IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

ACB

A.98/84

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IN THE MATTER OF The Declaratory Judgments Act 1908

BETWEEN **N.B. HUNT AND SONS LIMITED** a duly incorporated company having its registered office at Rotorua

Plaintiff

AND **THE MAORI TRUSTEE** a Corporation sole pursuant to the Maori Trustee Act 1953

Defendant

COUNSEL
DCL WGTN
NZLR
BUTTERWORTHS
11 DEC 1984

Hearing: 19 and 21 November 1984

Counsel: G.R. Joyce for Plaintiff
M.S. McKechnie for Defendant

Judgment: Delivered 11 DEC 1984

C.W. ENTWISTLE
Deputy Registrar

JUDGMENT OF GALLEN J.

The Maori Trustee acting as agent for owners, is lessor of that land known as Kaitao Rotohokahoka 2Q block hereinafter referred to as "the land". In 1966 the Maori

Trustee as lessor entered into a lease of the land with the lessee, N.B. Hunt and Sons Limited for a term of 21 years from 1 March 1966. The lease provides that rental reviews are to be carried out at 7 year intervals and the method of calculation of the rental is 5% of the capital value. The capital value is to be determined according to a special Government valuation of the land to be made at the expense of the lessee. The original lease was sent to the then solicitor for the lessee, but does not seem to have ever reached the lessee company. It refers to the land as "Kaitao Rotohokahoka 2Q block as partitioned out......". This appears from the Department's copy of the lease which was produced.

In 1973, re-calculation of the rental took place. The Maori Trustee obtained a certificate from the Valuation Department which refers to the description of the land as being "Kaitao Rotohokahoka 2Q Pt.". The total area of the land contained in the block is then set out at 1,144 acres 1 rood 13 perches. In that context, the abbreviation "Pt." must clearly refer to the partition since the whole block is included. On the basis of the valuation then carried out, the Maori Trustee calculated the rental which was paid thereafter by the plaintiff company.

In 1980 the rent was again to be reviewed. The Maori Trustee again sought a certificate from the Valuation Department. It appears that the plan of the land attached to

the Maori Trustee's copy of the lease, shows the block as appearing in two parts, one consisting of 694 acres 1 rood 13 perches and shown as the "bush block" and the balance showing the area of land as 450 acres but not otherwise identified. The only plan available to the lessee company (which had not received its copy of the lease from its solicitor), did not show the land so sub-divided but as one block which legally of course it is. Presumably as a result of an error in the Maori Trustee's Department, the Valuation Department was required to provide a certificate only for that part of the land identified on the plan as "the bush block". This appears clear from the area which exactly matches. The certificate prepared by the Valuation Department in accordance with these instructions, refers to the land as "Pt. Kaitao Rotohokahoka 2Q, 280.9858 hectares." The certificate was sent to the plaintiff with a letter from the office of the Maori Trustee which referred to "your lease of Kaitao Rotohokahoka 2Q Part.". It then set out the figures contained in the certificate from the Valuation Department and assessed a rental on the basis of 5% of the value shown in the certificate. That amounted to $4,035.

I set out that letter of 19 March 1980:-

> "We wish to advise that we have received details of the valuation on which rent payable for the period commencing 1.3.80 is assessed and attached herewith is your copy of the valuation and notice of filing in the Magistrate's Court, Rotorua.
>
> If no objections are raised, either by you as lessee or by the Maori owners, rent for the reviewed term will be as follows, in terms of the lease agreement.

Capital value		118,500.00
Less value of improvements		37,800.00
		$80,700.00
5% of $80,700	=	$ 4,035.00
Maori Trustee's Commission		$ Nil
Annual Rental		$ 4,035.00

If no objections are raised, rent will be demanded at the revised rate.

Please let us have a further $82.00 as the cost of the special Government valuation amounted to $162.00"

The lessee had contemplated further development of the land. The affidavits indicate that there were special reasons which justified this interest. The Bay of Plenty Catchment Commission was carrying out work which meant a water supply could be arranged. Rural Bank moneys were available for development and electric fencing made it economic to divide into smaller paddocks. The rental which was assessed in 1980 was a significant factor. The lessee worked on the assumption that it was the total rental and that it would remain as the rental for a period of 7 years. Budgets were accordingly prepared with the Rural Bank on this basis. A development loan was raised and development proceeded.

