claims for return of the deposit and for the refund for the money expended on work done on the property must not be confused, as they are separate and distinct, as is the claim by the defendant to be secured for any liability for duty to the Registrar of Lands. Basically he is arguing that the principles of proprietary estoppel do not apply to this case so as to give rise to an equitable interest in the property which can be given effect to by the registration of a caution.

The circumstances which give rise to an estoppel such as is claimed by the defendant were considered at length by Oliver J. in Taylor Fashions Ltd v. Liverpool Victoria Trustees Co Ltd. [1981] 1 All ER

897. His starting point was the much-cited passage from the judgment of Fry J. in Willmott v Barber (1880) 15 Ch D 96, 105-6:-

> "A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly , the plaintiff must have expected some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly,the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal rights, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraid of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing



short of this will do.'

Oliver J. then reviewed succeeding cases and finally set out his view of the law as it now stands. He set out passages in the judgments of Buckley LJ and Goff LJ in Shaw v Applegate [1978] 1 All ER 123 in which those Lords Justices expressed serious doubts whether it was necessary to satisfy the five probanda set out by Fry J. in Willmott v Barber . Oliver J. then went on:-

> The matter was expressed as follows by Lord Denning MR in Moorgate Mercantile Co Ltd v Twitchings [1975] 3 All ER 314 at 323, [1976] QB 225 at 241:
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> 'Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and of equity. It comes to this. When a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so, Dixon J [in Grundt v Great Boulder Pty Gold Mines Ltd (1937) 59 CLR 641 at 674] put it in these words:
> "The principle upon which estoppel in pais is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations." In 1947, after the High Trees case, I had some correspondence with Dixon J about it, and I think I may say that he would not limit the principle to an assumption of

> fact, but would extend it , as I would, to include an assumption of law, present or future. At any rate, it applies to an assumption of ownership or absence of ownership. This gives rise to what may be called proprietary estoppel. There are many cases where the true owner of goods or of land has led another to believe that he is not the owner, or, at any rate, is not claiming an interest therein, or that there is no objection to what the other is doing. In such cases it has been held repeatedly that the owner is not to be allowed to go back on what he had led the other to believe. So much so that his own title to the property, be it land or goods, has been held to be limited or extinguished, and new rights and interests have been created therein. And this operates by reason of his conduct-what he has led the other to believe-even though he never intended it".
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> The inquiry which I have to make therefore, as it seems to me, is simply whether, in all the circumstances of this case, it was unconscionable for the defendants to seek to take advantage of the mistake which, at the material time, everybody shared, and, in approaching that, I must consider the cases of the two plaintiffs separately because it may be that quite different considerations apply to each.

In the instant case the defendant entered upon the property with full acquiescence of the plaintiff and expended considerable sums upon it in the anticipation of a contract being completed for his purchase of

the property. He was persuaded by the plaintiff's representative to pay over 3 installment payments on the purchase price in that anticipation. It is interesting to go back to the plaintiff's claim in this action in which it says that the plaintiff sold the property to the defendant, and thereafter sets out the terms of their purported agreement. The claim by the plaintiff was for an equitable lien over the property or restoration of the property to the plaintiff. The use of the word "restoration" is interesting. Most certainly the plaintiff was asserting at the commencement of this suit that there was a deal struck between the parties. There is a certain inconsistency between that claim and the plaintiff's present claim that the defendant must commence a new action in damages if he wants to maintain his own claim. The conduct of the plaintiff must have induced the defendant into the course of action he took and it would be unconscionable of the plaintiff to part with the property now and leave the defendant to the expense and inconvenience of taking legal action against it. By acquiescing in the defendant's entry into the property and by acquiescing in his doing work upon it, the plaintiff left the defendant with an interest in the land sufficient to justify the lodging of a caution pursuant to section 127 of the Registered Land Law. The question of the deposits totalling US$26952.38 and of the possible claim by the Registrar of Lands of CI$13,570 may raise separate and distinct issues relating to the defendant's interest in the land, but they do not affect my view that the caution was properly lodged.

That being so I now have to consider whether the caution should be lifted. The defendant seeks security for a deposit which the plaintiff admits was paid. It would be unjust and wasteful to permit the plaintiff to sell the land and force the defendant to seek his remedy in damages when an adequate remedy already lies in the hands of the Court, which is to attach conditions to the removal of the caution. It is accepted by both parties that I can attach conditions to the lifting of the caution. It would be wrong to permit the caution to remain in force because the amount expended by the defendant on improving the property is not properly proved and is very much an issue between the parties. The plaintiff has a purchaser for the property and contracts have been exchanged. To hold him out of that contract and to force him by means of the caution to pay an amount which is not adequately proved and is disputed would be unjust. It is true that there is no reason to hold the defendant out of his deposit, which is accepted as paid, but there is every reason to hold him out of the amount he says he expended on the property until he has proved that amount. On the other hand he must be held secure for that amount in case he proves his claim. Similarly with the amount of CI$13570 claimed as stamp duty by the Registrar of Lands, the defendant is deserving of security. It may well be that the Registrar will relinquish his claim to that amount, and from the arguments I have heard I would be surprised if he did not. The defendant cannot claim an amount which may not be charged to him, but he can be secured against that potential charge until the matter has been finalized.

In the event I order the caution to be removed on payment by the plaintiff to the defendant of US$26952.38 and on payment into an escrow account pending further orders of the sum of US$15000 and CI$13570 or their equivalent.

D. Schofield

Judge

GRAND COURT - CAYMAN ISLANDS

Orders made the 17th February 1995.

Reasons handed down the 6th March 1995.