Privy Council Appeal No. 28 *of* 1963

Emmanuel Ayodeji Ajayi trading under the name and style of the Colony Carrier Company – – – – – – *Appellant*

v.

R. T. Briscoe (Nigeria) Limited – – – – – – – *Respondents*

FROM

THE FEDERAL SUPREME COURT OF NIGERIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH JULY 1964

Present at the Hearing:
LORD MORRIS OF BORTH-Y-GEST
LORD HODSON
LORD GUEST
[*Delivered by* LORD HODSON]

This is an appeal from an order of the Federal Supreme Court of Nigeria dated 21st December 1962 dismissing the appellant's appeal from a judgment of the High Court of Lagos dated 23rd January 1961 whereby the respondents, who will be referred to as the plaintiffs, were awarded £11,304 16*s*. 0*d*. as sums due under two hire purchase agreements entered into between the plaintiffs and the appellant, who will be referred to as the defendant.

The plaintiffs issued their summons on the 2nd November 1959 and by their statement of claim they relied on two agreements dated 1st June 1956 and 31st July 1956 relating altogether to eleven Seddon lorries valued at £24,511 6*s*. 8*d*. which had been delivered to the defendant on hire. The defendant had paid deposits of £1,071 2*s*. 6*d*. and £3,000 under the respective agreements and had agreed to pay the balance of £20,440 4*s*. 2*d*. by stated instalments on stated dates between the 1st July 1956 and the 30th January 1957. The defendant failed to pay the instalments in accordance with the agreements and, at the date when proceedings were instituted, there was still unpaid £11,304 16*s*. 0*d*.

This sum the plaintiffs claimed.

The substantial issue raised by the defence was that the defendant had been induced to enter into the agreements by fraudulent representations about facilities to be provided by the plaintiffs for repairing the lorries and providing spare parts for them. The defendant counterclaimed repayment of the money he had already paid under the agreements on the ground that the consideration had wholly failed and rescission of the agreements.

The learned trial judge found against the defendant on the issue of fraud and gave judgment for the plaintiffs for the full amount claimed as rents due on the lorries in accordance with the agreements.

On appeal to the Federal Supreme Court the point was taken, as the sole ground of appeal, that the defendant was not obliged to pay the arrears due on the hire purchase agreements so long as the lorries were off the road.

The defendant founded on a letter to him written by the plaintiffs' manager and dated the 22nd July 1957 which was in the following terms:—

" Dear Sirs,

SEDDON/TIPPERS

We are in receipt of your letters of 5th and 12th July and are indeed very sorry to hear about the troubles you have had with your fleet of Seddon Tippers.

We hope very soon to be able to put at your disposal the service of our engineer and on completion of our workshop in Apapa we should be able to give you a proper service for your Seddon vehicles in the time to come.

Please rest assured that we do regret the inconvenience and loss you have been put to and we confirm herewith that we are agreeable to your withholding instalments due on the Seddon Tippers as long as they are withdrawn from active service.

Yours faithfully,
(Sgd.) B. A. Heidemann
Acting Manager."

Reliance was placed on the equitable principle stated by Lord Cairns in *Hughes v. Metropolitan Railway* [1877] 2 A.C. 439 which was ten years later held to have general application in the case of *Birmingham and District Land Co. v. L.N.W. Railway* 40 Ch. 268 where the principle was interpreted by Bowen L.J. at page 286 as follows:—

> " If persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a Court of Equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before."

It was argued that the principle applied to this case for the suspension of the obligation to pay instalments still operated, no notice having been given to the defendant that the lorries were available for active service nor any other step taken to cause the suspension to cease. The judgment of the Federal Supreme Court was given by Taylor F.J. who held that he could not see in what way the defendant had altered his position or could be said to have acted on the promises contained in the letter under consideration.

Before their Lordships the defendant has taken the same point as he took in the Federal Supreme Court arguing that the plaintiffs could not enforce payment in the circumstances of this case pending the happening of a certain event which had never occurred. This event is the return to service and availability for service of the lorries. He claims that he has altered his position and relies on the following circumstances. First he says that the relevant terms of the agreements (clause 14 in each case) provided for the determination of the hiring if the hirer did not make punctual payments of the instalments of rent. He maintains that the conduct of the parties is inconsistent with determination in accordance with this clause because after instalments had fallen into arrear and after the payments ought to have been completed the lorries remained in the possession of the defendant with the consent of the plaintiffs, that three were never returned and eight were later returned to the plaintiffs with their approval and remained thereafter in their possession subject to the terms of the agreement in that it was open to the defendant to complete the transaction by paying the balance due and becoming the owner of the lorries. By the letter of the 22nd July it is said that the plaintiffs made plain they were not going to enforce their rights and would not insist on payment before the lorries were all back in service. By this letter they gave the defendant all he asked for since he had written on the 12th July pointing out that he had been compelled to lay up the lorries and had no desire to forfeit the large sums of money involved. In that letter the defendant proposed to make the necessary contribution for all essential repairs which were to be debited to his account and payment made when the vehicles were again in service. It is said the defendant acted

on the letter of the 22nd July by not putting forward proposals alternative to those he had already made in his letter of the 12th. Further it is said that after the letter of the 22nd July he did lay up the lorries by delivering eight to the plaintiffs after that date with the result that they were out of service and earned no revenue. Lastly it is said that he organised his business on the basis that the lorries would be put in repair and he would not have to make the payments due on them until they were back in service and accordingly earning revenue.

