Privy Council Appeal No. 26 of 1986

The Attorney General and Another *Appellants*

v.

Humphreys Estate (Queen's Gardens) Limited *Respondent*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH DECEMBER 1986

Present at the Hearing:

LORD KEITH OF KINKEL
LORD TEMPLEMAN
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY
SIR IVOR RICHARDSON

[Delivered by Lord Templeman]

Between April 1979 and April 1984, the appellants representing the Hong Kong Government negotiated with the Hong Kong Land Company Group ("HKL"), which includes the respondent company, for an exchange whereby the Government would acquire eighty-three flats, forming part of the Tregunter property belonging to HKL, and in exchange HKL would take from the Government a Crown Lease of property known as Queen's Gardens and be granted the right to develop Queen's Gardens and certain adjoining property already held by HKL. It is common ground that the negotiations did not result in a contract. The exchange of the Tregunter and Queen's Gardens properties was agreed in principle but subject to contract in January 1981. The Government contend that in the events which happened between June 1981 and August 1982 both parties became estopped from refusing to give effect to the agreement in principle. HKL purported to withdraw from the negotiations in April 1984. By that time both parties had sufficiently indicated their intentions with regard to the details of the exchange to enable the Court to make an order which would ensure that the agreement in principle was carried into effect on

terms acceptable to both parties if the agreement in principle had become binding by estoppel. The question is whether HKL were entitled to withdraw from the negotiations in April 1984. The trial judge, Jackson-Lipkin J. found in favour of HKL and his decision was upheld by the Court of Appeal of Hong Kong (Li V-P., Yang and Fuad JJ.A). The Government now appeal to Her Majesty in Council.

The agreement in principle was set forth in detail in an offer letter from the Government dated 12th January 1981 and an acceptance letter from HKL dated 13th January 1981. A major part of this agreement, as subsequently modified and expanded, was carried out. In particular the Government took possession of the Tregunter flats and fitted them out, and moved in senior civil servants to that accommodation by August 1981. The Government disposed of the residences formerly occupied by those civil servants. HKL took possession of Queen's Gardens by November 1981 and demolished the existing buildings on the Queen's Gardens and adjoining sites by May 1982 with a view to re-development. HKL paid to the Government by August 1982 the full sum of $103,865,608.00, the agreed difference between the value of the Tregunter premises and the value of Queen's Gardens. There remained to be solved various minor problems, some of which were envisaged in the agreement in principle and some of which arose thereafter. There also remained to be agreed and executed documents which would transfer the Tregunter premises to the Government and which would vest in HKL a Crown Lease of Queen's Gardens. These documents would define the rights and obligations of the Government as part owners of Tregunter and the rights and obligations of HKL as lessees of Queen's Gardens and as developers. By February 1984 all these problems had been solved with trivial exceptions of no importance. By February 1984 also, the necessary documents had been drafted and agreed, again with trivial exceptions of no importance. By February 1984 there was no difficulty in the Court devising an order for specific performance of the agreement in principle provided that the agreement had become binding by estoppel.

The agreement in principle was not binding in its inception. The letter dated 12th January 1981 containing the Government's offer was marked "without prejudice". The writer of the letter was "pleased to inform" HKL that "subject to contract, Government have agreed in principle" to grant Queen's Gardens to HKL in exchange for the Tregunter flats. After setting out the "basic terms" in some detail, the letter continued:-

> "I must, however, point out that the above basic terms may be varied or withdrawn prior to formal

> execution of the transaction. Furthermore, any agreement reached shall be subject to formal approval by the Government and until the document or documents necessary to give legal effect to this transaction are executed and registered, this letter should not be considered as binding the Government in any way."

Thus the author prudently gave emphasis to the principle that an agreement which is "subject to contract" has no binding force. The Government were fully aware and intended that either party could at any time and without any reason withdraw from the agreement in principle.

Mr. Morritt who appeared for the Government submitted that every action of the Government and every action of HKL after the date of the agreement in principle served to create or encourage a belief in the Government that the agreement in principle would be carried into effect. The actions taken by the Government in that belief were admittedly and seriously detrimental in a way which could not be remedied. The civil servants cannot be returned to their former residences and the buildings on Queen's Gardens and elsewhere which were demolished cannot be restored. In these circumstances Mr. Morritt submitted that by August 1982 it was unconscionable for HKL to withdraw from the agreement in principle and they were estopped from so doing.

The authorities expound and illustrate the principle upon which a litigant who is led to believe that he will be granted an interest in land and who acts to his detriment in that belief is enabled to obtain that interest.

From *Ramsden v. Dyson* (1866) L.R. 1 H.L. 129 the statement of principle enunciated by Lord Kingsdown in his dissenting judgment at page 170 has received judicial approval and extension. Lord Kingsdown said:-

> "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 obligation by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation."

In the present case, Mr. Morritt submits that HKL created or encouraged the Government in the

expectation that HKL would transfer the Tregunter flats to the Government. Under that expectation, the Government took possession of the flats and spent money on them to the knowledge of HKL. Therefore equity will compel HKL to fulfil the Government's expectation.

In *Laird v. The Birkenhead Railway Company* (1859) Johns. 500; 519, the plaintiff applied to construct and use a private branch line connecting with the mainline of the defendant railway company. Page Wood V-C. found at page 524 that there was an agreement "indefinite in a certain sense but still an agreement, that the Plaintiff should be allowed to join their railroad on reasonable terms, which were to be afterwards settled". The railway company allowed the plaintiff to construct and use the branch line paying agreed tolls; a draft agreement dealing with all the details of user was agreed in principle but not in fact signed. The railway company then gave notice to the plaintiff to take up the branch line. Page Wood V-C. continued:-

> "Did the company allow the Plaintiff to expend his money on the faith that he would be permitted to join their line on reasonable terms? Certainly they did. Then is there any difficulty in saying what are reasonable terms? None whatever ..."

In the present case, Mr. Morritt submits that HKL allowed the Government to expend money on the faith that they would be granted the Tregunter flats.

In *Inwards v. Baker* [1965] 2 Q.B. 29 where a father invited his son to build a house on the father's land, it was held that the son was entitled to live in the house as long as he wished. Lord Denning M.R. at page 36 said 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 ... 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."

Danckwerts L.J. at page 38 said that:-

> "... this is one of the cases of an equity created by estoppel, or equitable estoppel, as it is sometimes called, by which the person who has made the expenditure is induced by the expectation of obtaining protection, and equity protects him so that an injustice may not be perpetrated."

So here, says Mr. Morritt, the Government were allowed to expend money on Tregunter under an expectation created or encouraged by HKL that the agreement in principle would be carried into effect.

In *Holiday Inc. v. Broadhead* (1974) E.G. 951 at 1087 Robert Goff J. summarised the position as follows:-

> "... the authorities clearly established that there is a head of equity under which relief will be given where the owner of property seeks to take an unconscionable advantage of another by allowing or encouraging him to spend money, whether or not on the owner's property, in the belief, known to the owner, that the person expending the money will enjoy some right or benefit over the owner's property which the owner then denied him ... the authorities also established ... that this relief can be granted although the agreement or understanding between the parties was not sufficiently certain to be enforceable as a contract, and that the court has a wide, albeit of course judicial, discretion to what extent relief should be given and what form it should take."

In *Crabb v. Arun District Council* [1976] Ch. 179 the plaintiff sold part of his land without reserving a right of way for the retained part because he had been led to believe by a representative of the District Council that they would allow him to construct and use an alternative access over their land. The plaintiff constructed and used the alternative access and the District Council then tried to prevent him so doing. Lord Denning M.R. said at page 188 that if a person:-

> "... by his words or conduct, so behaves as to lead another to believe that he will not insist on his legal rights - knowing or intending that the other will act on that belief - and he does so act, that again will raise an equity in favour of the other; and it is for a court of equity to say in what way the equity may be satisfied."

Here, says Mr. Morritt, at the very least HKL are not entitled to insist on their strict legal right to claim possession of the Tregunter flats from the Government.

Scarman L.J. in the same case at page 194 accepted the formulation of Lord Kingsdown in *Ramsden v. Dyson*, referred with approval to the judgment of Fry J. in *Willmott v. Barber* (1880) 15 Ch.D. 96, deprecated the distinction between proprietary and promissory estoppel and stated that equity would interfere if:-

> "... it would be unconscionable and unjust to allow the defendants to set up their undoubted rights against the claim being made by the plaintiff."

He concluded that the District Council, as possessors of the legal right, encouraged the plaintiff in the expenditure of money or in the other acts which he had done, either directly or by abstaining from asserting their legal rights, and that therefore the plaintiff was entitled to a perpetual use of the alternative access.

In *Taylors Fashions Limited v. Liverpool Victoria Trustees Co. Ltd.* [1982] Q.B. 133 Oliver J., as he then was, reviewed all the authorities and in language to which he adhered in the Court of Appeal in *Habib Bank Limited v. Habib Bank A.G. Zurich* [1981] 1 W.L.R. 1265 at 1285 concluded that:-

> "... the more recent cases indicate, in my judgment, that the application of the *Ramsden v. Dyson* L.R. 1 H.L. 129 principle - whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial - requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour."

Mr. Morritt said it would be unconscionable for HKL to be permitted to deny that which HKL allowed or encouraged the Government to assume to their detriment, namely that the agreement in principle would be carried into effect.

Finally in *Amalgamated Investment and Property Co. Ltd. v. Texas Commerce International Bank Ltd.* [1982] Q.B. 84 at page 122 Lord Denning M.R. reduced the doctrine of estoppel:-

> "... into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption - either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so."

