1946

July 18.

Denning J.

CENTRAL LONDON PROPERTY TRUST LIMITED *v.* HIGH TREES HOUSE LIMITED.

Contract—Agreement intended to create legal relations—Promise made thereunder—Knowledge of promisor that promisee will act on promise—Promise acted on—Enforceability of agreement without strict consideration—Agreement under seal—Variation of by agreement of lesser value—Estoppel.

By a lease under seal dated September 24, 1937, the plaintiff company let to the defendant company (a subsidiary of the plaintiffs) a block of flats for a term of ninety-nine years from September 29, 1937, at a ground rent of 2,500*l.* a year. In the early part of 1940, owing to war conditions then prevailing, only a few of the flats in the block were let to tenants and it became apparent that the defendants would be unable to pay the rent reserved by the lease out of the rents of the flats. Discussions took place between the directors of the two companies, which were closely connected, and, as a result, on January 3, 1940, a letter was written by the plaintiffs to the defendants confirming that the ground rent of the premises would be reduced from 2,500*l.* to 1,250*l.* as from the beginning of the term. The defendants thereafter paid the reduced rent. By the beginning of 1945 all the flats were let but the defendants continued to pay only the reduced rent. In September, 1945, the plaintiffs wrote to the defendants claiming that rent was payable at the rate of 2,500*l.* a year and, subsequently, in order to determine the legal position, they initiated friendly proceedings in which they claimed the difference between rent at the rates of 2,500*l.* and 1,250*l.* for the quarters ending September 29 and December 25, 1945. By their defence the defendants pleaded that the agreement for the reduction of the ground rent operated during the whole term of the lease and, as alternatives, that the plaintiffs were estopped from demanding rent at the higher rate or had waived their right to do so down to the date of their letter of September 21, 1945.

Held (1.) that where parties enter into an arrangement which is intended to create legal relations between them and in pursuance of such arrangement one party makes a promise to the other which he knows will be acted on and which is in fact acted on by the promisee, the court will treat the promise as binding on the promisor to the extent that it will not allow him to act inconsistently with it even although the promise may not be supported by consideration in the strict sense and the effect of the arrangement made is to vary the terms of a contract under seal by one of less value; and

(2.) that the arrangement made between the plaintiffs and the defendants in January, 1940, was one which fell within the above category and, accordingly, that the agreement for the reduction of the ground rent was binding on the plaintiff company, but that it only remained operative so long as the conditions giving rise to it continued to exist and that on their ceasing to do so in 1945 the

plaintiffs were entitled to recover the ground rent claimed at the rate reserved by the lease.

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ACTION tried by Denning J.

By a lease under seal made on September 24, 1937, the plaintiffs, Central London Property Trust Ld., granted to the defendants, High Trees House Ld., a subsidiary of the plaintiff company, a tenancy of a block of flats for the term of ninety-nine years from September 29, 1937, at a ground rent of 2,500*l.* a year. The block of flats was a new one and had not been fully occupied at the beginning of the war owing to the absence of people from London. With war conditions prevailing, it was apparent to those responsible that the rent reserved under the lease could not be paid out of the profits of the flats and, accordingly, discussions took place between the directors of the two companies concerned, which were closely associated, and an arrangement was made between them which was put into writing. On January 3, 1940, the plaintiffs wrote to the defendants in these terms, "we confirm the arrangement made "between us by which the ground rent should be reduced as "from the commencement of the lease to 1,250*l.* per annum," and on April 2, 1940, a confirmatory resolution to the same effect was passed by the plaintiff company. On March 20, 1941, a receiver was appointed by the debenture holders of the plaintiffs and on his death on February 28, 1944, his place was taken by his partner. The defendants paid the reduced rent from 1941 down to the beginning of 1945 by which time all the flats in the block were fully let, and continued to pay it thereafter. In September, 1945, the then receiver of the plaintiff company looked into the matter of the lease and ascertained that the rent actually reserved by it was 2,500*l.* On September 21, 1945, he wrote to the defendants saying that rent must be paid at the full rate and claiming that arrears amounting to 7,916*l.* were due. Subsequently, he instituted the present friendly proceedings to test the legal position in regard to the rate at which rent was payable. In the action the plaintiffs sought to recover 625*l.*, being the amount represented by the difference between rent at the rate of 2,500*l.* and 1,250*l.* per annum for the quarters ending September 29, and December 25, 1945. By their defence the defendants pleaded (1.) that the letter of January 3, 1940, constituted an agreement that the rent reserved should be 1,250*l.* only, and that such agreement related to the whole term of the lease,

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(2.) they pleaded in the alternative that the plaintiff company were estopped from alleging that the rent exceeded 1,250*l.* per annum and (3.) as a further alternative, that by failing to demand rent in excess of 1,250*l.* before their letter of September 21, 1945 (received by the defendants on September 24), they had waived their rights in respect of any rent, in excess of that at the rate of 1,250*l.*, which had accrued up to September 24, 1945.

Fortune for the plaintiffs. The plaintiffs are entitled to recover rent on the basis of it being at the rate of 2,500*l.* a year, the amount reserved by the lease. The document in question was under seal and consequently could not be varied by a parol agreement or an agreement in writing not under seal. If there was a fresh agreement, it was void since it was made without consideration and in any event it was only an agreement of a purely temporary character necessitated by the difficult conditions prevailing when it was made, and coming to an end when those conditions ceased to exist at the end of 1944 or the beginning of 1945. Even supposing that the plaintiffs were held to be estopped from denying the existence of a new agreement, such estoppel would only operate so long as the conditions giving rise to the arrangement on which the estoppel was based, continued. [Denning J. This subject was considered by Simonds J. in *Re William Porter & Co., Ld.* (1).] It has recently been considered by Humphreys J. in *Buttery* v. *Pickard* (2). He also referred to *Forquet* v. *Moore* (3), *Crowley and Others* v. *Vitty* (4) and Foa, Landlord and Tenant, 6th ed., p. 701.

Ronald Hopkins for the defendants. The company are only liable to pay rent at the rate of 1,250*l.* per annum. The letters passing between the parties and the entry in the minute book of the plaintiff company constitute evidence of an agreement, which, although possibly not supported by such consideration as would strictly be necessary at common law, was of a type which a court of equity would enforce if it were satisfied that the parties intended to give contractual efficacy to that to which they were agreeing. The reduction in rent was made so that the defendants might be enabled to continue to run their business and that was sufficient to enable a court to hold the agreement binding on the plaintiff company. With regard

(1) [1937] 2 All E. R. 361.
(2) [1946] W. N. 25.
(3) (1852) 22 L. J. (Ex.) 35.
(4) (1852) 21 L. J. (Ex.) 135.

to the variation of an agreement under seal by a parol agreement or an agreement in writing, in *Berry* v. *Berry* (1), Swift J. said it was true that a covenant could not be varied except by some contract of equal value, but, he continued "although "that was the rule of law, the courts of equity have always "held themselves at liberty, to allow the rescission or variation "by a simple contract of a contract under seal by preventing "the party who has agreed to the rescission or variation from "suing under the deed. In *Nash* v. *Armstrong* (2) it was held "that a parol agreement not to enforce performance of a deed "and to substitute other terms for some of its covenants was a "good consideration for a promise to perform the substituted "contract . . ." If the above contentions fail, the defendants rely on the doctrine of estoppel. The propositions of law laid down in *Re William Porter & Co., Ld.* (3) exactly apply to the present case. The reduction in the rent was made in order that the defendants might be able to carry on their business. As a result of the reduction the business was carried on and the defendants arranged their affairs on the basis of the reduced rent with the result that the plaintiffs are estopped from claiming any rent beyond 1,260*l.* per annum for the whole period of the lease. Finally, the letters passing between the parties constituted a waiver by the plaintiffs of their right to a higher rent than 1,250*l.* down to the date of their letter of September 21, 1945.

Fortune in reply.

DENNING J. stated the facts and continued: If I were to consider this matter without regard to recent developments in the law, there is no doubt that had the plaintiffs claimed it, they would have been entitled to recover ground rent at the rate of 2,500*l.* a year from the beginning of the term, since the lease under which it was payable was a lease under seal which, according to the old common law, could not be varied by an agreement by parol (whether in writing or not), but only by deed. Equity, however stepped in, and said that if there has been a variation of a deed by a simple contract (which in the case of a lease required to be in writing would have to be evidenced by writing), the courts may give effect to it as is shown in *Berry* v. *Berry* (4). That equitable doctrine, however, could hardly apply in the present case because the variation here

(1) [1929] 2 K. B. 316, 319.
(2) (1861) 10 C. B. (N. S.) 259.
(3) [1937] 2 All E. R. 361.
(4) [1929] 2 K. B. 316.

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might be said to have been made without consideration. With regard to estoppel, the representation made in relation to reducing the rent, was not a representation of an existing fact. It was a representation, in effect, as to the future, namely, that payment of the rent would not be enforced at the full rate but only at the reduced rate. Such a representation would not give rise to an estoppel, because, as was said in *Jorden* v. *Money* (1), a representation as to the future must be embodied as a contract or be nothing.

