1970
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GEORGHIOS HADJI YIANNIS
v.
ATTORNEY-GENERAL OF THE REPUBLIC

[VASSILIADES, P., TRIANTAFYLLIDES, JOSEPHIDES, JJ.]

GEORGHIOS HADJI YIANNIS,
Appellant-Plaintiff,

v.

THE ATTORNEY-GENERAL OF THE REPUBLIC,
Respondent-Defendant.

(*Civil Appeal No.* 4577).

Contract—Contract of lease of land with option to buy—Specific performance—Principles upon which in the discretion of the Court it may be granted or refused—In the instant case it was refused—Because plaintiff's conduct rendered it both unreasonable and inequitable to decree specific performance of the contract regarding the said option to buy the demised land—The Contract Law, Cap. 149 *section* 76(1).

Specific performance—See supra.

Contract—Waiver of contractual rights—Waiver by conduct—Estoppel—Promissory estoppel—The equitable doctrine of promissory estoppel—Principles applicable—Breaches of contract by the plaintiff-lessee waived by conduct by the defendant-landlord—The latter became, thus, estopped from relying on the said breaches on the part of the tenant.

Waiver by conduct—The equitable doctrine of promissory estoppel —Supra.

Contract—Damages for breach of contract—Contract of lease with option to buy the demised land—Landlord refusing in breach of the contract to comply with his obligations regarding said option of the tenant to buy—Measure of damages—Principles applicable in this kind of cases—Specific performance refused as aforesaid—Damages in lieu thereof—Damages shall be a relief in the shape of compensation for the expenditure incurred by the other party (in this case by the plaintiff-lessee)—Therefore, in the instant case the measure of damages shall be the value of the improvements made on the land by the plaintiff-lessee, exclusive of the land itself.

Damages for breach of contract—Measure—See supra.

Specific performance—The question whether or not, in view of the provisions of sub-section (2) *of section* 76 *of the Contract Law,*

Cap. 149, *specific performance of an option to buy land under a contract of lease as in the instant case is available under sub-section* (1) *of that section* 76, *left open.*

Estoppel—Promissory estoppel—The equitable doctrine of— *See* supra.

Three main points were raised and determined in this appeal: (1) The first relates to the exercise by the Court of its discretion in rejecting a claim for specific performance of the contract sued upon under section 76 of the Contract Law, Cap. 149, on the ground that the conduct of the plaintiff rendered it unreasonable and inequitable to decree such performance ; (2) the second point raised is the question of waiver by conduct of contractual rights together with the equitable doctrine of promissory estoppel in the field of such rights ; (3) the last point is the proper assessment of the quantum of damages for breach of contract in the kind of cases similar to the present one (*infra*).

The facts of this case are very shortly as follows :—

On October 13, 1956 the appellant (plaintiff) entered into an agreement with the Government of the then Colony of Cyprus whereby the latter leased to him two plots of land, situate at Akaki village, for a period of five years commencing on September 8, 1956 and ending on September 7, 1961 at the annual rent of £5.500 mils. Under this agreement the lessee (appellant-plaintiff) had to observe a number of stipulations breach of which by him gave the landlord (respondent) the right to determine the lease and re-enter upon the demised plots (see clause 6 (*a*) of the agreement, post in the judgment). One of the main such stipulations—indeed the main one—was the following :

Clause 4 (*b*) :

" To use the plots of land hereby demised solely for the purpose of establishing and maintaining a farm unit for livestock and livestock products..... ..."

Clause 6 (*b*) provided that—

" If the tenant shall have performed and observed the stipulations and conditions in this agreement contained the landlord shall at the expiration of the period of tenancy hereby created, sell to the Tenant the plots of land hereby

demised together with everything standing thereon and in such case the following provisions shall have effect that is to say :—

(i) the sale price of the plots of land hereby demised is hereby fixed at £49 ;

(iii) upon the payment of the sale price the Landlord shall register the plots of land together with everything standing thereon in the name of the Tenant

Finally clause 6 (*c*) of the agreement provided :—

(*c*) If on the determination of this agreement by effluxion of time the Tenant shall not have performed and observed the stipulations and conditions in this Agreement contained or then and in any of the said cases the Tenant shall vacate the plots of land hereby demised without payment by the Landlord to the Tenant of any compensation whatsoever."

From the perusal of the Agreement it appears that the establishment and maintenance of a farm unit for livestock and livestock products (*supra*) was the cardinal term and the sole object of the said Agreement , and that the establishment of such farm was a condition precedent to the Tenant's (appellant's) right under clause 6 (*b*) of the Agreement to have the property transferred in his name on payment of the aforesaid sum of £49 (*supra*)

On the other hand it was clear on the evidence that the appellant (Tenant) did not start to do anything on the land until after four years from the commencement of the tenancy : and that it was on the fifth and last year of the tenancy and only six months before the date of its expiry, that he completed his buildings, and had a stock of 2100 chicks. Be that as it may the appellant– tenant incurred considerable expenses for that purpose to the amount of about £5,500

After the expiration of the tenancy the appellant-tenant addressed a letter to the respondents dated October 7, 1961, enclosing a money order for £49 " being the amount stipulated in the contract " and asking them to fix a date for the transfer of the property in question in his name pursuant to the provision of clause 6 (*b*) (iii) of the Agreement (*supra*).

Eventually the respondent declined to comply with the appellant's said request and on January 30, 1962 addressed a letter to the appellant informing him that as he had failed to observe or perform the stipulations and conditions of the Agreement, the Government of the Republic was not going to transfer in his name the property in question ; and he called upon the plaintiff to vacate and deliver up possession of the demised property within three days under the provisions of clause 6 (*c*) of the Agreement (*supra*). It is convenient to note at this stage that counsel for the appellant (tenant) conceded in the course of the hearing of this appeal that his client had indeed failed to perform his obligations under the Agreement but he pleaded waiver and estoppel (*infra*).

On February 28, 1962, the appellant took out the writ of summons in the present case claiming specific performance of the aforementioned Agreement, an order directing registration or transfer in his name of the two plots of land in question, including all structures thereon, or, in the alternative, £15,000 damages for breach of contract. The defendant government in due course denied the claim on the grounds set out hereabove and counterclaimed vacant possession of the property in dispute and damages.

Section 76 of the Contract Law, Cap. 149 provides as follows :—

"76 (1) A contract shall be capable of being specifically enforced by the Court if—

(*a*) it is not a void contract under this or any other Law ; and

(*b*) it is expressed in writing ; and

(*c*) it is signed at the end thereof by the party to be charged therewith ; and

(*d*) the Court considers, having regard to all the circumstances, that the enforcement of specific performance of the contract would not be unreasonable or otherwise inequitable or impracticable.

(2) Nothing herein contained shall affect the specific performance of contracts for the sale of immovable property under the provisions of the Sale of Land (Specific Performance) Law or any amendment thereof".

The trial Court found that the plaintiff (now appellant) committed breaches of contract that there has been in law no waiver (or estoppel) by the defendant (respondent) of any of his contractual rights and that therefore the plaintiff was not entitled to demand transfer or registration of the property in dispute as per clause 6 (*b*) of the Agreement (*supra*) in view of the provisions of clause (*c*) thereof (*supra*) ; and the trial Court dismissed the action and gave judgment in favour of the defendant (respondent) government on their counterclaim (*supra*).

It is from this judgment of the trial Court that the plaintiff took the present appeal. Counsel for the appellant conceded that the appellant-plaintiff had failed to perform his obligations under the Agreement sued on ; but he argued that there was waiver, by the defendant's (respondent's) conduct of his contractual rights and that, consequently, he (the defendant-respondent) was estopped from relying on the plaintiff's aforesaid breaches of covenant ; and that in the result the appellant was entitled to an order for specific performance ; or failing that to damages.

Allowing the appeal and reversing the findings of the trial Court regarding waiver or estoppel the Court :

Held, (1). Compliance with a particular stipulation in a contract may be waived by agreement or conduct (see Halsbury's Laws of England, 3rd edition Volume 8, page 175 paragraph 299, page 198 paragraph 335). The doctrine of the promissory estoppel is to the following effect, that is to say, where by his words or conduct one party to a transaction makes to the other a promise or assurance which is intended to affect the legal relations between them and the other acts upon it, altering his position to his detriment, the party making the promise or assurance will not be permitted to act inconsistently with it.

(2) Reverting to the facts of the present case we are of opinion that the conduct of the defendant Government (respondent) vis-a-vis the plaintiff (appellant) during the currency of the five-year lease amounts to a waiver or equitable estoppel. Considering the evidence on record we have no hesitation in holding that the breaches of the contract by the plaintiff (appellant) have been waived by the conduct of the defendant government (respondent) who is precluded by its conduct from avoiding the contract.

(3) The next question which falls for determination is as to what remedy is the plaintiff (appellant) entitled in the circumstances : specific performance or damages ? Counsel for the appellant argued that section 76 (2) of the Contract Law, Cap. 149 (*supra*) does not apply to the Agreement between the parties as this is not a case of sale of land but a lease with an option to buy. We do not think that it is necessary for us to decide this point as, in the circumstances of this case, in the exercise of our discretion we would refuse specific performance of the contract even if the said section 76 (2) were held to be inapplicable in the present case.

(4) Undoubtedly section 76 (1) of our Contract Law (*supra*) reproduces the provisions of the equitable remedy of specific performance as enforced in England. " The remedy is special and extraordinary in its character, and the Court has a discretion to grant it or to leave the parties to their rights at law .... " (see Halsbury's op. cit. Volume 36, page 263 paragraph 359 (the whole)).

(5) Considering the conduct of the plaintiff (appellant) in this case the considerable delay in beginning to set up the farm unit, and considering also the other breaches on his part—conceded by his counsel—we are of the view that it would be both unreasonable and inequitable to decree specific performance of the contract in the present case. Consequently the next question which we have to determine is the amount of damages to which the plaintiff (appellant) is entitled.

(6) Now, what is the measure of damages in this kind of cases ? On the authorities it appears that a Court of Equity would give relief " in the shape of compensation for the expenditure "; (see Lord Kingsdown's opinion in *Ramsden* v. *Dyson* [1866] L.R. 1 H.L. 129 at page 170). Having given the matter our best consideration we are of the view that in the present circumstances the measure of damages should be the value of the plaintiff's (appellant's) improvements, exclusive of the land, as at the time of their assessment by the valuers of both sides.

(7) In the result we award a round figure of £5,500 damages in favour of the plaintiff (appellant). There will be possession order of the land in dispute in favour of the defendant (respondent), together with all the structures. of dwelling-house and the trees standing thereon.

The defendant will pay to the plaintiff (appellant) the costs of this appeal and £100 towards his costs in the Court below.

Appeal allowed: order for costs as aforesaid.

Cases referred to:

Hughes v. *Metropolitan Railway Co.* [1877] 2 App. Cas. 439 H.L.;

Birmingham and District Land Co. v. *L. and N. W. Ry.* [1888] 40 Ch. D. 268;

Central London Property Trust Ltd. v. *High Trees House Ltd.* [1947] K.B. 130;

Combe v. *Combe* [1951] 2 K.B. 215;

Foot Clinics (1943), Ltd. v. *Cooper's Gowns, Ltd.* [1947] K.B. 506;

Charles Rickards Ltd. v. *Oppenhaim* [1950] 1 K.B. 616;

Braithwaite v. *Winwood* [1960] 1 W.L.R. 1257;

Ajayi v. *R. T. Briscoe (Nigeria) Ltd.* [1964] 1 W.L.R. 1326 at p. 1330;

Tool Metal Manufacturing Co. Ltd. v. *Tungsten Electric Co. Ltd.* [1955] 1 W.L.R. 761 at p. 764 per Lord Simonds (also at pp. 781, 799);

