IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Wambuzi & Law JJ A)

CIVIL APPEAL NO 8 OF 1978

Between

CHASE INTERNATIONAL INVESTMENT

CORPORATION ("CHASE") .....APPELLANT

GEORGE EDWIN OLIVER.....APPELLANT

AND

TO LAXMAN KESHRA.....RESPONDENT

PREMJI KESHRA.....RESPONDENT

KANJI BHIMJI .....RESPONDENT

MANJI KANJI .....RESPONDENT

JUDGMENT

Law JA The appellants are, respectively, a corporation incorporated in the United States of America, to which I shall refer as "Chase", and one of its senior officers, to whom I shall refer as "Oliver". The respondents are a firm of contractors who carry on business in Kenya. I shall refer to them as "Laxmanbhai".

Laxmanbhai sued the appellants in the High Court of Kenya for Shs 1,843,007 being the balance certified as due and payable to them under a building contract whereby Laxmanbhai built two lodges for a company known as African Ponderosa Ltd ("the company") on land belonging to the company. The company was incorporated in Kenya in 1969 with a capital of Shs 700,000. It was formed for the purpose of building and operating the two lodges. Chase and the Standard Bank Finance and Development Corporation ("Devco") agreed to lend money to the company to finance this project. They entered into an investment loan agreement with the company in December 1970, under which Chase lent the company US$1,425,000 and Devco lent £100,000. As security, the company allotted to Chase debenture stock to the face value of US$1,425,000 and executed a legal charge and debenture trust deed on the property and assets of the company in favour of Chase and Devco. Of the Shs 700,000 share capital of the company, Chase and Devco acquired 45 per cent, the remaining 55 per cent being acquired by twenty-five or so American and Kenyan shareholders, and four out of the seven directors of the company were appointed by Chase and Devco. The shareholders, or most of them, also entered into what is described as an overrun agreement with the company and Chase, whereby the shareholders jointly and severally agreed as

follows:

> ... that if, in the opinion of [Chase], at any time or from time to time during the period ending on the date two calendar months following the completion date, the company requires any funds (in addition to the proceeds of the loans) to fully complete the project and to provide all furnishings and equipment, operating equipment and operating supplies for the lodges and adequate initial working capital for the lodges and otherwise to fulfil its obligations to Hilton under the Management agreements then, and in any such event, the shareholders shall, forthwith upon notice thereof from [Chase] to the shareholders which shall specify the amount of funds then believed by [Chase] to be required for such purpose or purposes lend to the company in US dollars or in such other currency or currencies, as may be specified in such notice ...

Completion date was 31st December 1972, and by this remarkable document the shareholders engaged themselves to pay "forthwith", upon notice from Chase within that date and 28th February 1973, such sums (apparently without any limitation) as Chase might consider to be required for the full implementation of the project.

On April 19th 1971, the company and Laxmanbhai entered into a contract whereby Laxmanbhai was to build the two lodges for Shs 7,140,000. Laxmanbhai entered on the site, employed sub-contractors, and duly completed the building of the lodges by the end of 1972. It soon became apparent that the company was in financial difficulties, largely through mismanagement. At the end of 1971 it defaulted in making repayments due under the loan agreements. Under the building contract, Laxmanbhai was to be paid within fourteen days of each monthly certificate being issued. There were no funds available to meet the certificate issued on 13th October 1972. According to an accountant who gave evidence at the trial (Mr Trivedi), any reasonable businessman would have realised that the company was insolvent as early as September 1972. This evidence was not challenged. Laxmanbhai threatened to suspend work. Hilton was threatening to withdraw from its management agreement. The company's auditors warned Chase as early as 29th August 1972 that it was a matter of some doubt whether the company could pay its debts and they referred to section 220 of the Companies Act, which deals with the winding-up of companies which cannot pay their debts. Chase sent Oliver to Nairobi on 20th October 1972, to try to sort matters out. Oliver was in a difficult position, being both a director of the company and a vice-president of Chase. As a director, it was his duty to see that the company did not trade or incur credit when insolvent; as a Chase man, it was in his interests to try to secure the company's survival so that Chase did not risk losing its investments. Oliver attended a board meeting of the company on 26th October 1972, at which the secretaries reported a considerable "overrun" or deficit, and that the company had no funds to meet current expenditure.

