IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

A. 92/80

BETWEEN KEITH ALLAN NORRIS of Taupo, Carpenter and MAUREEN ANN NORRIS his wife

SET 3

Plaintiffs

A N D ALLAN DAVID WEAL of Taupo, Company Manager and LYNETTE HELEN WEAL his wife

Defendants

Hearing: 6 August 1984

Counsel: D.S. Dowthwaite for plaintiffs
A.I. Hassall for defendants
S. Thode for Commissioner of Crown Lands

Judgment: Delivered 30 NOV 1984

C.W. ENTWISTLE
Deputy Registrar

JUDGMENT OF GALLEN J.

In 1971 the Department of Lands and Survey had sections available under deferred payment licence in Armstrong Grove, Taupo. Three of those sections were ultimately taken up by the plaintiffs, Mr and Mrs Norris; the defendants, Mr and Mrs Weal and a third person, a Mr Fletcher, who was not a party to these proceedings. The southernmost of the sections, Lot No.278, was taken up by the plaintiffs, Mr and Mrs Norris. The locality diagram and the deferred payment licence plans show that this is an odd shaped section defined by 5 boundary points having the shortest of its boundaries on Armstrong Grove.

Mr Norris was, at the time of acquisition of the section, employed as a carpenter and it was his intention to erect his own dwelling. In order to develop the land for housing purposes it was necessary for him to site his house and for that reason to ascertain the boundaries on the ground. The land concerned was covered in broom, blackberry and undergrowth. The countour, at the least towards the rear, sloped away to a steep gully in which the Waipahihi stream flows. Mr Norris was able to find the pegs on the roadside without much difficulty but had considerable problems with those further onto the section. Eventually he located what he considered to be the boundary peg with the section to the north. He then made application to the Borough Council for a building permit and as part of that application, submitted a site plan. This site plan conforms to the plan on the deferred payment licence - at least in general configuration.

Mr Norris was concerned over his difficulty in finding all the pegs. He was concerned that the plan he had did not fit exactly with the pegs he had found but, because of the contour, he could not be sure whether he was right or wrong. He twice went to the Council and was informed that there had been some difficulty in the area finding pegs but if three pegs had been found, that would be sufficient. Mr Norris' site plan was passed by the Council. He stated he assumed that if there had been any mistake it would be found by the Council and he then proceeded to begin building. I should say at this point

that the obligation indicated on the permit documents is on the building owner to ascertain the boundaries and the evidence was to the effect that it is not a practice for building inspectors to check these.

In 1973, Mr Weal acquired the adjacent section. He too, was concerned to locate the exact boundaries and was able to find the roadside pegs without difficulty. He noted from the plan of his section, that the side boundaries proceeded from the front at what appeared to be nearly a right angle and using this as a basic guide, he endeavoured to locate the rear pegs but was frustrated in doing so by the contour and the extensive undergrowth. He says that having obtained what he thought was the general area of the section, he began to clear but was told by Mr Norris that he was in fact clearing on land which was a part of the section to the north. Mr Norris denies this conversation. There is no doubt however, that there was some communication between Mr Norris and Mr Weal and at some stage Mr Norris indicated to Mr Weal what he regarded as defining the boundary between them, this being the peg found by Mr Norris and on which he had based his own development.

It should be noted at this stage that the Fletchers to the north had already erected a house and had done so in such a manner as to confirm the understanding of Mr Norris and Mr Weal as to the position of the boundaries and the layout of the sections. Mr Fletcher was not a party to these proceedings.

No evidence was called from him and there is therefore nothing to indicate how he came to arrive at the boundary assumptions on which his house was sited and built, but it is clear that those assumptions were the same as those adopted by Messrs Norris and Weal. By this time, Mr Norris had proceeded some distance with his house but it was certainly not completed.

Mr Weal has a brother who was, at the time, involved in the building industry and Mr Weal sought assistance from him. Mr Weal's brother was Mr William Weal. Mr William Weal gave evidence that when it came to attempting to site the house, he was influenced by a boundary line which he says Mr Norris had placed in position from the corner peg identified by Mr Norris, to the front peg and which appeared to define the boundary between the two sections. No doubt also, he would have been influenced in his conclusion by the position of the Fletcher house.