Evangelou v. *Crompton* (1954) 20 C.L.R. Part I, 122;

Plasticmoda Societa per Azioni v. *Davidsons (Manchester) Ltd.* [1952] 1 Lloyd's Rep. 527, C.A. at pages 538-9, per Denning L.J. (as he then was);

Panoutsos v. *Raymond Hadley Corporation of New York* [1917] 2 K.B. 473 at p. 479;

Tankexpress A/S v. *Compagnie Financière Belge Des Petroles S.A.* [1949] A.C. 76 at p. 98;

Ramsden v. *Dyson* [1866] L.R. 1 H.L. 129 at p. 170;

Dillwyn v. *Llewelyn* [1862] De G. F. and J. 517;

Plimmer v. *Mayor, & C., of Wellington* [1884] 9 App. Cas. 699;

Raffaele v. *Raffaele and Raffaele* (1962) *Western Australian Report* 29; Cf. Law *Quarterly Review* (1963) Volume 79, page 238.

The facts sufficiently appear in the judgment of the Court.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (Stavrinides, P.D.C. and Izzet, D.J.) given on the 17th March, 1966 (Action No. 923/62) dismissing

his claim for specific performance of a written agreement between the parties, concerning the leasing of certain plots of land and giving judgment in favour of the defendant on his counterclaim for a declaration that he was entitled to vacant possession of the property in dispute and for a possession order.

L. Clerides, for the appellant.

A. Frangos, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

VASSILIADES, P.: The judgment of the Court will be delivered by Josephides, J.

JOSEPHIDES, J.: This is an appeal by the plaintiff against the judgment of the District Court of Nicosia dismissing his claim and giving judgment in favour of the defendant (respondent) on the counterclaim.

The plaintiff's claim was for specific performance of a written agreement between the parties, an order of the Court directing registration and/or transfer of two plots of land, including all structures standing thereon, a declaration that he is entitled to be registered as the owner of such property, or, in the alternative, £15,000 (fifteen thousand pounds) damages.

The defendant's counterclaim was for a declaration that he was entitled to vacant possession of the property in dispute, for a possession order and damages.

We shall first state the undisputed facts in this case, as they appear from the documentary evidence. On the 13th October, 1956, the plaintiff entered into an agreement with the Government of the Colony of Cyprus (through the then District Commissioner), whereby the latter leased to him plots 102 and 111, under sheet/plan XXIX.6, consisting of 21 donums and 3 evleks, situate at Akaki village, in the District of Nicosia, for a period of five years from the 8th September, 1956, until the 7th September, 1961, at the annual rent of £5.500 mils payable in advance on the 8th day of September each year.

Under this agreement the plaintiff had, *inter alia*, to observe the following stipulations :—

" *Clause* 4 (*b*) to use the plots of land hereby demised solely for the purpose of establishing and maintaining a farm unit for livestock and livestock products ;

(*c*) : not without the permission in writing of the landlord previously obtained to use or permit the use of the plots of land hereby demised for any other purpose except that specified in Clause 4 (*b*) of this Agreement ;

(*d*) : not to erect or cause or permit to be erected on the plots of land hereby demised any building or structure other than those required for use in connection with the establishment of the farm unit, without the permission in writing of the landlord previously obtained ;

. . . . . .

(*h*) : during the continuance of this Agreement to maintain the farm unit to the satisfaction and in accordance with the directions of the Director of Agriculture."

It was further provided in clause 6 (*a*) that, if any condition or stipulation on the tenant's part contained in the Agreement were not performed or observed, then the landlord would be entitled to re-enter upon the said plots of land and thereupon the demise would absolutely determine. Clause 6 (*b*) provided that—

" If the tenant shall have performed and observed the stipulations and conditions in this Agreement contained the landlord shall at the expiration of the period of tenancy hereby created, sell to the Tenant the plots of land hereby demised together with everything standing thereon and in such case the following provisions shall have effect, that is to say :—

(i) the sale price of the plots of land hereby demised is hereby fixed at £49.000 mils ;

(ii) the sale price shall be paid by the Tenant to the Landlord not later than one month from the date of the expiration of the period of tenancy hereby created ;

(iii) upon the payment of the sale price the Landlord shall register the plots of land together with everything standing thereon in the name of the Tenant . . ".

Finally, clause 6 (*c*) provided as follows:

" (*c*) if on the determination of this Agreement by efflux of time the Tenant shall not have performed and observed the stipulations and conditions in this Agreement contained or if he the Tenant shall not have

paid to the Landlord the sale price aforesaid within the period of time in sub-clause (*b*) (ii) of this clause specified, then and in any of the said cases the Tenant shall vacate the plots of land hereby demised without payment by the Landlord to the Tenant of any compensation whatsoever."

On the 2nd March, 1960, the plaintiff submitted an application to the District Officer of Nicosia for permission to erect a house in plot 111, which application was refused by the District Officer by a letter dated the 28th September, 1960. The reasons given for such refusal were that the proposed structures did not comply with or fulfil the terms of the aforesaid Agreement dated the 13th October, 1956.

In spite of this refusal the plaintiff proceeded with the erection of a house, and on the 27th April, 1961, the District Officer addressed another letter to the plaintiff's advocate (in reply to the latter's letter of 30.3.1961), informing him that, on reconsideration of his client's case, he had reached the conclusion that the building permit applied for could be granted to him on the usual sanitary and other conditions.

After the expiration of the period of tenancy the plaintiff's advocate addressed a letter to the District Officer on the 7th October, 1961, enclosing a money order for £49.– " being the amount stipulated in the contract of lease between the Government of Cyprus and my client payable to you one month after its expiration " ; and asking the said Officer to fix a date for the transfer of the property in dispute in the plaintiff's name pursuant to the provisions of clause 6 (*b*) (iii) of the Agreement. On the 16th October, 1961, the District Officer returned the money order for £49.– to the plaintiff's advocate, informing him that he was unable to accept such sum. He added that he understood that the plaintiff had failed to perform or observe fully the conditions stipulated in the Agreement and that the whole matter was being investigated ; and that for the time being he was unable to give any definite reply in the matter.