It was resolved to seek an injection of funds by implementing the overrun agreement. On the afternoon of the same day, Oliver had an interview with Laxman of Laxmanbhai. Although Oliver had just learned of the company's desperate financial condition, with only the hope of successfully enforcing the overrun agreement as a means of salvation, Oliver was able to persuade Laxman not only to carry on with the building contract to completion, but to expedite the work so that the lodges would be ready for occupation by the end of the year. A Mr Kimberland, also of Chase, was also present at this interview. What exactly was said on this occasion is a question of vital importance. Laxman deposed that he was assured by Oliver that if he completed and expedited the work "Chase would pay". Oliver and Kimberland denied that any such assurance was given. Kneller J preferred the evidence of Oliver and Kimberland. His impression was that Oliver used words to this effect:

> Are you going to finish these lodges by the end of this year? You must do so. You will be paid for all your work on them if you do so.

Laxmanbhai in its re-re-amended plaint had pleaded that the words used by Oliver amounted to a representation that Chase would pay all moneys due on completion, that Laxmanbhai relying on those representations and in consideration of them continued and expedited the construction work, completed and handed over the two lodges by the end of December 1972 and 7th January 1973, respectively; that they did further work in 1973; that the balance finally due and payable to them was certified by the

quantity surveyors at Shs 1,843,007; and that receivers and managers were appointed under the debenture trust deed on 23rd October 1973, after which the company's land and the lodges were sold to Hilton for Shs 6,000,000 which was paid to Chase and Devco. The company having no funds available for unsecured creditors, Laxmanbhai accordingly claimed that sum from the appellants: (a) on an alleged express contact arising out of what transpired at the meeting of 26th October 1972, between Laxman and Oliver; (b) on the basis that the representations were false, and that Laxmanbhai in reliance upon them acted to their detriment and suffered loss; and (c) on the footing of fraud and restitution, alleging that the appellants, with knowledge of the company's inability to pay its debts caused and permitted the company to carry on business, when insolvent, thereby obtaining credit from Laxmnabhai, and that by enforcing Chase's security under the debenture trust deed the appellants took the benefit of Laxmanbhai's labour and services, and that Laxmanbhai were unable to enforce the overrun agreement against the shareholders. By their defence, the appellants denied all these allegations. By their reply, Laxmanbhai pleaded that the appellants were estopped in equity and by their conduct from denying their liability to pay to Laxmanbhai the sum of Shs 1,843,007, on the grounds that the appellants, with knowledge that the company had no funds, represented that all moneys due to Laxmanbhai would be paid by Chase, in consideration of Laxmanbhai completing the work, and with the intention that Laxmanbhai would act on those representations, which Laxmanbhai did believing the same to be true.

At the trial a long list of issues was suggested by Mr Muir Hunter QC, who appeared for Laxmanbhai, and was adopted by Kneller J. Issue 12 dealt with estoppel, and that is the issue which found favour with the judge and upon which the judgment in favour of Laxmanbhai was based.

The judge held that Laxmanbhai had -

> failed to prove the oral or implied contract, the fraudulent misrepresentation of fraud and restitution but he did establish that Chase by setting up its legal rights and taking advantage of them was being unconscionable, inequitable and unjust.

The appellants had submitted that estoppel was a shield and not a sword, and could not found a cause of action (*Low v Bouverie* [1891] 3 Ch 82). The judge considered a long line of authority on the subject, all of which were cited on this appeal, starting with *Ramsden v Dyson* (1866) LR 1 HL 129, going on through *Willmott v Barber* (1880) 15 Ch D 96, *Birmingham & District Land Co v London & North Western Railway Co* (1888) 40 Ch D 268, *Lyle Meller v A Lewis & Co (Westminster) Ltd* [1956] 1 All ER 248, *Inwards & Baker* [1965] 2 QB 29 and, finally, *Crabb v Arun District Council* [1975] 3 WLR 847. The judge concluded from these cases that nowadays -

> it [that is to say, a proprietary or promissory estoppel] can be a weapon of defence to counter a contention put forward by the defence, embrace written or verbal representations or a course of conduct even as to the future which led the plaintiff to believe something even though the defendants never intended it and this would affect legal relations between the parties and a cause of action could be founded on it.

The judge also had in mind the three questions posed by Scarman LJ in *Crabb's* case [1975] 3 WLR at page 859:

1. Were the circumstances here such as to raise an equity in favour of the plaintiff?
2. If so, what is the extent of the equity? And
3. In what way should it be satisfied?

And also the tests laid down by Fray J in *Willmott's* case, as to the establishment of a proprietary estoppel, which are:

1. Has the plaintiff made a mistake as to his legal rights?
2. Did he expend some money or do some act on the faith of his mistaken belief?
3. Did the defendant who possessed the legal right know of its existence which is inconsistent with the right claimed by the plaintiff?

