O G Sanft and Sons v Tonga Tourist and Development Co Ltd, Hamilton and Minister of Lands

Privy Council
App 2/1981

22 May 1981

Equity - principles of equity to be applied by Land Court where not inconsistent with Constitution or Land Act

Land - owner of land who permits another person to spend money in development of land in reliance on interest granted by owner cannot later claim that the interest is not valid and binding.

O G Sanft & Sons were in April 1970 granted a lease of some 4 acres of land in Vava'u for a period of 50 years. On 21 December 1970 they entered into a deed of sub-lease of that land to the Tonga Tourist and Development Co Ltd for a period of 45 years. The company was incorporated in February 1971, and the sub-lease was registered by the Minister of Lands on 26 March 1975. Later the company experienced financial difficulties and in 1976 Hamilton was appointed as provisional liquidator.

O G Sanft & Sons then brought proceedings to have the sublease declared void on the ground that it was entered into with the company before the company was incorporated. The Land Court dismissed this claim on the ground that the members of O G Sanft & Sons were in a fiduciary relationship with the company since they had helped to promote it, and one member was a secretary and another member was a director of the company, and they had entered into the deed of sublease with full knowledge that the company was not incorporated, and had allowed the company to incur extensive expenditure on the land for the building of a hotel. The Land Court held that the sublease was valid and binding.

O G Sanft appealed to the Privy Council from the this decision of the Land Court.

HELD:

Dismissing the appeal but varying the decision of the Land Court

(1) The Land Court had jurisdiction to apply principles of equity where they were not in conflict with the Constitution and the Land Act

(2) Under principles of equity if an owner of land allows another person to expend

money in the development of that land on the basis of a grant of an interest in that land by the owner, the owner will not be allowed later to say that the grant was invalid and that no good title was given to that person to undertake that work, and an appropriate remedy will be provided by the court for that person.

(3) The company was entitled to be granted a valid sub-lease in terms of the sublease already registered which was to be cancelled.

Statutes referred to

Constitution of Tonga cls 90, 104-106
Land Act 3-5, 105, 116
Civil Law Act, ss2-4

Cases referred to

Inwards v Baker [1965] 1 All ER 446
Chalmers v Pardoe [1963] 3 All ER 552
Dillwyn v Llewellyn [1861-73] All ER Rep 384
Ramsden v Dyson (1866) LR 1 HL 129
Plimmer v Wellington City (1884) 9 App Cas 699
Willmott v Barber (1880) 15 Ch D 96

Privy Council

Judgment

Appellant, under the firm name of O.G. Sanft & Sons, were lawfully granted, in accordance with the Constitution and the Land Act (Cap 63), a lease for a period of 50 years commencing on April 5, 1970 in respect of all that piece of land containing 4 acres 3 roods 24.2 perches situated in Neiafu, Vava'u, being part of Lot 57 on Block 215/158 being also Lot 2 on Survey Office Plan 2429. The annual rental was $180.00 per annum. The lease contained a provision that prohibited the lessee from granting any sublease or transfer without the consent of Cabinet beforehand obtained. By a deed of sublease dated December 21, 1970 appellants purported to sublease an area of 4 acres 1 rood 24.2 perches of the said land to the first respondent, Tonga Tourist and Development Co. Ltd. herein referred to as "the company". The deed of sublease called "the sublease" was for a period of 45 years commencing on December 21, 1970 and continuing until to 20 December 2015. The rent reserved was 5% of the net profit of the Company to be paid on the 20th day of December in each year. The sublease appears to be signed by one (? Dibbs) above the typed words "Tonga Tourist & Development Co. Ltd." The company was not registered until February 26, 1971 so clearly, and it is common ground, that sublease did not create any contractual relationship between appellants and the company and was unenforceable by either party. The sublease was registered with the Minister of Lands in March 26, 1975. The consent of Cabinet had been earlier obtained.

It is relevant at this stage to refer to an agreement entered into on January 12, 1971. The parties to this agreement were Donald Gordon Sundin, Robert William Moin and D.G. Sundin & Co. Pty Limited and each of the appellants.
Appellants were called the fourth and fifth parties.

