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14/1963

IN THE PRIVY COUNCIL

No. 4 of 1962

UNIVERSITY OF LONDON INSTITUTE OF ADVANCED LEGAL STUDIES 19 JUN 1964 25 RUSSELL SQUARE LONDON, W.C.1.
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ON APPEAL FROM
THE FIJI COURT OF APPEAL

B E T W E E N :

NATHANIEL STUART CHALMERS
(Plaintiff) Appellant

74085

- and -

LAWRENCE PARDOE
(Defendant) Respondent

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CASE FOR THE APPELLANT

Record

1. This is an Appeal from the Judgment and Order of the Fiji Court of Appeal, dated the 5th May 1961, dismissing the Appellant's appeal from the Judgment of the Supreme Court of Fiji, dated the 30th September 1960, and allowing in part the Respondent's cross-appeal from the Judgment of the Supreme Court of Fiji by setting aside the Order made by the said Court permitting the Appellant to remove certain buildings erected by him on the Respondent's land.

p. 42.
 p. 47.

 p. 36.

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2. The Appellant built a cottage on the Respondent's land with his consent. The Respondent is the registered lessee of land from the Native Land Trust Board (hereinafter called "the Board"). The Respondent was called upon by the Board to regularize the position of the appellant and his own position by applying for the consent of the Board to the buildings erected by the Appellant and by applying to the Board for a sub-lease or for a surrender of his lease. The Respondent at first agreed to do so, whereupon the Board gave its consent to the building and increased the rent payable by the Respondent; but subsequently the Respondent withdrew from applying for a sub-lease or a surrender, and brought a suit (No. 220 of 1958) against the Appellant claiming a declaration in trespass and damages. Thereupon the Appellant brought a suit (No. 221 of 1958) against the Respondent claiming an equitable charge or lien over

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the Respondent's land to the extent of the value of the buildings erected by him.

3. The principal question for determination in this Appeal is whether the Appellant has established an equitable right to reimbursement.

4. The relevant facts as proved and admitted are set out in the Judgment of the Court of Appeal as follows:-

p.43, 11.1-28.

"The learned trial Judge, in the course of his judgment, emphasised the confusing and conflicting nature of the evidence and the difficulty he encountered in the matter of finding the facts. For the purpose of the determination of these appeals, however, the proved and admitted facts can be contained within a small compass.

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At all material times the Respondent was the lessee of certain lands in the Conua District, held under Lease 7235 from the Native Land Trust Board under the provisions of the Native Land Trust Ordinance, Cap.104. While the relations between the parties were friendly, the Respondent permitted the Appellant to erect certain buildings on the land comprised in the lease. There was some discussion between the parties as to obtaining the consent of the Native Land Trust Board, and at one time there was a proposal that the Respondent should surrender a portion of his leasehold land and that the Appellant would obtain a new lease of the surrendered portion from the Board. The Board was aware that the buildings had been erected and on this account increased the rental payable by the Respondent. At no time, however, was an application made to the Native Land Trust Board for consent to the erection of the buildings by the Appellant nor to his occupation of a portion of the leasehold land."

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p. 1.

5. On the 11th July 1958, the Respondent instituted his Suit, Action No. 220 of 1958, against the Appellant in the Supreme Court of Fiji.

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p. 3.

6. On the 22nd October 1958 the Appellant instituted his Suit, Action No. 221 of 1958, against the Respondent in the Supreme Court of Fiji.

7. On the 28th July 1958 the Appellant filed his Defence to Action No. 220 of 1958. p. 2. Record
8. On the 8th December 1958 the Respondent filed his Defence and Counterclaim to Action No. 221 of 1958. p. 5.
9. Replies were filed in both Actions respectively by the Respondent (No. 220 of 1958) on the 2nd October 1958 and by the Appellant (No. 221 of 1958) on the 13th December 1958. p. 3.
p. 7.
- 10 10. The Respondent claimed a declaration that the Appellant was in wrongful occupation of the land comprised in Native Lease 7235 and consequential injunction and damages. p.2, 11.1-10.
11. The Appellant claimed a declaration that he had an equitable charge or lien over the Respondent's land to the extent of £2,600 being the value of the buildings erected by him on the Respondent's land with permission of the Respondent. p.4, 11.41-47.
- 20 12. Both Actions were heard together. The hearing commenced on the 24th August 1960. p. 8.
13. The Court framed the following issue:- p.8, 11.24-26.
- "Can there be an equitable charge in a native lease? Might there nevertheless be an equitable right to reimbursement?"
14. The parties adduced oral and documentary evidence.
- The manager of the Native Land Trust Board, Thomas Edward Foster, gave evidence on behalf of the Respondent. In the course of his examination in chief he said:-
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- "The Board did not threaten Pardoe. They merely informed him of the situation, of the Board's rights in the matter. As far as I can recall the position was explained - our privity of contract was with Mr. Pardoe and not with Mr. Chalmers. And we didn't require him. The Board has not given Mr. Chalmers permission to occupy the land. It could only deal with Mr. Pardoe and not with Mr. Chalmers until there was any surrender."
- 40 p.33, 1.36.

