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Privy Council Appeal No. 7 of 2004

(1) Vehicles and Supplies Limited and
(2) Vehicles and Supplies (Industrial Division) Limited *Appellants*

v.

Financial Institutions Services Limited *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 28th June 2005

Present at the hearing:-

Lord Nicholls of Birkenhead
Lord Steyn
Lord Hoffmann
Lord Millett
Lord Walker of Gestingthorpe

*[Delivered by **Lord Walker of Gestingthorpe**]*

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1. The litigation leading up to this appeal has been on foot for more than five years, and has comprised two substantive first-instance hearings and two appeals to the Court of Appeal of Jamaica. But none of the judgments below has contained detailed or comprehensive findings of fact. That is indeed one of the main grievances of the appellants, Vehicle & Supplies Ltd ("V&S") and Vehicles and Supplies (Industrial Division) Ltd ("V&S (ID)"). The appellants complain that their claims have been dismissed in a summary way when they merited fuller and closer investigation.

2. It is not appropriate for the Board to embark on detailed findings of fact. Some of the documentary material included in the record raises

more questions than it answers. It is sufficient to summarise some salient facts which are not in dispute and to indicate other matters which, had they fallen to be investigated in detail, might have been hotly disputed. Ultimately this appeal turns on the parties' pleaded cases and the course which the litigation took in the courts below.

The undisputed facts

3. Consolidated Holdings Ltd ("Consolidated") was an industrial and provident society incorporated under the Industrial and Provident Societies Act. It embarked on an ambitious joint venture with V&S for a large warehouse development at Constant Spring Road, Kingston. The joint venture was regulated by a written agreement dated 1 November 1989. This agreement referred to two other companies, DoJap Investments Ltd ("DoJap"), which was to be the project manager, and Blaise Trust Company & Merchant Bank Ltd ("BTMB"), which was to be the financier to the project.

4. These companies were not wholly independent of each other. Their Lordships do not have the full picture, but it is apparent from the record that Mr Donald Panton was a director of V&S and Mrs Janet Panton was its secretary; they were also directors of DoJap; and Mr Panton was a committee member of Consolidated.

5. Moreover BTMB, and another body corporate called Blaise Building Society ("BBS"), seem to have been under the same control as Consolidated. In a scheme of arrangement relating to Consolidated approved by Cooke J on 26 October 1995 Recital E was as follows ("the BFI's" – Blaise Financial Institutions – being defined as Consolidated, BTMB and BBS):

> "The Minister as Temporary Manager as well as the Preferential and General Creditors recognise that the BFI's have been operated as a single entity in that the assets of [Consolidated] are so intermingled with the assets of the two remaining BFI's that it is just and equitable that the BFI's should be treated as a single undertaking and it is in their overall interests to pool the assets of the BFI's in order to accommodate a scheme of arrangement and provide an expeditious and equitable conclusion to the existing state of affairs surrounding the three BFI's."

6. As a committee member of Consolidated, Mr Panton made an application to the Registrar of Titles, supported by a statutory

declaration dated 17 July 1991, for the title to the development land to be registered in fifteen different lots. The warehouse development, when completed, comprised fifteen warehouse units in three blocks, surrounded by a ring fence.

7. In the course of the development Consolidated (and, it seems, the other two BFI's) got into serious financial difficulties. All three companies were the subject of schemes of arrangement approved by the Court. That affecting Consolidated provided for the assets of Consolidated to be transferred to a new company, Financial Institutions Services Ltd ("FIS") the respondent to this appeal, and for FIS to meet the claims of Consolidated's creditors, subject to the terms of the arrangement. In view of Recital E it is to be presumed that the other two schemes of arrangement contained similar provisions.