The following recitals appear:-

"WHEREAS the parties hereto have acknowledged that they will accept shares in a company to be registered in Tonga and entitled "TONGA TOURIST AND DEVELOPMENT COMPANY LIMITED" (hereinafter called the Company) by being signatories to the Memorandum and Articles of Association of that company AND WHEREAS the parties hereto have agreed that the issue of such shares will be in accordance with this Agreement AND WHEREAS the parties of the fourth and fifth are joint holders of a leasehold of land situated in Vava'u in the Kingdom of Tonga know as Vila comprising 4 acres 1 rood 24 perches AND WHEREAS the parties of the fourth and fifth have agreed to arrange for a sub-lease of the portion of the said lease delineating in the schedule hereto comprising area of 4 acres 1 rood 24 perches subject to the approval of the Minister of Lands and the Cabinet of the Government of Tonga to the Company for a period of 48 years AND WHEREAS in consideration of this Agreement shares in the Company shall be allotted in the manner prescribed in Clause 4 and 5 to the parties of the fourth and fifth parts in relation to such leasehold AND WHEREAS annual rent will be payable to the parties of the fourth and fifth in accordance with Clause 7 of this Agreement AND WHEREAS it is agreed by the parties hereto that if the head rent payable in the lease is increased then the percentage of profit referred to in Clause 7 shall be increased proportionally."

The following clauses are relevant:-

4. Twenty Five Thousand shares in the Company shall be allotted as fully paid forthwith to the said Ralph Walter Sanft as his portion of the consideration for the sale of goodwill on the site.

5. Twenty Five Thousand shares in the Company shall be allotted as fully paid forthwith to the said Herbert Henry Sanft as his portion of the consideration for the sale of goodwill on the site.

7. In addition to the issue of the shares referred to in Clause 4 and 5 the parties hereto agree that by way of annual renting of the aforesaid sub-lease the said Ralph Walter Sanft and Herbert Henry Sanft will receive an amount equivalent to FIVE per centum of the net profit derived from the Company in each year before any distribution of profit is made. Such amount will be equally divided between them.

The subscribers to the Memorandum of Association and the Articles of Association were:-

Name	No. of Shares
Donald Gordon Sundin	100,000
D.G. Dundin & Co. Pty. Ltd.	200,000
Robert W. Moin	100,000
Herbert Henry Sanft	50,000
Ralph Walter Sanft	50,000

The first directors appointed by the Articles of Association were:-

Messrs. Donald Gordon Sundin, Robert William Moin and Herbert Henry Sanft.

The development of a Tourist Hotel and a complex of some magnitude had been commenced on the land before the sublease was signed and continued in a very substantial way after the Company was registered. The Company, being unable to pay its debts, second respondent was on July 23, 1976 appointed as provisional liquidator. Arrangements were made for the liquidator to supervise the further development of the said land and to conduct the management of the said Hotel. Considerable further expenditure was incurred. With the approval of the Supreme Court, in its control of the liquidation, a debenture was given over the assets of the Company (including the interest purported to be granted by the sublease) to the Commercial Banking Company of Sydney Ltd to secure repayment of a sum of $57,000 borrowed from the said Banking Company.

With the concurrence of the creditors and contributories (including appellants), the aim of the liquidator was to sell the undertaking as a going concern. Steps were taken by the liquidator to achieve this purpose. The negotiations need not be detailed except that it is important to note that appellants were amongst those with whom negotiations were conducted for the sale of the undertaking. On May 25, 1980 the Solicitors for appellants sent the following letter to the liquidator:

"re: Sub-lease from O.G. Sanft & Sons

We enclose herewith a copy of letter which we have already despatched to the Minister of Lands in Tonga, in respect of the sub-lease of the land on which the Port of Refuge Hotel is situated.

We have now received firm instructions that your agents, representatives or people acting under your authority or occupying the land, must vacate the land by the 30th day of September 1980.