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In the course of cross-examination he said:-

p.35, 1.6.

"There is a letter on 18th June, 1957. Mr. Pardoe wanted to regularise position. The Board approved in terms of memorandum of 11th October, 1957 - second dwelling: rent increased. There was a letter to the same effect on page 19 of Exhibit 2 to Mr. Pardoe of same date from the Board. There is a note that Mr. Pardoe withdrew from everything on 22nd January, 1958. If the Board had not been approached to grant this permission it could not have increased the rent. As far as buildings went the irregularity was all forgiven by the consent of page 19 Exhibit 2. As a friend of Mr. Pardoe we had no objection to Mr. Chalmers presence. Putting up buildings was one matter. Disposing of land was another."

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p.35, 1.5.

15. On the 18th June 1957, the Respondent applied to the Board to regularise the position to grant permission for a second dwelling.

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p.35, 1.7.

On the 11th October 1957 the Board granted its approval for the second dwelling and ordered an increase of rent in terms of a Memorandum of that date.

p.35, 1.11.

On the 22nd January 1958 there is a note made by the Board that the Respondent withdrew from everything.

16. Mr. Foster referred in particular to the following letters in the correspondence addressed by the Board to the Appellant and the Respondent, separately, from the 22nd November 1956 to the institution of Suit No. 220 of 1958 on the 11th July 1958:-

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p. 85.

(1) 22nd November 1956 from the Board to the Respondent;

p. 57.

(2) 29th November 1956 from the Respondent to the Board;

p. 58.

(3) 5th December 1956 from the Board to the Appellant;

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p. 58.

(4) 21st December 1956 from the Respondent to the Board;

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- (5) 15th February 1957 from the Board to the Appellant; p. Record 61.
- (6) 20th February 1957 from the Board to the Respondent; p. 61.
- (7) 10th May 1957 from the Board to the Appellant; p. 62.
- (8) 10th May 1957 from the Board to the Respondent; p. 63.
- 10 (9) 19th November 1957 from the Board to the Appellant; p. 65.
- (10) 17th May 1958 from the Board to the Appellant's Solicitor; p. 73.
- (11) 23rd May 1958 from the Board to the Appellant. p. 73.
17. As stated by Mr. Foster in his evidence the correspondence established the position between the Appellant and the Respondent quite clearly, namely, as follows:- p. 33.
- 20 (a) the Board controls the building of beach cottages;
- (b) the original lease was issued to Mr. Walker;
- (c) the lease was a residential lease with an open permission to have two buildings on the land;
- (d) by transfer of the lease from Mr. Walker the Respondent was the registered lessee;
- (e) there is privity of contract between the Board and the Respondent;
- (f) there is no privity of contract between the Board and the Appellant;
- 30 (g) the Respondent approached the Board to grant permission for a second dwelling;
- (h) the Board granted the permission sought for and increased the rent due from the Respondent;
- (i) the Board would consider the surrender of a tenancy if it was put through in a proper manner;

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- (j) the Respondent could have followed the correct procedure and applied to the Board for a sub-lease or a surrender of his lease;
- (k) there were no grounds upon which the Board could have objected to either a sub-lease or a surrender;
- (l) the Board could recognize the Appellant only after the Respondent had surrendered his lease or obtained a sub-lease;
- (m) the Respondent wanted to regularise the position by his letter of the 18th June 1957; 10
- (n) the irregularity over the permission to build the second cottage by the Appellant was cured by the Board's consent to the building on the 19th November, 1957;
- (o) the Respondent agreed on the 21st December 1956 to surrender to the Board a portion of the lease for the purpose of leasing that portion to the Appellant and of having a separate lease issued to him; and 20
- (p) the Respondent changed his mind and withdrew from everything on the 22nd January 1958 and refused to regularize his position and the Appellant's position with the Board.

p. 36.

18. The Judgment of the Supreme Court of Fiji was delivered by Mr. Justice Knox-Mawer on the 30th September, 1960.

The Trial Court held -

- p.37, 1.11. 1. That at no time has the Appellant obtained either a sub-lease or a transfer to himself of the land upon which he erected certain buildings: 30
- p.37, 1.27. 2. That the Appellant has failed to discharge the onus of proving the necessary facts to found a claim in equity:
- p.37, 1.36. 3. That the Respondent has failed to discharge the onus of proving the necessary facts to support any claim to damages.