In 1983 an officer in the Maori Trustee's Department realised that an error had occurred. A certificate was then required from the Valuation Department on the whole block and the rental re-assessed. The certificate was prepared on the basis of a valuation as at February 1980.

On 20 February 1984 the Maori Trustee advised the lessee of the mistake which had been made and of the re-assessed rental. This was the first the lessee had heard of the true position. The lessee asserts that it would not have been economic to carry out the development which was done if faced with the re-assessed rent which in fact was raised from $4,035 to $23,700 p.a.. The Maori Trustee now contends that it is entitled - indeed is obliged - to recover the full rental for the whole period. The lessee maintains that the Maori Trustee is estopped from claiming rental on this basis for any part of the 7 years. That is the dispute.

Arguments based on estoppel by representation have become of increasing significance in increasing years. In Amalgamated Investment and Property Company Limited (in Liquidation) v. Texas Commerce International Bank Limited (1982) 1 Q.B. 84, Lord Denning M.R. said at p.122:-

> "The doctrine of estoppel is one of the most flexible and useful in the armoury of the law."

He then went on to set out a general theory of the concept.

In Spencer Bower and Turner on Estoppel by Representation 3rd ed. 4, a general definition of the concept is set out based on an analysis of a considerable number of authorities and is to this effect:-

> " Where one person has made a representation to another person in words or by acts or

> conduct......with the intention, (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto."

As a statement of principle, that was accepted in Hopgood v. Brown (1955) 1 All E.R. 550. The first question for consideration in this context therefore is, was there a representation?

The plaintiff says that the letter from the defendant to the plaintiffs dated 19 March 1980 amounted to a representation for the purposes of the definition. The defendant says this letter was no more than the equivalent of an invoice. An invoice is not as such, normally sufficient to create an estoppel, see Holding and Others v. Elliott 1865 H. & M. 117. This follows from the fact that it is not a document likely to induce a person receiving it to alter his position. It may further be observed that it is normally open to the recipient of an invoice to check it against the goods to which it refers and indeed it would be prudent to do so. Nevertheless, it is clear that the reasons why an invoice would not usually found an estoppel arise from the facts which are commonly associated with it.

It is conceivable that even an invoice might in certain circumstances give rise to an estoppel. In Taranaki Electric-Power Board v. Proprietors of Puketapu 3A Block Incorporated 1958 N.Z.L.R. 297, North J. as he then was, was concerned with a situation where an electric power board had sent monthly accounts which had been paid by the defendant. The equipment metering the electricity supplied upon which the monthly accounts had been prepared, was in fact defective although this was not known to either the board or the defendant company. The result was that over a period the company was under-charged by a very substantial amount for the power used by it. In the circumstances of that case, North J. held that the monthly accounts were to be regarded as representations of the existence of a certain state of fact.

Mr McKechnie for the defendant however, says that the letter is not to be regarded on its own - that for the purposes of this case, any representations must be spelled out of the composite documents consisting of first, the notice as to intention; secondly, the letter from the defendant to the plaintiff; thirdly, the certificate which was enclosed with that letter.

The notice indicates the basis upon which the rental is to be re-assessed. It refers to the whole block. The certificate refers to part of the block and the area of land described is less than the total. The letter of advice of the

rental refers to the block as "Kaitao Rotohokahoka 2Q Part.". It then refers to the rent for the reviewed term. Mr McKechnie puts considerable reliance upon this certificate. He draws attention to the fact that it clearly refers to part of the land and that the area contained in the certificate is only approximately half of the area involved in the lease. He relies in this connection on the decision of the Privy Council in Canada and Dominion Sugar Company Limited v. Canadian National (West Indies) Steamships Limited 1947 A.C. 46. That was a case of estoppel based on a bill of lading. The bill of lading in respect of sugar stated that the sugar had been "received in apparent good order and condition" for shipment. On the basis of that statement, it was contended that the shipper was estopped from arguing that the sugar referred to in the bill of lading was damaged before shipment. It was established as a matter of fact that this had occurred. The bill of lading contained the qualifying words, "Signed under guarantee to produce ship's clean receipt." The Privy Council held that the bill of lading was to be construed as a whole. Lord Wright stated at p.55:-

> "A question now of estoppel must be decided on ordinary common law principles of construction and of what is reasonable, without fine distinctions or technicalities."