The defendant's final contention was that having altered his position in the manner indicated the plaintiffs never gave notice that the period of suspension was at an end before issuing their summons and that accordingly the lorries never having been returned or made available for service he was entitled to rely on the equitable defence as defined by Bowen L.J. in the *Birmingham and District Land Co.* case (*supra*).

Alternatively he went further and contended on the authority of the cases of *Central London Property Trust v. High Trees Ltd.* [1947] K.B. 30 and *Combe v. Combe* [1951] 2 K.B. 215 that the promise given by the letter of the 22nd July was irrevocable unless the lorries were made available for service and that since this never happened the plaintiffs cannot enforce their claim.

Their Lordships are of opinion that the principle of law as defined by Bowen L.J. has been confirmed by the House of Lords in the case of the *Tool Metal Manufacturing Co. v. Tungsten Electric Co. Ltd.* [1955] 1 W.L.R. 761 where the authorities were reviewed and no encouragement was given to the view that the principle was capable of extension so as to create rights in the promisee for which he had given no consideration. The principle which has been described as quasi estoppel and perhaps more aptly as promissory estoppel is that when one party to a contract in the absence of fresh consideration agrees not to enforce his rights an equity will be raised in favour of the other party. This equity is however subject to the qualification (1) that the other party has altered his position, (2) that the promisor can resile from his promise on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position, (3) the promise only becomes final and irrevocable if the promisee cannot resume his position.

The difficulty of this case stems in great part from the fact that the equitable defence was never expressly pleaded and no part of the argument at the trial appears to have been directed thereto. Certainly the trial judge made no reference to it. True it is that the defence contains in paragraph 29 a reference to the letter of the 22nd July 1957 by which " the defendant was asked to withhold the instalments due on the Seddon Tippers so long as they are withdrawn from the road." Again paragraph 30 reads " The defendant avers that the fleet of Tippers were not on the road on the receipt of this letter and ever since they have not been on the road (8 are with the plaintiffs and 3 lying in the defendant's garage)." These paragraphs are contained in a narrative statement of facts pleaded in order to establish the allegation of fraud and although the letter of the 22nd July 1957 was put in evidence it was used not in support of the doctrine of promissory estoppel but to show that the defendant " was told not to pay at all any more ". It is not surprising that the trial judge did not address his mind to the implications of the letter which are now relied upon and indeed made no express finding on the question whether or not the lorries were ever made available to the defendant for return to service. The plaintiffs' witness, Mr. Gramhanssen, chief accountant to the plaintiffs, gave evidence that the defendant had been asked to remove the lorries after repairs but had failed to do so. This was denied by the defendant.

The correspondence is incomplete and there is a gap between letters written in July 1957 and a letter written on behalf of the defendant in April 1958. It can be inferred from the last mentioned letter but not with certainty that during this period the plaintiffs were making demands for payment of the instalments due under the agreements.

Their Lordships have referred to these matters of fact not to exclude the raising of the equitable defence but to show that the facts relied upon although covered by the pleaded defence were not investigated at the trial through no fault of the plaintiffs. Battle was joined by the defendant on the issue of fraud and on that issue the plaintiffs succeeded. The defence was first put forward effectively in the Federal Supreme Court and further elaborated before their Lordships on inadequate material. It would not be just to the plaintiffs to remit the matter either for a new trial or for a decision to be given at this late stage on the facts which have not been expressly found. Their Lordships agree with the Federal Supreme Court in thinking that an application to that end should be rejected especially as the defence sought to be raised is of a suspensory or delaying nature and not of itself decisive to defeat the plaintiffs' claim for all time.

The question remains whether the defendant has made good the defence. In their Lordships' opinion he has not succeeded in so doing.

The defendant did not alter his position by not putting forward counter proposals after receipt of the letter of the 22nd July 1957. There is no evidence to support the contention that he did so by organising his business in a different way having regard to the fact that the lorries were out of service and it cannot be inferred from the evidence given that such reorganisation was necessary. It can be said that the lorries were laid up and there is evidence to support the view that they were laid up after the receipt of the letter of the 22nd July 1957. Nevertheless, in view of the evidence given by the plaintiffs' witness, not rejected by the trial judge (although contradicted by the defendant), it cannot be said to have been proved that the lorries were not made available for the defendant after they had been repaired.

The defendant has accordingly failed to establish any defence to the plaintiffs' claim. Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

(99404) Wt. 8069 113 90 8/64 Hw.

In the Privy Council

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Delivered by

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