1967

*May 26, 29 30, 31 Oct. 3

CLARK'S-GAMBLE OF CANADA LIMITED (*Plaintiff*) ..... APPELLANT;

AND

GRANT PARK PLAZA LIMITED, GRANT PARK WESTERN LIMITED, GRANT PARK EASTERN LIMITED and ARONOVITCH & LEIPSIC LIMITED (*Defendants*) RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Contracts—Interpretation—Premises in shopping centre constructed for and leased to plaintiff department store—Plaintiff later advised that further development of centre would include additional department store—Injunction sought to restrain developer from constructing proposed store.

The defendant Grant Park Plaza Ltd. was engaged in the development and construction of a shopping centre and after prolonged negotiations it had accepted a proposal for a lease from the plaintiff department store. The proposal and the lease itself were executed at the same time and formed one contract. The defendant encountered difficulties in securing tenants and as a result of financial stringency, work on the centre ceased after completion of the building leased to the plaintiff and certain other buildings. Some two years later, the plaintiff was advised by the defendant that it was proceeding with further development of the centre and that this additional development would include another department store. The plaintiff immediately objected to the proposed lease for a "Woolco Store" and upon the defendant's refusing to desist, an action was brought for a permanent injunction restraining Grant Park Plaza Ltd., its two subsidiary companies and its agent, from entering into an agreement with W Co. for the construction and operation of an additional department store in the Grant Park Centre. This action was dismissed at trial. The plaintiff also claimed for damages and the defendants counterclaimed for damages. Both of these claims were dismissed.

On appeal to the Court of Appeal, the main appeal was dismissed; the appeal from the dismissal of the claim for damages by the plaintiff was discontinued and the counterclaim for damages was not pursued. An appeal from the judgment of the Court of Appeal was then brought to this Court.

Held: The appeal should be dismissed.

The Court rejected the appellant's contention that by the agreement between the parties the leasing of any space in a building within the proposed shopping centre to any department store or discount store was prohibited. The appellant had relied on para. 5 of the proposal which read "We understand that Grant Park Plaza will be constructed at your cost and under your supervision approximately as shown

*PRESENT: Cartwright, Martland, Judson, Hall and Spence JJ.

on the layout in the plans submitted by Waisman & Ross dated November 22, 1961." However, as held by the trial judge, there was no covenant by Grant Park Western Ltd. (the assignee of the lease) to build the shopping centre other than that building which was constructed for and leased to the appellant.

The section of the lease relating to competitive use had no application to the present situation: (1) It applied only outside the shopping centre and had no application to two sites within the same shopping centre. (2) The proposed construction of a building for the "Woolco Store" and the lease thereof was not one of the things prohibited by the section if the respondents were bound by it.

The submission that the proposal which the appellant made to the respondent Grant Park Plaza Ltd. and which was accepted by the latter contemplated a building scheme and implied a negative covenant of the respondent not to depart from that scheme failed. This was not a building scheme as dealt with in the many cases upon that subject. In such cases it was contemplated that like covenants should be taken from each of the grantees receiving their grants from the common grantor, and that was not at all the situation contemplated in the present case. The argument that to permit the respondent to lease any part of the shopping centre to a discount department store the activities of which would be competitive with the appellant's business would be in derogation of its grant was not accepted.

The further submission that the respondents were estopped by the conduct of Grant Park Plaza Ltd. in the premises from asserting as against the appellant the right to lease any part of the shopping centre to a discount department store also failed. That there was no covenant by the said respondent to build the shopping centre other than the one building to be leased to the appellant was in itself sufficient to dispose of the argument based upon estoppel. Moreover, it would seem that an estoppel can only be based upon representations made as to facts in existence. The representations alleged here were all representations of intentions to act in a certain way in the future.

