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IN THE PRIVY COUNCIL No. 9 of 1983

ON APPEAL

FROM THE COURT OF APPEAL OF THE COMMONWEALTH OF THE BAHAMAS

BETWEEN :

INVERUGIE INVESTMENT LIMITED
(Defendants) Appellants

- and -

RICHARD HACKETT (Plaintiff) Respondent

CASE FOR THE APPELLANTS

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INTRODUCTION

1. This is an Appeal from an Order of the Court of Appeal (Civil Side) of the Commonwealth of the Bahamas (Luckhoo P., Sir James Smith J.A. and da Costa J.A.) dated 8 July 1982, whereby it was declared that Alliance (hereinafter defined) be deemed to have consented to the lease referred to in paragraph 8 hereof and that the Respondent is entitled to possession of the apartments listed in paragraph 1 of the Amended Statement of Claim; possession of the said apartments was ordered and an enquiry ordered as to mesne profits and damages, including damages for trespass to the Respondent's furniture; and an Order made for the costs of that appeal and in the court below (in favour of the Respondent). 192 /N.B. No copy Order in Record/

2. The Appeal concerns the position of a purchaser (the Appellants) from a mortgagee of property in respect of which there is a claim by the Respondent to an equitable right, or rights, alleged to arise by way of proprietary estoppel operating (if at all) against the mortgagee/vendor. It raises two questions: first, whether the facts are such as to have given rise to a proprietary estoppel as between

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the Respondent and the mortgagee/vendor (Alliance Services Industrial & Commercial Corporation Limited - hereinafter called "Alliance"); and, second, whether any such estoppel enured as against the Appellants when they purchased the mortgaged property from Alliance for valuable consideration under a Conveyance dated 5 December 1974.

THE FACTS

3. In 1969 Myra Investments Limited ("Myra") was the estate owner in respect of the fee simple in possession of the land described in the Mortgage and in the Conveyance hereinafter mentioned later known as Silver Sands Hotel, Freeport, Grand Bahama ("the Property").

4. Myra undertook a development on the Property, consisting of the construction of 144 apartments financed largely from advance sales of apartments. To that end contracting purchasers of apartments paid deposits; and some paid the entirety of the agreed purchase price in advance in cash on their contracting to take 99 year leases on completion of the building.

5. By a Mortgage, dated 15 November 1969 ("the Mortgage"), Myra mortgaged the Property to Alliance by conveying the same to Alliance in fee simple subject to a proviso for redemption. The Mortgage was duly registered at the Registry of Records on 15 January 1970.

6. Myra defaulted on payment due to Alliance under the Mortgage, and Alliance, as mortgagee, sold the Property to the Appellants under a Conveyance dated 5 November 1974. That Conveyance was delivered for registration at the said Registry on 7 November 1974.

7. The Mortgage contained (inter alia) a prohibition against the exercise of the powers of leasing conferred on mortgagors in possession by section 20(3) of the conveyancing and Law of Property Act, Chapter 115 of the 1965 Statute Laws of the Bahamas, without the consent in writing of Alliance.

8. By an Instrument, dated 5 June 1970, made between Myra and the Respondent, Myra purported to demise to the Respondent 30 apartments in the Property for a term of 99 years from that date at a premium of $300,000. The said purported demise was effected without the written consent of Alliance being sought or given.

9. The said instrument was not lodged for record at the Registry of Records until 27 December 1974.

10. The Respondent first learnt of the interest of Alliance in the Property on 3rd or 4th June 1970, when he was shown by Myra a letter dated 2 June 1979 from Alliance to Myra ("the Letter").

11. By that time Myra had sought to procure Alliance to defer the due date for repayment of moneys due under the Mortgage, and the Letter contained an offer by Alliance to extend the mortgage loan by one year, making reference to the purchase by the Respondent of 30 apartments on or before 15 June 1970.

12. The said offer was re-negotiated by Myra, acting by its President, Z.W. Radomski, and its attorney, G.N. Capps; and a deed containing terms for the postponement of the Mortgage repayment which were different from those offered in the Letter was executed after 25 June 1971 and dated 1 July 1970. Radomski and the Respondent were good friends and both were substantial shareholders in a neighbouring apartment development.

13. The re-negotiation of the said offer was commenced at a meeting with Alliance attended by Radomski and Capps on 3rd and 4th June 1970 immediately after they had shown the Respondent the Letter; and Radomski and Capps returned from that meeting and told the Respondent that Alliance had agreed to vary the term numbered (3) in the Letter (to which the Respondent had taken exception); but they did not inform the Respondent that they were re-negotiating all the terms for the postponement of the Mortgage repayment, or that (that as was the case) the said terms were no longer being pursued in the form which they took in the Letter.

14. Radomski did not give evidence, although he was found by the trial judge to have been heavily involved in the negotiations leading from the terms set out in the Letter to those set out in the said deed incorrectly dated 1 July 1970.

15. No evidence was adduced which was directed to the knowledge or the state of mind of the directors of Alliance in June 1970, or at any time; and none was adduced as to the knowledge or state of mind of the directors of the Appellants in November 1974, or at any time.

16. The sale by Alliance to the Appellants was effected

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pursuant to an Agreement for sale, dated 28 October 1974, made between Alliance, selling as mortgagee, and Gleneagles Investment Co. Limited as purchaser. The purchaser's rights under that contract were assigned to the Appellants on 4 November 1974. Clause 8 of the said Agreement contained a statement that Alliance had not given its written consent to any leases claimed on portions of the Property.

THE ISSUES

17. There are two categories of issue, viz.

(i) the significance of questions of law overlooked by the Court of Appeal, and

(ii) whether the majority decision of the Court of Appeal, which was founded solely on proprietary estoppel, was correct.

18. As to 17(i) above, the Court of Appeal overlooked two fundamental questions of law, namely

(a) the effect of the impact of Section 10 of the Registration of Records Act, Chapter 193 of the Statute Laws of the Bahamas, in the light of the facts that: the Mortgage was registered at the Registry of Records on 15 January 1970, the Conveyance to the Appellants, dated 5 November 1974, was so registered on 7 November 1974, and the purported lease to the Respondent dated 5 June 1970 was not so registered until 27 December 1976.

(b) the powers of leasing conferred on a mortgagor in possession (and also on a mortgagee) by section 20 of the said Conveyancing and Law of Property Act do not extend to the grant of a 99 year lease except for a building lease; and the purported lease to the Respondent is not a building lease.

19. As to 17(ii) above, the questions before the Board are :

(a) Are all the probanda stated in Willmott v. Barber (1880) 5 Ch. D. 96 requisite to establish a proprietary estoppel in a case where no representation was made by the party alleged to be estopped?

(b) If so, has the Respondent proved matters sufficient to discharge those probanda?

(c) If the probanda are not all requisite, has the Respondent discharged the onus of satisfying whatever test is appropriate to establish a proprietary estoppel against Alliance?

(d) If Alliance were so estopped from disputing the Respondent's claim to a lease of 30 apartments in the Property, are the Appellants bound by that estoppel?

THE APPELLANTS' SUBMISSIONS

20. Whatever the position as between the Respondent and Alliance, and even if there were sufficient to raise a proprietary estoppel against Alliance, the Appellants were purchasers for value under their Conveyance, dated 5 November 1974, without notice of any such estoppel and took free of it. That is so for two reasons :-

(i) The operation of section 10 of the said Registration of Records Act is to postpone a lessee who has failed to register his lease to a subsequent purchaser who does register; and a claim by estoppel cannot place the claimant in a better position than if he had been granted a legal estate.

(ii) The majority in the Court of Appeal wrongly held that the Appellants were bound by reason of

(a) notice of the contents of the "lease" to Respondent, 165:51 189:27

(b) the alleged occupation of the Respondent by the presence of his furniture giving constructive notice of the Respondent's rights. 166:3 190:1

21. The ground stated at (a) above is wrong because the doctrine of Patman v. Harland (1881) 17 Ch.D. 353 extends only to notice to the contents of a lease, not to claims arising out of extraneous facts surrounding the grant thereof; and because notice of the contents of the particular instrument relied on would have included notice that the instrument was ex facie invalid as not falling within subsection 20(3) of the Conveyancing and Law of Property Act, thus justifying the Appellants in regarding the instrument as not binding them.

22. The proposition that the presence of the Respondent's furniture put the Appellants on notice of all the Respondent's 33:7

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38:39 rights is not tenable in the circumstances of this case viz. where Myra, the mortgagor in possession, was
190:5 offering the apartments for short lets and no evidence was adduced to show that the Appellants knew who was the owner of the furniture or on whose behalf Myra was purporting to let the apartments.

23. The majority in the Court of Appeal erred further in holding that the five probanda in Willmott v. Barber (loc. cit.) had been satisfied by the Respondent.
106:51 Despite the pleadings' failure to identify the nature of the mistake alleged to have been made by the Respondent and
111:30 to 113:4 despite the equivocal nature of the Respondent's evidence, the learned trial judge held that the Respondent believed that the lease which he executed on 5 June 1970 was valid because Alliance had orally consented thereto, and that
111:19 this satisfied the first probandum. However the finding is later described in broader terms: the mistaken belief that the lease was valid. The latter formulation need not have arisen because of the want of written consent - see paragraph 18(b) above - and there would have been no moral or equitable obligation on Alliance to act as legal adviser to the Respondent and to point out to him the mortgagor's inability to grant a long lease. Moreover there is no evidence that Alliance had any knowledge of the form in which Myra was proposing to effect the sale of 30 apartments to the Respondent; and the fact that some contracting purchasers had paid all the purchase price in advance without obtaining a lease means that there is no ground for drawing the inference that Alliance must have expected the grant or purported grant of a lease to precede the payment of money by the Respondent.

24. The learned trial Judge was right to reject the suggestion that the fourth or fifth probanda had been satisfied in the complete absence of any evidence directed to these areas. The majority in the Court of Appeal relied on supposition and speculation to fill the gaps left by the want of evidence in these areas: Sir James Smith
163:11 J.A., relying on inference from the Letter without considering the fact that under earlier contracts advance
164:40 payments had been made, and ignoring the invalidity of
164:5 the lease arising from want of compliance with the Conveyancing and Law of Property Act; and da Costa J.A.
187:40 assuming knowledge in Alliance that a lease was being
185:50 granted and making sweeping general inferences as to "the probabilities."

25. The Appellants contend that the doctrine expounded

in Willmott v. Barber remains the correct test either for all claims of proprietary estoppel - notwithstanding the broader approach propounded in Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd. [1982] Q.B.133, and the doubts as to Willmott v. Barber expressed in cases there cited - or at least in cases where the claim is founded on the silence and "standing by" of the party charged rather than on any representation made by that party. The Court of Appeal were correct in applying the probanda from Willmott v. Barber in Berg Homes Ltd. v. Grey (1979) 253 E.G.473.

26. Even if the broader test expounded in Taylors Fashions v. Liverpool etc. were correct, the correct appraisal of all the facts and of the state of the evidence in the present case is such as not to give raise to a proprietary estoppel.

27. The Appellants humbly submit that the Appeal should be allowed with costs for the following, among other

R E A S O N S

I. BECAUSE the learned trial Judge and Luckoo P., dissenting in the Court of Appeal, were correct.

II. BECAUSE the Respondent failed to satisfy the requirements to establish a proprietary estoppel as against Alliance.

III. BECAUSE the majority in the Court of Appeal were wrong in holding that the Appellants were bound by an equity affecting Alliance.

IV. BECAUSE the majority in the Court of Appeal failed to appreciate, or to give due weight to the questions of law referred to in paragraph 18 hereof.

PETER MILLETT

BENJAMIN LEVY

No. 9 of 1983

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- and -

RICHARD HACKETT (Plaintiff) — Respondent

CASE FOR THE APPELLANTS

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