

**IN THE COURT OF APPEAL**  
**ON APPEAL FROM THE HIGH COURT**

**(Civil Appeal No. ABU 0053 of 2012)**  
**(High Court Case No. HBC 267 of 2006L)**

**BETWEEN** : **I TAUKEI LAND TRUST BOARD** **Appellant**

**AND** : **ANARE NASOQIRI HUGHES** **1<sup>st</sup> Respondent**

**AND** : **1. JOSAIA SABUI**  
**2. OPETI NAIIO** **2<sup>nd</sup> Respondents**

**Coram** : Almeida Guneratne, JA  
Anjala Wati, JA  
A.L.B. Mutunayagam, JA

**Counsel** : Mr. I. Lutumailagi with Ms E. Raitamata for the Appellant  
Mr. S. Nacolawa for the Respondents

**Date of Hearing** : 17 November 2014

**Date of Judgment** : 5 December 2014

**JUDGMENT**

**Almeida Guneratne JA:**

**Nature of this Appeal**

- [1] This is an appeal against the judgment dated 22 November, 2011 of the High Court in Lautoka.

- [2] By that judgment, Justice Sosefo Inoke held that, there was a binding agreement obliging the Appellant (the 2<sup>nd</sup> defendant in the original action) to issue to the 1<sup>st</sup> respondent (the Plaintiff in the original action) a residential lease of part of an i Taukei land which was breached by the Appellant resulting in the 1<sup>st</sup> Respondent having to dismantle the house he had built and vacate the land.
- [3] At the outset it is noted that, the 1<sup>st</sup> Respondent had not sought specific performance but had claimed as damages compensation for the improvements; he had effected on the land which the learned High Court Judge decreed in his judgment.
- [4] Apart from that, although in the said judgment the Appellant and the 2<sup>nd</sup> Respondents (the 1<sup>st</sup> Defendants) had been ordered jointly and severally to pay to the 1<sup>st</sup> Respondent a sum of \$60,000.00 (Sixty thousand dollars) and costs in a sum of \$2,500.00 (Two thousand and five hundred dollars), in subsequent proceedings dated 2<sup>nd</sup> June 2014 had in the High Court, by consent, the 2<sup>nd</sup> Respondents had been struck out as a party and the judgment entered against them dismissed with no appearance being entered for the Appellant.

### **The Grounds of Appeal**

- [5] By notice of appeal filed pursuant to leave to appeal being granted, the Appellant has raised the following grounds of appeal viz:
1. That, the learned trial judge, Mr. Justice Sosefo Inoke, erred in fact and in law and/or mixed law and fact in:
    - (i) *Failing to take due consideration of the fact that, the 1<sup>st</sup> Respondent did not settle the appellant's original offer of lease by payment of the levied sum of \$5000,00 within the prescribed six (6) weeks period;*
    - (ii) *Failing to take due consideration of the fact that, the 1<sup>st</sup> Respondent did not obtain any consent from the*

*Appellant to build a permanent structure on the subject, originally agricultural leased and;*

- (iii) *Failing to take due consideration of the fact that, the said lease was not issued by the Appellant to the 1<sup>st</sup> Respondent for the reason that, the latter caused tension and animosity between himself and the members of the relevant land owning unit by way of threats, intimidation and assault.*

**Background Facts and Aspects of Evidence Relevant to and Impacting on the said Grounds of Appeal**

- [6] In his lucidly written judgment the learned High Court Judge has recapped the history of the case in detail and we do not consider it necessary to crowd this judgment with all that.
- [7] However, we shall put down the background facts and aspects of evidence relevant to and impacting on the grounds of appeal necessary for us to make a determination in this appeal.

**Relevant Background Facts Impacting on the Grounds of Appeal**

- [8] In or about August 2004, the 1<sup>st</sup> Respondent had approached the 2<sup>nd</sup> Respondent land owners to consent to the issue of a residential lease of the land in question for 30 years which request had been accepted by the said landowners.
- [9] That is not disputed, but we agree with the submission of the learned counsel for the Appellant that, having regard to the provisions of Sections 5(2) 7, 8(1) & (2), 9 and 10(1) of the Native (presently i Taukei) Land Trust Act (Cap. 134 revised, 1985, hereinafter referred to as the Act) what was material was not the consent of the said landowners but the consent of the Appellant, which constituted a mandatory pre-condition.