[*Browne v. Fowler*, [1911] 1 Ch. 219; *Aldin v. Latimer Clark, Muirhead & Co.*, [1894] 2 Ch. 437; *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1873), L.R. 6 H.L. 352; *Jorden v. Money* (1854), 5 H.L. Cas. 185; *Maddison v. Alderson* (1883), 8 App. Cas. 467; *Marquess of Salisbury v. Gilmore*, [1942] 2 K.B. 38, referred to.]

APPEAL from a judgment of the Court of Appeal for Manitoba[1], dismissing an appeal by the plaintiff from a judgment of Smith J. Appeal dismissed.

Hon. C. H. Locke, Q.C., and *M. J. Mercury*, for the plaintiff, appellant.

Clive K. Tallin, Q.C., and *A. S. Dewar, Q.C.*, for the defendants, respondents.

[1] (1966), 57 W.W.R. 27.

1967

CLARK'S-GAMBLE OF CANADA LTD. v. GRANT PARK PLAZA LTD. et al.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Manitoba[1] which dismissed an appeal by the plaintiff from the judgment delivered at trial by Smith J., as he then was.

The learned trial judge had dismissed the plaintiff's action for a permanent injunction restraining the defendants from entering into an agreement with the F. W. Woolworth Company for the construction and operation of an additional department store in the Grant Park Plaza Shopping Centre in the City of Winnipeg. The plaintiff also claimed for damages and the defendants counterclaimed for damages. Both of these damage claims were dismissed. The appeal from the dismissal of the claim for damages by the plaintiff was discontinued on the appeal to the Court of Appeal for Manitoba and the counterclaim for damages was not pursued. Therefore, we are left with the main appeal by Clark's-Gamble of Canada Limited only, that is, against the judgment refusing the injunction.

The defendant Grant Park Plaza Limited, represented by Aronovitch and Leipsic Limited, was engaged in the development and construction of a shopping centre in the City of Winnipeg. It entered into negotiations with Clark's-Gamble of Canada Limited and its founders and main shareholders Marshall Wells of Canada and MacLeod's Limited. Clark's-Gamble was represented by Mr. P. C. Fikkan and Mr. Irving Strum. Mr. Fikkan was the merchandising expert for the appellant and Mr. Strum was the real estate expert for the appellant who had negotiated its leases.

As pointed out by the learned trial judge, the lease in this case, which is the subject of the present action, was the result of thorough and prolonged negotiations between the officials of the parties and their solicitors. The negotiations culminated in the delivery by the appellant to the respondents Grant Park Plaza Limited of a document, ex. 25, which bears the date March 27, 1962 and which has been designated throughout the proceedings as "The Proposal". That was a proposal for the lease which was accepted by the respondent Grant Park Plaza Limited.

[1] (1966), 57 W.W.R. 27.

The lease itself, two copies of which had been filed, one as ex. 1 and one as ex. 55, bears the same date, March 27, 1962. The learned trial judge found, upon the evidence, that exs. 1 and 25 were executed at the same time and that ex. 25 was intended to be part of the contract holding that the two exhibits must be read together as forming one contract. That finding was accepted in the Court of Appeal for Manitoba and I propose to adopt the finding in these reasons. It might be added that the same is in exact accordance with para. 7 of the Proposal, ex. 25, which reads:

> 7. The Company will enter into a lease with Grant Park Plaza Limited (hereinafter called the "Lessor") in the form to be attached and executed by the Lessor and the Company and the said lease together with this letter when executed by us and accepted by you and the Lessor will constitute but one agreement between the parties.

It should be noted that the lease is on the printed form supplied by the solicitors for Grant Park Plaza Limited and, apart from schedules, it is thirteen pages in length. Many of those pages have extensions pasted to them and every page but one bears alterations, strike-outs and additions. It is quite apparent and in accordance with the evidence that the lease resulted from intense negotiations between not only the representatives of the parties but their solicitors. The counsel for the appellant, when the lease was produced at trial, upon the Court putting to him the query, "Did you draft the lease?", replied, "Our firm drafted it". Despite the fact the lease is on a form from Aronovitch & Leipsic Limited, under these circumstances I am of the opinion that there is no basis for the argument advanced by counsel for the appellant in this Court based upon the maxim *contra proferentem*. The mere fact that the document was originally first typed on a form provided by the solicitor for one of the parties in the light of the circumstances which occurred thereafter and up to its execution is not sufficient to bring the transaction within the class of cases where a contract is presented by one person for execution by another.