8. About four months before the approval of the schemes of arrangement attorneys-at-law acting on behalf of V&S had lodged a caveat indicating that V&S claimed "as purchaser" an interest in lots 1, 2 and 15 of the warehouse development. This caveat was lodged under section 139 of the Registration of Titles Act. The claim that V&S was a purchaser seems to have been based on an agreement (entitled "memorandum of understanding") dated 12 November 1991 made between Consolidated and V&S. Their Lordships heard no oral submissions about this agreement but its apparent effect was that V&S was to acquire Consolidated's interest in lots 1, 2 and 15 and that Consolidated was in exchange to acquire V&S's interest in the remainder of the joint venture.

9. On 6 June 1996, a little over seven months after the approval of the schemes of arrangement, the Registrar of Titles gave notice to V&S that Consolidated had applied to register a transfer to FIS of the whole of the development. V&S took no action and fourteen days after the notice the caveat lapsed, in accordance with section 140 of the Registration of Titles Act, and FIS was registered as proprietor.

10. On 22 July 1996 FIS gave notice to V&S (ID) in the following terms:

> "Lot Nos 1, 2 & 15 Blaise Industrial Park, 69-75 Constant Spring Road, Kingston 10.

> We hereby give you notice to vacate the captioned premises within (30) days of the date of this letter, as it is required by the Owners.
>
> Please note that it is our intention to send you our statement of account for use and occupation of the said premises shortly."

11. The matters summarised above seem not to have been in dispute, although the terms of the scheme of arrangement affecting Consolidated (which was a deposit-taker) raised some possible questions of construction. Matters which might have been hotly disputed, had they fallen to be investigated, would have included a series of oral agreements pleaded by the appellants (as mentioned below), and the financial arrangements and state of account as between the BIF's and the appellants.

The proceedings below

12. V&S (ID) did not vacate lots 1, 2 and 15, and on 26 January 2000 FIS issued a writ against the appellants claiming (i) a declaration that they had no interest, legal or equitable, in the lots; (ii) possession of the lots; and (iii) mesne profits, or alternatively damages for trespass.

13. The appellants' amended defence and counterclaim made the following averments (among others):

(a) that V&S (ID) was in lawful possession of the three lots as tenant with the full knowledge of FIS and with the agreement of V&S (para 6);

(b) that V&S (ID) was the lawful tenant of V&S (para 7);

(c) that Consolidated was one of a group of companies operating as part of the Blaise Financial Institutions "which were a part of a group of companies inclusive of [V&S] which were owned and/or controlled by [DoJap] and/or Donald Panton and Janet Panton and/or their related and/or connected companies" (para 11); and

(d) that under a series of oral agreements V&S expended a sum of $11.74m on completing and fitting out buildings on the development (paras 12-17).

The reply and defence to counterclaim consisted largely of denials and non-admissions on the part of FIS.

14. FIS applied for summary judgment and on 23 June 2000 Harrison J gave judgment in favour of FIS to the extent of making (i) a declaration in the terms sought by FIS; (ii) an order for possession; and (iii) an order for mesne profits to be assessed. He gave leave to appeal.

15. The appeal came before the Court of Appeal (Downer, Walker and Langrin JJA) which dismissed the appeal on 16 March 2001. Downer JA (in a brief oral judgment of the Court) based his decision on section 71 of the Registration of Titles Act. The general effect of section 71 is that in the absence of fraud, the transferee of a registered interest is not affected by notice, actual or constructive, of any trust or unregistered interest. Downer JA said towards the end of his judgment:

> "It may be that the appellants have a good case based on the counterclaim which they may wish to pursue. It would be a claim in money terms but such claim does not run with the land. If such a claim is vindicated in the Supreme Court it could be conveniently heard together with the order for assessment of the mesne profits."