You will note from the letter that we have forwarded to the Minister of Lands that the sub-lease is null & void, as it was executed and completed at the time when the company had not been incorporated. The finding of fact by the Supreme Court of Tonga had held that

the date of incorporation, as shown in the Certificate of Incorporation, is the 21st February 1971. This date is different from that set out in your proposed form of contract in respect of the auction to be held on the 28th of this month. On the first page, paragraph (a), you will note that you have stated the date of incorporation of the company as the 19th February 1971, whereas the correct date is the 21st February 1971.

You may wish to discuss with us and Mr Ralph Sanft the terms for the removal of chattels you may have on the land, but as regards any fixtures or fittings, this will be a totally different matter."

A writ was issued on December 1, 1980 claiming the following relief:

(a) For an order declaring that the Sub-lease is null and void and of no effect.

(b) An order restraining and prohibiting the Second Defendant from transferring the pruported Sub-lease to any person or persons unknown.

(c) For an order directing the Third Defendant that the register of Lease be amended, and that the purported Sub-lease shall not be transferred to a person or persons nominated by tne Second Defendant in any Memorandum of Transfer submitted to the Third Defendant.

A statement of defence and cross-claim were filed. Whilst it is acknowledged that the sublease itself did not grant to the Company the leasehold interest which it purported to grant, first and second respondents claim that, by reason of the events which happened after incorporation, they have an enforceable contract which binds appellants to grant a subleae in t erms of the document dated December 21, 1970 or alternatively, that by reason of estoppel or the operation of equity, appellants are bound to grant such a sublease. Appellants contend that the Land Court has no jurisdiction in equity, and, that since the sublease was executed before the registration of the Company first and second respondants have no right to occupy the land. The first claim of the said respondents involves an equitable remedy and the second involves the establishment of an equitable right to the grant of such a sublease. The relevant statutory provisions must be first examined to ascertain whether or not the Land Court has jurisdiction in respect of these claims.

Section 104 of the Constitution provides that all land is the property of His Majesty the King who may at his pleasure grant hereditary estates but it then declares that "it shall not be lawful for anyone at any time thereafter, whether he be King or any one of the chiefs or the people ... to sell any land whatever in the Kingdom of Tonga but they may lease it only in accordance with the Constitution."

Sections 105 and 106 then provide as follows:-

"105. The Cabinet shall determine the terms for which leases shall be granted but no lease shall be granted for any longer period than ninety-nine years and the Cabinet shall determine the amount of rent for all Government lands.

106. The forms of deed transfer and permit which shall from time to time be sanctioned by His Majesty are hereby appointed to be the forms according to which all deeds of leases transfers and permits shall be made (Law No.25 of 1916)."

The Land Act (Cap 63) provides as follows:

"3. All the land of the Kingdom is the property of the Crown.

4. The interest of a holder in any hereditary estate, tax allotment or town allotment is a life interest subject to the prescribed conditions.

5. Every estate (tofi'a) and allotment (api) is hereditary according to the prescribed

rules of succession."

The disposition of any land either verbally, by document, or by devise is prohibited (Section 6). Division II (Section 12 to 16) provides for penalties for unlawfully dealing with land. Section 14 deals in particular with the prohibition of occupation of or residence on land by aliens except upon conditions therein laid down.

The general scheme of the Constitution and the Land Act is to limit all estates to life interests with prescribed rights of succession. No alienation is permitted except under specified types of lease which are granted in the name of His Majesty the King in whom all land is vested: vide Section 104 of the Constitution and Section 3 of the Land Act. Permits may be granted but these need not be specially noted. The types of lease which may be granted are:-

(1) Under Section 33 which enables the holder of an hereditary estate, pursuant to the provisions of the Act, to grant leases. The period must not exceed 99 years.

(2) Under Part V leases may be granted to Tongan subjects for a period not more than 50 years.

(3) Under Part I (Division III) leases may be granted to religious bodies, charitable and social organisations for a period not exceeding 99 years.

There are certain rights of renewal.

Part VII deals generally with the registration of titles. Division III deals with the form and registration of leases, subleases, transfers and permits. Section 105 provides as follows:

"105. No lease, sub-lease, transfer or permit until registered in the manner hereinafter prescribed shall be effectual to pass or affect any interest in land:

Provided always that the requirements of Division III (B) of Part VII as to registration shall not apply to a sub-lease not exceeding a term of three years from the making thereof."