But what is the position in view of developments in the law in recent years? The law has not been standing still since *Jorden* v. *Money* (1). There has been a series of decisions over the last fifty years which, although they are said to be cases of estoppel are not really such. They are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on. In such cases the courts have said that the promise must be honoured. The cases to which I particularly desire to refer are: *Fenner* v. *Blake* (2), *In re Wickham* (3), *Re William Porter & Co., Ld.* (4) and *Buttery* v. *Pickard* (5). As I have said they are not cases of estoppel in the strict sense. They are really promises—promises intended to be binding, intended to be acted on, and in fact acted on. *Jorden* v. *Money* (1) can be distinguished, because there the promisor made it clear that she did not intend to be legally bound, whereas in the cases to which I refer the proper inference was that the promisor did intend to be bound. In each case the court held the promise to be binding on the party making it, even though under the old common law it might be difficult to find any consideration for it. The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it. It is in that sense, and that sense only, that such a promise gives rise to an estoppel. The decisions are a natural result of the fusion of law and equity: for the cases of *Hughes* v. *Metropolitan Ry. Co.* (6), *Birmingham and District Land Co.* v. *London & North Western Ry. Co.* (7) and *Salisbury (Marquess)* v. *Gilmore* (8), afford a suffi-

(1) (1854) 5 H. L. C. 185.
(2) [1900] 1 Q. B. 426.
(3) (1917) 34 T. L. R. 158.
(4) [1937] 2 All E. R. 361.
(5) [1946] W. N. 25.
(6) (1877) 2 App. Cas. 439, 448.
(7) (1888) 40 Ch. D. 268, 286.
(8) [1942] 2 K. B. 38, 51.

cient basis for saying that a party would not be allowed in equity to go back on such a promise. In my opinion, the time has now come for the validity of such a promise to be recognized. The logical consequence, no doubt is that a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration: and if the fusion of law and equity leads to this result, so much the better. That aspect was not considered in *Foakes* v. *Beer* (1). At this time of day however, when law and equity have been joined together for over seventy years, principles must be reconsidered in the light of their combined effect. It is to be noticed that in the Sixth Interim Report of the Law Revision Committee, pars. 35, 40, it is recommended that such a promise as that to which I have referred, should be enforceable in law even though no consideration for it has been given by the promisee. It seems to me that, to the extent I have mentioned, that result has now been achieved by the decisions of the courts.

I am satisfied that a promise such as that to which I have referred is binding and the only question remaining for my consideration is the scope of the promise in the present case. I am satisfied on all the evidence that the promise here was that the ground rent should be reduced to 1,250*l.* a year as a temporary expedient while the block of flats was not fully, or substantially fully let, owing to the conditions prevailing. That means that the reduction in the rent applied throughout the years down to the end of 1944, but early in 1945 it is plain that the flats were fully let, and, indeed the rents received from them (many of them not being affected by the Rent Restrictions Acts), were increased beyond the figure at which it was originally contemplated that they would be let. At all events the rent from them must have been very considerable. I find that the conditions prevailing at the time when the reduction in rent was made, had completely passed away by the early months of 1945. I am satisfied that the promise was understood by all parties only to apply under the conditions prevailing at the time when it was made, namely, when the flats were only partially let, and that it did not extend any further than that. When the flats became fully let, early in 1945, the reduction ceased to apply.

In those circumstances, under the law as I hold it, it seems to me that rent is payable at the full rate for the quarters ending September 29 and December 25, 1945.

(1) (1884) 9 App. Cas. 605.

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If the case had been one of estoppel, it might be said that in any event the estoppel would cease when the conditions to which the representation applied came to an end, or it also might be said that it would only come to an end on notice. In either case it is only a way of ascertaining what is the scope of the representation. I prefer to apply the principle that a promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply. Here it was binding as covering the period down to the early part of 1945, and as from that time full rent is payable.

I therefore give judgment for the plaintiff company for the amount claimed.

Judgment for plaintiffs.

Solicitors for the plaintiffs: *Henry Boustred & Sons.*
Solicitors for the defendants: *Callingham, Griffith & Bates.*

P. B. D.

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Oct. 21, 23.

Wrottesley J.

DUFFIELD *v.* GREAT WESTERN RAILWAY COMPANY.

Emergency legislation—Essential work—Scheduled undertaking—Master and servant—Railway—Failure of employee to pass examination for promotion—Transference of employee to lower grade under term of service contract—Rate of wages payable—Essential Work (General Provisions) (No. 2), 1942 (St. R. & O. 1942, No. 1594), art. IV. (1.), (d).

An employee of the defendant railway company who, after three attempts, had failed to pass an examination for promotion to engine-driver, was reduced from the position of locomotive fireman to lower grade work with lower pay, in accordance with the terms of the company's conditions of service, of which the employee was aware. The employee, who had been in the service of the company since 1921, was willing to do the lower grade work but claimed that under art. IV. (1.) (*d*), of the Essential Work (General Provisions) (No. 2) Order, 1942 (1), he was entitled to be paid the higher wages of a fireman:—

(1) Essential Work (General Provisions) (No. 2) Order, 1942, art. IV. (1.) (*d*): "without pre- "judice to any terms and condi- "tions of employment more "favourable to persons employed "in the undertaking that may be "provided for by the Conditions "of Employment and National "Arbitration Order, 1940, or by "that order as amended by any "subsequent order, the person "carrying on the undertaking shall "in respect of every prescribed "period pay to every specified "person (except as otherwise pro-