16. That course was followed, and on the hearing (on 29 August 2001) of the summons for directions it was ordered that the trial of the counterclaim and the assessment of damages (a slip, it seems, for mesne profits) should be heard together. These matters came before Cooke J on 25 October 2001. Although the estimated duration of the hearing was two weeks, it lasted only one day. The judge decided to hear the assessment of mesne profits first. Two witnesses were called on behalf of FIS. FIS was awarded $7.341m in mesne profits. The judge then considered the counterclaim. He dismissed it on a preliminary point raised by the Solicitor-General. The preliminary point was, in short, that the earlier decision of the Court of Appeal had conclusively rejected all of the appellants' proprietary claims, leaving nothing more than a possible money claim against FIS; and that the liabilities of FIS, under the terms of the scheme of arrangement affecting Consolidated, did not include any such liability to V&S. The judge rejected the submission that mere notice of a claim by V&S could create an estoppel so as to fix the liability on FIS.

17. The appellants appealed to the Court of Appeal (Forte P, Panton JA and Clarke JA (Ag)), which dismissed the appeal on 20 December

2002. The grounds of appeal did not include the complaints against Cooke J's conduct at the hearing which have been raised before the Board. They were for practical purposes limited to two points. First, the appellants contended that Mr Patrick Hylton, the Managing Director of FIS, had admitted in cross-examination that V&S (ID) had been occupying the premises as tenant, and that that admission by itself entitled the appellants to succeed: one or other of them, it was submitted, must have been a tenant protected under the Rent Restriction Act. The other ground was that the principle in *Ramsden v Dyson* (1866) LR 1 HL 129 could on the pleaded facts give rise to an equitable estoppel capable of binding FIS, and that the judge had misdirected himself about this possible claim, which should not have been summarily disposed of on a preliminary objection.

18. The Court of Appeal rejected both those grounds of appeal. On the first ground, Forte P (with whom the other members of the Court agreed) accepted the submission that it was never the appellants' pleaded case that either of them was a tenant of FIS; V&S claimed to be the purchaser of the freehold in part of the development, and V&S (ID) claimed to be the tenant of V&S. That pleaded case had been rejected by the Court of Appeal when, in dismissing the appeal from the summary judgment, it upheld the declaration that the appellants had no interest, legal or equitable, in the premises. Their claim to protection under the Rent Restriction Act was therefore without merit.

19. On the second ground, Forte P noted that the only surviving part of the counterclaim was a money claim for reimbursement of $11.74m. FIS had neither requested nor acquiesced in that alleged expenditure (which had happened before FIS was even incorporated). Nor had it, under the scheme of arrangement, assumed the alleged liability of Consolidated to V&S.

The grounds of appeal before the Board

20. Before the Board Mr Raphael Codlin (for the appellants) relied on five propositions set out in the appellants' printed case. They can be summarised as follows:

(1) The appellants' reliance on *Ramsden v Dyson* should not have been dismissed out of hand.

(2) The decision of Harrison J was "clearly wrong" and did not provide a basis for an estoppel *per rem judicatam*.

(3) Cooke J and the Court of Appeal were clearly wrong in rejecting the claim that the appellants were tenants.

(4) Cooke J erred in his conduct of the proceedings by descending into the arena and intervening too much in the course of the evidence and argument.

(5) The award of mesne profits was wrong because the appellants were not in wrongful possession of the premises.

21. These grounds are listed in the order in which they appear in the appellants' case. But on analysis it is apparent that all of them except ground (4) (the complaints about the judge's conduct) must fail if the appellants are wrong in asserting that there is no estoppel *per rem judicatam* arising out of the order of Harrison J and the first order of the Court of Appeal.

22. Their Lordships are of the clear opinion that the principal point in the appeal fails on that ground. Mr Codlin submitted that an order for summary judgment was not a final order adjudicating on the merits of the proceedings. That submission involves a basic misconception. No estoppel *per rem judicatam* arises from an interlocutory order, or an order dismissing an action for want of jurisdiction. A judgment in default of appearance, or in default of defence, is also lacking in finality so long as it is liable to be set aside. But summary judgment in proceedings in which a defendant appears and offers a defence, but the defence is held to be wholly defective, is a final judgment on the merits. These principles are fully explained and documented in chapters 2, 4, 5 and 6 of the third (1996) edition of Spencer Bower Turner and Handley, Res Judicata. The decision of the Board in *Patrick v Beverley Gardens Development Company Ltd* [1979] AC 547 is distinguishable, since in that case the resident magistrate (whose summary order for possession of land, made on proceedings commenced by an information, lay at the foundation of arguments about estoppel) had no jurisdiction to decide a question of title to land. That was clear from the second proviso to section 54 of the Landlord & Tenants Law (see at p 554). No question of lack of jurisdiction arises in this case.