Section 110 provides:

"110. The registration of the following documents affecting leaseholds shall be compulsory:

(a) assignments for the benefit of creditors;
(b) grants of Letters of Administration;
(c) grants of probate;
(d) injunctions affecting land and releases of such injunctions;
(e) memorials of pending suits affecting lands;
(f) mortgages (including therein assignments by way of mortgage);
(g) orders of Court appointing a trustee or trustees (including the appointment or discharge of a trustee in bankruptcy proceedings);
(h) orders of Court for the sale of interests in land under lease, transfer or sub-lease;
(i) powers of attorney to deal with any interest in lands whether by sale, surrender, mortgage, or otherwise, including powers to execute any document affecting lands."

Section 116 provides for rules governing caveats and it is necessary only to set out Sub-section (1) which reads:-

"116. (1) Any person claiming to be interested under any will, settlement or trust

deed or any instrument of transfer or transmission or under any unregistered instrument or otherwise howsoever in any leasehold land may lodge a caveat with the Minister to the effect that no disposition of such leasehold land be made either absolutely or in such manner and to such extent only as in such caveat may be expressed or until notice shall have been served on the caveator or unless the instrument of disposition be expressed to be subject to the claim of the caveator as may be required in such caveat or to any conditions conformable to law expressed therein."

Schedule VIII of the Act provides for the procedure and forms in respect of leases, subleases, transfers permit. The present appeal is concerned solely with a lease and a sublease. Form No.1 is an application to the Minister of Lands by the holder of the title for leave to lease a defined piece of his land. Certain particulars are required including "Remarks by Minister". The matter is then dealt with by Cabinet under the appropriate statutory provision.

If consent is granted then a Deed of Lease in Form 3 is entered into. The Lessor named in the deed is H.M. the King in pursuance of His Majesty's constitutional position as earlier set out. The deed itself must be signed by the Minister of Lands and by a Cabinet Minister. It is then effective as a grant upon the lessee also signing and the deed being registered in accordance with Division III of Part VII of the Act. The prescribed form contains a covenant by the lessee, his heirs and representative, that he will not grant a sublease of, or transfer the lease without the consent of Cabinet beforehand obtained.

It will be noticed that a new estate of leasehold for a term of years will now arise. It is transferable with the prior consent of Cabinet. The interest may be affected in any of the manners set out in Section 110 which has earlier been cited in full. In particular the interest in the lease may pass by will. On his death the lessee's representative, upon grant of probate or of letters of administration, is entitled to be registered. He would hold as trustee subject to the rights of creditors and of the beneficiaries. Assignments may be made for the benefit of creditors and orders of Court for the sale of the interest are registrable. Mortgages are also recognised.

By Section 116(1) person claiming to be interested (inter alia) under any will, settlement or trust deed may lodge a caveat. There is a wide range of interests which may be so protected. The intention of the legislature emerges clearly that, once lawfully granted, such a lease-hold interest can be dealt with in any way in which property in the nature of a leasehold interest may be dealt with and that it becomes liable for debt. The only restriction on the lessee dealing with his interest is the provision for prior consent of Cabinet before a sublease or transfer may be made. Further that such interest does not pass until registration. No statutory application to the Minister of Lands in a prescribed form is required in respect of the grant of a sublease as is the case of a proposed grant of a lease. Cabinet can, of course, regulate the method of making applications for consent together with what information it may require before granting its consent but that is not a statutory requirement under the Land Act. The only statutory requirement is that consent must be obtained.

The Privy Council now turns to the question of jurisdiction of the Land Court to grant relief under the rules of equity. Section 90 of the Constitution provides for the jurisdiction of the Supreme Court. In its relevant provision is reads:

"90. The Supreme Court shall have jurisdiction in all cases in Law and Equity

arising under the Constitution and Laws of the Kingdom (except indictable offences where the accused elected to be tried by jury and except also cases concerning titles to land which shall be determined by a Land Court subject to an appeal to the Privy Council)."