The Privy Council held that construing the bill as a whole, including the reference to the receipt, the language was not sufficient to found an estoppel. Certainly the decision in that case supports Mr McKechnie's contention that the material as a whole must be looked at.

In this case, the defendant has given notice to the plaintiff that the rental payable by the plaintiff is to be re-assessed in terms of the agreement between the parties. That rental had twice previously been assessed on a total basis and not apportioned between parts of the land, the subject of the transaction. In a subsequent letter, the defendant indicated a rental but did not say that this was for part only of the land. Certainly it included the certificate. The certificate does not constitute the assessment for rent. Indeed, while it provides the basis for the rental, the rental must be calculated according to the formula contained in the lease. I think therefore, that for the purposes of the action, it is the letter from the Maori Trustee advising of the rental, which is to be regarded as the representation. The certificate is enclosed for the information of the plaintiff so that he may, if he wishes, avail himself of the rights of objection.

The situation in the Canada and Dominion Sugar Company Limited case is different. There, the bill of lading was itself qualified. The letter is not here qualified. The certificate as such is not a qualification of the letter. It is an indication of the basis upon which it has been prepared.

Actual knowledge of the incorrectness of the representation is sufficient to defeat any estoppel. There are also certain circumstances where knowledge will be presumed. See Spencer Bower and Turner Estoppel by Representation 3rd ed. p.133:-

> "Knowledge on the part of the representee is presumed in certain circumstances (sometimes defined by a statute) where his actual knowledge of some other fact or his notice of some document makes it reasonable to say that he was thereby put upon inquiry and could by taking reasonable steps have known the truth of the matter."

See also p.134:-

> "Accordingly, whenever a representor has established that the representee or his agent in hac re, had such actual knowledge of any fact, or document, as to put him upon inquiry, that is to render it reasonable for him, or his agent, to institute further investigation, and probable that such investigation, if pursued, would have led to the knowledge of further facts, or documents, disclosing the truth, any estoppel which might otherwise have arisen has been defeated."

However, the learned author goes on to say:-

> "In the vast majority of the modern cases, however, the courts having exhibited a marked and growing reluctance to extend the doctrine in question, and the legislature having also evinced, by the strictly negative form of the enactment above cited, a similar disinclination, the representor has failed to discharge this onus, with the result that the affirmative answer has been defeated, and the estoppel maintained. It is to be noted here that knowledge will not be presumed from the mere presence and availability of means of knowledge, though, if the means of knowledge are very obvious and palpable, a finding of actual knowledge as a fact may well be justified."

The question is therefore, were the circumstances such that the plaintiffs ought to have been put on inquiry? In The London Joint Stock Bank v. Charles James Simmons 1892 A.C. 201, a bank had acquired negotiable securities from an agent who would normally have been considered to be entitled to dispose of them and it was held that the bank under those circumstances, should not have been put upon inquiry.

There is no doubt that the plaintiffs in this case were not aware of the error. Should the certificate have put them on notice? The affidavits indicate that being unfamiliar with metric measurements, they did not pick up the fact that the area as defined in hectares, was not the full area of the land leased by them. The reference to "Part." was equivocal because this appeared in other documents as an abbreviation for "Partition", being the basis of the Maori Land Court definition of the property.

On the basis of the proposition that the courts are reluctant to impute knowledge in such circumstances and the further comments as to the undesirability of the concept of estoppel being watered down by the imposition of technicalities, I think I must conclude that having regard to the circumstances, the letter may properly be regarded as a representation and that the representation was to the effect that the rental for the whole of the block was as indicated in the letter. I conclude that the certificate was not enough to fix the plaintiffs with knowledge that an error had occurred.