23. Cooke J and the Court of Appeal (on the second appeal) were therefore right to proceed on the basis that the appellants, not having

appealed against the first order of the Court of Appeal, were bound by the declaration that neither had any legal or equitable interest in the three lots. This was fatal to any claim to a protected tenancy, regardless of what was said in evidence before Cooke J. The appellants' claim to a proprietary interest had in fact been fatally undermined as long ago as June 1996, when the caveat was allowed to lapse after the warning letter from the Registrar of Titles.

24. The appellants' reliance on the principle in *Ramsden v Dyson* was not clearly articulated until the second appeal to the Court of Appeal, and even then it does not seem to have been fully explored. That principle is most clearly stated in the speech of Lord Kingsdown (who dissented on the facts). He said at p 170:

> "The rule of law applicable to the case appears to me to be this: 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."

The relief may consist (see at p.171) of a specific interest in the land, or in monetary compensation charged on the land. As the principle has developed it has been recognised that the principle creates an "equity" which is capable, in some circumstances, of binding successors in title (see generally, as to developments down to 1991, Graham Battersby in [1991] Conv 15, and the summary of more recent developments in Megarry & Wade, The Law of Real Property, 6th (2000) edition pp745-8).

25. The principle as it has developed can therefore be seen as giving rise to a proprietary claim. But for the appellants this presented a dilemma. If they had an equity capable of binding a third party such as FIS, it was a proprietary claim which was excluded (just as any claim as purchaser or tenant was excluded) by the binding declaration upheld by the first order of the Court of Appeal. The possibility of a purely personal claim against FIS founded in unjust enrichment was not raised either below or before the Board, and it is unnecessary to say more than that any such claim, if otherwise sound, might have been difficult

to reconcile with the terms of the schemes of arrangement. The affairs of the appellants were on their own pleadings and documentation closely intertwined with those of the Blaise Financial Institutions.

26. Their Lordships have referred to the fact that the appellants did not seek to appeal to the Board against the first order of the Court of Appeal. Mr Codlin drew attention to the fact that the oral judgment of the Court of Appeal delivered by Downer JA on 16 March 2001 ended with the statement that the Court would put their reasons in writing at an early date. Unfortunately that did not occur. More than three years elapsed before the parties were sent a transcript of what Downer JA had said on 16 March 2001, with the last sentence changed to read,

> "The reasons which were delivered orally are now reduced to writing as promised."

The express concurrence of Walker and Langrin JJA was added. So no fuller reasons were ever given. This is regrettable, but Mr Codlin accepted that his clients had known the substance of the decision from the time of the oral judgment. He did not seek an extension of time for appealing to the Board. He did not contend that the decision whether or not to appeal had been postponed in the expectation that the Court of Appeal would deliver fuller reasons in due course.

27. Finally, their Lordships must refer to the criticisms which Mr Codlin made of Cooke J's conduct of the proceedings before him. Mr Codlin made clear that he did not in any way impugn the judge's motives; his complaint was that the judge had, with the best of intentions, intervened too much.

28. Although this complaint was not raised in the Court of Appeal, their Lordships have considered all the passages in the transcript to which Mr Codlin drew attention. They are very far from being persuaded that the judge's conduct of the proceedings was open to serious criticism. A judge is not merely entitled, but is under an obligation, to intervene if that course is necessary in order to identify and clarify the real issues, and to ensure that evidence does not stray into irrelevance. It may be that some of the judge's interventions were rather premature. But their Lordships are satisfied that the judge was not seriously at fault and there is no question of the appellants not having had a fair trial.

29. For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed.