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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP No 912/88

BETWEEN IVAN DESMOND ENGLAND and DAWN SOPHIE ENGLAND both of Wellington, Retired

Plaintiffs

A N D G & D RITCHIE HOLDINGS LIMITED a duly incorporated company having its registered office at Lower Hutt

Defendant

Date of Hearing: 8 February 1989

Counsel: Jody Foster for Plaintiffs
Joanna Shur for Defendants

Date of Judgment: 28 February 1989

RESERVED JUDGMENT OF McGECHAN J : SUMMARY JUDGMENT

The Application

This is an application for summary judgment by plaintiff tenants against a defendant landlord in respect of (i) a first cause of action for rent allegedly overpaid (ii) a third cause of action in respect of misrepresentation as to maximum rental which would be claimed on renewal. Summary judgment is not sought in respect of a second cause of action.

Factual Background

The defendant company owns a block of shops. By a brief document dated 23 April 1979 Mr G C Ritchie granted an option

to Mr I D England as agent to lease "2,000 square feet of shop space (to be measured exactly for inclusion in the lease)". The shop was described as "at the south end of block of three and is bounded by Pine Avenue, and two access lanes with a partition separating it from the next shop". There was no diagram, and there is no other express indication whether measurement was to be to internal or external boundaries. The lease would be for nine years (one, two, three, and three years). No precise commencement date was given. Rent was to be $3.20 per square foot monthly in advance. Importation of normal conditions doubtless include provision for rent reviews.

It is alleged that by letter dated 29 May 1979 the plaintiffs exercised that option. The next clear step is that the defendant landlord's solicitors prepared and both parties executed an agreement to lease dated 14 August 1979. I am prepared to assume from formal verification of the statement of claim allegations, and similarity in names of parties to the option and agreement to lease, that the agreement to lease was and was treated as granted pursuant to the option. The premises were described as the "part of the building presently occupied by the tenant containing 2157.75 square feet". The term was from 18 June 1979 to 17 June 1980; with rights of renewal carrying rental increases including a ratchet clause. Commencing rent was $6,904.80 per annum (arithmetically that equates 2,157.75 x $3.20). The verified allegation is that it was the defendant which "purported to" have the premises so measured, or which "in purported performance" of obligations took that step. The plaintiffs held under the agreement and paid rental accordingly until 18 June 1984. As from that date, the agreement to lease was replaced by a deed of lease dated 27 August 1984. The deed described the premises as "being that part of the building previously occupied by the tenant containing 2157.75 square feet". Again there was no diagram, and no description as to manner of measurement adopted. Rental was $10,249.30, which arithmetically is 2,157.75 x $4.75 per

square foot. Provision was made for four further terms of three years as at 18 June 1987, 1990, 1993 and 1996, rent falling due for review accordingly, again with a ratchet provision. Rent was paid accordingly over the first three years.

Rent fell due for review upon renewal on 17 June 1987. Renewal rent could not be agreed, and was referred to arbitration in terms of the deed. This involved two arbitrators and an umpire. The arbitration process took the normal enough form in these matters of the two arbitrators presenting their different valuations and arguments in favour to the umpire for decision. The valuations were as far apart as $32,345.00 per annum and $20,560.00 per annum, in each case plus outgoings. In an "award of umpire" dated 3 May 1988; the umpire fixed rental at $24,468.00 per annum plus stated outgoings. In relation to shop area the umpire stated:

> "A copy of the lease was provided and it was noted that this document, on page 17, states the area of the subject premises as 2,157.75 square feet, a figure which both arbitrators considered to be in error by something a little in excess of 100 square feet, they having independently measured the shop, and found a significant difference. Later at the arbitration hearing (the valuers) agreed that the floor area was approximately 2,039 square feet rather than 2,157.75 square feet.".

There is no express or formal finding as to the exact square footage, or indeed information as to how the 2,039 square feet approximation was measured. Nor does the umpire expressly determine rental on a per square foot basis, although it may be no coincidence that $24,468.00 determined arithmetically equates 2,039 x $12.00.

The plaintiffs were concerned to learn of the apparent over-estimate of space let. In the plaintiffs' view it had resulted in the plaintiffs paying rent since 18 June 1979 in the mistaken belief the floor area was 2,157.75 square feet when indeed it was merely 2,039, 118.75 square feet less.

Accordingly, under the first cause of action, for the period 18 June 1979 to 17 June 1987 the alleged overpayment calculated as $3,592.15 is claimed back, together with interest.

The second cause of action arises somewhat differently. It relates to renewal rental for period 17 June 1987 onwards. Mr England, presumably acing for both plaintiffs, was considering whether to renew as at 17 June 1987. A commitment was required at least three months prior. Mr England deposes that he telephoned a Mr Ross, solicitor to the defendant company landlord, around 3 December 1986. Mr Ross' recollection is that he, Ross, made the call on the defendant's instructions. Recollections as to the course of the telephone conversation also differ. On Mr England's present account, "Mr Ross advised me that the defendant would be seeking rental of 'up to $10.00'". On that basis Mr England states the plaintiffs commited themselves to renewal, which of course has led to a rental of $12.00 per square foot. Mr Ross' present account is that in the course of a general discussion Mr England requested his "personal view" (as opposed to my client's position) of market rental for premises similar"; and he (Ross) "expressed that my view of the market rental was $10.00/square foot, but stressed to Mr England that my client's decision as to the rental payable on review would be based upn a valuation it would obtain from a registered valuer". Mr Ross denies, in terms, Mr England's version of the matter, and disowns authority to make any such statement as alleged. The plaintiffs claim inducement to enter into renewal by the alleged statement by Mr Ross, and the difference at $2.00 per square foot on 2,039 square feet for three years.

Summary Judgment : Second Cause of Action

The mere statement of the differing accounts of the telephone conversation demonstrates there can be no summary judgment on the second cause of action. Counsel for the plaintiffs said everything that could be said, but there is no escape from the sharp credibility issue which lies at the heart of the plaintiffs' claim. I cannot be satisfied there is no defence, and the second cause of action must go to trial.

First Cause of Action : Submissions for Plaintiffs

The plaintiffs' statement of claim makes no assertions of law. Their summary judgment application is put forward on the basis that the claim is one based on payment made under mistake. Specifically, it is said not to be a claim under the Contractual Mistakes Act 1977. Instead, the claim is put as resting upon the law exemplified by Barclays Bank Ltd v W J Simms & Son & Cook (Southern) Ltd [1979] 3 All ER 522, 535; a principle said to have been applied in New Zealand in Vanvi Ltd v Dawson [1980] 1 NZLR 513 and K J Dawes (1976) Ltd v B N S W [1981] NZLR 262; and to be extended by ss 94A and 94B Judicature Act 1980. The remedies for recovery of payments made under mistake of fact, and remedies under the Contractual Mistakes Act 1977, are said to exist independently. Put briefly, the law so based is said to be that payment made under a mistake of fact prima facie is recoverable, but the claim may fail if (a) the payer intends the payee shall have the money at all events (b) the payment is made for good consideration, in particular to discharge a debt (c) the payee has changed his position in good faith or is deemed in law to have done so. In the present case, it is said the award of the arbitrator fully determines the issue of correct measurement at 2,039 square feet. Reference was made to the Arbitration Act 1980 s 4 and second schedule; Russell on Arbitration 20th Ed 352 and Bernstein Handbook of Arbitration Practice 151 - 152. The

plaintiffs, it is submitted, intended to pay on a per square foot basis and nothing more, and received no consideration for the additional payment. There is no evidence the defendant acted to its detriment in reliance on the mistaken payment.

First Cause of Action : Submissions for Defendant

Defendant's counsel disputed availability of relief at common law or under the Contractual Mistakes Act 1977. She submitted common law principles are "embodied in" the Contractual Mistakes Act 1977. No cause of action existed under s 94B Judicature Act 1980 (which I take to be a reference to the common law and equitable doctrine of payment made under mistake). If such existed, the Contractual Mistakes Act 1977 would "be made defunct". The deeds of lease provided how rental would be paid : it "is the very matter the Contractual Mistakes Act deals with". There was no unilateral mistake known to the defendant. There was no proof of common mistake, there being no proof measurement of the premises was a material factor to the defendant in entering into the lease. There was no mutual mistake. Moreover, there is no proof of a term to pay by measurement. The option is superceded and irrelevant. No mistake occurred. The valuer's statements do not set out the criteria used. There is no evidence before the Court that measurement as carried forward into the lease was wrong. The arbitrator's decision merely deemed the floor area to be "approximately" 2,039 square feet. The arbitrator's measurement is not a finding of fact binding retrospectively. There is room for difference of opinion as to the correct measurement criteria.

First Cause of Action : Money Paid Under Mistake of Fact : Contractual Mistakes Act 1977

The case raises a short but difficult point on which there does not appear to be direct authority. Clearly, the plaintiffs base this summary judgment application solely upon the traditional cause of action for payment under mistake of fact, eschewing the Contractual Mistakes Act 1977. The cause of action may well be said to arise out of a contractual mistake situation. Under the (exercised) option, rent payable was at the rate of $X per square foot on an area to be accurately measured. The obligation in respect of payment, and corresponding entitlement, calculated on a true area, have a contractual origin. The payments that were made under the ensuing agreement to lease and deed of lease were made under contractual obligation, albeit alleged to have arisen under a mistake of fact as to measurement and a mistake in the resulting calculated liability. The proceeding is between parties to a contract. The claim is one with all the insignia of a claim for relief on the grounds of mistake made in the course of contract. In that situation, is the claim barred by s 5 Contractual Mistakes Act 1977? Section 5 provides:

> "5. Act to be a Code - (1) Except as otherwise expressly provided in this Act, this Act shall have effect in place of the rules of the common law and of equity governing the circumstances in which relief may be granted, on the grounds of mistake, to a party to a contract or to a person claiming through or under any such party.
> (2) Nothing in this Act shall affect -
> (a) The doctrine of non est factum:
> (b) The law relating to the rectification of contracts:
> (c) The law relating to undue influence, fraud, breach of fiduciary duty, or misrepresentation, whether faudulent or innocent:
> (d) The provisions of the Illegal Contracts Act 1970 or of sections 94A and 94B of the Judicature Act 1980:
> (e) The Frustrated Contracts Act 1944.
> (3) Nothing in this Act shall deprive a Court or an arbitrator of the power to exercise its or his discretion to withhold a decree of specific performance in any case."

Literally, the claim would seem to be within s 5(1). The cause of action for money paid under mistake of fact, commonly viewed as quasi contractual in nature, is a rule of common law or equity as mentioned. As such, it appears to have been codified out of existence in relation to relief on grounds of mistake to a party to a contract, although this would not be so in relation to relief claimed on grounds of mistake outside contract as in Barclays Bank v W J Simms & Son & Cook (Southern) Limited (supra) and other authorities cited (and see also Farmers Trading v Holdgate [1986] 1 PRNZ 26 Hillyer J). Is it, however, saved by s 5(2)? The point is arguable.

(i) On the one hand, there are the references in s 5(2)(d) to ss 94A and 94B Judicature Act 1908. These two sections provide:

> "(1) Subject to the provisions of this section, where relief in respect of any payment that has been made under mistake is sought in any Court, whether in civil proceedings or by way of defence, set off, counterclaim, or otherwise, and that relief could be granted if the mistake was wholly one of fact, that relief shall not be denied by reason only that the mistake is one of law whether or not it is in any degree also one of fact.
>
> (2) Nothing in this section shall enable relief to be given in respect of any payment made at a time when the law requires or allows, or is commonly understood to require or allow, the payment to be made or enforced, by reason only that the law is subsequently changed or shown not to have been as it was commonly understood to be at the time of the payment.
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> 94B Payments made under mistake of law or fact not always recoverable - Relief, whether under section ninety-four A of this Act or in equity or otherwise, in respect of any payment made under mistake, whether of law or of fact, shall be denied wholly or in part if the person from whom relief is sought received the payment in good faith and has so altered his position in reliance on the validity of the payment that in the opinion of the Court, having regard to all pssible implications in respect of other persons, it is inequitable to grant relief, or to grant relief in full, as the case may be."

Clearly at least s 94B is predicated upon the continued existence of rights "in equity or otherwise" in respect of payments "made under mistake, whether of law or of fact". Why, it might be asked, would the legislature have been careful to save ss 94A and 94B from extinction through the Contractual Mistakes Act 1977 unless it recognised the doctrine of payment under mistake of fact, to which both refer and on which both to some extent turn, itself survived the general codifying words of that Act?

(ii) On the other hand,

(a) If it was intended to save the doctrine of payment under mistake of fact from extinction in contractual situations, it is curious s 5(2) does not specify the doctrine in so many words. The draftsman lists, expressly and by technical name, doctrines as distinctive as "non est factum" and "rectification". Why not, it might be asked, likewise specify "payment under mistake of fact" if such saving were intended? To bring in the whole doctrine merely by oblique reference to modifying ss 94A and 94B is rather like referring to the whole law of contract by mere mention by title of certain related statutes. It seems an unlikely mechanism.

(b) So far as claims arising from contractual situations are concerned, if s 94A is regarded as remaining applicable, it is otiose in the light of the s 2 definition of mistake which includes mistake of law. Section 94B, if saved for contractual situations, is not easy to reconcile with the somewhat differing provisions of s 8 Contractual Mistakes Act 1977. A more probable explanation may be that ss 94A and 94B were not envisaged as applying in situations arising from contract.

(c) To allow the continued operation of the common law/equitable doctrine of recovery of money paid under mistake of fact, as modified by ss 94A and 94B in the face of the new regime created by s 5 Contractual Mistakes Act 1977, seems contrary to the main thrust of legislative policy. On the background to the Act I refer generally to Conlon v Ozolins [1984] 1 NZLR 489, 496 CA particularly per Somers J 506, 507. The purpose of the Contractual Mistakes Act is clear. It emerges distinctly in the report of the Contracts and Commercial Law Committee (May 1976), on which the Act largely is based. Paragraph 11(c) of that report speaks of the object of "amalgamation of the present fragmented doctrines, some based upon mistake and others based upon different legal devices, into a single body of law dealing with 'mistakes'". Its purpose is likewise evident from s 4. This amalgamation process has not been carried out to the ultimate degree. Paragraph 12 of the Committee report expressed concern at a doctrine which "could well supercede all other heads of relief", and in the discussion which followed (paras 12 and 13) specified some heads of relief which should be saved and which have been carried through into s 5(2). That discussion makes no mention whatsoever of the quasi contractual doctrine of recovery of payment made under mistake of fact, or of ss 94A and 94B. The latter two section references emerge, suddenly and without textual explanation in clause 4 of the draft Bill appended. The exceptions should not be regarded as the rule. To imply into s 5(2) an additional unwritten saving in respect of the common law or equitable doctrine in the context of contractual mistake situations does not implement the overall intention of the legislature.

While I cannot locate case precedents, there is some academic writing on the topic by the learned editors of Cheshire Fifoot & Furmston Law of Contract 7th NZ Ed (1988). I am not, with respect, altogether sure whether a firm conclusion is reached. At p 235, the work states s 5(2) states a number of matters "not affected by this Act". It lists these in short order, including a reference to "payment of money under a mistake of fact (ss 94A and 94B of the Judicature Act 1908)". Nothing more is said. The reference can be read as an extrapolation back from references to ss 94A and 94B to a saving of the basic doctrine which they adjust. That gains some reinforcement from observation following shortly afterwards that the Contractual Mistakes Act "may well be coupled together with one or more of the exempted grounds for relief". At p 626, however, in the course of a discussion in the context of a chapter on quasi contract, and the heading "money paid under a mistake of fact", the learned editors observe (citations omitted):

> "However sometimes a mistake is connected with the formation of an apparent contract between the parties. At common law it would appear that recovery of the money in quasi-contract would lie provided the plaintiff could prove the same sort of mistake as would entitle him to treat the contract as void ab initio. In New Zealand today, a mistaken payment by a party to a contract may be able to be dealt with under the Contractual Mistakes Act 1977, which provides that it has effect in place of the rules of the common law and equity governing the circumstances in which relief may be granted on the grounds of mistake to a party to a contract."

I am left uncertain, overall, whether the Contractual Mistakes Act approach is put forward as an available alternative, or as the only remedy now available in the case of payments under mistake of fact arising from contractual situations.

Generally speaking, a pure point of law should be resolved rather than stand in the way of summary judgment : Pemberton v Chappell [1987] 1 NZLR 1, 4 per Somers J. Tempting as it is, in this case I do not propose to do so. The point is

important, and requires the further and better argument which will be possible on substantive hearing if the cause of action still is pursued. I will not adopt the alternative of calling for further submissions, as a further point relating to area in any event makes summary judgment difficult.

Area Leased : Umpire's Award

I accept that the award, expressed to be that of the umpire in this case, at least until legally overturned in appropriate proceedings raises an issue estoppel as to the floor area for the purposes of rental calculation. The determination of that area was an essential step on the way to determination of the parties' rental rights and obligations as from 1987 by arbitral award. If authority is needed, I note Fidelitas Shipping v V/O Exportchlev [1965] 2 All ER 4, 9-10. Upon reflection I do not see the agreement of the issue, upon which the finding evidently turned, as displacing or diminishing the finality of the finding based upon it : see generally Spencer Bower & Turner Res Judicata 2nd Ed para 41 - 42.

However, precisely what is the fact so conclusively determined? In the words of the award it is that the area is "approximately 2,039 square feet". The umpire proceeded to use the figure of exactly 2,039 for the purpose of rent calculation from 18 June 1987. That course is binding upon the parties to that extent. Obviously, however, it does not otherwise convert an approximation into an exactitude. The plaintiffs now are in the difficulty that when they wish to sue for an exact and liquidated sum, they must themselves be exact. The onus is upon the plaintiffs to prove an exact area and exact resulting calculation; not an approximate area and approximate resulting calculation.

I do not see an issue estoppel to the effect that the area is "approximately" 2,039 square feet preventing a determination of fact as to the exact area included, at least within boundaries of what might be described as an "approximation". For the purposes of rental from 18 June 1987, the matter is all over. For the purposes of recovery of rental prior to that date, the exact area remains to be proved, and the claim cannot proceed otherwise.

Decision

The application for summary judgment on both first and third causes of action is dismissed. The matter must go on for trial. Leave is reserved to apply for directions if desired.

Costs

Costs are reserved.

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R A McGechan J

Solicitors: Buddle Findlay, Wellington for Plaintiffs
Phillips Shayle George, Wellington for Defendant