4. Did the defendant know of the plaintiff's mistaken belief?
5. Did the defendant encourage the plaintiff in his expenditure of money or in the other acts which he has done either directly or by abstaining from asserting his legal right?

The judge answered all these questions in the affirmative, and concluded

as follows -

> Laxmanbhai made a mistake as to his legal rights. He thought Chase would pay him. He expended a great deal of his own money, provided his services and materials for the building of the lodges on the strength of this mistaken belief. Oliver and Chase knew they did not have to pay him for all these and that they had the right to take the benefit of all his money, work and services under their debenture if the lodges were sold by the receiver which was inconsistent with Laxmanbhai's belief in his claim against Chase. They knew he was wrong in his belief. They encouraged him to spend his money and to perform these other acts (... you must finish these lodges in time, hurry up their completion) and they never warned him that [the company] might have difficulty in paying him or [that] they had their rights under the debenture. So [Laxmanbhai] proved the circumstances here were such as to raise an equity in his favour. Its extent is clear: he is Shs 1,843,007 short now and no-one will pay him without litigation. The way in which it should be satisfied is that Chase should pay him this sum together with interest, costs and interest on the costs.

The judge proceeded to give judgment for Laxmanbhai accordingly.

The appellants have appealed, the principal grounds being that Kneller J erred in law in entering judgment on grounds which had not been pleaded no raised in agreed issues, and in holding that an estoppel other than a proprietary estoppel can give rise to a cause of action. The respondents have filed a notice of grounds for affirming the decision, contending in the main that the judge should have held that the words spoken by Oliver to Laxman on 26th October 1972 were of contractual import, and amounted to a contract of indemnity; and that the judge erred in holding that Oliver reasonably believed that the overrun agreement could be relied on to justify the company in continuing to trade and incur credit, and in holding that the appellants did not know of the company's insolvency. The judge had held that Chase and Oliver had reasonable grounds for believing that the company would be able to pay all its debts and liabilities in the ordinary course of business, and were entitled to believe that the obligor who signed the overrun agreement would pay up when called upon to do so. These findings were based on the judge's view of Oliver's honesty and truthfulness. To my mind, it was highly optimistic on the part of Oliver to think that a number of shareholders, separated in some cases by thousands of miles and living in a number of different jurisdictions, would forthwith pay large sums of money to keep alive an ailing company. That Oliver was unlikely, as a reasonable businessman, to have had much faith in the efficacy of the overrun agreement, seems to me to be a proper inference from the fact that Chase did not seek to make serious use of it, although it was the only apparent source of funds to enable the company to pay its debts at the end of 1972. The company could not have traded itself out of insolvency in the ordinary course of business by that date as the first guests were not booked into the lodges until the beginning of 1973. For some reason only three shareholders seem to have been asked for money under the agreement. Mr Hassan, a Kenyan shareholder, was written to on 30th October 1972. He answered by return denying all liability to contribute towards the overrun. Mr Baker, another Kenyan shareholder, was written to on the same day and was asked for Shs 350,000 payable immediately. He is not on record as having replied, and we were told that he has disappeared. A Mr Roethe, of Wisconsin, USA, was written to and actually sent $200,000 which, however, he was astute enough to borrow from Chase itself. Incidentally, the letters written to these people on behalf of Chase all make it clear that the company needed money at once, and that its overrun or debt by the end of the year would be in the order of $800,000. The conclusion I draw from all this is that Chase and Oliver must have known, well before the end of 1972, that the company was insolvent and would not be able to pay its debts in the ordinary course of business, unless of course reliance on the overrun agreement could be considered as part of the ordinary course of business, which I doubt. The agreement could only be activated at the instance of Chase, and it can hardly be described as an asset of the company. If it was an asset, then it was of the most speculative and contingent character. In my view, Oliver's conduct in encouraging Laxmanbhai to incur expense and provide services and

materials, for the benefit of the company without any warning that the company was unlikely to be able to pay anything at the end of the year, amounted to a representation which was reckless, and upon which Laxmanbhai acted to its detriment. As regards the conversation of 26th October 1972, the words spoken by Oliver to Laxman were, as found by the judge:

> Are you going to finish these lodges by the end of this year? You must do so. You will be paid for all your work on them if you do so.

I am inclined to agree with Mr Hunter's submission that these words were of contractual import. They were certainly acted upon by Laxmanbhai as if that were so. If Oliver was speaking in his capacity as a director of the company, he was representing to Laxman that if he carried on to completion his firm would be paid its full dues, which would be a rash statement indeed coming from a director who had learnt earlier that day that the company was without funds. If Oliver spoke the words in his capacity as a vice-president of Chase, then he was promising payment by Chase in any event, which would create a contract of indemnity, or in the event of the company not paying, would create a contract of guarantee.

Laxman was unable to satisfy Kneller J that a new contract was concluded with Chase, but he clearly established in my view that a representation was made that Laxmanbhai would be paid in full, and that is why the contract work was at once resumed with redoubled energy and at considerable cost to Laxmanbhai.

My own view is that Oliver, on behalf of Chase, either guaranteed payment, in default of the company paying or undertook to pay in any event. If the contract was one of guarantee it was unenforceable for want of writing under section 3 of the Law of Contract Act. It was for Laxmanbhai as plaintiff to establish the nature of the contract on a balance of probabilities, and this he failed to do. However, it seems to me to be an irresistible inference from all the circumstances of this case that Laxman left the meeting of 26th October 1972, firmly and honestly believing as a result of what was said to him by Oliver that Chase would pay whatever Laxmanbhai was owed on completion. This is what Laxman told his subcontractors on the following day, and this is why Laxmanbhai and the sub-contractors set to work and expedited completion in the way they did. Laxman believed that his firm had acquired a legal right to payment against Chase, and this is important in considering the equitable aspect of this appeal. Whatever assurance may have been made by Oliver, even if it did not amount to a contract, it was an assertion of a legal relationship ("you will be paid") which was intended to be acted upon and was acted on.

This brings me to a consideration of the grounds of appeal. I see no merit in the first ground. Estoppel was not pleaded in the plaint as giving rise to a cause of action, but it was pleaded in the reply to counter-contentions put forward by the defence. Whether or not an estoppel arose in this case was an issue which was canvassed at the trial and was made a specific issue by Kneller J. The second ground is that the judge erred in holding that an estoppel other than a proprietary estoppel can found a cause of action. The judge held that an equity by way of estoppel had arisen in favour of Laxmanbhai. He did not specifically categorise the estoppel.

The appellants submit that it was at the most a promissory estoppel, which requires proof of a clear and unambiguous representation intended to affect legal relationships. In this case there was no such representation, and no pre-existing legal relationship between Laxmanbhai and the appellants.

For the respondents it was submitted that the equity raised was what is known as a proprietary estoppel which,, as stated by Lord Denning MR in Crabb's at page 853, can give rise to a cause of action. As he said -

> The new rights and interests, so created by estoppel, in or over land, will be protected by the courts and in this way give rise to a cause of action.

In *Inwards v Baker* [1965] 2 QB 29 the defendant was induced by his father to build a bungalow on the father's land, expended money for that purpose, and expected to be allowed to stay there. It was held that equity would not allow the expectation so created to be defeated. The fact that the equity was applied in

favour of the defendant is not, I think, material.

Had the defendant been the plaintiff in the suit, suing for a declaration that he was entitled to remain in the house, the result would have been the same.

In the present case, Chase was not the legal owner of the land on which Laxmanbhai expended the money, but Chase was the equitable owner under the charge secured by the debenture. Chase, as unpaid mortgagee and debenture-holder, was entitled to appoint receivers and liquidators, and later did so, whereupon Chase became the legal owner of the land and all that stood on it, and was able to sell all this at a higher price than would have been obtained had the lodges not been finished, and Chase retained this benefit to the exclusion of Laxmanbhai who got nothing. A landowner who allows and encourages another to build on his land in the expectation of being allowed to keep the building or be paid for it will be prevented by equity from enriching himself to the detriment of the other.

It would be anomalous if a mortgagee could encourage a contractor to build for a mortgagor something which eventually would become the mortgagee's property, as must have been envisaged by Chase here in view of the company's known lack of funds.

In all the circumstances I think that the equity which arose in this case was in the nature of a proprietary estoppel, in favour of Laxmanbhai. What are the circumstances? Before signing the contract, Laxman was told by the manager of the bank (which was associated with Chase) that it was a Chase project. Kimberland (a Chase man) told Laxman that Chase had invested in the project. When it became apparent that the company could not meet the sums certified, Laxman saw Oliver (a senior Chase man) and was assured by him that if he finished the lodges by the end of that year, he would be paid. Laxman honestly and reasonably believed that it was Chase who would pay, and completed the work at considerable expense to his firm. Chase, thought its agents, must have known of this belief, and did nothing to warn Laxman that he was unlikely to receive anything from the company, a matter which must have been apparent to Oliver, who knew that the company was without funds and could not reasonably have expected the overrun agreement to provide the required deficit of US$800,000 in two or three months. Laxmanbhai expended its money on the company's land, but Chase was the equitable owner of that land, and soon after became the legal owner, whereupon it sold the land, benefiting from the fact that the lodges had been completed, and leaving Laxmanbhai unpaid. It would be unconscionable for Laxmanbhai to be left without a remedy, and the only way that the equity in his favour can be satisfied is, as the judge held, by ordering Chase to pay Laximanbhai its dues.