**Does The Evidence Reveal Consent on the Part of the Appellant?**

- [10] Pages “38 to 40” of the Composite Case Record reveals that, the application for the new lease was still “pending” (vide: titled “the Lease Particulars”).
- [11] Moreover, the payment of \$950.00 had been paid not to the Appellant Board but to the landowners as a goodwill payment.
- [12] On that established evidence alone I find it difficult to accept as the learned High Court Judge did in holding that, there was a “binding agreement” for the Appellant to issue a new lease to the 1<sup>st</sup> Respondent.
- [13] It is true that, the Appellant had accepted a payment of \$56.25 as an application fee for the new lease. (page 34 of the Composite Case Record).
- [14] But, in my view that, only showed an intention to grant the 1<sup>st</sup> Respondent the said new lease provided the 1<sup>st</sup> Respondent paid the \$5,000.00 for the granting and/or issue of the same, which admittedly, the first Respondent did not do.
- [15] Even if the \$950.00 is to be construed as an advance payment, the balance to be paid later, the same had been paid to the landowners (the 2<sup>nd</sup> Respondents).
- [16] The fact that, that was done in keeping with tradition in addition to the giving of a “tabua” was not a relevant matter to the Appellant, in so far as its statutory involvement and relationship with the 1<sup>st</sup> Respondent was concerned.

### **The Conduct of the 1<sup>st</sup> Respondent Himself**

- [17] The 1<sup>st</sup> Respondent's conduct also impacts on the issue as to whether he was entitled to procure a new lease he was sanguine of obtaining.
- [18] The ongoing lease the 1<sup>st</sup> Respondent had been enjoying expired in June, 2004 and he had been given a grace period up to December, 2005.
- [19] In that period or even thereafter, he had not taken any steps to pay the \$5000.00 which he was required to pay to the Appellant.
- [20] He may have had a "hope" of obtaining a fresh lease but it was his obligation to make that payment to cement his entitlement to obtain the same.
- [21] He did not do so and his procrastination cannot enure to his advantage and/or in his favour for that reason.
- [22] As *Yevgeny Baratynsky (AD 1800 – 44)* in his exposition on "The Two Fates" said in (1823) "providence has given human wisdom the choice between two fates: either hope and agitation or hopelessness and calm".
- [23] Here, the 1<sup>st</sup> Respondent may have had a hope but he had not agitated to procure the new lease he was hoping to obtain and had remained in calm apart from the fact that, he had made no effort to pay the said \$5000.00.

- [24] Accordingly, I am unable to endorse the learned High Court Judge's conclusion that, there was a "binding agreement" for the Appellant to grant a new lease to the 1<sup>st</sup> Respondent.

**Section 59 of the Indemnity, Guarantee and Bailment Act**

- [25] In that context, I wish to add, as pointed out by Her Ladyship, Justice Ms Wati; that, Section 59 of the Indemnity and Guarantee Act (Cap.232) had also not been satisfied, to which judicial interjection, learned counsel for the 1<sup>st</sup> Respondent had no answer. There was no memorandum as contemplated therein.

- [26] Section 59(d) States that;

*"no action shall be brought upon any contract or sale of lands or any interest in them unless the agreement upon which such action is brought or a memorandum thereof is in writing".*

- [27] But, the fact of the matter is that, there was no agreement upon which the action was brought or a memorandum thereof in writing.

- [28] Indeed, it appears that, this is the reason why the 1<sup>st</sup> Respondent had not sought specific performance.

- [29] For the aforesaid reasons, I cannot agree with the learned High Court Judge's view that, there was a 'binding agreement'', although, even assuming that, there was some estrangement between the 1<sup>st</sup> Respondent and some of the landowners that was no reason, as the learned High Court Judge held, for the Appellant to have withheld the issue of the lease.



**Is That Sufficient to Allow This Appeal?**

[30] I think not, and accordingly proceed to state my reasons for saying so as follows.