On the 30th January, 1962, the District Officer addressed another letter to the plaintiff whereby he informed him that, as he had failed to perform or observe the conditions or stipulations of the Agreement, the Government of the Republic was not going to transfer in his name the property in dispute ; and he called upon the plaintiff to vacate and deliver up possession of the property within three days thereof, under the provisions of clause 6 (*c*) of the Agreement.

On the same day (30.1.62) the plaintiff's advocate replied to the District Officer's letter and called upon him to inform him what stipulations or conditions of the Agreement the plaintiff had failed to perfom or observe. The District Officer by his letter dated the 19th February, 1962, informed the plaintiff's advocate that his client was, *inter alia*, in breach of the stipulations contained in clauses 4 (*b*) and 4 (*h*) of the Agreement.

Nine days later, on the 28th February, 1962, the plaintiff took out the writ of summons in the present case claiming what has been stated earlier in this judgment. The statement of claim was filed on the 16th June, 1962 and the amended defence and counterclaim were filed on the 16th May, 1964.

The case was heard by the Full District Court and judgment delivered on the 17th March, 1966, whereby the plaintiff's claim was dismissed and a declaration and possession order made in favour of the defendant on the counterclaim.

It should, perhaps, be stated in passing that after the conclusion of the hearing of this appeal in April, 1967, the parties requested this Court not to proceed to consider its judgment in the hope that they would be able to settle their differences ; but although a considerable time was allowed to them to do so, eventually, more than two years later, the parties informed the Court that they had not been able to reach a settlement.

Reverting now to the pleadings, the plaintiff in his statement of claim alleged that in pursuance of the said contract he entered upon the demised lands, which were originally non-arable and abandoned lands, and that he improved them by spending £15,000 (fifteen thousand pounds) and establishing a modern poultry farm thereon. He further alleged that at no time during the subsistence of the said contract of lease did the Government complain to the plaintiff of any breach of any term or condition of the said contract, and at no time did the Government exercise its right of re-entry. The plaintiff also contended that clauses 4 (*b*) and 4 (*h*) of the contract were not clauses going to the root of the contract and that, therefore, any breach thereof did not entitle the defendant to refuse registration in the plaintiff's name. Finally, the plaintiff contended that, as the defendant or his predecessor never complained of any breach of contract on the plaintiff's

part, he (the defendant) was estopped by conduct from complaining of any breaches after the expiration of the lease ; and the plaintiff put forward the claim described earlier in this judgment.

The defendant by his defence denied plaintiff's allegations and alleged that the plaintiff had failed to perform and observe the stipulations and conditions contained in the Agreement. It was contended on behalf of the defendant that the plaintiff failed to establish and maintain a farm for livestock and livestock products ; that the plaintiff, in contravention of the terms of the Agreement, used a great part of the land for tree planting ; that he built a dwelling-house on the land without the permission in writing of the landlord previously obtained ; and that he did not maintain the farm unit to the satisfaction of, and in accordance with, the directions of the Director of Agriculture. It was finally alleged that non-performance and non-observance by the plaintiff of the aforesaid stipulations and conditions entitled the defendant to demand vacant possession of the property ; and the defendant counterclaimed as stated earlier in this judgment.

The first question which the trial Court had to decide was whether the plaintiff had performed the terms and conditions of the Agreement. It should, we think, be stated at the outset that we are in agreement with the trial Court that from a perusal of the Agreement it appears that the establishment and maintenance of a farm unit for livestock and livestock products was the cardinal term and the sole object of the Agreement ; and that the establishment of such farm was a condition precedent to the plaintiff's right under clause 6 (*b*) of the Agreement to have the property transfered in his name on payment of the sum of £49.–.

The trial Court, after analysing the evidence adduced in the case, stated in their judgment that it was clear that the plaintiff did not start to do anything on the land until after four years from the beginning of the tenancy ; and that it was in the fifth and last year of the tenancy, and only six months before the date of the expiry of the Agreement, that he completed his buildings, and had a stock of 2100 chicks. In the result the trial Court found that " the plaintiff committed breaches of contract and that he was not entitled to demand registration of the properties in his name as per clause 6 (*b*) of the Agreement."

This finding is supported by the evidence adduced and, in fact, although it was contested in the plaintiff's grounds

of appeal in the course of the hearing, plaintiff's-appellant's counsel abandoned this ground and conceded that the plaintiff had failed to perform his obligations under the Agreement but he argued that there was waiver, by the defendant's conduct, of his contractual rights and that he was, therefore, estopped from relying on the plaintiff's breach of covenant. We shall revert to this point later in this judgment.

For the purpose of deciding the question whether any of the stipulations in the Agreement between the parties was waived by the defendant's conduct and, if yes, whether this is a proper case in which to decree specific performance, it is, we think, necessary to state the particular findings, of fact of the trial Court with regard to what was done by the plaintiff as from the commencement of the tenancy for the purpose of establishing and maintaining a farm unit for the purposes aforesaid.

The following facts were found by the trial Court or they appear in the uncontested evidence. The period of tenancy was for five years and commenced on the 8th September, 1956. He took possession of the property immediately but he did nothing in the first eight months. Then, in May, 1957, he went to England where he stayed for a period of two years and 3 months returning to Cyprus in August, 1959. He conceded that he did nothing on the properties until his return from England, that is, for the first three years.

During the currency of his tenancy the plaintiff *erected* the following structures :—

(*a*) a dwelling-house in 1960 : On 2.3.1960 he applied for permission to build and he received a negative reply on 28.9.1960 ; but eventually a covering permission was granted to him by the District Officer on 27.4.1961 (further particulars are given later in this judgment) ;

(*b*) a building for poultry-reproduction after May 1960 and before March 1961 ; the building permit was granted to him on 19.5.1960 ;

(*c*) a building for poultry-fattening after March but before November 1961 ; the building permit was granted to him on 19.5.1960 ;

(*d*) a building for egg-production after 1.6.1961 but before November 1961 ; the building permit was granted to him on 1.6.1961. (On the same date he was also granted a building permit for a " piggery " but this was not eventually built by plaintiff).

It was the plaintiff's case on oath that in respect of the three structures under paragraphs (*b*), (*c*) and (*d*) above he was advised throughout by two Senior Officers of the Government Agricultural Department (Agrotis and Papadopoulos) and that he erected such structures in accordance with the plans provided to him by Agrotis ; that both Agrotis (in charge of poultry section) and Papadopoulos (in charge of livestock section) visited his farm once or twice a month ; and that he was further advised by another two officers of the Agricultural Department (Constantinides and Stokkos). He was not cross-examined on any of these points nor was any of the above-mentioned officers of the Agricultural Department called by the defence to contradict him at the hearing before the trial Court (16.1.1965–3.7.1965).

In November, 1960 the plaintiff brought to the farm the first 500 chicks and by the expiry of the tenancy (Sept. 1961) he had some 2100 chicken on the farm. He also planted almond-trees, fig-trees and vines after consulting the Agricultural Department (we shall revert to this later).

In March 1961 when Mr. Phylactou, a District Inspector in the District Officer's Office, Nicosia, visited the farm he saw that the dwelling-house and the building for reproduction had been erected. The plaintiff must have erected the other two buildings between March and November 1961, the date of the second visit of Mr. Phylactou. The building for reproduction, seen in March 1961 by Phylactou, was later converted into a cowshed. The dwelling-house was built by plaintiff without the District Officer's permission which was eventually granted to him after the erection of the house. This is the permission referred to in the District Officer's letter, dated the 27th April, 1961, which was sent to the plaintiff's advocate after the first visit of Phylactou in March 1961.

Pausing there, it is significant to observe that although in March 1961, as a result of Phylactou's visit, the defendant was aware that the plaintiff was in breach of clause 4 (*d*) of the Agreement—in erecting a building on the land in dispute without the prior permission of the defendant in writing—nevertheless, the defendant did not draw the plaintiff's attention to such breach, nor did he exercise his right of re-entry under clause 6 (*a*). On the contrary, a covering approval was given by the defendant for such a building in April 1961.

Reverting to the sequence of events, on the 1st June, 1961, the plaintiff was granted a permit to erect a building for

egg-production and a "piggery". As stated earlier he built the former structure but not the "piggery". The plaintiff brought three cows on the farm in December 1962, after the expiry of the Agreement and after the institution of the present action; and he acquired a bull still later in January 1963. This bull was provided to him by the Government to serve cows.

It should here be observed that the plaintiff cannot have any complaint for anything done by him or any expense incurred by him after the District Officer's letter of the 30th January, 1962, and that of the 19th February, 1962, whereby he was given clear notice that he was in breach of the Agreement and he was required to deliver up possession of the property. In any event, the rights of the parties crystallised on the 28th February, 1962, when the plaintiff instituted the present action.

It should also be stated that the trial Court found that the planting of trees by the plaintiff on the property was not allowed under the terms of the Agreement but it did not make a specific finding as to the exact number of trees planted. In the judgment it is stated that the plaintiff said that he planted 204 fruit-trees and vines, while Mr. Phylactou found 166 on the land, Mr. Patrikiou (a valuer called on behalf of the defendant) 280, and Mr. Mavroudis (a valuer called on behalf of the plaintiff) counted 305 trees. The fact remains that at no time during the subsistence of the tenancy, or indeed until the institution of the action, was the plaintiff given any notice that in planting trees he was in breach of any of the conditions of the Agreement between the parties, and there is no express prohibition in the Agreement.

The trial Court, after finding that the plaintiff had committed breaches of contract and that he was not entitled to demand registration of the property in his name (in accordance with clause 6 (*b*) of the Agreement), went on to consider the contention of plaintiff's counsel that since the defendant had never directed the plaintiff's attention to any breach by him of the terms of the lease during its subsistence, he was now estopped by conduct from raising such a question at this stage, and/or that he acquiesced by conduct to such breaches.

The trial Court state in their judgment that, if this related to the period covered by the Agreement, then it was quite clear that the fact that the other party did not complain does not prevent him from alleging breaches of contract, unless

it was proved that with full knowledge of the breach that party encouraged the plaintiff to continue. And they went on to state that, although the plaintiff said that the plans of the four buildings were prepared for him by two officials of the Agricultural Department, the Court was not told when this was done and whether the plans for the buildings were prepared all at once or at different times ; but that in any case, preparation of the plans and giving of advice as to housing of chicks did not, in the trial Court's opinion, in any way prevent the defendant from setting up breaches by the plaintiff. And the trial Court added that " it is common knowledge that such advice was, at all material times, as it still is, freely available to all interested persons. Therefore, the giving of such advice is not referable to the existence of any agreement. The same applies to the plans for the piggery which were in fact never put into execution ".

At a later stage in this judgment we shall have occasion to refer to the law on the point, but we think that it should here be observed that even if such " advice " was, at all material times, freely available to all interested persons, meaning advice by officials of the Agricultural Department, with great respect to the trial Court, the position with regard to the parties in the present case is entirely different, considering the express provision in clause 4 (*h*) of the Agreement which provided that " during the continuance of this Agreement (the Tenant) to maintain the farm unit to the satisfaction and in accordance with the directions of the Director of Agriculture ". This makes it abundantly clear that the two officials of the Agricultural Department were acting under the express provision of the Agreement and that the plaintiff was observing the stipulations contained in clause 4 (*h*) to the satisfaction and in accordance with the directions of the Director of Agriculture on whose behalf the officials of that Department must be presumed to have been acting.

The trial Court further stated in their judgment that " clause 6 (*c*) of the agreement on its true construction made it unnecessary for Government to watch during the currency of the lease to see whether plaintiff was carrying out his obligations thereunder and accordingly no action or inaction on Government's part, short of express waiver, could have the effect of disentitling Government from relying on breaches by plaintiff. We find, accordingly that during the subsistence of the Agreement, Government's conduct was not such as to prevent defendant from relying on the breaches ".