This section does not purport to define the limits of the jurisdiction of the Land Court. It simply excludes certain jurisdiction from the Supreme Court and does no more than direct that cases concerning titles to land shall be determined by a Land Court. The law to be applied is not stated. Although, in the case of the Supreme Court, the cases are defined as "in Law and Equity" neither term appears in the reference to a Land Court. The words used to define the jurisdiction of the Supreme Court cannot possibly be construed as qualifying the jurisdiction of a Land Court or for the purpose of saying there is jurisdiction in law but not in equity. Section 90 simply states "all cases concerning titles to land ... shall be determined by a Land Court." The law applicable whether in law or in equity is not stated so the provisions constituting a Land Court must be considered to ascertain what jurisdiction has been vested in a Land Court.

The jurisdiction of a Land Court is set out in Section 127 of the Land Act. The only relevant provision is Section 127 (1) (b) which provides:

"127 (1) The Court shall have jurisdiction -

(b) to hear and determine all disputes, claims and questions of title affecting any land or any interest in land in the Kingdom and in particular all disputes, claims and questions of title affecting any tofi'a, tax or town allotment or any interest therein;"

It cannot be disputed that the present claim by the Company and the liquidator comes within those wide words.

Counsel for first and second respondents contends that the Civil Law Act (Cap 14) applies. Section 3 reads:

"3. Subject to the provisions of this Act, the Court shall apply the common law of England and the rules of equity, together with statutes of general application in force in England at the date on which this Act shall come into force."

Section 4 defines the extent of application of the Act. Section 4 (a) reads:

"4 (a) only so far as no other provision has been, or may hereafter be, made by or under any Act or Ordinance in force in the Kingdom; and"

By Section 2 "Court" is defined. It reads:-

" "Court" means any Court of the Kingdom of competent jurisdiction and includes any Judge or Magistrate thereof whether sitting in court or in chambers;"

Undoubtedly a Land Court is a Court of competent jurisdiction to hear a case which comes within the words of Section 127 (1) (b) which the present case does.

Counsel for appellants argued that, to apply the rules of equity, would amount to revolutionising Tongan Land Tenure and the Tongan Land Act. This argument fails to appreciate the extent to which it is sought to apply the rules of equity. By Section 4 (a) of the Civil Law Act its application is limited to "only so far as no other provision has been made". In respect of Tongan land, the Land Act is a complete code which, subject to the cunder the Act. No estate right, title or interest can be created in accordance with the provisions of the Act.

However, once a leasehold interest has been validly created, the Land Act quite clearly departs from its strict control of titles to land. It recognises the right to dispose of

interests by will, to register an executor or administrator as the holder although it is a fiduciary office and he is not the beneficial owner. The interest is liable for debts; attorneys may be appointed. The interest may be mortgaged in which event questions of mortgagee and mortgagor law may be relevant such as powers of sale and the equity of redemption and clogging of equity just to mention some matters. Sales may be effected by order of a Court. Caveats may be lodged to protect any claim to interest set out in Section 116.

The wide variety of questions, both at law and in equity, which may arise on dealings recognised by Sections 110 and 116 cannot, as counsel for appellants claimed, be dealt with under the provisions of the Contract Act or the Probate and Administration Act. That is too clear to permit of any argument. There is thus no provision made for matters which clearly arise under the estate or interest of leasehold once a lease has been validly granted in accordance with the Act. The only legal restriction is the requirement of consent of Cabinet to any sublease or transfer.

The Privy Council wishes to emphasise that equitable principles can apply only to leasehold interests after they have been validly granted. Such principles have no application to any other title, claim or interest in any other Tongan interest in land. The line of demarcation is clear. Whilst all interests in Tongan land are strictly governed by the Constitution and the Land Act, the legislation has recognised that such lands may be leased. No code of law has been prescribed for the numerous disputes claims and questions affecting such an interest and accordingly equitable principles may apply except to the extent that any express Tongan statutory provision may affect any particular type of lease, for example, as an instance, those relating to aliens. The control which is retained is that the consent of Cabinet is a pre-requisite to any sublease or transfer of the interest. In the opinion of the Privy Council the jurisdiction which first and second respondents wish to invoke, is within the powers of a Land Court.