[31] As observed earlier, (at paragraph 20 hereof), the lease the 1<sup>st</sup> Respondent had been enjoying had expired in June 2004 and he had been given a grace period going up to December, 2005.

[32] In the mean time, it is not disputed that, the 1<sup>st</sup> Respondent had constructed a house on the land.

[33] Learned counsel for the Appellant was heard to submit that, the Appellant had not consented to the said house being built.

[34] But, what steps or action did the Appellant take to prevent that?

[35] In terms of Section 4(1) of the Act, the Appellant is charged with the duty to:

*“Control .....all native land .....and .....all such  
land (to be) administered by the Board for the benefit of the  
Fijian owners”*

[36] Rather than preventing the house being built, the Appellant had acquiesced in it and it was only on 6<sup>th</sup> July, 2006 by a Notice that, it had called upon the 1<sup>st</sup> Respondent to remove the building and vacate. This was followed by another notice dated 7<sup>th</sup> August 2006. (vide: pages 46 and 48 respectively of the Composite Case Record).

- [37] From June, 2004 to July, 2006 the 1<sup>st</sup> Respondent was on the land. The Appellant cannot be said to have been unaware that the 1<sup>st</sup> Respondent was building and had completed building a residential house and was continuing to reside in it.
- [38] As observed earlier the application for the renewal of the lease was “pending”. The 1<sup>st</sup> Respondent had paid an application fee of \$56.25 and a receipt dated 9<sup>th</sup> July, 2004 (page 34 of the Composite Case Record) had been also issued by the Appellant.
- [39] For all these reasons, could it be said by any stretch of imagination that, the 1<sup>st</sup> Respondent was in unlawful occupation of the land as sought to be made out in the two notices to vacate dated 6<sup>th</sup> July, 2006 and 7<sup>th</sup> August, 2006? I think not.
- [40] It would have been possible perhaps to argue that, had the 1<sup>st</sup> Respondent continued to be in occupation after the expiry of the notice to vacate dated 7<sup>th</sup> August, 2006 that he would be deemed to have been in unlawful occupation after the expiry date.
- [41] Quite to the contrary the 1<sup>st</sup> Respondent dismantled the house and vacated even before the terminal date stated in the said notice dated 7<sup>th</sup> August, 2006.

**Was the 1<sup>st</sup> Respondent entitled to claim compensation / Damages?**

- [42] The thrust of the Appellant’s argument was that, it did not give consent to the 1<sup>st</sup> Respondent to construct the residential house which he built.
- [43] No doubt there is no evidence of any written consent.
- [44] At first blush, Section 59(d) of the Indemnity, Guarantee and Bailment Act (Cap.232) appears to have barred the 1<sup>st</sup> Respondent’s action but I propose to deal with that aspect as follows:



**What was the 1<sup>st</sup> Respondent's status on the land?**

- [45] I have already given my reasons for holding that; there was no evidence of a “binding agreement” to lease the land to the 1<sup>st</sup> Respondent.
- [46] However, I have also taken the view that; the 1<sup>st</sup> Respondent could not have been regarded as one who was in unlawful occupation.
- [47] Thus, the 1<sup>st</sup> Respondent's occupation was that of a bona fide occupier, sanguine of obtaining a lease but in the meantime who had constructed a residential house with the acquiescence of the Appellant. In other words there was implied consent.
- [48] Moreover, originally the lease of the land was in the name of the 1<sup>st</sup> Respondent's father who had obtained a lease in 1974 and having obtained an extension in 1984 for another 20 years, after his demise in 1993 his father's estate having devolved on the 1<sup>st</sup> Respondent's mother (the widow of the original lessee), the 1<sup>st</sup> Respondent sought a renewal of the lease for another 30 years in 2004.
- [49] That original lease given in the 1<sup>st</sup> Respondent's father's name in the year 1974 in Clause 19 (vi) had provided thus:
- “(19) Subject to the provisions of the Native Land (lease and licenses) Regulations, any building erected by the lessee on the land hereby shall be removable by the lessee within three months after the expiration of the lease; provided that:-*
- (vi) If the lessee applies for a renewal of his lease the provision of this condition shall be deemed to cease to apply as from the date of the application of the lessee for renewal of the lease, and thereafter the whole matter shall be dealt with under the provisions of the said Native Land (lease and licenses) Regulations.”*