After we state the law on the waiver of contractual rights and the equitable doctrine of promissory estoppel it will become apparent that waiver need not be "express", but that it may be in the form of a representation to another person in words, or by acts or conduct. We shall then consider whether the defendant's conduct in the present case amounts to waiver or estoppel, as there is no evidence of waiver by express agreement in this case.

Compliance with a particular stipulation in a contract may be waived by agreement or conduct (see Halsbury's Laws, 3rd edition, volume 8, page 175, paragraph 299). At page 198 of the same volume, paragraph 335, reads as follows :—

> "335. Failure to perform condition precedent. The failure of the one party to perform a condition precedent only operates as a discharge of the contract if the other party elects to treat the contract as at an end. He has the option of treating the contract as being still open for further performance, and if he elects to do this he will be taken to have waived the performance of the condition precedent, and can only rely on it as a breach of warranty which entitles him to damages. If, after leading the party in default reasonably to suppose that the contract was not to be treated as at an end notwithstanding the failure to perform the condition, the other party wishes to avoid the contract for breach of the condition he must, if he is not precluded by his conduct from avoiding the contract, give to the party in default a reasonable opportunity after notice to remedy the default."

The doctrine of promissory estoppel is to the following effect, that is to say, where by his *words or conduct* one party to a transaction makes to the other a promise or assurance which is intended to affect the legal relations between them, and the other party acts upon it, altering his position to his detriment, the party making the promise or assurance will not be permitted to act inconsistently with it : See *Hughes* v. *Metropolitan Railway Co.* [1877] 2 App. Cas. 439, H.L. ; *Birmingham & District Land Co.* v. *L. & N. W. Ry.* [1888] 40 *Ch. D.* 268 ; *Central London Property Trust Ltd.* v. *High Trees House Ltd.* [1947] K.B. 130 ; *Combe* v. *Combe* [1951] 2 K.B. 215 ; *Foot Clinics* (1943), *Ltd.* v. *Cooper's Gowns, Ltd.* [1947] K.B. 506 ; *Charles Rickards Ltd.* v. *Oppenhaim* [1950] 1 K.B. 616 ; *Braithwaite* v. *Winwood* [1960] 1 W.L.R. 1257 ; *Ajayi* v. *R.T. Briscoe* (*Nigeria*) *Ltd.* [1964] 1 W.L.R. 1326 at 1330. This is "the gist of the equity" : *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten*

Electric Co. Ltd. [1955] 1 W.L.R. 761 at 764, per Lord Simonds (also at pages 781, 799). See also *Evangelou* v. *Crompton* (1954) 20 C.L.R. Part I, page 122, a case which was decided by the District Court of Nicosia, in which these principles were applied.

In *Plasticmoda Societa per Azioni* v. *Davidsons (Manchester) Ltd.* [1952] 1 Lloyd's Rep. 527, C.A. at pages 538–9, Denning L.J. (as he then was) stated that the following general principle was laid down by the House of Lords in *Hughes* v. *Metropolitan Railway Co.* [1877] 2 App. Cas. 439 H.L. and by *Panoutsos* v. *Raymond Hadley Corporation of New York* [1917] 2 K.B. 473, at page 479, and *Tankexpress A/S* v. *Compagnie Financière Belge Des Petroles S.A.* [1949] A.C. 76, H.L. at page 89, namely, that if one party by his *conduct* led another to believe that the strict rights arising under the contract would not be insisted on, intending that the other should act in that belief, and he did act on it, then the first party would not afterwards be allowed to insist on the strict rights when it would be inequitable for him to do so ; and in *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.* [1955] 1 W.L.R. 761, H.L., it was held that where a party wishes to determine a variation and resume his legal rights equity requires reasonable notice to be given.

Reverting to the facts of the present case we have to consider what was the conduct of the defendant Government *vis-a-vis* the plaintiff during the currency of the five-year lease and whether that conduct amounts to a waiver or equitable estoppel. In considering this matter we have taken into consideration the following matters :—

(*a*) in March 1961 the Government District Inspector, Phylactou, inspected the property in dispute. He did not intimate to the plaintiff that he was guilty of any breaches of contract ;

(*b*) furthermore, although the plaintiff had built a house without a permission, and after such a permission had been refused to him, nevertheless, after Phylactou's visit in March 1961, a covering permission for this house was given to the plaintiff by the District Officer "on reconsideration" of the plaintiff's case (see the District Officer's letter dated the 27th April, 1961) ;

(*c*) three buildings were built on the advice and according to the plans prepared for the plaintiff by officials of the Agricultural Department. This is in accordance with the plaintiff's evidence who was

not cross-examined on this point ; nor were the individual officials, who were named, called by the defendant to contradict the plaintiff. On the 19th May, 1960, building permits for the erection of a poultry-reproduction house and a poultry-fattening house were granted to the plaintiff ; and on the 1st June, 1961 (after Phylactou's visit in March 1961), a permit for the erection of the egg-production building and piggery was granted to the plaintiff ; but it appears that the plans for the piggery were not put into execution by him. As already stated the other three buildings were erected by the plaintiff ;

(*d*) if a building permit was granted to the plaintiff on the 1st June, 1961, as in fact it was (as described in the preceding paragraph), it would be reasonable to assume that the defendant would not require the plaintiff to deliver up possession of the property three months later on expiry of the tenancy ;

(*e*) during the currency of the tenancy there were continuous visits by officers of the Agricultural Department who advised the plaintiff on his project of a farm unit for livestock. There is no evidence on record that any complaints were made to him during that period of five years either by the Director of Agriculture or any of his officers that the plaintiff was in breach of his contract with the Government ; nor is there any evidence that the plaintiff was at any time notified that he did not maintain the farm unit to the satisfaction and in accordance with the directions of the Director of Agriculture (see clause 4 (*b*) and (*h*) of the Agreement) ;

(*f*) finally, no notice of any breach by the plaintiff of any of the stipulations of the contract was given by the defendant to the plaintiff during the currency of the lease (as admitted by the Government District Inspector Phylactou), and the first intimation which the plaintiff had as to any breach of the contract was on the 16th October, 1961, that is, after the expiration of the tenancy and after the plaintiff had remitted the sum of £49.– through his advocate to the District Officer, and had asked for the transfer of the property into his name, under the provisions of the Agreement.

Considering all these matters we have no hesitation in holding that the breaches of the contract by the plaintiff have been waived by the conduct of the defendant Government who is precluded by its conduct from avoiding the contract.

The next question which falls for determination is as to what remedy is the plaintiff entitled in the circumstances : specific performance or damages ;

Section 76 of our Contract Law, Cap. 149, provides as follows :—

" 76.—(1) A contract shall be capable of being specifically enforced by the Court if—

(*a*) it is not a void contract under this or any other Law ; and

(*b*) it is expressed in writing ; and

(*c*) it is signed at the end thereof by the party to be charged therewith ; and

(*d*) the Court considers, having regard to all the circumstances, that the enforcement of specific performance of the contract would not be unreasonable or otherwise inequitable or impracticable.

(2) Nothing herein contained shall affect the specific performance of contracts for the sale of immovable property under the provisions of the Sale of Land (Specific Performance) Law, or any amendment thereof." Cap. 232.

Mr. Clerides for the plaintiff argued before us that the provisions of section 76, sub-section (2), do not apply to the Agreement between the parties as this is not a case of sale of land but a lease with an option to buy. We do not think that it is necessary for us to decide this point as, in the circumstances of this case, in the exercise of our discretion, we would refuse specific performance of the contract (for the reasons to be given later) even if section 76 (2) were held to be inapplicable in the present case.

Undoubtedly section 76 (1) of our Contract Law, reproduces the provisions of the equitable remedy of specific performance as enforced in England. The following extract from Halsboury's Laws, third edition, volume 36, page 263, paragraph 359, is helpful in construing and applying the provisions of our section 76 (1) :—

"The remedy is special and extraordinary in its character, and the court has a discretion to grant it, or to

leave the parties to their rights at law. The discretion is, however, not an arbitrary or capricious discretion ; it is a discretion to be exercised on fixed principles in accordance with the previous authorities. The judge must exercise his discretion in a judicial manner. If the contract is valid in form and has been made between competent parties and is unobjectionable in its nature and circumstances, specific performance is in effect granted as a matter of course, even though the judge may think it involves hardship. The mere existence, however, of a valid contract is not in itself enough to bring about the interference of the court ; the conduct of the plaintiff, such as delay, acquiescence, breach on his part, or some other circumstance outside the contract, may render it inequitable to enforce it, or the contract itself may, for example, on the ground of misdescription, be such that the Court will refuse to enforce it."

It will thus be seen that the conduct of the plaintiff, such as delay, breach on his part, or some other circumstance outside the contract, may render it inequitable to enforce it. Considering the conduct of the plaintiff in this case, the delay in beginning to set up the farm unit which he started seriously some four years after the commencement of the tenancy and that shortly before the expiry of the agreement he completed all the buildings and had a comparatively small stock of chicken, and considering also the other breaches on his part, we are of the view that it would be both unreasonable and inequitable to decree specific performance of the contract in the present case. Consequently, the next question which we have to determine is the amount of damages to which the plaintiff is entitled.

Now, what is the measure of damages in this kind of cases. On the authorities it appears that a Court of Equity would give relief " in the shape of compensation for the expenditure "; see Lord Kingsdown's opinion in *Ramsden* v. *Dyson* [1866] L.R. 1 H.L. 129, at page 170 ; *Dillwyn* v. *Llewelyn* [1862] 4 De G.F. & J. 517 ; and *Plimmer* v. *Mayor, & C., of Wellington* [1884] 9 App. Cas. 699.

In a recent Australian case the plaintiff was awarded damages assessed on " the market value of the house exclusive of the land " : *Raffaele* v. *Raffaele and Raffaele* (1962) Western Australian Reports 29 ; (as we do not have the original report in our library we have taken the facts of this case from an article in the Law Quarterly Review (1963), volume 79, page 238, in which this case is discussed by D. E. Allan).

The defendants were husband and wife and they were the registered proprietors of certain land in South Street, Freemantle. The defendant's son (hereinafter referred to as " the deceased ") married the plaintiff in 1947. In April, 1952, the deceased purchased certain land in Smith Street, Freemantle, and in 1955 began to erect a dwelling-house thereon. However, shortly thereafter he sold the Smith Street Land and erected a dwelling-house instead upon a portion of the South Street land and he lived there with the plaintiff until his death in 1959. After his death the defendants denied that the deceased had any interest in the South Street land. D'Arcy J. found as a fact that the deceased removed to South Street in pursuance of an agreement with the defendants that, if he would sell the Smith Street Land and build instead on a portion of the South Street land, the defendants would re-subdivide the South Street land into three lots and would transfer one lot to the deceased. This agreement was brought about through the wish of the defendants to have their son living near them.

On these facts the plaintiff (as administratrix of the deceased) claimed a declaration that the defendants held a portion of the South Street land in trust for the deceased's estate ; in the alternative, she claimed an order directing the defendants to execute a registrable transfer of a portion of the South Street land ; and, in the further alternative, she claimed repayment of the money spent by the deceased on the erection of the dwelling-house as money spent at the request of the defendants. D'Arcy J. held that there was a binding contract concluded between the deceased and the defendants for a transfer to the deceased of a portion of the South Street land, but he held however that, in the particular circumstance of that case, an order for specific performance would be " unsuitable " and he, therefore, awarded damages assessed on " the market value of the house exclusive of the land ".

In the present case the trial Court did not make an assessment of the damages. They had before them the following material :

(*a*) the plaintiff's evidence that he had spent £7,965 on the structures, tree planting, etc.;

(*b*) the evidence of his valuer, Mr. J. Mavroudis, who assessed the value of these structures and trees at £6,003 plus £1,500 for " loss of business, reinstatement, interest on capital and personal labour";

(*c*) the evidence of Phylactou, the District Inspector, who assessed the value of the above at £3,700 ; and

(*d*) the evidence of Patrikiou, a valuer in the Land Registration and Survey Department, and Zavros, Senior Technical Assistant in the Public Works Department, whose valuation was £5,178.305 mils.

We do not think that any weight can be attached to the figures given by the plaintiff as they are not even supported by his own valuer. We give below the comparative valuations made by Mavroudis, Phylactou, and Patrikiou and Zavros jointly:

	Mavroudis	*Phylactou*	*Patrikiou and Zavros*
	£	£	£
(1) Breaking up rocks and levelling	100	—	—
(2) Fencing of the pty. ..	250	150	260.000
(3) Water to premises ..	300	250	279.625
(*a*) Drinking water	110	—	—
(4) Shed for reproduction (later converted into cowshed)	900	500	725.000
(5) Large poultry house ..	1,200	850	1,412.000
(6) Small poultry house (7) Stable	800	400	582.200
(8) Conversion into cowshed..	—	—	—
(9) House	900	1,250	900.800
(10) Fruit trees and vines ..	1,333	300	1,008.000
(11) Planting of fruit trees ..	50	—	—
(12) Absorption pit	60	—	—
	6,003	3,700	5,178.305

Regarding the item of £1,500 assessed by Mavroudis (over and above the sum of £6,003), in respect of loss of business, re-instatement, etc., we are of opinion that such an item cannot be included in the compensation on the principles enunciated earlier in this case, because it does not come either within the compensation for the expenditure or the value of the improvements.

Mr. J. Mavroudis is a very experienced and reliable valuer and in preparing his evidence he was advised, with regard to the cost of construction, by an experienced architect, Mr. Aristides Michaelides. He made his valuation in May, 1965. With regard to the four structures, that is, the house, the larger poultry house, the smaller poultry house and the shed for reproduction (which was later converted into a cowshed), he conceded that although the total amount of his assessment was £3,800 (while that of Zavros for the defendant was £3,620), his advising architect, Aristides Michaelides, was of the view that the cost of those structures was by £250 less, that is, £3,550.

We do not think that we can accept the assessment of Phylactou, the District Inspector, as he admitted that he is not a valuer at all and that he was assisted by a building superintendent of the Public Works Department who died before the hearing of the action.

Zavros and Patrikiou were called on behalf of the defendant. Zavros is a Senior Technical Assistant in the Public Works Department and he assessed the structures on the basis of labour and materials as in October, 1964. We have already referred to his figure of £3,620 for the four structures. In fact, it is somewhat lower than that of Mavroudis but somewhat higher than that of Aristides Michaelides, the architect.

Patrikiou, a valuer in the Land Registration and Survey Department, was called by the defendant. He was assisted by Zavros and an Agricultural Superintendent, Mr. Lambrou. The joint assessment of Patrikiou and Zavros is given above, and with regard to the trees and vines their assessment is £1,008 as in December,1964 (made by Lambrou), while that of Mavroudis is £1,333. But they do not include in their assessment any amount for breaking up rocks and levelling (Mavroudis £100), for drinking water (Mavroudis £110) and the absorption pit. (Mavroudis £60).

As already stated, the trial Court did not assess the damages in the present case but they stated that if a question arose as to such an assessment the figures of Phylactou " would probably be more representative ". The reason given for that view by the trial Court was that he inspected the property in March and November, 1961. With great respect, we do not accept that view for the very reason that Phylactou is neither a qualified valuer nor has he got any experience in valuation.

With regard to Patrikiou and Zavros the trial Court simply stated that they visited the properties in 1964, and the Court expressed no other view. With regard to Mavroudis, their main criticism of his valuation was that the cost of construction was assessed on the basis of early 1965. In any event, the defendant's valuers (Patrikiou and Zavros) made their assessment on more or less the same basis (late 1964).

Having given the matter our best consideration we are of the view that in the present circumstances the measure of damages should be the value of the plaintiff's improvements, exclusive of the land, as at the time of their assessment by the valuers of both sides, that is, by Zavros and Patrikiou in October/December, 1964, and by Mavroudis for plaintiff in May, 1965. In any case, there is no evidence on record that there was any difference in the building cost between those dates. The compensation should include the value of the structures and the trees and vines.

Having considered, on the one hand, the valuation of Mavroudis and, on the other, that of Patrikiou and Zavros, we are of the view that it would be fair if the valuation of Mavroudis (£6,003) were adopted, subject to the following qualifications :

(*a*) the sum of £250 should be deducted from the value of the structures, according to the view of architect Aristides Michaelides, which Mavroudis was honest enough to disclose in the course of his evidence ; and

(*b*) we think that the valuation of Lambrou, an Agricultural Superintendent, as regards the trees and vines (£1,008) should be preferred to that of Mavroudis (£1,333). This means that another £325 should be deducted from the figure of Mavroudis. This gives a net figure of £5,428.

In fact, there is practically no difference between this figure (£5,428) and that of defendant's valuers, provided the three items left out by them (items 1, 3 (*a*) and 12) are added up, as they ought to be.

In the result—(1) We award a round figure of £5,500 (five thousand and five hundred pounds) damages in favour of the plaintiff ;

(2) there will be possession order of the land in dispute in favour of the defendant, together with all the structures

(including the dwelling-house) and trees standing thereon. In the circumstances of this case, having heard the parties, we consider it fair to grant a stay of execution until the 15th September, 1970.

(3) the defendant shall pay to the plaintiff the costs of this appeal and £100 towards his costs in the Court below.

The appeal is, therefore, allowed and the judgment of the District Court set aside ; and judgment is hereby entered on the claim and counterclaim as above.

Appeal allowed ; order for costs as aforesaid.