In the result the Trial Court dismissed the

Appellant's Suit (No. 221 of 1958) and the Respondent's Suit (No. 220 of 1958). The Trial Court ordered the Appellant to remove the buildings erected by him forthwith.

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19. Against the said Judgment the Appellant appealed, and the Respondent cross-appealed, to the Fiji Court of Appeal.

20. The Judgment of the Fiji Court of Appeal was delivered on the 5th May 1961.

p. 42.

10 The learned Judges held -

(1) that the arrangement arrived at between the parties was in law a licence by the Respondent to the Appellant to occupy coupled with possession;

p.45, 11.28-41.

(2) that 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;

20 (3) that the transaction was illegal inasmuch as the Board's consent was not obtained prior to the dealing with the land;

(4) that an equitable charge cannot be brought into being by an unlawful transaction; and

(5) that therefore the Appellant's claim to such a charge must fail.

21. The reasoning of the Judgment is set out in the following passage:-

30 "The first question for determination on the Appeal is the legality of the arrangement entered into between the Appellant and the Respondent as a result of which the Appellant erected the buildings in question on the Respondent's leasehold land. This requires a consideration of the provisions of the Native Land Trust Board Ordinance, Cap. 104. The two sections which were discussed in the course of the argument at the hearing of the appeal were Sections 12 and 27. These read:-

p.43, 1.29 to
p.45, 1.41.

"12. (1) Except as may be otherwise provided by regulations made hereunder, it

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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."

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"27. Any person who is found to be in unlawful occupation of any native land shall be liable to immediate eviction and to a fine of fifty pounds or to imprisonment for six months or to both such fine and imprisonment."

Counsel for the Appellant conceded that if the arrangements between the parties constitute an illegal transaction then the Appellant is not entitled to the equitable relief which he claims.

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Section 12 is very wide in its scope. It provides in effect that no dealing of any sort with the land, without the prior consent of the Board, is lawful. On this aspect of the appeal Counsel for the Appellant made two main submissions to the Court:

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- (a) That the arrangement or transaction entered into between the parties was not a "dealing with" land;
- (b) That even if it were held that the transaction was illegal as against the Board it was good between the parties.

We cannot subscribe to the doctrine set out in the second of these submissions. We do not understand the phrase used by Counsel "illegal as against the Board, but legal as between the parties". A transaction which is illegal is contrary to law, and accordingly, has no validity whatever, even between the parties.

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10 As to the first submission, Counsel contends that the evidence disclosed merely a "friendly arrangement" between the parties which did not in any sense constitute "alienating or dealing with" the land. This is the crux of the matter. Even if it were found that the Native Land Trust Board had tacitly consented to the erection of the buildings by its action in increasing the rent on that account - and there is no such finding - the consent, to make the transaction lawful, must be the prior consent. Section 12 is quite clear on this point. If the consent of the Board is not first had and obtained, the alienation or dealing with the land is unlawful.

20 Counsel for the Appellant submits that the Lessee, under a lease from the Native Land Trust Board, can do anything he wishes, without bringing his action within the ambit of Section 12, provided that he does not create an interest in the land. He further contends that permitting an act which may give rise to an equitable charge over the land is not creating or disposing of an interest in the land. This contention, in our view, is untenable.

30 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

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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."

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22. The Respondent's cross-appeal to set aside the Order of the Trial Court permitting the Appellant to remove the buildings erected by him was allowed.

In the result the Appellant's appeal was dismissed and the Respondent's cross-appeal was allowed in part by setting aside the Order made by the Trial Court permitting the Appellant to remove the buildings erected by him.

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p. 47. 23. An Order in accordance with the Judgment was made on the 5th May 1961.

p. 48. 24. From that Judgment and Order, the Appellant was granted Leave to Appeal to Her Majesty in Council on the 2nd June 1961.

25. The Appellant humbly submits that this Appeal be allowed with costs throughout and the Judgment and Order of the Courts below be set aside and the Appellant be granted a declaration that he has an equitable charge or lien over the Respondent's land comprised in Native Lease No. 7235 to the extent of the sum of £2,600 until payment of the said sum by the Respondent to the Appellant, for the following among other

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R E A S O N S

1. BECAUSE the legal position as explained by the Manager of the Native Land Trust Board to the Respondent (set out in paragraph 17 herein) is correct.

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2. BECAUSE the Respondent having agreed to regularise the position, and subsequently refusing to carry out his agreement, is liable in equity to compensate the Appellant by way of damages for the value of the buildings erected by him with the consent of the Respondent.
3. BECAUSE therefore the Appellant is entitled to an equitable charge over the land for the amount of the damages suffered by him.

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S.P. KHAMBATTA.

S. STOUT-KERR.

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- and -

LAWRENCE PARDOE
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CASE FOR THE APPELLANT

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