[50] Clause 16 of the said original lease in fact expressly provided as follows:

*“Only such buildings shall be erected on the land hereby leased as are necessary for (a) a dwelling or dwellings for the lessee.”  
(Vide: p.54 of the Composite Case Record).*

[51] Though contained in a memorandum in writing between the Appellant and the original lessee the said clauses taken together with the renewal in 1984 and the Appellant’s conduct from June, 2004 to July, 2006 clearly constituted implied consent in permitting the 1<sup>st</sup> Respondent to build and then acquiescing in not only the construction but also the continued occupation of the residential house in question.

[52] Section 59(d) of the Indemnity, Guarantee and Bail Act states that:

*“no action shall be brought upon any contract or Sale of lands or any interest in them unless the agreement upon which such action is brought or a memorandum thereof is in writing.”*

[53] We have already held that, there was no “binding agreement”.  
No consideration had been paid. Only the application fee had been paid.

[54] A notation on the receipt issued on the payment of the said application had also stated that:

*“This amount is subject to final acceptance and certification by the Board and does not create nor recognise a tenancy.”*

[55] In contrast the construction of the residential house by the 1<sup>st</sup> Respondent stood on a different footing.

[56] The agreement took root by the conduct of parties and by acquiescence on the part of the appellant. It was separate from the proposed agreement to renew the lease which required it to be in writing.

[57] In that view of the matter, I have no difficulty in saying that, Section 59 of the Indemnity, Guarantee and Bailment Act had no application to the construction of the residential house in question. It was a contract or agreement that did not require a memorandum as envisaged in Section 59.

[58] It is to be borne in mind that, statutory requirements requiring a memorandum of an agreement relate to the mode of proving the agreement and not to the existence of an agreement. (see: *Lochefoucauld v Boustead* [1897] 1 Ch. 196, CA, which dealt with the requirement of a memorandum of a contract for the sale of land.

### **Principles of Statutory Interpretation**

[59] I am conscious of the fact that, I have adapted a benevolent construction of section 59(d) of the Indemnity, Guarantee and Bailment Act but feel fortified in that approach on the principle that, statutes affecting property rights like penal statutes must be construed to favour an affected party.

[60] What would be the consequence of holding that, even in regard to the construction of the house there should have been a memorandum in writing?

[61] The 1<sup>st</sup> Respondent who built a four bedroomed house with other amenities and who had an expectation to have a residential lease for 30 years must vacate dismantling the house itself with no compensation notwithstanding the fact that, the Appellant Board had acquiesced in it for two long years?

[62] Is that question a mere moral query? Or does it put this Court on inquiry as to see whether there is a legal basis for the award of compensation?



[63] In that regard there is a fact which we have to address and take note of in embarking on that query. We have held in this judgment already that, (disagreeing with the learned High Court Judge) there was no “binding agreement” between the Appellant and the 1<sup>st</sup> Respondent. It is on that basis that His Lordship, Justice Inoke had abandoned addressing the equitable principle of estoppel. (vide: paragraph (21) of Justice Inoke’s Judgment).

[64] This Court is vested with jurisdiction under Rule 15(1) of the Court of Appeal Rules to deal with this appeal as a rehearing and for our part we will proceed to determine this matter as such and in so doing will proceed to determine this appeal on the principles of equitable estoppel promissory and / or proprietary.

#### **Principles of Equitable Estoppel**

[65] In what has been considered as one of the most useful statements on equitable estoppels, Lord Kingsdown, in his dissenting judgment in *Ramsden v Dyson* [1865] CLR. 1 HL.129 at page 140 said thus:

*“If a man under a verbal agreement with a landlord for a certain interest in land or what amounts to the same thing under the expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation with the knowledge of the landlord and without any objections by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation.”*

[66] Also at page 140 Lord Cransworth L.C. said :

*“If a stranger begins to build on any land supposing it to be his own and I perceiving his mistake, abstain setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land in which he had expended money on the supposition that the land was his own.”*