Grant Park Plaza Limited encountered difficulties in obtaining leases for the various stores which were to line each side of an enclosed mall under the original concept for the shopping centre and although certain work was carried out in the construction of the shopping centre other than

1967

CLARK'S-GAMBLE OF CANADA LTD. v. GRANT PARK PLAZA LTD. et al.

Spence J.

the building intended for occupancy by the appellant, due to financial stringency the respondent after construction of the building leased to the appellant and certain other buildings, particularly a food store and a service station, ceased work, levelled the site of the enclosed mall and its adjoining stores, and cut off at ground level the pilings which had been driven for such construction. Matters stood in this fashion until the year 1964. On April 22, 1964, Mr. Aronovitch, as President of Aronovitch & Leipsic Ltd., which is described as managing agent for the respondent Grant Park Plaza Limited, wrote to the plaintiff as follows:

> We are pleased to advise that we are now completing negotiations for further development of Grant Park Plaza Shopping Centre. This additional development will include a second food store; 53,000 square feet of closed mall, made up of approximately thirty allied stores; and a department store having an area of approximately 150,000 square feet.
>
> We are quite confident that the increased number of retail stores, with their added variety of merchandise, will generate additional sales. The increased size of the centre should draw from a greater trading area. It is anticipated that these new additions will be completed before August, 1965.

The appellant immediately objected to the proposed lease to the F. W. Woolworth Company for a "Woolco Store" and upon the respondent's refusing to desist, commenced the present action. Almost at the same time, the respondent Grant Park Plaza Limited transferred to its fellow respondent Grant Park Eastern Limited part of the land in the proposed shopping centre on which it proposed that the department store should be constructed for lease to the F. W. Woolworth Company.

In 1962, the respondent Grant Park Plaza Limited had already transferred to Grant Park Western Limited a portion of the land which included that which was the subject of the lease to the appellant, and on November 21, 1962, by a document produced at trial as ex. 56, the respondent Grant Park Western Limited and the appellant had agreed as to the term of the lease of the premises in question, *i.e.*, 25 years, and as to the amount of rental, and the appellant had acknowledged that it had received notice of the assignment of the lease to the respondent Grant Park Western Limited, and accepted the latter as its lessor.

The appellant contends that by the agreement between the parties the leasing of any space in a building within the

proposed shopping centre to any department store or discount store is prohibited. The appellant particularly relies on para. 5 of the Proposal, ex. 25, which reads as follows:

> 5. We understand that Grant Park Plaza will be constructed at your cost and under your supervision approximately as shown on the layout in the plans submitted by Waisman & Ross dated November 22, 1961.

and submits that under that paragraph the respondent Grant Park Plaza Limited was compelled to construct a shopping centre approximately in accordance with the plans referred to which shopping centre envisaged the store which was constructed for the appellant and occupied by it under the lease, adjoined on the west by a building to be occupied as a food store, on the east by an enclosed mall into which were to face a large number of smaller stores referred to throughout the evidence as "allied stores", and further to the east of them again another food store. I find it most significant that the lease bears as section 2.06 a typed section which has been pasted over the original printed section. That printed section as it appeared in the unaltered original document read as follows:

> With all due diligence to commence and complete the construction *of the shopping centre* and the leased premises in accordance with the schedule.

(The italicizing is my own.)