For various reasons, the building arrangements contemplated by the Weals did not come to pass and eventually an arrangement was entered into whereby Mr Norris, who was interested in building on his own account, entered into a contract to build the Weal's house, Mr Weal providing the materials and being responsible for sub-contracting. On this basis, Mr Norris built the Weal's house. There is some dispute over responsibility for laying-out. Mr Norris maintained that he merely took over the setting out already undertaken by Mr

Weal's brother. Mr Weal, on the other hand, put emphasis upon the responsibility of a builder to satisfactorily lay out a house in relation to the boundaries. Whatever the true position, everyone connected with these developments had already accepted assumptions based on the assumed boundary point located by Mr Norris and I think it would have been unreal to expect any change at that stage. Mr Weal was however, concerned over boundaries. He too, felt something was not right and he approached the Borough Council, discussing his concern with a person whom he described as a receptionist. I think it likely that the person concerned was someone connected with the building responsibilities of the Council because that person produced plans and assured Mr Weal that the two houses which had already been built, that is Mr Norris and Mr Fletcher's, were correctly sited.

Mr Weal's house was then built. Subsequently, Mr and Mrs Weal were involved in very substantial developments. They constructed a reinforced concrete drive down the side of the house, built terraces and concrete walls and on the rear of the section a very substantial concrete area which was used for parking purposes. They also put up a boat shelter and developed a considerable vegetable garden. It is no exaggeration to say that the photographs revealed a developed section into which an enormous amount of work and a considerable expenditure must have gone. The development is a credit to the Weals and produced a property of which they were entitled to be - and no doubt were - extremely proud.

In 1978, Mr Norris decided to build a garage and prepared a site plan in support of an application for a building permit. While this was under consideration, the Borough Council was also in the course of extending sewerage reticulation to the area and this development caused boundaries to be checked as a result of which it was ascertained that all three properties had been developed on a wrong basis. Where Mr Norris proposed to put his garage, was on reserve land belonging to the Council. Mr Weal had erected part of his house and a boatshed and a substantial part of his garden as well as driveway on land which was in fact a part of Mr Norris' section and Mr Fletcher's house and garden extended onto the land which belonged to the Weals. I have no evidence before me to indicate how the problem arising in respect of the Fletcher land occurred, but it is clear that the difficulty between Messrs Norris and Weal arose because the boundary peg found by Mr Norris was in fact not a peg between his property and that of Mr Weal, but an angle point to the south of that. The boundary point between Mr Norris and Mr Weal had actually been discovered by Mr Weal who, in the course of his investigations, had burned some of the growth in the course of which he himself had received injuries, but he had understood the peg he found to be the boundary between himself and Fletchers.

Obviously, the situation was one which required a remedy and various suggestions were canvassed to resolve the problem. Unfortunately, none of these resulted in agreement. The evidence indicated that a considerable degree of bad feeling has now understandably arisen. Comments have been made

orally and in writing which, though understandable enough, were unlikely to smooth the concerns of those involved. In whatever way the position is looked at, there are enormous difficulties. If Mr and Mrs Weal are to retain any part of the area which they have developed, Mr and Mrs Norris will lose a part of their land and have no assurance that this can be recouped from any other source.

It was suggested that the Borough Council might be able to correct the situation by making available part of the reserve lands. Evidence was given that such a course would take a considerable time to implement and there could be no assurance that it would be successful. There is strong opposition to the disposition of reserve lands and the correspondence indicates that in any event there would be some contour problems but perhaps more significantly, the Council required the land concerned for access purposes.

Mr and Mrs Weal on the other hand, if they lose the land developed, will not only lose the advantage of the development but in addition will be faced with very serious problems in endeavouring to get access to the land owned by them at the rear and would face practical difficulties in erecting a garage. Without the land occupied by Mr and Mrs Weal, Mr and Mrs Norris face the same difficulty. The position of the Fletcher house makes access to the true Weal land impractical. There is no solution to this problem which will satisfy all parties and no solution which can fairly put right

the existing situation without some loss and certainly some distress, to all those concerned.

The Borough Council suggested a proposal at an early stage which involved a transfer of land from Mr Norris' section to Mr Weal's section and the establishment of a right of way which would give access to Mr Weal. While this might have been acceptable to Mr Weal, it was unattractive to Mr Norris because the existence of the right of way, in his view, constituted a serious impediment to his construction of a garage on the land which would then have become available to him. This was hotly contested by Mr Weal who considered that there would have been ample room for the construction of a garage.

Various other proposals were considered and eventually the evidence indicates that the parties were close to agreement on an arrangement which is set out on a plan produced by the defendants as ex.A, but this did not proceed because although the suggested boundaries might have been acceptable, the parties could not agree on other consequences relating to compensation. The plaintiff now suggests an arrangement which would effectively add that land on which the Weal's house and driveway encroaches to the Weal's section but deprive the Weals of the balance of the land developed by them. This is not acceptable to the Weals because it involves the loss of part of their vegetable garden, the loss of access to the rear of their section and the loss of access to a garden shed which has been built into the bank and which would remain on their property, but the door of which would open onto the Norris' land.

It is against this background that the plaintiffs and the defendants seek relief.

Because the parties failed to reach any agreement, the plaintiffs initiated proceedings in order to bring the matter to resolution. The plaintiffs sought an injunction in respect of the defendant's house by compelling the defendants to remove, dismantle or demolish the house or alternatively, compelling the the defendants to agree to purchase the area of land encompassing the encroachment at a price determined by the Court and an inquiry as to damages suffered by the plaintiffs, together with judgment for such damages as should be found. The defendants met thse claims by alleging that in the circumstances, the plaintiffs were estopped from asserting that the true boundary line was other than that which the parties had assumed it to be when developing their properties and further sought orders under the provisions of ss.129 and/or 129A of the Property Law Act 1952. The plaintiffs subsequently abandoned their claim for a writ of injunction and all other relief as pleaded in the statement of claim, but sought an oder under s.129 of the Property Law Act 1952 rectifying the position. They specifically did not seek any order under s.129A.

The defendants allege that in the circumstances they are entitled to rely upon a proprietary estoppel or estoppel by acquiescence, nomenclature preferred in Spencer-Bower and Turner on Estoppel by Representation 3rd ed.. Counsel for the defendants started from the decision in Willmott v. Barber

(1880) 15 Ch.96 and referred to the five probanda enunciated in that case by Fry J.. These are as follows:-

1. The person said to have been encouraged must have made a mistake as to his legal rights.
2. The person so claiming must have expended some money or done some act on the faith of his mistaken belief.
3. The possessor of the legal right must know of the existence of his own right which is inconsistent with the right claimed by the claimant. If he does not know of it, he is in the same position as the claimant.
4. The possessor of the legal right must know of the claimant's mistaken belief of his rights. If he does not, there is nothing to call upon him to assert his own rights.
5. The possessor of the legal right must have encouraged the claimant in his expenditure of money while the other acts he has done either directly or by abstaining from asserting his legal rights.

In this case, there is no doubt that the defendants were mistaken as to their legal rights. There is equally no doubt that they expended considerable funds and carried out substantial work on the basis of their mistaken belief. I accept however that the plaintiffs - the possessor of the legal right - did not at all material times know of the existence of their own rights inconsistent with those assumed by the-

defendants. The plaintiffs did know of the defendants' belief, but not that this belief was mistaken. I also accept that the plaintiffs did not assert their legal rights and to that extent may be said to have encouraged the defendants, but in saying this, I also accept that there was no conscious decision or acquiescence with knowledge since they were not aware of the true position. The defendants contend that to succeed in establishing an estoppel of the kind relied upon, it is not necessary that all five probanda should be established. They submit that the more modern cases proceed on a rather more general basis and that Willmott v. Barber is no more than a particular illustration of the application of the more general principle. Reference was made to Crabb v. Arun District Council (1975) 3 All E.R. 865 and in particular to the statement of principle by Lord Denning M.R. at p.871 where he said:-