[67] Spry in his 'Principles of Equitable Remedies' 4<sup>th</sup> Edition 1990 page 179 sets out the basic principles of equitable proprietary estoppel as follows:

- “1. *The Plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship.*
2. *The Plaintiff has induced the defendant to adopt that assumption or expectation.*
3. *The Plaintiff acts or abstains from acting in reliance on the assumption or expectation.*
4. *The defendant knew or intended him to do so.*
5. *The plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled.*
6. *The defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise.”*

#### **Application of the aforesaid principles to the facts of the instant Case**

[68] In this case on the promise or understanding that the lease in question would be renewed the Appellant induced the 1<sup>st</sup> Respondent to construct a residential house and acquiesced in it for two long years. The issue of the lease did not materialise and that too, owing to an unacceptable reason namely, tension and animosity between the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondents.

[69] The 1<sup>st</sup> Respondent's expectations had been denied and the Appellant's act of resiling from issuing the lease had resulted in causing detriment to the 1<sup>st</sup> Respondents. In that background of facts it would be unconscionable not to compensate the 1<sup>st</sup> Respondent when he was asked to dismantle the house and vacate.

#### **The Evidence**

[70] At this point it may be appropriate to briefly peruse the evidence.

- [71] An officer attached to the Appellant Board had come and worked with, the 1<sup>st</sup> Respondent's sons to mark the boundaries' preparatory to the granting of the lease and the construction of the house.(page 198 of the Composite Case Record).
- [72] The 1<sup>st</sup> Respondent's evidence in cross-examination that he obtained consent from the Appellant to build the house was not challenged. (supra)
- [73] The unilateral decision not to renew the lease and seek the 1<sup>st</sup> Respondent's eviction becomes clear in the evidence of the only witness called by the Appellant namely, '*Anare Hughes and family's fear of being attacked by the landowners. He mentioned to me in interview that he paid for 'tabua' and other things for landowners.*''(page 202 of the Composite Case Record).
- [74] The 1<sup>st</sup> Respondent never said in his evidence that he and his family had any fear of being attacked by the landowners. Consequently, the evidence of the witness loses credibility in view of his earlier statement in his examination in chief that, he could not recall consulting the 1<sup>st</sup> Respondent.
- [75] This witness also admitted that, he was not aware of any written withdrawal by landowners of their consent. (Page 202 of the Composite Case Record).
- [76] All this evidence reveals that, the decision not to issue a lease was sudden and arbitrary.



[77] It may not have invested the 1<sup>st</sup> Respondent with a cause of action to seek specific performance on the basis of a binding lease agreement but the appellant's conduct clearly smacked of an unconscionable decision to suddenly ask the 1<sup>st</sup> Respondent to dismantle his house and vacate after inducing him to build the house and acquiescing in the same for two long years thus denying the 1<sup>st</sup> Respondent his expectations to reside in the house.

[78] It is to be noted that, just as much as the 1<sup>st</sup> Respondent did not make an effort to pay the consideration of \$5,000.00 since paying the application fee, the Appellant too did not any time call upon the 1<sup>st</sup> Respondent to expedite the payment of the consideration.

[79] This is another pointer to the fact that, the Appellant by its conduct consented impliedly and had acquiesced in the 1<sup>st</sup> Respondent building a house and continuing to occupy the same.

#### **Right to Compensation by way of Damages**

[80] The 1<sup>st</sup> Respondent at paragraph 15 of his statement of claim has pleaded equitable estoppels quoting paragraphs 8 to 14 as grounds for the said estoppels. We find that, only paragraphs 11, 13 and 14 could constitute such grounds.

[81] At paragraphs 16 to 20 of the said statement of claim he has averred the other consequences that had visited him and his family on account of the Appellant's decision in asking him to vacate.

[82] The appellant's responses in its statement of Defence (Vide: pages 104 to 107 of the Composite Case Record) are principally directed at challenging the existence

of a lease and the reasons for not renewing the same. The averments in that statement do not address the matter pertaining to acquiescing in the construction and continued occupation of the house by the 1<sup>st</sup> Respondent.