I would dismiss this appeal, with costs, and certify for two counsel.

Madan JA. I agree that the appeal should be dismissed.

What transpired at the meeting which was held on 26th October 1972 between Laxman and Oliver when Kimberland was also present is of crucial importance. Two matters are indisputably clear. First, Oliver had been informed almost immediately before this meeting that African Ponderosa Ltd ("the company") was in serious financial difficulties. As adirector of the company, Oliver must have been aware that the company had had difficulty in meeting Laxmanbhai's certificate issued on 13th October 1972. The company had no immediate assets to float itself financially. The only asset, if it was an asset, was what has been called the overrun agreement, a nebulous contract of extremely doubtful value which was enforceable, as provided therein, only upon completion of the lodges in the future.

The attempt to enforce it against two of the signatories proved a failure. A third signatory had to be lent money by Chase itself to meet his obligation.

Both as a banker and as a reasonable businessman Oliver knew that the company would not be able to raise funds in the immediate future to meet its current obligations, in particular it would be unable to meet the building contractor's bill.

Secondly, both as a director of the company and in his capacity as a representative of Chase, Oliver knew

that the only way to save the Chase investment was by completing the lodges; but to the knowledge of Oliver at that stage the company was not in a position financially to have them completed. Who better to do it than Laxmanbhai, the contractor who was already on the site? But Laxmanbhai had already threatened to suspend work. He must be offered an inducement. Hence, or so I think, the meeting with Laxman.

Kneller J found the following to be the words which Oliver said to Laxman at the meeting on 26th October:

> Are you going to finish these lodges by the end of this year? You must do so. You will be paid for all your work on them if you do so.

Whoever was to pay Laxmanbhai, Laxman certainly acted upon those words which he conveyed to his sub-contractors; he felt rejuvenated after the meeting and, working overtime himself as well as inducing his subcontractors to do so, the construction of one lodge and completed by the end of the year, and the second lodge was handed over on 7th January in the following year.

If Oliver spoke the foregoing words as a director of the company, they were untruthful for he knew that the comp any had no funds to pay for the work. In this capacity he induced Laxmanbhai to work on the lodges by an untruthful and reckless representation as a direct result of which Laxmanbhai suffered detriment.

If Oliver spoke the words as a Chase man, he was either guaranteeing payment or promising to indemnify Laxmanbhai for his work if the company did not pay.

Kneller J was not satisfied that a new contract was entered into with Chase. What then induced Laxmanbhai to resume work on the building Contract? In my view, it could only be a representation by Oliver that he would be paid in any event which was intended to be acted upon and was acted upon; otherwise, there is no sensible purpose for the meeting of 26th October.

Three propositions arise. First, Oliver guaranteed payment on behalf of Chase if the company failed to pay; secondly, Oliver undertook to indemnify Laxmanbhai in full under the foregoing event happening; thirdly, the appellants are liable to pay Laxmanbhai under the doctrine of unjust enrichment.

I am of the opinion that, but for the judge’s finding that Laxmanbhai had failed to establish a new contract, Laxmanbhai would be entitled, depending upon the holding by the court, to succeed upon any one of the foregoing three propositions, the first two of which are of contractual import by their very nature.

I am aware that in the case of a claim under a guarantee the plea would be that it is unenforceable for want of writing under section 3 of the Law of Contract Act. In *Moses v Macferlan* (1760) 97 ER 676, 681, Lord Mansfield said:

> the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.

In *Fibrosa Spolka Akcyjana v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 62, Lord Wright said:

> Lord Mansfield does not say that the law implies a promise. The law implies a debt or obligation which is a different thing. In fact, he denies that there is a contract; the obligation is as efficacious as if it were upon a contract. The obligation is a creation of the law, just as much as an obligation in tort. The obligation belongs to a third class, distinct from either contract or tort, though it resembles contract rather than tort ... The standard of what is against conscience in this context has become canalised or defined, but in substance the juristic concept remains as Lord Mansfield left it.