> ".....Lord Cairns said in Hughes v. Metropolitan Railway Company (1877) 2 a.c. 439 at 448 - ".....It is the first principle upon which all Courts of Equity proceed....."
> that it will prevent a person from insisting on his strict legal rights - whether arising under a contract, or on his title deeds, or by statute - when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties. What then are the dealings which will preclude him from insisting on his strict legal rights? If he makes a binding contract that he will not insist on the strict legal position, a court of equity will hold him to his contract. Short of a binding contract, if

he makes a promise that he will not insist on his strict legal rights - even though that promise may be unenforceable in point of law for want of consideration or want of writing - and if he makes the promise knowing or intending that the other will act on it, and he does act on it, then again a court of equity will not allow him to go back on that promise: see Central London Property Trust v. High Trees House (1956) 1 All E.R. 256, Charles Rickards v. Oppenheim (1950) 1 All E.R. 420 at 423. Short of an actual promise, if he, by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights - knowing or intending that the other will act on that belief - and he does so act, that again will raise an equity in favour of the other, and it is for a court of equity to say in what way the equity may be satisfied. The cases show that this equity does not depend on agreement but on words or conduct."

That case involved a right of access to a public highway. Further reference was made to the decision of Oliver J. in Taylor Fashions Limited v. Liverpool Victoria Trustees Company Limited (1981) 1 All E.R. 897. That was a case arising out of a mistaken belief as to the validity of options. The plaintiffs with the knowledge of the defendants, expended considerable sums in reliance on the validity of the options and claimed that in the circumstances the defendants were estopped from denying their validity. The defendants met this contention by alleging that the mistaken belief of both parties in the validity of the options was sufficient to prevent estoppel by acquiescence and in particular that the defendants not having been aware of their strict rights, could not have acquiesced in the sense necessary to establish the rights

contemplated by the concept of acquiescence. After a careful review of the authorities, Oliver J. held that estoppel by acquiescence was not restricted to cases where the representor was aware both of what his strict rights were and that the representee was acting in the belief that those rights would not be enforced against him. The Court was required to ascertain whether in the particular circumstances it would be unconscionable for a party to be permitted to deny that which knowingly or unknowingly he had allowed or encouraged another to assume to his detriment. He held that whether the representor knew of the true position was merely one of the factors relevant to determining whether it would be unconscionable for him to be allowed to take advantage of the mistake. The defendants also relied upon the unreported decision of Barker J. in Andrews and Barnard v. Colonial Mutual Life Assurance Society Limited referred to in 1982 Current Law p.386.

The learned author of Spencer-Bower and Turner on Estoppel by Representation, 3rd ed., indicates the necessity of preserving the distinction between acquiescence or proprietary estoppel on the one hand and estoppel by representation on the other. He points to the undesirability of relaxing the requirements established for acquiescence by an application of principles more appropriate to estoppel by representation. He suggests that it is undesirable to over-simplify by applying inappropriate principles. Since the publication of that edition, in the Taylor Fashions case, Oliver J. applied what might be described as the more liberal approach adopted in the

English Court of Appeal. He did not consider that it was necessary for all five probanda in Willmott v. Barber necessarily to be satisfied and did so after an examination of many authorities including some earlier than Willmott v. Barber. In that decision, as in Crabb v. Arun District Council, the emphasis is rather on the element of unconscionability. Fortunately, I do not need to come to any conclusion between these conflicting views in this case. The defendants cannot satisfy the criteria in Willmott v. Barber because there is no doubt that at all material times the plaintiffs, the possessor of the legal right, were not aware of the existence of their own rights as inconsistent with the rights claimed by the defendants.

In addition, there is authority to the effect that there can be no estoppel where the parties are equally ignorant of their respective rights, see Spencer-Bower and Turner Estoppel by Representation 3rd ed. para.298 and the authorities there cited.

However, even if the broader or more liberal approach were accepted, I could not find that in this case there had been any element of unconscionability in the sense in which that term has been understood in the authorities. In the Taylor Fashions case for example, the claimant was encouraged to spend substantial sums of money on development on the basis that it was entitled to a valid option. While it is true that the defendant also believed that the option was valid, eventually it was held invalid on a technicality related to a

lack of registration and under those circumstances, there was good reason for the suggestion that there was an element of unconscionability.

In this case, I accept that both parties genuinely understood that the boundary line was where they both believed it to be and set out to develop their sections accordingly. It is true that the establishment of that line depended initially on the investigations of the plaintiffs, but the defendants made independent investigations consulting the Borough Council, as well as making some attempt to find the pegs themselves. The Fletchers also were mistaken. In my view, there is insufficient to establish acquiescence either in the strict sense or the more liberal sense of the later cases. I do not overlook that Mr Norris built the defendants' house, but I consider the siting was a consequence of the original mistake, not a reinforcement of it.

That brings me to the question of the application of ss.129 and 129A of the Property Law Act 1952. I should say at this stage that at my direction, the Commissioner of Crown Lands was served with these proceedings. At all material times the land was and remains Crown land, subject so far as both plaintiffs and defendants are concerned, to deferred payment licences. The question was raised as to whether or not under the circumstances there was any jurisdiction to apply the provisions of the Property Law Act in respect of such land.

Before considering this question, I propose to deal with the application on the basis that the Property Law Act does apply and having arrived at the conclusions I consider appropriate on that assumption, to then consider whether these are affected by the land status question. S.129 of the Property Law Act 1952 is in the following terms:-

> "(1) Where any building on any land encroaches on any part of any adjoining land (that part being referred to in this section as the piece of land encroached upon, whether the building was erected by the owner of the first-mentioned land (in this section referred to as the encroaching owner) or by any of his predecessors in title, either the encroaching owner or the owner of the piece of land encroached upon may apply to the Supreme Court, whether in any action or proceeding then pending or in progress and relating to the piece of land encroached upon or by an originating application, to make an order in accordance with this section in respect of that piece of land.
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> (2) If it is proved to the satisfaction of the Court that the encroachment was not intentional and did not arise from gross negligence, or, where the building was not erected by the encroaching owner, if in the opinion of the Court it is just and equitable in the circumstances that relief should be granted to the encroaching owner or any other person, the Court, without ordering the encroaching owner or any other person to give up possession of the piece of land encroached upon or to pay damages, and without granting an injunction, may in its discretion make an order -
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> (a) Vesting in the encroaching owner or any other person any estate or interest in the piece of land encroached upon; or
> (b) Creating in favour of the encroaching owner or any other person any easement over the piece of land encroached upon; or
> (c) Giving the encroaching owner or any other person the right to retain possession of the piece of land encroached upon.

(3) Where the Court makes any order under this section, the Court may, in the order, declare any estate or interest so vested to be free from any mortgage or other encumbrance affecting the piece of land encroached upon, or vary, to such extent as it considers necessary in the circumstances, any mortgage, lease, or contract affecting or relating to that piece of land.

(4) Any order under this section, or any provision of any such order, may be made upon and subject to such terms and conditions as the Court thinks fit, whether as to the payment by the encroaching owner or any other person of any sum or sums of money, or the execution by the encroaching owner or any other person of any mortgage, lease, easement, contract, or other instrument, or otherwise."

The first question to determine is the extent to which the section may properly be applied to the problem which arises in this case. The section is confined in terms to the encroachment of a building. In Collins v. Kennedy 1972 N.Z.L.R. 939, Henry J. was concerned with a situation where a double garage retaining wall and terrace had been built in such a way that the garage and wall encroached onto the plaintiff's property for a width of 16" and a length of 50'. It was conceded that the garage was a building within the meaning of the section, but it was contended that the rest of the structure encroaching did not come within that term. While the learned Judge accepted that a wall as such might not be a building for the purposes of the section, when the wall was an integral part of a building, it might well be. He stated that every case needed to be considered on the basis of its own facts and concluded that the structure as a whole including the wall, was a building for the purposes of the section.

In this case, there is encroachment by the defendants' house; by their concrete drive; by a concrete wall; by a garden shed; by a garden and by a boat shed which does not seem to have been of any very permanent construction. There can be no doubt about the house. Clearly that is a building as contemplated by the section. Equally clearly the garden is not so covered. The question is whether the concrete drive and wall are to be regarded as so closely associated with the house as to constitute a building for the purposes of the section as that word was interpreted in Collins v. Kennedy. The concrete drive abuts the house and provides access to the rear of it. The concrete wall is sufficiently closely associated with the house and the drive to be reasonably considered as contributing to the stability of the house and in that sense, a retaining wall. The garden shed is of course a building, as is also the boat shed.

The question will always be one of degree. I find as a fact that in the circumstances of this case, having regard to the evidentiary material available to me, that the concrete drive and concrete retaining wall are - together with the house - sufficiently associated with the house to be regarded as a building for the purposes of s.129 of the Property Law Act 1952.

(2) I further find as a fact, that it is proved to my satisfaction that the encroachment was not intentional and did not arise from gross negligence.

On the basis of these findings, it is then necessary to decide what relief, if any, is appropriate having regard to the provisions of the section. Mr Hassall for the defendants has argued strenuously that as far as possible the parties should be put in the position which they have all along assumed was correct. This would involve the plaintiffs obtaining an area of land which is at present recreation reserve vested in the Taupo Borough Council. I have no power to compel the Taupo Borough Council to make land available and the evidence suggests that in any event it is rather unlikely that it would be prepared to go along with such a proposal. The suggestion was made during the course of the hearing, that the matter could be adjourned until such time as this possibility had been investigated. I do not think that this is appropriate. It is important that these parties should know their position as soon as possible. I accordingly reject that suggestion. In the absence of Council involvement, the proposal would correct the defendants' position, but be seriously detrimental to the plaintiffs.

The parties have made some efforts in the past to resolve the issue. They almost reached agreement on a particular proposal which is illustrated by the plan produced as ex.A. This would have allowed the defendants to retain a proportion of their driveway, their garden shed and part of the garden at the rear. This proposal was not however able to proceed because although the parties could have reached agreement on the boundaries indicated, they were unable to reach agreement on the question of whether or not any

compensation should be paid and if so, how much. This particular proposal is no longer attractive to the plaintiffs although it would be acceptable to the defendants. It is not attractive to the plaintiffs because the plaintiffs maintain that they would be unable to satisfactorily construct a garage on the balance of the land remaining to them after the adjustments contemplated by the plan had been made. The plaintiffs have proposed as a possible solution, the suggestions illustrated by the plan, ex.2. This effectively gives to the defendants the area encroached upon by the house, the driveway to the side of the house and a small area behind this, but leaves for the plaintiffs a substantial area of the land developed by the defendants at the rear.

It is quite clear that no solution to this problem is going to be satisfactory to all parties and at best, there can only be a compromise which would preserve some of the developments which both parties quite reasonably wish to retain.

In my view, the least unsatisfactory solution would be a combination between the proposals shown on the plan ex.A and the plan ex.2. I consider that the solution should be generally as shown on plan ex.A. However, I think that the corner should be rounded off as is shown on the plan ex.2, to give easier access to the plaintiffs to the rear of their section. Neither plan therefore completely defines the proposal which I consider appropriate and a survey would be necessary to implement it. Subject to amendment by rounding

the corner therefore, the defendants would be entitled to recover the land generally defined on ex.A and coloured blue.

Can the solution outlined above be approached within the ambit of s.129 of the Property Law Act? In my view it can. I have already concluded that the concrete driveway, wall and garden shed may on the analogy of the decision in Collins v. Kennedy, be regarded as a building for the purposes of the section becasuse of their association with the house, as well as the fact that the garden shed may reasonably be considered as a building in its own right. Although the boat shed has a somewhat equivocal status, for the purposes of the section I think it must be regarded as a building and its position adjacent to the extended concrete area would further reinforce the conclusion that the whole encroachment must be regarded as one. While the proposal above includes an area of garden, which cannot be considered as a building, this area is completely cut off from the balance of the plaintiffs' section and in my view the surrounding encroachment is sufficient to justify the inclusion of this small piece of land because it is cut off. Any other proposal would be quite unworkable. Therefore, I consider that the section does give sufficient power to arrive at the solution set out above even although the solution does not extend to including in the area for transfer, the whole of the encroachment since I do not think it appropriate to include the boat shed or the balance of the concrete area adjacent to it.

Reliance was also placed on the provisions of s.129A. If I am wrong in my conclusions as to the extent of the jurisdiction afforded by s.129, then consideration should be given to s.129A. That is in the following terms:-

> "(1) Where (whether before or after the commencement of this section) any person who has or had an estate or interest in any piece of land (in this section referred to as the original piece of land) has, while he had that estate or interest, erected a building on any other piece of land (that other piece together with any land reasonably required as curtilage and for access to the building being in this section referred to as the piece of land wrongly built upon), if the building has been so erected because of a mistake as to any boundary or as to the identity of the original piece of land, that person, or any other person for the time being in possession of the building or having an estate or interest in either the original piece of land or the piece of land wrongly built upon, or any other person mentioned in subsection (6) of this section, may apply to the Supreme Court, whether in any action or proceeding then pending or in progress and relating to the piece of land wrongly built upon or by an originating application, to make an order in accordance with this section.
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> (2) If in the opinion of the Court it is just and equitable in the circumstances that relief should be granted to the applicant or any other person, the Court may in its discretion make an order -
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> (a) Vesting the piece of land wrongly built upon in the person or persons specified in the order:
> (b) Allowing any person or persons specified in the order to remove the building and any chattels and fixtures or any of them from the piece of land wrongly built upon:
> (c) Where it allows possession of the building to any person or persons having an estate or interest in the piece of land wrongly built upon, requiring all or any of the persons having an estate or interest in that piece of land to pay compensation in respect of the building and other improvements to the piece of land wrongly built upon to such person or persons as the Court may specify:

(3) Where appropriate, the Court may make any such order without ordering the applicant or any other person to give up possession of the piece of land wrongly built upon, or to pay damages, and without granting an injunction.

(4) Where the Court makes any order under this section, the Court may, in the order, declare any estate or interest in the piece of land wrongly built upon to be free from any mortgage, lease, easement, or other encumbrance affecting that piece of land, or vary, to such extent as it considers necessary in the circumstances, any mortgage, lease, easement, contract, or other instrument affecting or relating to that piece of land.

(5) Any order under this section, or any provision of any such order, may be made upon and subject to such terms and conditions as the Court thinks fit, whether as to the payment by any person of any sum or sums of money, or the execution by any person of any mortgage, lease, easement, contract, or other instrument, or otherwise."

The plaintiffs contend that s.129A applies only in a case where a building has been wholly erected on another piece of land rather than partially so building. That is a view which is contained in those commentaries made on the section in the textbooks, but there is as yet no authority on the question. The section need not be read in such a restricted fashion. It could in terms apply to any situation where a building has been erected wholly or partially on any area of land and I think this contention is strengthened by the reference to a mistake as to the boundary. A mistake as to a boundary is more likely to refer to a crossing of a boundary than to erection wholly on a defined area of land which would be more aptly referred to without reference to a boundary in that context.

S.129A is wider than s.129 in that it refers to land reasonably required as curtilage and for access. Curtilage is not a defined term, nor is it one which could be regarded as having any rigid meaning. Curtilage is a term which effectively covers areas accessory to a building. In every case the extent of the curtilage will be a question of fact and the use of the term will vary according to the context in which it is used. It may be that the more extensive jurisdiction to allow a curtilage is the reason for the additional jurisdiction conferred by s.129A which would be appropriate to meet the special requirements imposed by planning considerations. The restricted jurisdiction of s.129 could not provide for compliance with, for example, side yard restrictions. If I were wrong therefore in concluding that the order I propose may be made under the provisions of s.129, I should be prepared to conclude that it might properly be made under the provisions of s.129A or if necessary, by a combination of the two sections.

Either then under the provisions of s.129 or s.129A or a combination of the two, I am prepared to order that the plaintiffs do transfer to the defendants, that land defined on the plan ex.A and coloured blue, subject to that definition being amended by rounding the corner as referred to above.

That leaves the question of compensation. The plaintiffs claim that they are entitled to be compensated for the loss of land from their section. The defendants claim that having regard to the circumstances, compensation should not be

payable. Effectively, the transfer of land will increase the value of the defendants' land and reduce that of the plaintiffs which will be left in a rather unattractive shape. Having regard to the circumstances, the actual increase in value of the defendants' land is likely to be very considerable for without the transfer, their house would be unsaleable. I think justice can best be done to the parties if compensation is payable to the plaintiffs.

It was submitted that any compensation should be assessed on the basis of the values which pertained at the time the parties took up their interest. While there is something to be said for such an approach, the realities of the situation are that the parties are dealing with land which, if they were to sell, would be assessed on current values and I consider that it is more appropriate to work on this basis. The defendants are getting an advantage and the plaintiffs are sustaining a loss. In my view, it is appropriate that both advantage and loss should be ascertained as at the present time.

Both the plaintiffs and the defendants called evidence from valuers as to the advantages and disadvantages of the various proposals and in the case of the valuer called for the defendants, evidence was also given on the value of improvements. Since the solution I regard as appropriate was not contemplated by either, I am not in a position to accept the views which either put forward since these could be affected by considering what is a different proposal. In my

view, the matter would be best resolved if the area of land to be transferred to the defendants, ~~were valued as at~~ the date of this judgment by a Government Valuer from the Valuation Department. An allowance is to be made to the plaintiffs for any injurious affection in addition to the actual loss of land, but the defendants are to be given credit for the value of any improvements which the plaintiffs now receive effectively built on their land as a result of the mistake made by the parties. I do not consider however, that the defendants should have to pay to the plaintiffs any sum in respect of the improvements they retain which were of course provided by them. The value of the improvements to be paid for by the plaintiffs is also to be assessed by the Departmental Valuer and I direct that any necessary assessment be made by that Department. The balance resulting would be paid by the defendants to the plaintiffs as a condition of the implementation of any order made as a result of this judgment.

Any survey charges necessary to implement the order contemplatd by this judgment, should be borne equally by the parties and in all other respects I consider that the parties should bear their own costs. If the parties cannot agree to a surveyor, leave is reserved to apply for further directions.

There remains the question of the jurisdiction to make the order bearing in mind the provisions of the Land Act 1972. Counsel for the Commissioner of Crown Lands prepared detailed and helpful submissions. He submits that the Court has no

... to make orders under the provisions of ss.129 or 129A of ... Property Law Act 1952 in respect of the land concerned ... it is Crown land subject to the provisions of the Land ... He submits that deferred payment licences are unusual ... of Statute and that the Land Act provides a complete ... for dealing with them, including sub-division and the ... of incorporation of other areas. He submits that ... provisions should apply in preference to any contained in ... Property Law Act and in particular, that in any conflict ... the Acts, the Land Act must prevail for it contains the ... provisions which deal with deferred payment licences. ... drew to my attention the provisions of s.86 of the Land ... which clearly contemplates the possibility that land might ... incorporated or excluded from a lease or licence pursuant to ... Act and I do not see any necessary conflict between the ... Law Act and the Land Act since the provisions referred ... are clearly designed to deal with quite different ... situations.

However, counsel also submitted that the Property Law ... 1952 does not bind the Crown. The Property Law Act does ... state that it binds the Crown and this is not an Act ... included in the schedule to the Crown Proceedings Act 1950. ... while at first sight the provisions of s.5 (k) of the Acts ... Interpretation Act 1924 would appear to apply, there is ... authority to the effect that this is by no means decisive on ... the question, see In re Buckingham 1922 N.Z.L.R. 771. While ... the question has not perhaps been finally determined, the

balance of authorities suggest that the Land Transfer Act does not apply to the Crown and since the Land Act does provide a code dealing with Crown land, it would be difficult to argue that by necessary implication the provisions of the Property Law Act applied, at least in total. In this case, the parties have indicated that if there is any doubt, in order to dispose of the matter they would be prepared to freehold the land concerned. This would have the effect of involving them in the loss of the particular advantages which they at present enjoy because of the terms of the deferred payment licences under which they are purchasing. As a practical solution, the parties may consider that the conclusions contained in this judgment might be submitted to the Board under the provisions of the Land Act for implementation.

I direct therefore, that the provisions of this judgment are to be made avaialble to the Commissioner of Crown Lands. Leave is reserved to any party to further apply in respect of any of the matters raised by the decision.

Solicitors for Plaintiffs:	Messrs Dennett, Olphert, Sandford and Dowthwaite, Rotorua
Solicitors for Defendants:	Messrs Bennetts, Bennetts and Morrison, Hamilton
Solicitor for Commissioner of Crown Lands:	Department of Lands and Survey, Hamilton