**Paucity of Pleadings and Evidence on Record**

[83] We note that, there is some shortcomings in the 1<sup>st</sup> Respondent's pleadings where the aforesaid matter pertaining to acquiescing and the construction and continued occupation of the house is concerned.

[84] However, those pleadings recede to the background in the light of the uncontradicted oral evidence of the 1<sup>st</sup> Respondent and the documentary evidence which speak for themselves which we have referred to earlier.

**Do the Native (presently i Taukei) Land (Leases and Licenses) Regulations (hereinafter referred to as the Regulations) exclude the possibility of Compensation for property on native leases where such leases have expired?**

[85] It is not disputed that, the immediately antecedent lease of the 1<sup>st</sup> Respondent had expired in June, 2004.

[86] However, the 1<sup>st</sup> Respondent was occupying the land with the hope of obtaining a new residential lease and with the acquiescence and implied consent of the Appellant as already found by us, had built a house and was residing there with his family.

[87] We have already held that, Section 59(d) of the Indemnity, Guarantee and Bailment Act (Cap 232) has no application to a situation such as the one under consideration.

[88] It is against that background that, we looked at Regulation 26(b) of the Native Land (presently i Taukei) Regulations.

[89] Under the titular head “Conditions of a lease for residential purposes”, Regulation 26 provides as follows:

*“26. A lease for residential purposes shall be subject to the following special conditions in addition to any other conditions which the Board in the circumstances of any case may see fit to impose:-*

*(a) That the lessee shall within a specified number of years and under penalty of re-entry erect to the satisfaction of the lessor a dwelling house on the demised land at such minimum expenditure or to such minimum specifications as may be specified in the lease;*

*(b) That the lessee shall not without the written consent of the lessor erect or permit to be erected more than one dwelling house upon the demised land;*

*(c) That the lessee shall not use or permit to be used the demised land or any part thereof or the dwelling house or accessory outbuildings to be erected thereon, for any trade, business, occupation or calling whatsoever; and no act, matter or thing whatsoever shall, during the term of the lease, be done in or upon the said land or buildings or any part thereof, which shall or may be or grow to the annoyance, nuisance, damage or disturbance of the occupier, lessee, or owner of the adjoining lands:*

*Provided that a home industry approved by the lessor in writing or a professional practice may with the written consent of the lessor first had and obtained be conducted within the dwelling house;*

*(d) That the lessee shall maintain and keep in good repair and tenantable condition, to the satisfaction of the lessor, all buildings erected upon the demised land;*

*(e) That the lessee shall not cover or permit to be covered with buildings more than one-third of the total area of the demised land. ”*

[90] Regulation 26(b) states that, while the written consent of the lessor is required for a lessee to erect more than one dwelling house upon the demised land, no such written consent is required for the erection of one dwelling house.



- [91] It is nobody's case that, the 1<sup>st</sup> Respondent in this case erected more than one dwelling house.

### **The Application of the Principle *Expressum facit Cessare Tacitum***

- [92] The maxim '*expressum facit cessare tacitum*' embodies the principle that no inference is proper if it goes against the express words. 'Express enactment shuts the door to further implication' (vide: *Whiteman v. Sadler* [1910] AC 514, per Lord Dunedin at p.527).
- [93] Bennion on 'Statutory Interpretation - Acode' (4<sup>th</sup> Edition Butterworths, 2002) explains the maxim thus:

“To state a thing expressly ends the possibility that something inconsistent with it is implied ....” and its ‘Chief application lies in the.... principle ‘*expressio unius*’ (at p.1071), that is, that, the express mention of the one excludes the application of the other.

- [94] Applying these principles to the instant case, it is manifestly clear that, the written consent of the lessor is required only if the lessee desire to erect more than one dwelling house in terms of regulation 26(b).
- [95] Consequently we find that, our view that, by conduct the Appellant has impliedly consented to and acquiesced in the 1<sup>st</sup> Respondent constructing a residential house and continuing to occupy it, strikes a harmonious chord with the said regulation, and is justified in the light of the aforecited principles of statutory construction.

### **What is not Prohibited must be permitted**

- [96] It is another well established principle that, what is not prohibited must be permitted.