Some reliance was also placed upon the receipts which were given on the payment of rentals, as being representations in themselves. Mr McKechnie rightly contended that receipts as such do not normally give rise to estoppel, see Perpetual Trustees Estate and Agency Company of New Zealand Limited v. Morrison (1980) 2 N.Z.L.R. 447. In that case, a mortgage was inadvertently discharged. It was held that the receipt endorsed on the mortgage did not of itself raise an estoppel, regardless of the circumstances. I accept that the receipts for rent which were paid subsequent to the letter already referred to, would not of themselves be sufficient to found an estoppel, but I consider that they, coupled with the demands upon which payment was made, as well as the documentary material already referred to, become part of a course of conduct and accumulation of material which strengthens the case of the plaintiff and these constitute further grounds for accepting that overall there was a representation upon which the plaintiff was entitled to rely.

Following the authorities referred to then, I conclude that there was a representation sufficient to found an estoppel in this case. It is then necessary to consider whether the other aspects are satisfied, principally, that is, that the plaintiff has altered its position in reliance upon the representation so as to justify the application of the principle. In this case, the plaintiff has given evidence that on the basis of the rental which was assessed, it negotiated financial assistance from the Rural Bank to undertake major

development on the farm concerned. The affidavits indicate that the plaintiffs would not have been prepared to undertake this development had the rental been fixed at the sum which is now appropriate, bearing in mind the valuation. They contend the returns would cease to be economic. In the meantime, they have clearly implemented their decision; carried out the development and incurred the cost of doing so. Under those circumstances, I think that they do satisfy the criteria and are entitled to rely upon the estoppel which is pleaded.

An estoppel cannot be maintained in respect of a statutory duty under certain circumstances, see Maritime Electric Company Limited v. General Dairies Limited 1937 A.C. 610. In that case, there was a statutory obligation to collect certain sums and in the face of the clear wording of the Statute, the Privy Council concluded that an estoppel did not avail to assist the representee. That case was considered in the decision of North J. already referred to, who concluded that it did not apply in the case of the obligations of New Zealand Power Boards.

In this case, the Maori Trustee does not have an obligation to act on behalf of the owners, but is empowered to do so. He acts as agent and although he has a statutory authority, he does not have a statutory duty. I do not think it could reasonably be argued that the plaintiff was prevented from relying upon an estoppel by any statutory provision akin to that which prevailed in the Martitime Electric Company case.

That is not however, the end of the matter. Mr McKechnie raised a number of further matters and supported them with substantial and detailed arguments. The first of these was a contention that in certain circumstances equity will give relief by way of rectification. He based his argument principally upon statements made by Lord Maugham in the decision of Greer v. Kettle 1938 A.C. 156. That case was one which involved the special considerations which arise from that category of estoppel known as estoppel by deed. In the statement which he made during the course of his judgment, Lord Maugham referred to the extent to which equity will intervene to allow rectitication where the common law principles of estoppel by deed apply.

Lord Maugham in the case cited is considering the special matters which relate to the alteration of a deed. In this case, it is not rectification of the contractual arrangements entered into between the parties which would be necessary if the defendant's contention were to be accepted, but the correction of a mistake in the implementation of what had been agreed. The estoppel sought in this case does not depend upon the original document but upon the mistake made in arranging for the re-assessment of rental contemplated by that document. I do not think that Greer v. Kettle applies to this case.

Mr McKechnie then submitted that there was recent authority to the effect that an estoppel would not be applied if in the circumstances of the case it would be unconscionable to do so. He relied for this submission, on the decision of the Court of Appeal in Amalgamated Investment and Property Company Limited (in Liquidation) v. Texas Commerce International Bank Limited (1981) 3 All E.R. 577 and in particular, the decision of Lord Denning M.R. at p.584. In the case of Crabb v. Arun District Council, Lord Denning M.R. enunciated the basis for a general theory of estoppel, one which applied to all varieties of estoppel and which depended upon the finding of elements of unconscionability in a particular action proposed having regard to the circumstances. I think it is this to which Lord Denning refers in the Amalgamated Investment case. I think that in so far as the principle may be said to exist at all and there is considerable controversy over this, it has application in ascertaining whether or not an estoppel arises. I do not think it has been extended to a point where the application of the estoppel itself has been considered in terms of unconscionability. Whether that may be so or not, the concept of unconscionability in the cases has always depended upon an assessment of the conduct of the parties and one which suggests that particular behaviour is in some respect, unacceptable for the purposes of estoppel, see for example the decision in Taylor Fashions Limited v. Liverpool Victoria Trustees Company Limited (1981) 1 All E.R. 897.

There is nothing here in the behaviour or actions of the plaintiff which would suggest any element of unconscionability as that was understood in the cases referred to. While it might be suggested that once the true position is known there is an element of unconscionability in endeavouring to preserve a rent much below that which should be paid, such an argument has not prevailed in such cases as Avon County Council v. Howlett (1983) 1 W.L.R. 605 and in any event, the effect of relying on the representation, the commitment to the development continues.

Mr McKechnie then went on to invoke the provisions of the Contractual Mistakes Act 1977. He submitted that the fact that an estoppel by representation has occurred, does not prevent the opeation of the act, a proposition for which he relied upon the decision of the Court of Appeal in Ozolins v. Conlon C.A.16//83, unreported judgment delivered 31 May 1984 and I accept that proposition. Mr McKechnie however, appreciated that a difficulty standing in the way of his submission was the question of whether or not the provisions of s.6 of the Contractual Mistakes Act 1977 were limited to situations related to the formation of the contract.

S.6 is in the following terms:-

"(1) A Court may in the course of any proceedings or on application made for the purpose grant relief under section 7 of this Act to any party to a contract -

(a) If in entering into that contract -

(i) That party was influenced in his decision to enter into the contract by a mistake that was material to him, and the existence of the mistake was known to the other party or one or more of the other parties to the contract (not being a party or parties having substantially the same interest under the contract as the party seeking relief); or

(ii) All the parties to the contract were influenced in their respective decisions to enter into the contract by the same mistake; or

(iii) That party and at least one other party (not being a party having substantially the same interest under the contract as the party seeking relief) were each influenced in their respective decisions to enter into the contract by a different mistake about the same matter of fact or of law; and

(b) The mistake or mistakes, as the case may be, resulted at the time of the contract-

(i) In a substantially unequal exchange of values; or

(ii) In the conferment of a benefit, or in the imposition or inclusion of an obligation, which was, in all the circumstances, a benefit or obligation substantially disproportionate to the consideration therefor; and

(c) Where the contract expressly or by implication makes provision for the risk of mistakes, the party seeking relief or the party through or under whom relief is sought, as the case may require, is not obliged by a term of the contract to assume the risk that his belief about the matter in question might be mistaken.

(2) For the purposes of an application for relief under section 7 of this Act in respect of any contract, -

(a) A mistake, in relation to that contract, does not include a mistake in its interpretation:

(b) The decision of a party to that contract to enter into it is not made under the influence of a mistake if, before he enters into it and at a time when he can elect not to enter into it, he becomes aware of the mistake but elects to enter into the contract notwithstanding the mistake."

Sub-para.(a) is therefore specifically limited to a mistake which occurred at the time of entering into the contract. Sub-para.(b) which is cumulative, refers to an assessment of the consequences of the mistake at the time of the contract and sub-para.(c) which is also cumulative, deals with the special situation that arises where the parties may have contemplated the possibility of a mistake. On the face of it, the section is therefore confined to mistakes which occur at the time the contract itself is entered into. Mr McKechnie appreciated this difficulty and made the submission that bearing in mind the Act being remedial, is to be interpreted in a fair, large and liberal manner to achieve its objective, (see Ozolins v. Conlon (supra)), there is jurisdiction to grant relief to a party to a contract if the terms of that contract are subject to periodical alteration.

At first sight, this is an attractive and ingenious argument, but I do not think it can succeed. The whole concept of mistake relates to an attitude of mind of the party or parties to a contract in relation to agreement. That agreement occurs when the contract is entered into. If the contract contained a provision which contemplated an agreement in the

future, then that would be unenforceable since the law does not permit an agreement to agree. The provision which has given rise to the problem in this case is not such a provision, but one which provides machinery for re-calculation of rent. There is no element of agreement involved in this at all and therefore no room for mistake in the sense in which that term is used in the Act. It is conceivable that a contract may contain a provision which contemplated future agreements by the parties, subject to a machinery provision providing certainty in the event of no such agreement and in that case, it may be possible to argue in support of the proposition put forward by Mr McKechnie. That effectively would involve an element of agreement, but that is not the case here.

That being so, I am obliged to conclude that the Contractual Mistakes Act cannot avail the defendant in this case. It is therefore not necessary for me to consider the further submission raised by Mr McKechnie that the nature of the mistake in this case was sufficient to qualify for the purposes of the Act.

Mr Joyce submitted for the plaintiff that the effect of any estoppel was not only to prevent the defendant recovering the full rental now assessed for the period from which the re-calculation of the rental was required until the present date, but that it effectively estopped the plaintiff from recovering the full rental for the full 7 years period contemplated for the re-assessed rental.

At first sight the claim made by Mr Joyce seems surprising. The parties are now aware of the position. The immediate reaction to it might be expected to be that rent should be paid in accordance with the true position from the date of the discovery - whatever might be the position with regard to rent paid up to date or up to that time, Mr Joyce relies on the decision of the Court of Appeal in Avon County Council v. Howlett (1983) 1 W.L.R. 605. In that case, wages had been paid to an employee on a wrong basis, resulting in an over-payment in excess of one thousand pounds. The plaintiffs claimed that sum. The defendant pleaded an estoppel, he having altered his position on the payments as made. Although the Judge found as a fact that the whole of the money received had been spent, the pleadings alleged that only a proportion had been spent. The Judge held that the defendants were obliged to account for the balance. This decision was reversed in the Court of Appeal. Cumming-Bruce L.J. made the particular point that the Judge's decision had to some extent been based on a hypothetical situation and to that extent, any decision of the Court of Appeal was not to be taken as laying down the correct position in respect of the disputed point of law. Slade L.J. however, specifically concluded that the doctrine of estoppel by representation did not operate merely pro tanto in cases where it was invoked as a defence to an action for money had and received. He did however, leave open the question as to whether or not the courts might come to a contrary conclusion

where the disparity was so large as to result in an obvious injustice. I think however, that the cases dealing with money had and received, tend to fall into a particular category. The question then arises as to whether in the circumstances of this case, the estoppel should continue to be available to the plaintiff once the true position is known.

The answer may be found in a statement contained in Central London Property Trust Limited v. High Trees House Limited (1947) 1 K.B. 130, where Denning J. (as he then was), stated:-

> "If the case had been one of estoppel, it might be said that in any event the estoppel would cease when the conditions to which the representation applied came to an end, or it also might be said that it would only come to an end on notice. In either case it is only a way of ascertaining what is the scope of the representation."

In that case, the representation as to a reduction in rent, was clearly limited in term. In this case, the representation I think extends to indicating that the rent stated will apply throughout the 7 years at which the machinery would fix it. That would accord also with the term of the detriment, if the matter may be put in that way, because the plaintiff's case is that it arranged its finances and carried out its development on the basis that for a period of 7 years it had a rental at a fixed figure. If it is accepted that that is the case, then the detriment clearly continues. I therefore conclude that having regard to the circumstances of this case,

the defendant is estopped from denying that the rental for the 7 year term is as set out in its letter of 19 March 1980; that this position is not open to rectification either by way of equitable principles or under the provisions of the Contractual Mistakes Act 1977 and that it continues through the whole period contemplated, that is, the 7 year term during which it was provided the rentals are assessed would apply.

While I share Mr McKechnie's concern over this result, in the end I think it has to be recognised that the position arose as the result of a mistake by the defendant and on the whole it is fairer that the consequences should be borne by the party causing them.

There will be declarations accordingly. The plaintiffs are entitled to costs which I fix at 750 dollars.

<u>Solicitors for Plaintiff</u>: Messrs East, Brewster, Urquhart and Partners, Rotorua

<u>Solicitors for Defendant</u>: Messrs McKechnie, Morrison and Shand, Rotorua

A.98/84

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

IN THE MATTER OF The Declaratory Judgments Act 1908

BETWEEN N.B. HUNT AND SONS LIMITED
a duly incorporated company having its registered office at Rotorua

Plaintiff

A N D THE MAORI TRUSTEE
a Corporation sole pursuant to the Maori Trustee Act 1953

Defendant

JUDGMENT OF GALLEN J.