On the other hand, the opening words of s. 2.06 as they appear on the lease as executed and with the original clause replaced by another pasted over it are "with all due diligence to commence and complete the construction of the leased premises in accordance with the schedule". I am at a loss to understand how in the light of these circumstances, that is, the careful amendment of a very broad clause requiring completion of the whole shopping centre to an exact clause requiring completion of the leased premises, there can be any argument that the respondent Grant Park Western Limited was under any duty to complete the buildings of the shopping centre other than that the subject of the lease. I am in complete agreement with the learned trial judge when he notes that para. 5 of the Proposal by its very words was only an understanding of what was intended, and what is more, by the use of such words as "approximately" and "layout" the outline of what was intended was, to put it conservatively, very

1967

CLARK'S-GAMBLE OF CANADA LTD. *v.* GRANT PARK PLAZA LTD. *et al.*

Spence J.

tentative. It should, moreover, be noted that the plan referred to in the said para. 5 of the Proposal which was dated November 22, 1961, and produced at trial as ex. 26, places the building to be occupied by the appellant and the surrounding buildings a considerable distance further to the east than the appellant's building was actually constructed, and that this alteration is again reflected in the plan attached to the lease as schedule 2. This plan was dated April 16, 1962, some 19 days after the lease was actually executed but it is signed by the appellant and the respondent Grant Park Plaza Limited. Again, it is, in my view, most significant as it shows on the east side of the proposed shopping centre a large area upon which the words "future expansion" appear and the area of the enclosed mall with its allied stores is designated as "proposed Stage 2".

For all of these reasons, it would seem that the learned trial judge, with respect, was justified in his holding that there was no covenant by the respondent, Grant Park Western Ltd., to build the shopping centre other than that building which was constructed for and leased to the appellant.

In the Court of Appeal for Manitoba, Dickson J., *ad hoc*, said:

> Smith J. considered paragraph 5 of the Proposal to be nothing more than an expression of the parties' intention, and not a binding obligation of Grant Park Plaza Limited. It is a general rule of construction that terms of a written instrument which import that the parties have agreed upon certain things being done have the same effect as express promises. For this reason I think that Grant Park Plaza Limited did become obligated to construct the shopping centre approximately as shown on the layout in the plans attached to the lease. But I hasten to add this: Paragraph 5 must not be considered in isolation, and when read in the context of the lease and of the circumstances obtaining at the time the lease was entered into it is apparent that great latitude was reserved to Grant Park Plaza Limited in the development of the shopping centre.

I am of the opinion that the learned justice in appeal failed to appreciate that the learned trial judge had found that the parties had not "agreed upon certain things", *i.e.*, the completion of the shopping centre in accordance with the plan (ex. 26), and therefore the recital of an understanding was not a recital of matters upon which the parties had agreed. Holding this view, I am not required, therefore, to consider whether the section in the lease

relieving the respondent Grant Park Plaza Ltd. from construction in case it met financial difficulties resulted in a permanent or only temporary release.

I also note in the lease other sections which have been referred to both by the learned trial judge and in the majority judgment of the Court of Appeal for Manitoba, and which further emphasize the latitude granted to the respondent Grant Park Plaza Ltd., particularly s. 8.04:

> NOTWITHSTANDING anything hereinbefore contained, the Lessor may cause other buildings to be constructed within the boundaries of the lands or to retain on the lands any buildings presently located thereon,
>
> PROVIDED that the Lessor shall provide on the lands a parking area not less in extent than three (3) times the aggregate of the following areas:

Section 8.06 reserves to the landlord the right to relocate the auto parking areas and other common areas. The covered mall, which according to the last proposed plans will run from a food store adjoining the appellant's building to the east easterly to the proposed Woolco Store and will be considerably shorter than originally planned, is certainly one of the "common areas".

The appellant relies particularly on para. 1.11. Again as to this section we have an example of the alteration of the original lease. That term originally read:

> Section 1.11—Competitive Use
>
> AND THAT during the term hereof the Lessee shall not directly or indirectly, whether as an owner, stockholder, principal, agent, employee or independent contractor or otherwise howsoever engage or participate in or be a stockholder, or holder of any other security of any nature whatsoever of or a lender to or an owner of any debt or portion of a debt of or furnish any financial aid or other support or assistance of any nature whatsoever to any business enterprise or undertaking which in any manner or degree is competitive with its use of the leased premises hereinbefore stated if such business enterprise or undertaking is situated in whole or in part conducted from premises situated within a distance of five thousand (5,000') feet from any part of the Shopping Centre unless in any instance the Lessor shall have given its prior written consent which consent may be withheld in the sole discretion of the Lessor.