The general proposition of law relied on in the Land Court is set out in Halsbury's Laws of England 4th Edition Vol.16 paragraph 1475 which reads:-

> "1475. Purchase of and expenditure on another's property. The doctrine of acquiescence has been applied where a person interested in property, whether as owner or incumbrancer, has stood by while another has purchased what he supposed to be a good title to the property; thus the person so standing by cannot afterwards set up his title against the innocent purchaser or a person deriving title under him."

The court will also protect a person who takes possession of land or exercises an easement over it under an expectation, created or encouraged by the owner, that he is to have an interest in it, and, with the owner's knowledge and without objection by him, expends money on the land. The protection may take the form of requiring repayment of the money, or the refusal to the true owner of an order for possession, or of holding the person expending the money entitled to a charge or lien, or of finding a constructive trust. Similarly, where a person who mistakenly believes that he has an interest in land, being ignorant of his want of title, expends money on it in buildings or other improvements or otherwise dealing with it, and the true owner, knowing of the mistaken belief and the expenditure, raises no objection, equity will protect the person who makes the expenditure, as by confirming that person's supposed title, or by requiring that he be compensated for his outlay, or by giving him such a charge or lien."

In Inward v Baker [1965] 1 All ER 446 Lord Denning M.R. stated the law as follows

at page 448:

"We have had the advantage of cases which were not cited to the county court judge, cases in the last century, notably Dillwyn v. Llewelyn (2) and Plimmer v. Wellington Corpn. (3). This latter was a decision of the Privy Council which expressly affirmed and approved the statement of the law made by Lord Kingsdown in Ramsden v. Dyson (4). It is quite plain from those authorities that, if the owner of land requests another, or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with an equity. Counsel for the plaintiffs urged before us that the licensee could not stay indefinitely. The principle only applied, he said, when there was an expectation of some precise legal term; but it seems to me, from Plimmer's case (5) in particular, that the equity arising from the expenditure on land does not fail

> "merely on the ground that the interest to be secured has not been expressly indicated... the court must look at the circumstances in each case to decide in what way the equity can be satisfied."

So in this case, even though there is no binding contract to grant any particular interest to the licensee, nevertheless the court can look at the circumstances and see whether there is an equity arising out of the expenditure of money. All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable so to do."

(2) [1861-73] All E.R. Rep. 384; (1862), 4 De G.F. & J.517.

(3) (1884), 9 App. Cas. 699.

(4) (1866), L.R. 1 H.L. 129 at p.170

(5) (1884), 9 App Cas. at pp. 713, 714.

The relevant portion applicable to the present case of the judgment of Lord Kingsdown reads:-

"If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an 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 objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in Gregory v Michell (1), and, as I conceive, is open to no doubt."

In England the Privy Council in the case of Chalmers v Pardoe [1963] 3 All ER 552 in page 555 said:-

"There can be no doubt on the authorities that where an owner of land has invited or expressly encouraged another to expend money on part of his land on the faith of an assurance or promise that part of the land will be made over to the person so expending his money a court of equity will prima facie require the owner by appropriate conveyance to fulfill his obligation; and when, for example for reasons of title, no such conveyance can effectively be made, a court of equity may declare

that the person who has expended the money is entitled to an equitable charge or lien for the amount so expended. That was in fact the order in the Unity Joint Stock Mutual Banking case (3) though it appeared in that case that the land-owner had never actually engaged or promised to make over the appropriate land. The facts of the case were most unusual and as Romilly, M.R., said (4):

"The court must look at the circumstances in each case to decide in what way the equity would be satisfied"."

(1) 18 Ves. 328

(3) (1858), 25 Beav. 72.

(4) (1858), 25 Beav. at p.79.