Cartright J in *Deglman v Guaranty Trust Co of Canada* [1954] SCR 725, after saying at pages 734, 735, that the right is based, not on the contract, but on an obligation imported by law, said at page 735:

> In my opinion when the Statute of Frauds was pleaded the express contract was thereby rendered unenforceable, but the deceased having received the benefits of the full performance of the contract by the respondent, the law imposed upon her, and so on her estate, the obligation to pay the fair value of the services rendered to her.

If the contract was one of indemnity it is enforceable without being in writing for Chase and Oliver assumed a primary liability: *Halsbury's Laws of England* (3rd Edn) pages 91, 92 and *Chitty on Contracts* (23rd Edn) 1668.

It is clear from the circumstances in this case that after his meeting with Oliver on 26th October, Laxman honestly believed, as a result of what was said to him by Oliver, though mistakenly according to Kneller J, that Chase would pay Laxmanbhai in full, otherwise the man must be a lunatic to have rushed into work, event to do overtime at an accelerated pace to complete the lodges on the date required. Judging by the records of the building jobs done by Laxmanbhai, the man could not possibly be a lunatic.

The benefit of Laxman's work went to Chase as equitable owner of the property under the charge secured by the debenture. As counsel put it, every brick that Laxmanbhai laid became a Chase brick. And as the judge put it:

> Chase took his money and his services and materials in the lodges when it scooped the proceeds of the sale of the lodges by the receiver which Chase asked [Devco] to effect under the trust deed for its debenture by appointing receivers and managers for [the company].

In *Fibrosa Spolka,* Lord Wright ([1943] AC at page 61):

> It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.

It seems to me that upon a fine analysis the first category, ie the contract of guarantee which I have discussed above, blends into the theory of restitution which gives it the foundation to justify it. Goff and Jones in their treatise, *Law of Restitution*, state (page 11):

> Most mature systems of law have found it necessary to provide, outside the fields of contract and civil wrongs, for the restoration of benefits on grounds of unjust enrichment. There are many circumstances in which a defendant may find himself in possession of a benefit which, in justice, he should restore to the plaintiff.
>
> Obvious examples are where the plaintiff has himself conferred the benefit on the defendant through mistake or compulsion. To allow the defendant to retain such a benefit would result in his being unjustly enriched at the plaintiff's expense, and this, subject to certain defined limits, the law will not allow ... The principle of unjust enrichment presupposes three things: first, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff's expense; and thirdly, that it would be unjust to allow him to retain the benefit.

All the three foregoing conditions are satisfied in this case: the appellants have been enriched by the receipt of benefit at the expense of Laxmanbhai, and, so obviously, it would be unjust to allow the appellants to retain the benefit of it to the full extent of Laxmanbhai's claim. Goff and Jones also state (at page 12):

> The principle of unjust enrichment is placed in the forefront of the *American Restatement of Restitution*. Paragraph 1 provides that 'a person who has been unjustly enriched at the expense of another is required to make restitution to the other'.

In the Canadian case, *James More & Sons Ltd v University of Ottawa* (1974) 5 OR (2d) 162, the plaintiff submitted a tender for the construction of a building contract for the defendant at a certain price. The tender included:

> taxes ... in force at this date, but not including any additional ... taxes which may be imposed subsequent to this date, and which shall be payable by or to the owners.

Between the date of the tender and its acceptance the excise tax payable on building materials was increased. The defendant's architect orally assured the plaintiff that the increase in tax would be met by the defendant, but the written contract executed by the parties provided only for the case of a reduction, not an increase, of tax. The plaintiff brought an action to recover the rise in tax and it was held that the plaintiff was entitled to succeed in restitution, for the defendants would be unjustly enriched if he were permitted to retain the rise in taxes which it recovered from the Government as entitled and which had been paid by the plaintiff. Morden J who decided this case said (5 OR (2d) at pages 166 to 171):

> The plaintiff puts its case forward on, essentially, three grounds: (a) ... (b) ... and (c) unjust enrichment or restitution.
>
> (c) Unjust enrichment or restitution: that the doctrine of restitution, which is based neither on contract nor tort, is firmly established in the law of Canada is clear from the decisions of the Supreme Court ... in ...

The aim of equity is to do justice between parties, that is what the doctrine of unjust enrichment is all about. I am firmly convinced that Laxmanbhai is entitled to succeed on the ground of unjust enrichment.

The occasion is unique. This is the first case in my experience in Kenya relating to the doctrine of unjust enrichment. But then I am young as a judge and also otherwise. This doctrine is recognised and worked in the three jurisdictions of England, Canada and United States. Woe unto the day when it is lost sight of in Kenya, which would also be contrary to the spirit of section 3(c) of the Judicature Act. I trust that in future, in appropriate cases, there will be less smothering of just equitable rights for want of writing under section 3 of the Law of Contract Act.