That section was amended partly in type and partly in handwriting. The typed amendments were these: the insertion of the word "firstly" after the words "Shopping Centre unless" and before the words "in any instance" in the third line from the end of the original printed section, and by the addition at the end of the printed section of the words "and secondly, in any instance where the business

1967

CLARK'S-GAMBLE OF CANADA LTD. *v.* GRANT PARK PLAZA LTD. *et al.*

Spence J.

enterprise or undertaking occupies store premises self-contained, not exceeding in gross area 5,000 square feet". The hand printed amendment was by the insertion after the words "hereof the Lessee" of the words "or Lessor" in s. 1 of the printed form, so that the section after its amendment read as follows:

> AND THAT during the term hereof the Lessee *or Lessor* shall not directly or indirectly, whether as an owner, stockholder, principal, agent, employee or independent contractor or otherwise howsoever engage or participate in or be a stockholder or holder of any other security of any nature whatsoever of or a lender to or an owner of any debt or portion of a debt of or furnish any financial aid or other support or assistance of any nature whatsoever to any business enterprise or undertaking which in any manner or degree is competitive with its use of the leased premises hereinbefore stated if such business enterprise or undertaking is situated in whole or in part conducted from premises situated within a distance of five thousand (5,000') feet from any part of the shopping centre unless *firstly*; in any instance the Lessor shall have given its prior written consent which consent may be withheld in the sole discretion of the Lessor, *and, secondly, in any instance where the business enterprise or undertaking occupies store premises, self-contained, not exceeding in gross area, 5,000 square feet.*

(I have italicized the amendments.)

I am in agreement with the learned trial judge and with the majority judgment in the Court of Appeal that the clause prior to its alteration was an ordinary covenant by the lessee and by no one else which prohibited the lessee going outside the shopping centre to establish or assist in any way another enterprise which would compete with its enterprise inside the shopping centre and therefore reduce the revenue accruing to the lessor from the percentage lease. Much debate both below and in this Court occurred as to the proper interpretation of the section as so amended. I am of the opinion that I need not attempt to resolve the problems of whether the amendments did work out a mutual covenant and if so the extent thereof, as I am of the opinion that the question may be solved very simply.

In my view, the section has no application to the present situation for two reasons: Firstly, it applies only outside the shopping centre. The words " ... if such business enterprise or undertaking is situated in whole or in part conducted from premises situated within a distance of 5,000 feet from any part of the shopping centre..." in their natural meaning could only apply outside the shopping centre and have no application to two sites within the

same shopping centre, and I know of no doctrine of law which would require, in the interpretation of the section, the insertion of a revised covenant to apply both within and without the limits of the shopping centre: See *Toronto Railway Company v. City of Toronto*[1], *per* Sedgewick J. at p. 434:

> In construing an instrument in writing, the court is to consider what the facts were in respect to which the instrument was framed, and the object as appearing from the instrument, and taking all these together it is to see what is the intention appearing from the language when used with reference to such facts and with such an object, and the function of the court is limited to construing the words employed; it is not justified in forcing into them a meaning which they cannot reasonably admit of. Its duty is to interpret, not to enact. It may be that those who are acting in the matter, or who either framed or assented to the wording of the instrument, were under the impression that its scope was wider and that it afforded protection greater than the court holds to be the case. But such considerations cannot properly influence the judgment of those who have judicially to interpret an instrument. The question is not what may be supposed to have been intended, but what has been said. More complete effect might in some cases be given to the intentions of the parties if violence were done to the language in which the instrument has taken shape; but such a course would on the whole be quite as likely to defeat as to further the object which was in view.

Secondly, I am of the opinion that the proposed construction of a building for the Woolco Store and the lease thereof to the F. W. Woolworth Company is not one of the things prohibited by the section if the respondents are bound by it. It prohibits the person, to use the most indefinite word, as an "owner, stockholder, principal, agent, employee or independent contractor or otherwise howsoever engage or participate in or be a stockholder or holder of any other security of any nature whatsoever of or a lender to or an owner of any debt or portion of a debt or to furnish any financial aid or other support or assistance of any nature whatsoever". None of those words are appropriate to the position of the respondent who would be acting as a landlord for the proposed Woolco Store. As Romer J. said in *Ward v. Patterson*[2], if a party had wished to provide against such a course of conduct then it was perfectly easy for it to have done so. When parties, advised by their solicitors, as in the present case, amend a printed clause by the insertion of additional words, then every effort must be made to give meaning to those words, but there is no

[1] (1906), 37 S.C.R. 430.

[2] [1929] 2 Ch. 396.

1967

CLARK'S-GAMBLE OF CANADA LTD. v. GRANT PARK PLAZA LTD. et al.

Spence J.

requirement that the clause so amended be extended to import covenants which there is no indication in the material or in the circumstances, as revealed in the evidence, the parties ever contemplated.

The appellant also makes the submission that the Proposal which it made to the respondent Grant Park Plaza Ltd. and which was accepted by the latter contemplated a building scheme and implies a negative covenant of the respondent not to depart from that scheme. The cases, of course, of such building schemes and the enforcement of such so-called negative covenants are numerous and it is quite plain that the common grantor who had required the grantee to enter into restrictive covenants may be enjoined from the utilization of the balance of his lands in a fashion contrary to that envisaged by such restrictive covenants despite the fact that the grantor himself has not entered into like covenants with his grantee. It is, however, significant that in such cases it was contemplated that like covenants should be taken from each of the grantees receiving their grants from the common grantor, and in my view that was not at all the situation contemplated in the present case.

On the other hand, the evidence would indicate that it was intended that each of the grantees, for instance, all these proposed allied stores, would be required to enter into certain covenants as to their utilization of the premises which would vary in each case in accordance with the type of operation which such tenants intended to pursue. One would be under a covenant to sell shoes and other small leather goods such as purses, while another would be under a covenant to sell ladies' wear which might include ladies' shoes, another under a covenant to sell men's wear which might include some men's shoes, and others under covenants to sell only certain wares which would almost inevitably be amongst the stock carried by the appellant. This is not a building scheme as dealt with in the many cases upon that subject.

The appellant argues that to permit the respondent to lease any part of the shopping centre to a discount depart-

ment store the activities of which would be competitive with the appellant's business would be in derogation of its grant.

In *Browne v. Flower*[1], at p. 227 it is said:

> It is quite reasonable for a purchaser to assume that a vendor who sells land for a particular purpose will not do anything to prevent its being used for that purpose, but it would be utterly unreasonable to assume that the vendor was undertaking restrictive obligations which might prevent his using land retained by him for any lawful purpose whatsoever merely because his so doing might affect the amenities of the property he had sold. *After all, a purchaser can always bargain for those rights which he deems indispensable to his comfort.*

(The italicizing is my own.)

And in *Aldin v. Latimer Clark, Muirhead & Co.*[2], Stirling J. said at p. 444:

> The result of these judgments appears to me to be that where a landlord demises part of his property for carrying on a particular business he is bound to abstain from doing anything on the remaining portion which would render the demised premises unfit for carrying on such business in the way in which it is ordinarily carried on...

In the present case, the landlord, whether it be considered to be Grant Park Plaza Ltd. or either of its subsidiary companies, does not propose to utilize any part of the balance of its land in a fashion which would result in any part of the lands leased to the appellant being rendered unfit for doing business. It proposes to erect a building more than twice the size of that leased to the appellant and lease the said building to the F. W. Woolworth Company for the carrying on of a Woolco store. It is true that one could only expect the operation of the Woolco Store to be stern competition for the appellant. But this is far from conduct which would render the premises leased to the appellant unfit for it to carry on its business. To adopt the words from *Browne v. Flower, supra,* "after all, a purchaser can always bargain for those rights which he deems indispensable to his comfort". Certainly the responsible officers of the appellant were well aware of the rights and interests of their employer. They had had long experience in both merchandising and leasing and would have found it

[1] [1911] 1 Ch. 219. [2] [1894] 2 Ch. 437.

1967

CLARK'S-GAMBLE OF CANADA LTD. v. GRANT PARK PLAZA LTD. et al.

Spence J.

a matter of no particular complication whatsoever to have drafted and insisted on a clear and exact covenant against leasing to a competing enterprise.

The appellant further submits that the respondents are estopped by the conduct of the respondent Grant Park Plaza Ltd. in the premises from asserting as against the appellant the right to lease any part of the shopping centre to a discount department store. An amendment of the statement of claim to present this argument was permitted by the judgment of the Court of Appeal for Manitoba. The said order permitted the amendment of the statement of claim by the addition of para. 9a which read as follows:

> 9(*a*). The Plaintiff repeats the allegations in paragraphs 5, 7, 8 and 9 hereof and says that the Plaintiff altered its position, relying upon such representations made orally by the President of the Defendant Grant Park on its behalf and in writing by the said plans prepared by the said Defendant and exhibited to the Plaintiff on its behalf, and entered into the lease referred to in paragraph 11 hereof and the Plaintiff says that the said Defendants are estopped by their conduct in the premises from asserting as against the Plaintiff the right to lease any part of the said shopping centre to a discount or other department store, the activities of which are competitive with the Plaintiff in the said location.

It would seem that the findings of fact made by the learned trial judge affirmed by the majority judgment of the Court of Appeal of Manitoba have held that the appellant failed to prove the allegations made in paras. 5, 7, 8 and 9 which it repeated as the basis of its claim for estoppel. I have already indicated that there was no covenant by the respondent Grant Park Plaza Ltd. to build the shopping centre other than the one building to be leased to the appellant. This in itself would be sufficient to dispose of the argument based upon estoppel. Moreover, it would seem that an estoppel can only be based upon representations made as to facts in existence: *Citizens' Bank of Louisiana v. First National Bank of New Orleans*[1], *per* Lord Selborne L.C. at pp. 360-361, where the Lord Chancellor quoted Lord Cranworth in *Jorden v. Money*[2] at pp. 214-215:

> I think that that doctrine does not apply to a case where the representation is not of a fact, but a statement of something which the party intends or does not intend to do. In the former case it is a contract, in the latter it is not.

[1] (1873), L.R. 6 H.L. 352. [2] (1854), 5 H.L. Cas. 185.

In *Maddison v. Alderson*[1], Lord Selborne L.C. said at p. 473:

> I have always understood it to have been decided in *Jorden v. Money* that the doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to promises *de futoro*, which, if binding at all, must be binding as contracts...

I do not regard *Marquess of Salisbury v. Gilmore*[2] as being an authority for the proposition that representations of intention as distinguished from representations of existing facts can found an estoppel. In my opinion, that case turns on the interpretation of the provisions of s. 18 of the United Kingdom *Landlord and Tenant Act, 1927*. MacKinnon L.J., at pp. 51-2, when dealing with estoppel finds that the estoppel alleged was not one of intention although framed in those words, but was a representation of fact.

The representations alleged here were all representations of intentions to act in a certain way in the future which the trial court had found to be nothing more and which the majority judgment of the Court of Appeal has found to be only a very rough guide to the probable development of the centre.

For these reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Thorvaldson, Eggertson, Saunders & Mauro, Winnipeg.

Solicitors for the defendants, respondents: Tallin, Kristjansson, Parker, Martin & Mercury, Winnipeg.

[1] (1883), 8 App. Cas. 467.

[2] [1942] 2 K.B. 38.