IN THE KIRIBATI COURT OF APPEAL]
LAND JURISDICTION]
HELD AT BETIO]
REPUBLIC OF KIRIBATI]

Land Appeal No. 3 of 2016

BETWEEN	**DOROTHY HIGHLAND MTMM**	**APPELLANTS**
AND	**ATTORNEY-GENERAL**	**RESPONDENT**

Before: Blanchard JA
Handley JA
Hansen JA

Counsel: *Banuera Berina* for appellants
Taaira Timeon for respondent

Date of Hearing: 12 August 2016
Date of Judgment: 17 August 2016

JUDGMENT OF THE COURT

[1] This appeal from the High Court has arisen from the respondent landowners' claim to possession of that part of the Customs House at Betio which encroaches on their land that has not been leased to the Government. The Customs House was built in 1991, principally on land leased from Miina Highland, the appellants' predecessor in title, but it

significantly encroached on Terawabono 820u (the encroached land) which was not leased to the Government.

[2] The mistake was discovered and the encroached land was defined by the Magistrates' Court in 2006. The appellants then sued for trespass and in 2009 recovered damages of $8,805.95. In July that year Cabinet resolved to offer the appellants a lease of Terawabono 820u defined as lot BE 707, an area of .263 of an acre, at an additional rent.

[3] In January 2010 the Government paid the additional rent to the appellants when it paid the rents due on its leases from them. The appellants knew that they were being offered additional rent, but the Government did not make it clear to them that this was for the encroached land. At about the same time the Government tendered a lease of the encroached land to the appellants, but they refused to sign it. In February 2010 they sued the Government in the Magistrates' Court at Betio seeking an order for the removal of the encroachment. The case was heard in April 2010.

[4] The magistrate, in her judgment on 5 December 2011, found that the appellants knew that their rents have been increased "but were not aware of the reason". The Chief Land Officer, who gave evidence for the Government, was not cross-examined to suggest that the appellants had repaid or tendered the extra rent, and evidence that this had occurred was not given in reply.

[5] The magistrate ordered the Government to remove the encroachment. The Government appealed to the High Court, and the Chief Justice, sitting with two magistrates, allowed the appeal holding that the evidence established an equitable proprietary estoppel. The appellants appealed to this Court seeking to have the decision of the Magistrates' Court reinstated.

[6] Section 73 of the *Magistrates' Court Act* allows the High Court to admit further evidence on an appeal from the Magistrates' Court. Leave to adduce further evidence will readily be given if it relates to events which have occurred since the case was heard below. The present appellants could have led evidence, by leave, in the High Court that they have repaid, or attempted to repay the additional rent they had unknowingly received in January 2010, and had not accepted the additional rent since. No such evidence was given, or sought to be given.

[7] In their reasons for judgment the High Court said:

> **"The Court was not told nor the Court below, that the respondents returned the money to the Government. The respondents in fact kept the additional rent payments".**

[8] In the absence of further evidence the presumption of continuance also applies to support an inference that the appellants have continued to accept the additional rent. Counsel for the Government made that claim in her written submissions to the High Court (Record p. 36) and it was not refuted. The High Court in a civil appeal from the Magistrates' Court can draw inferences of fact: *Magistrates' Court Act*

s.72(1). The inference that the appellants have continued to accept and retain the additional rent is fairly open on the facts.

[9] The respondent, relying on r.7 of the *Court of Appeal Rules*, objected to the competency of the appeal, contending that there is no appeal to this Court from any decision of the High Court in land cases. However s.78 of the *Magistrates' Court Ordinance* was amended in 1990 to confer a right of appeal from the High Court to this Court in such cases.

[10] The payment and acceptance of rent as and for the rent of particular land creates an estoppel which binds the payee to accept the payer as his tenant for the period covered by the payment, and binds the payer to accept the payee as his landlord for the same period. However, as the Government did not inform the appellants that the extra payments they received in January 2010 were for the encroached land the receipt of that rent did not create an immediate estoppel.

[11] An owner who is not aware of the facts is not estopped by receiving rent: ***Hindle v Hick Bros Manufacturing Co. Ltd*** [1947] 2 All ER 825 CA. However the appellants came to know the basis on which the additional rent had been paid, and with that knowledge they retained that rent. By doing so they accepted the basis on which it had been paid creating, by estoppel, the relationship of landlord and tenant with the Government over the encroached area.

[12] A tenant who takes possession of adjoining land of the landlord is presumed, for some purposes at least, to do so as a tenant and not as a

trespasser. Such a tenant will be estopped, after the lease has expired, from claiming a possessory title to the encroachment barring the landlord's title and from claiming that the tenant's covenants, such as a covenant to repair, do not apply to the encroachment: ***J Perritt & Co v Cohen*** [1951] 1 KB 705 CA, [1950] 2 All ER 939 CA.

[13] There is nothing in this case to suggest that the estoppel from entry and payment of rent would automatically bind the appellants for the remainder of the 99 year lease of the land on which the rest of the Customs House stands. The appellants may be entitled to terminate the lease by estoppel of the encroachment by giving an appropriate notice to quit. The Court expresses no view on this, or on the length of the notice required. However we note that counsel for the Government told the magistrate, without contradiction, that the rent received in 2010 was for the 2010 year, and repeated this claim in her written submissions to the High Court (Record pp. 33, 35).

[14] We should also record our view that the estoppel proved in this case was not an equitable proprietary estoppel but an estoppel by representation or convention based on the payment of rent. There is no evidence that the Government relied on the acceptance of rent by the appellants for any purpose other than its lawful possession for the period for which the rent was paid. In particular there is no evidence that the Government did further building work or incurred other capital expenditure on the encroached land which may have supported an equitable proprietary estoppel.

[15] The appeal is dismissed with costs.

Blanchard JA

Handley JA

Hansen JA