[97] The aforesaid regulation or any other provision does not prohibit implied or verbal consent being given to erect a single dwelling house to a person who is desirous of obtaining a new or renewal of his expired lease.

[98] Even on the application of that principle, the occupation by the 1<sup>st</sup> Respondent of the land in question, residing as he did in the house he built for two long years cannot be regarded as unlawful. No sooner he was asked to vacate he did so, dismantling his house as well, his hopes to obtain a residential lease for 30 years also being shattered as averred in his statement of claim.

[99] An obvious detriment caused to a person is to take away his right without commensurate compensation.

[100] When the 1<sup>st</sup> Respondent was asked to vacate after dismantling his house and forced to relocate himself, this is the detriment he suffered. The evidence on record reveals that, the land even as at June 2011 was unoccupied. (Page 198 of the Composite Case Record).

[101] In a scenario such as that, it is not only fair and just but also a must in equity that the 1<sup>st</sup> Respondent should be compensated.

### **Common Law vs. Equity**

[102] The cleavage between the Common Law and Equity in the 19<sup>th</sup> century England is a known historical fact.

[103] Over that century how that had influenced Commonwealth and the other jurisdictions is also another well known fact.

[104] That, 'equity' developed in order to mitigate the rigours of the common law is yet another historical fact. The Chancery division in the courts system in England, the law relating to Trusts, Concepts such as unjust enrichment and payment of compensation for improvements effected on a land by a possessor are all results of that development to name a few. The doctrines of promissory estoppel and proprietary estoppel had come as another addition where conduct of parties in a relationship had been the focus, an addition about which, however, Lord Denning in the famous decision in *Central London Property Trust Ltd v. High Trees House Ltd* [1947] 1KB 130 had had certain reservations for fear of it being stretched too far, lest it should be endangered. In the subsequent decision of *Combe v. Combe* [1951] KB 215, those reservations had developed into a serious concern in His Lordship's mind, in the context of the doctrine of consideration in contractual relationships where His Lordship had stated that;

*"The doctrine of consideration is too firmly fixed to be overthrown by a side-wind."*

[105] Nevertheless, despite those reservations and concerns, Lord Denning in *Evenden v Guildford Football Club* [1975] 1 QB 917 rejecting the argument that, for promissory estoppels to apply, parties must be contractually bound to one another stated thus:

*"...Promissory estoppel ... applies whenever a representation is made, whether of fact or law, present or future, which is intended to be binding, intended to induce a person to act upon it and he does act upon it."*

[106] In the background of the evidence in this case considered by us in the light of legal principles expounded by authoritative sources as refereed to earlier, we have no hesitation in drawing the conclusion that, that judicial enunciation of Lord Denning applies in the 1<sup>st</sup> Respondent's case here.



### **Proprietary Estoppel**

- [107] There remains another aspect to be considered. That is, the aspect of ‘proprietary estoppel’, which used to be called ‘estoppel by acquiescence’ (see : Lord Denning, The Discipline of Law, Butterworths, New Delhi, Aditya Books, 1993 at page 216).
- [108] We have already found that, the Appellant had acquiesced in the 1<sup>st</sup> Respondent building a house and continuing to reside in it. Accordingly the conditions necessary for this estoppel to come into operation are also satisfied.

### **Combining the Estoppels**

- [109] On the principle of promissory estoppel we have proceeded on the basis that, the Appellant had induced the 1<sup>st</sup> Respondent to build a residential house on the land in question and the 1<sup>st</sup> Respondent had done just that.
- [110] On the principle of proprietary estoppel we have held that, in the construction of the residential house the 1<sup>st</sup> Respondent built and thereafter in his continued occupation of the same from June, 2004 to July 2006 when a notice to vacate had been suddenly and arbitrarily served on him (for unacceptable reasons, as pointed out earlier) constitutes estoppel by acquiescence.’’
- [111] It is to be noted that both “promissory estoppel” and “proprietary estoppel” have been derived from the same source – namely – the interposition of equity to mitigate the strict rules of law.
- [112] Sir Alexandar Turner on “Estoppel by Representation” has opined that, the two doctrines must be kept separate and distinct. (vide: Turner, Estoppel by Representation (1977, 3<sup>rd</sup> Edition.p.307).