In Dillwyn v Llewellyn [1861-73] All ER (Reprint) 384 cited in Inwards v Baker (Supra) Lord Westbury L.C. said at pages 387 and 388:

"The equity of the donee and the estate to be claimed by virtue of it depend on the transaction, that is, on the acts done, and not on the language of the memorandum, except as that shows the purpose and intent of the gift. The estate was given as the site of a dwelling-house to be erected by the son. The ownership of the dwelling-house and the ownership of the estate must be considered as intended to be co-extensive and co-equal. No one builds a house for his own life only, and it is absurd to suppose that it was intended by either party that the house, at the death of the son, should become the property of the father. If, therefore, I am right in the conclusion of law that the subsequent expenditure by the son, with the approbation of the father, supplied a valuable consideration originally wanting, the memorandum signed by the father and son must be thenceforth regarded as an agreement for the soil, extending to the fee-simple of the land. In a contract for sale of an estate, no words of limitation are necessary to exclude the fee-simple; but further, upon the construction of the memorandum itself, taken apart from the subsequent acts, I should be of opinion that it was the plain intention of the testator to vest in the son the absolute ownership of the estate.

The only inquiry, therefore, is whether the son's expenditure, on the faith of the memorandum, supplied a valuable consideration and created a binding obligation. On this I have no doubt, and it, therefore, follows that the intention to give the fee-simple must be performed, and that the decree ought to declare the son the absolute owner of the estate comprised in the memorandum. I propose, therefore, to reverse the decree of the Master of the Rolls, and to declare that, by virtue of the original gift made by the testator, and of the subsequent expenditure by the plaintiff, with the approbation of the testator, and of the right an obligation resulting therefrom, the plaintiff is entitled to have a conveyance from the trustees of the testator's will, and the other parties interested under the same, of all their estate and interest under the testator's will in the estate of Henderefoilan, in the pleading mentioned; and, with this declaration, refer it to the judge in chambers to settle such conveyance accordingly."

The Privy Council now returns to the facts of the present case and adds to the matters already set out. The learned judge held that appellants were promoters of the company. The Privy Council sees no reason to disturb this finding of fact which is supported by ample evidence. Further that Ralph Walter Sanft was at all material times Secretary of the Company and well knew what expenditure was being incurred. There was some

dispute whether or not Henry Herbert Sanft was a Director of the Company. He was so named in the Articles of Association which were signed by him. No consent to act in compliance with Section 3 of the Company Rules was found amongst the Company records. There is evidence that the Secretary sent letters to the Directors. There were five directors and five forms of consent were, according to the letter, sent for signature together with the Statutory Report. What appears to be a form sent to the Sydney Directors was signed by them (Ex 3). The records of the Company are apparently not complete but both appellants refrained from giving evidence. This took place in March 1972. The letter is signed by H.H. Sanft and the form is stated to be presented by him to the Registrar of Companies. He also is named as a Director. The fair inference is that he did sign the consent but, be that as it may, his brother would know the true position, and, undoubtedly R.W. Sanft was acting as a director. Equity in a case such as the present is not concerned whether technical objections to an office may arise - the important consideration is not the validity of appointment but what office was assumed and performed.

Appellants were in business together. The letter of July 19, 1972 (Ex 7) shows the closeness of their relationship in the Company. The following paragraph appears in that letter:

> "We have here the rates used between the Landowners and overseas companies in Fiji, and the lowest in the list is 5% on the revenue, apart from the shares allocated by the company to the landowner. We believe this is an ideal rent for us to use and may we please suggest to undertake this rate 5% on the revenue when the hotel is opened."

However, the whole of this letter is important. The reference to shares allocated might well include the shares to be given in consideration of the goodwill. There is an entry (Ex 8) which shows the shareholding in exact terms of the subscription to the Memorandum of Association. There is also an entry:

"Sept 11 Goodwill
H H Sanft 50,000
R W Sanft 50,000"

"Consideration for goodwill applied to purchase of shares."

The year appears to be "1971" but it is not clear. This item was written by H H Sanft as secretary but it has never been explained.