Mr. Morritt says that the Government and HKL proceeded on the basis of the underlying assumption that the agreement in principle would be carried into effect and that it would be unfair or unjust to allow HKL to go back on that assumption.

Their Lordships accept that the Government acted to their detriment and to the knowledge of HKL in the hope that HKL would not withdraw from the agreement in principle. But in order to found an estoppel the Government must go further. First the Government must show that HKL created or encouraged a belief or expectation on the part of the Government that HKL would not withdraw from the agreement in principle. Secondly the Government must show that the Government relied on that belief or expectation. Their Lordships agree with the courts of Hong Kong that the Government fail on both counts.

Mr. Morritt submitted that every action of the Government and every action of HKL after the date of the agreement in principle served to create or encourage a belief and expectation in the Government that the agreement in principle would be carried into effect and that HKL would not withdraw. HKL allowed the Government to take possession of Tregunter, to fit out the flats, to re-house senior civil servants and to dispose of their former residences. HKL prevailed on the Government to allow HKL to enter upon and to destroy the buildings comprised in Queen's Gardens and adjacent sites and HKL paid in full the price for taking over Queen's Gardens. It was impossible for the Government to go back and unthinkable that HKL would not go forward. It was unconscionable for HKL to seek to exercise their legal right to withdraw from the agreement in principle.

Their Lordships accept that there is no doubt that the Government acted in the confident and not unreasonable hope that the agreement in principle would come into effect. As time passed and more and more actions were undertaken in conformity with the proposals contained in the agreement in principle, the Government's hopes were strengthened. It became more and more unlikely that either the Government or HKL would have a change of heart and would withdraw from the agreement in principle. But at no time did HKL indicate expressly or by implication that they had surrendered their right to change their mind and to withdraw. That right, expressly reserved and conferred by the Government, was to withdraw at any time before "the document or documents necessary to give a legal effect to this transaction are executed and registered". HKL did not encourage or allow a belief or expectation on the part of the Government that HKL would not withdraw. HKL proceeded in accordance with the proposals contained in the

agreement in principle but at the same time they continued to negotiate the exact provisions of the documents which were necessary to be executed before the parties could become bound.

There were significant events which indicated plainly that HKL, to the knowledge of the Government, retained the right to withdraw from the agreement in principle.

By a licence dated 17th November 1981 the Government authorised HKL to enter and demolish the buildings on Queen's Gardens. The licence was expressed to be revocable at any time without notice. Clause 22 stipulated that:-

> "The issue of this licence shall in no way be construed as having committed Government to the permanent grant of the licensed area nor the concept and form of development which may be agreed in the event of a permanent grant proceeding."

This provision is inconsistent with the submission that the Government believed that it was no longer possible for the Government or HKL to withdraw from the agreement in principle. Clause 22 is only consistent with the desire on the part of the Government to maintain the position constituted by the letters of agreement in principle namely that neither party would be bound until the necessary grants were made.

On 3rd February 1982 HKL stipulated and the Government accepted that in the event of the grant of the Tregunter flats not being completed before the end of the month, the occupation by the Government of Tregunter would be deemed to be on the terms of a licence in a form which had already been agreed. The licence permitted the Government to occupy the Tregunter flats but expressly provided that HKL might determine the licence by seven days' notice in writing in the event of "the grant not being made within six months of the date hereof". The licence required the Government to deliver up vacant possession of the Tregunter flats to HKL if and when the licence was terminated. If the Government believed that HKL could no longer withdraw from the agreement in principle and could not refuse to grant the Tregunter flats to the Government then the Government were not bound to accept a licence or to give up vacant possession of the Tregunter flats in any circumstances.

The draft licence served to show that, although HKL had no immediate intention of withdrawing from the agreement in principle, they were entitled to revoke the licence and to recover possession of Tregunter in

the event of the agreement in principle never becoming binding. It was argued that when six months expired, HKL did not attempt to revoke the licence and to regain possession of Tregunter and that their failure to do so encouraged the Government to believe that HKL no longer retained the right to revoke the licence. But when the six months expired both sides were still hoping that the agreement in principle would be consummated and it was unnecessary for HKL immediately to recover possession of Tregunter. Their failure to do so did not indicate that they surrendered the right to withdraw from the agreement in principle and, as they are now seeking to do, to recover possession of Tregunter after such withdrawal.

The evidence also discloses that the Government did not rely on any belief or expectation that HKL would not withdraw from the agreement in principle. In an internal memorandum dated 18th September 1981 Mr. Ward who was one of the Government officials concerned with the negotiations commented that a dispute on the cost of roadworks was holding up the conclusion of the agreement in principle. He advised that:-

> "... the transaction has reached a point of 'no return', particularly as Government has taken possession of the Tregunter flats and in my view the only practical course is to allow the land company to have possession of the Queen's Gardens site ... by way of a Licence ... to include the usual clause making it clear that no contract exists between Government and the Company until such time as a formal document is executed."