[113] But, Lord Denning in Moorgate Ltd v. Twitchings (1976) 1 QB 225, had been in favour of combining them into one.

[114] His Lordship in that case opined thus:-

*“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 (the emphasis is mine) he will not be allowed to go back on it when it would be unjust or inequitable for him to do so.”*

[115] For my part, I prefer to follow His Lordship, Lord Denning’s view to that of Sir Alexander Turner, the reason why we at the very outset of this judgment posed the question for us to answer as to whether the 1<sup>st</sup> Respondent could have sustained the action he filed against the Appellant on the basis of a promissory and/or proprietary estoppel notwithstanding the absence of any written consent or contract between them, to claim compensation as damages.

#### **The Deduction drawn in this Judgment**

[116] For all the reasons adduced, discussed and determined above, we make the judicial deduction that, although the appellant was not obliged to issue the 1<sup>st</sup> Respondent a renewed lease, nevertheless, it was obliged to pay the 1<sup>st</sup> Respondent compensation by way of damages for being forced to dismantle his house and vacate the land.

#### **The Question of Compensation claimed by the 1<sup>st</sup> Respondent (Plaintiff in the action)**

[117] In regard to that, a Valuer (who was called by the Plaintiff/1<sup>st</sup> Respondent) has given evidence (not contradicted in any sense as the composite record of the case reveals) which evidence had been accepted by the learned High Court Judge wherein he stated this:-

*“I accept the evidence of the Valuer that the value of these improvements were \$60,000.00. There was no evidence as to how much of the materials were reusable but I make no allowance for that because what the plaintiff lost was more than just building materials. He lost a 30 year residential lease which would be worth substantially more.”*

[118] That value stands independently on the alternative approach we have adapted on the basis of promissory estoppel and/or proprietary estoppel although not on the basis of a breach of a “binding agreement” to have issued a renewed lease.

[119] In any event there is no evidence led by the appellant challenging the said quantum.

[120] Accordingly, we affirm the view expressed by the learned High Court Judge in awarding the said sum of \$60,000.00 contained in his judgment, without having to say anything more on that aspect.

### **Conclusion**

[121] Accordingly, we dismiss this appeal.

[122] We have also referred to the written submissions filed on behalf of the Parties and the authorities cited. We have also considered the oral submissions made by the learned Counsel.

### **Wati JA:**

I agree with the verdict of Almeida Guneratne JA.

### **Mutunayagam JA:**

I agree with the conclusion of Almeida Guneratne JA.



**The Orders of the Court are:**

1. The Appeal is dismissed.
2. Although the decree of the High Court is to pay the sum of \$60,000.00 jointly and severally by the Appellant and the second defendants to the original action (the 2<sup>nd</sup> Respondents to this appeal), given the fact that the second defendants (the 2<sup>nd</sup> Respondent to this appeal) have been discharged of all liability (without any opposition by the appellant) on the basis of an order dated 2<sup>nd</sup> June, 2014, (the said order having passed the seal of the Court on the 26<sup>th</sup> day of June, 2014) the liability to pay the said sum shall be on the Appellant.
3. Accordingly, the Appellant is ordered to pay the said sum of \$60,000.00 (Sixty thousand dollars) together with the costs of the High Court proceedings fixed at \$2,500.00 (Two Thousand Five Hundred dollars) to the 1<sup>st</sup> respondent along with the costs of this appeal which is fixed at \$2,500.00 (Two Thousand Five Hundred dollars) making up a total sum of \$65,000.00 (Sixty Five Thousand dollars) which the Appellant shall pay to the 1<sup>st</sup> Respondent within 28 days of the pronouncement of this Judgment.



*Jale A. Guneratne*

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**Hon. Justice Almeida Guneratne**  
**JUSTICE OF APPEAL**

*Anjala Wati*

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**Hon. Madam Justice Anjala Wati**  
**JUSTICE OF APPEAL**

*A.L. Brito Mutunayagam*

.....  
**Hon. Justice A.L. Brito Mutunayagam**  
**JUSTICE OF APPEAL**