In the words of Morden J (5 OR (2d) at page 173):

> Should an amendment to the statement of claim be required to enable this ground of the claim to be pleaded, I would have no hesitation in granting it. It has been raised in reply, prior to the examination for discovery [in this case indirectly in the form of estoppel pleaded in the reply].

Finally, a word about estoppel which has been so much talked about in this case and which I have scrupulously left alone until this moment. In my opinion the appellants must have known about Laxman's mistaken belief as to his right to payment, but they let him carry on also knowing that they would reap the benefit of it. Their intentions could not have been altogether honourable. Without Laxmanbhai's work there would have been no lodges to be sold to Hilton. If need be, I agree that the equity which arose in this case was in the nature of proprietary estoppel, in favour of Laxmanbhai (see also *Cotton LJ in Birmingham & District Land Co v London & North Western Railway Co* (1888) 40 Ch D 268, 277). In my opinion, as I say later, the distinction as to the type of estoppel should be of little importance. Laxmanbhai's loss is directly traceable to the appellants. It would be unconscionable for Laxmanbhai to be left without a remedy. Whichever way I consider this appeal, it must fail.

In my opinion, the time has come to do away with the archaic artificial distinction in the various categories (descriptions really) of estoppel.

Estoppel should be looked upon in itself as an instrument of justice. What the law implies is an obligation which has been improperly termed a contract, per Cotton LJ in *Re Rhodes* (1890) 44 Ch D 94, 105.

If the circumstances are such as to raise an equity in favour of the plaintiff and the extent of the equity is known, and in what way it should be satisfied, the plaintiff is entitled to succeed. As I have said, all three ingredients are satisfied in this case. Lord Mansfield said (in *Moses v Macferlan*) "obliged by the ties of natural justice and equity to refund the money". Anything else would be against conscience. The recovery is based upon an obligation imposed by law which, to use an expression I have employed previously, justice demands, therefore the law requires, to be done. It is a rule of reason. As Lord Atkin said in *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, 29:

> When these ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course of the judge is to pass through them undeterred.

I am enamoured by the following words of Scarman LJ spoken in *Crabb v Arun District Council* [1975] 3 WLR 847, 858:

> I do not find helpful the distinction between promissory and proprietary estoppel. This distinction may indeed be valuable to those who have to teach or expound the law; but I do not think that, in solving the particular problem raised by a particular case, putting the law into categories is of the slightest assistance.

I believe Scarman LJ's idea will catch on, spread and be accepted as a legal theorem in due course. In the interests of justice even no-existent grounds succeed.

As Wambuzi JA also agrees, the appeal is ordered to be dismissed, subject to the order for costs proposed by Law JA.

Wambuzi JA. I have had the advantage of reading in draft the judgment prepared by Law JA which sets out the facts and the main arguments by counsel on both sides. I agree with it and would add only a word or two.

The main issue in the appeal is whether a cause of action can be founded on an estoppel, other than a proprietary estoppel. As I understand it, the case for the appellants was that no representation was ever made to Laxmanbhai that Chase would pay if Laxmanbhai completed building the lodges. If there was such a representation then it was for payment in the future and could give rise only to a promissory estoppel which on the authorities cited (16 *Halsbury's Laws of England* (4th Edn) paragraph 1514, and *Argy Trading Development Co Ltd v Lapid Developments Ltd* [1977] 3 All ER 799 can only be used as a shield and not as a sword; in other words it cannot found an action. It is common ground, however, that a proprietary estoppel can give raise to a cause of action. As Mr Couldrey for the appellants remarked, all the cases relied on by Kneller J, and indeed all the cases cited to us by Mr Hunter for the respondents, concerned proprietary estoppels. This includes the case of *Crabb v Arun District Council* [1975] 3 WLR 847 from which counsel cited a number of passages. One such passage is in the judgment of Scarman LJ at page 858. After posing three questions which the trial judge in this case also had in mind (that is whether the circumstances raise and equity, the extent of it and the way it should be satisfied), his Lordship said -

> Such therefore I believe to be the nature of the enquiry that the courts have to conduct in a case of this sort. In pursuit of that enquiry I do not find helpful the distinction between promissory and proprietary estoppel. This distinction may indeed be valuable to those who have to each or expound the law, but I do not think that, in solving the particular problem raised by a particular case, putting the law into categories is of the slightest assistance.