The memorandum continued:-

> "The possible danger in proceeding as suggested above is that agreement on road costs may not be reached and if this should happen the exchange may never be concluded, but I do not expect this situation to materialise. Should the worst happen, Government would have to come to some alternative arrangement with the land company, for retaining the Tregunter flats already occupied or alternatively vacate these flats. Failure to conclude an agreement would be a messy business with claims for mesne profits, etc. and counterclaims ..."

This memorandum makes it clear that the Government did not believe that HKL were bound to proceed. In retrospect the Government could have insisted before occupying Tregunter on acquiring Tregunter at the agreed price and providing for the purchase price to be placed on deposit pending the outcome of the Queen's Gardens negotiations. Mr. Ward is not to be blamed for failing to suggest this course before

Tregunter was occupied when there was no reason to suspect the decline in the fortunes of HKL and the fall in the value of land which led HKL to withdraw in 1984. But Mr. Ward's memorandum makes it clear that the Government were well aware of and accepted "the possible danger". In the event "the worst" happened with a resulting "messy business" which exceeded Mr. Ward's most gloomy forebodings.

Mr. Morritt relied on the decision of Woolf J. in *Salvation Army Trustee Co. Limited v. West Yorkshire Metropolitan County Council* [1980] P. & C.R. 179. Mr. Morritt claimed that specific performance of an agreement "subject to contract" was ordered. The Bradford City Council told the Salvation Army that the Council intended to acquire the site of the Salvation Army's meeting hall for road widening purposes and were prepared to negotiate on the basis of the sale of an alternative site by the Council to the Salvation Army and on the basis of a payment to the Salvation Army of the reasonable costs of equivalent re-instatement pursuant to the compensation provisions of rule (5) of section 5 of the Land Compensation Act 1961. It was eventually agreed "subject to contract" that the Salvation Army would acquire the new site valued at £4,500 and build a new hall. The amount which the district valuer was prepared to recommend as compensation for the acquisition of the old site on the basis of equivalent re-instatement amounted to £29,097.00. The Salvation Army wished to build the new hall before they vacated the old hall and applied to the City Council for leave to enter and build on the new site. No formal reply was received to that application but with the knowledge of the City Council the Salvation Army entered upon the new site, built the hall, paid for the new hall and did everything which was necessary to justify the payment of £29,097.00 on an equivalent re-instatement basis. The City Council's highway responsibilities were then transferred to the defendant Metropolitan County Council. . The Metropolitan County Council abandoned the road widening scheme and refused to acquire the old site or to pay the equivalent re-instatement compensation. Woolf J. held that the conduct of the City Council in allowing the Salvation Army to take possession of the new site and to build a new hall encouraged the Salvation Army to believe that the City Council would not resile from the arrangements which had been made subject to contract for the acquisition of the old site and payment of compensation on an equivalent re-instatement basis and he made an order for specific performance. The learned judge was clearly right to conclude that the Metropolitan Council were bound to acquire the old site and to pay compensation of £29,097.00. But the fact that the arrangement was "subject to contract" was irrelevant. The Salvation Army did not enter on

the new site and build the new hall because they hoped that an arrangement "subject to contract" would eventually result in a concluded binding agreement. The Salvation Army took possession of the new site and built the new hall in consequence of the expressed intention on the part of the City Council to acquire the old site for a purpose for which the City Council held compulsory acquisition powers. The City Council expressly or impliedly represented that upon the exercise of their statutory acquisition powers they would be bound to pay and would pay compensation on an equivalent re-instatement basis pursuant to the Land Compensation Act 1961. The City Council and their successors, the Metropolitan County Council, were estopped from denying or changing the expressed intention of the City Council with regard to the acquisition of the old site under statutory powers or the representation with regard to the basis of compensation to which the Salvation Army would then be entitled. The Salvation Army were entitled to the statutory compensation for the statutory acquisition which the City Council led the Salvation Army to expect. That expectation impelled the Salvation Army, to the knowledge of the City Council, to enter and build on the new site.

In the present case the Government acted in the hope that a voluntary agreement in principle expressly made "subject to contract" and therefore not binding would eventually be followed by the achievement of legal relationships in the form of grants and transfers of property. It is possible but unlikely that in circumstances at present unforeseeable a party to negotiations set out in a document expressed to be "subject to contract" would be able to satisfy the Court that the parties had subsequently agreed to convert the document into a contract or that some form of estoppel had arisen to prevent both parties from refusing to proceed with the transactions envisaged by the document. But in the present case the Government chose to begin and elected to continue on terms that either party might suffer a change of mind and withdraw.

In the result their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the respondent's costs.