It is important to read the sublease and Ex 4 together and in relation to their respective dates. The sublease was signed before Ex 4. From this fact it is clear from the contents of Ex 4 that no contract of sublease was intended to be concluded when the sublease was signed but that this was the sublease to which the company would be entitled. These were promoters' documents and the sublessors were also promoters. No third parties were involved. The fair reading of both documents is that these were the conditions upon which the promoters (including appellants) were forming the company and that such a sublease would be granted for the consideration of the allotment in due course of fully paid shares. When the shareholding was recorded in the books of the company (Ex 8) the fully paid shares appear therein as an item. The important fact is that appellants were not third parties entering into a sublease before incorporation but were two of the promoters who were forming a company on the basis that it would be granted a sublease when it was formed. Their whole scheme as appears from Ex 4 and the sublease, was something to come into operation after the company was registered.. Why

the sublease, only informally signed, was not replaced by a formal document may well be known by appellants but they elected not to give evidence. Why the sublease should not be registered until 1975 is also unexplained. The important fact is that read together the documents show that appellants had agreed to give a sublease to the company and were not purporting to make an actual grant to a company not registered.

Both appellants were closely associated with all activities of the Company from its registration in 1971 until a provisional liquidator was appointed in 1976. They were aware that debts were being incurred. They knew that by 1976 the Company was in financial difficulties and that a provisional liquidator would be incurring expenditure for the purpose of realising the undertaking as a going concern. It was not until May 1980 that they challenged the validity of the basis upon which they knew for the past 10 years was the basis upon which the Company was in possession of the land. This followed what appears to be an unsuccessful attempt to purchase the undertaking for a sum over $400,000.

Both appellants allowed themselves to be named as directors. They had a duty to ensure that the Company acquired a proper title to the asset they, at least in their present claim, intended to give but for a technical reason they now seek to withdraw from the large body of creditors of the Company. All that was necessary to put this matter beyond doubt was a formal adoption of the sublease by both parties after registration of the Company. They participated in and were aware that persons dealing with the Company would, almost inevitably, act on the basis that the Company had a valid title to the land, as indeed so did appellants likewise think.

The general law is stated in Halsbury's Laws of England 4th Edition Vol.7 para 728 as follows:

> "728. Adoption of pre-incorporation contracts. In order that the company may be bound by agreements entered into before its incorporation, there must be a new contract to the effect of the previous agreement; although this new contract may be inferred from the company's acts when incorporated, except where such acts are done in the mistaken belief that the agreement is binding."

There is no reason for finding that the acts of the parties were done in the mistaken belief that the sublease was binding. Ex 4 shows the preliminary nature of the document of sublease. The terms of Ex 4 were later fully carried out except that no formal grant and acceptance of the sublease was entered into. The exception in the above citation does not apply.

Counsel for appellants strongly relied on Willmott v Barber (1880) 15 Ch.D. 96, 105. This case sets out the rules applicable in estoppel. It is summarised in Halsbury's Laws of England 4th Edition Vol.16 para 1474. The present decision will not rely upon the rules of estoppel so the Privy Council finds no reason to consider the rules so laid down.

On the facts set out in this judgment and upon the application of the law as earlier cited, the Privy Council is of opinion that first and second respondents are entitled to succeed on their cross-claim both on the principles laid dow in Dillwyn v Llewellyn (Supra) and upon the principles laid down by Lord Kingsdown in Ramsden v Dyson and expanded and applied in many cases since. No good purpose can be served by examining the facts of the various cases. What is important is the principle laid down or applied. As Lord Romilly M.R. said in the Unity Joint Stock Mutual Banking case (1858) 25 Beav.

72 the Court must look at the circumstances in each case to decide in what way the equity would be satisfied.

The following orders are made:-

(1) The claims of appellants are dismissed.

(2) The order of the Land Court is set aside and in lieu thereof the following orders are made:

(a) That the Company is entitled to have executed by appellants a sublease in terms of the document already registered.

(b) The registration of that document is cancelled.

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(c) Whether or not the new sublease requires a fresh consent is not a matter for determination in this proceeding, but the new sublease will require an effective consent.

(3) The case is remitted to the Land Court for it to make, upon application by first and second respondents, such further orders as may be necessary for the first respondents to have a new sublease properly executed and for such further relief as may be necessary or expedient to give effect to the orders made.

The appeal is dismissed and the cross-claim is allowed in terms set out above.