On this basis Mr Hunter argued that there is no distinction between proprietary and promissory estoppel in so far as founding a cause of action is concerned. In the same case, however, Lord Denning MR said (at page 853).

> When Mr Millett, for the plaintiff, said that he put his case on an estoppel, it shook me a little: because it is commonly supposed that estoppel is not itself a cause of action. But that is because there are estoppels and estoppels. Some do give rise to a cause of action. Some do not. In the species of estoppel called proprietary estoppel, it does give rise to a cause of action.

Lord Denning MR then said (quoting from his own judgment in the earlier case *Moorgate Mercantile Co Ltd v Twitchings* [1975] 3 WLR 286) that the effect of estoppel on the true owner may be that

> His own title to the property, be it land or goods, has been held to be limited or extinguished, and new rights and interests have been created therein. And this operates by reason of his conduct – what he has led the other to believe – even tough he never intended it.

Lord Denning MR continued:

> The new rights and interests so created by estoppel, in or over land, will be protected by the courts and in this way give rise to a cause of action.

In all the cases cited to us the plaintiff thought he had acquired some right or interest in or over the property of the defendant. For example, in *Crabb's* case, he thought that he had acquired a right of way. In *Inwards v Baker* [1965] 2 QB 29 the son thought that he had acquired a right to live in the house he had erected on his father's land. No case was cited to us in which a promissory estoppel had been used to found an action. It may well be that the matter is far from being settled, and I am inclined to the view that a promissory estoppel cannot found an action. By its definition it creates no cause of action where there was none before (see 16 *Halsbury's Laws* (4th Edn) paragraphs 1514). Nearer home, the case *Nurdin Bandali v Lombank Tanganyika Ltd* [1963] EA 304, the only East African case cited to us on the subject, was again a case of proprietary estoppel. It concerned a hire purchase agreement of a vehicle which was repossessed by the seller. The hirer sued alleging (*inter alia*) fraud, waiver and estoppel.

The suit was dismissed and, on appeal, it was held (*inter alia*), dismissing the appeal, that the respondent had not by its course of action estopped itself from asserting its right to repossesses.

The present case has caused me some anxiety because Laxmanbhai cannot be said to have hoped to acquire any right over, or interest in, land on which he erected the two lodges. His assignment was to build the lodges and go away. On the other hand, the evidence indicates that Chase had a controlling interest in the company which was formed to build and manage the lodges and which owned the land. Chase held a debenture and a legal charge over the property and assets of the company. Chase reserved the right to itself to enforce the overrun agreement to generate more funds if necessary. Chase knew through its officers that the company could not pay and stood by watching, encouraging Laxmanbhai go ahead placing more of his materials on the land in the form of completing the two lodges. These lodges were sold and the money paid the debenture to Chase and Devco. Kneller J found that Laxmanbhai was induced by Chase to believe that Chase would pay. I would in the circumstances agree that sufficient interest in the land had been created whereby Laxmanbhai put his materials on it and expended labour thereon under a representation by Chase that Chase would pay for them. Chase cannot now say that it will not pay, and sell or cause to be sold the land and the lodges and pocket the money. The resulting estoppel is very much in the nature of a proprietary estoppel.

The second point I would like to mention was raised in the notice of grounds for affirming the decision of the High Court on other grounds, to the effect that the facts in this case entitled Laxmanbhai to recover on the principle of unjust enrichment. The matter does not appear to have been canvassed in this form in the High Court. However, I am not quite sure what issue 10 was intended to cover, it was framed as follows:

> Did Chase receive out of the proceeds of sale of the lodges by the receivers the sum of Kenya Shs 5,142,062 and were they entitled to regard that sum as its sole disposition?

The answer to this issue by the judge was "Yes"; and nothing more was said. For the appellants, the only argument against this ground was that it falls with the doctrine of estoppel.

According to Goff and Jones' *Law of Restitution*, the principle of unjust enrichment presupposes three things: (1) that the defendants has been enriched by the receipt of a benefit; (2) that he has been so enriched at the expense of the plaintiff; and (3) that it would be unjust to allow him to retain the benefit. I think the circumstances of his case are such that the principle would apply and would justify an order that Chase do pay for the benefit it received from the two lodges built or completed at the expense of Laxmanbhai. I concur in the order proposed by Law JA.

Appeal dismissed with costs.

Dated and delivered at Nairobi this 11th day of July 1978.

C.B MADAN

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JUDGE OF APPEAL

S.W.W WAMBUZI

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JUDGE OF APPEAL

E.J.E LAW

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR