THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

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No. CP13/86

BETWEEN RUSSELL JOHN McDONALD

Plaintiff

A N D ATTORNEY-GENERAL

Defendant

Hearing: 13, 14, 15, 16, 20 May 1991

Counsel: Christine French for Plaintiff
P.F. Whiteside for Defendant

Judgment: 20 JUN 1991

JUDGMENT OF HOLLAND, J.

The plaintiff is a farmer and wheat grower residing in Southland. He has brought proceedings against the Attorney-General arising out of actions of the New Zealand Wheat Board, a statutory body created by the Wheat Board Act 1965 and dissolved by the Wheat Board Amendment Act 1986. Section 13 of that Act provided that all liabilities rights and authorities of the Board should pass to the Crown.

The proceedings were commenced in March 1986. The amount of the plaintiff's claim is $22,162.52. However, I am told that there are 46 farmers and wheat growers in a similar position to the plaintiff who are awaiting the disposition of these proceedings. It is a matter of some considerable concern to me that the Court is being asked to consider claims which arose in 1983 in respect of actions which occurred in that year, some eight years after the events.

The Legal Position Relating to Marketing of Wheat in 1983

Before considering the details of the plaintiff's claim it is necessary to outline in brief form the legal position relating to the marketing of wheat in New Zealand in 1983. The Wheat Board Act 1965 created a Board of ten persons, the Chairman of whom was the Minister of Trade and Industry. One member was an officer of the Trade and Industry Department appointed by the Chairman, another was an officer of the Ministry of Agriculture and Fisheries appointed by the Chairman, six persons were appointed by the Governor General on the recommendation of the Chairman, of whom one was to be a person experienced in the wheat growing industry, one to be a person experienced in general farming including the growing of wheat, one a person experienced in the flour milling industry, one a person experienced in the bread baking industry, one a person experienced in the poultry industry, and one experienced in the grain, seed and produce business. A further member was to be appointed by the Governor General on the recommendation of the Chairman who should have no direct association with any industry or business referred to in respect of the six members earlier described.

The Board was given totally monopolistic powers. It was required to purchase all milling standard wheat grown in New Zealand and it was unlawful for any person to sell or purchase milling standard wheat other than to or from the Board. The Board was also empowered to purchase non-milling

standard wheat but was not obliged to do so. The flour miller, who was of course required to purchase its milling standard wheat from the Board, was likewise bound to sell its flour to the Board. The price, terms and conditions applicable to the purchase of wheat by the Board were to be such as the Board from time to time notified and the Board was empowered to sell wheat at such prices and on such terms and conditions as it thinks fit. In fact prices were determined by the Department of Trade and Industry.

The Wheat Board Regulations 1965, made pursuant to the Act, defined "milling standard wheat". That definition was amended from time to time but the relevant definition during 1983 was as follows:-

> "Wheat which
> (a) Is sound and sweeet, free from smut, free from decay, free from damage by insect pests injurious to baking quality, and free from any other blemish or damage; and
>
> (b) When gristed yields flour with a baking score of 12 or higher as determined by the Mechanical Dough Development testing method equivalent to that used by the Wheat Research Institute in the year 1981; and
>
> (c) Does not have a sprout index of greater than S1 as determined by the Wheat Research Institute test; and
>
> (d) Does not contain -
> (i) More than 0.5 percent, by weight, of weed seeds; or
> (ii) More than 5 percent, by weight, of weed seeds and other extraneous matter and broken, immature, or shrivelled grains; or
> (iii) More than 15 percent, by weight, of moisture; or
> (iv) More than 5 percent of visibly sprouted grains."

Although the Act provided for the Board to purchase and sell wheat, it acted through authorised brokers. Section 28 of the Act provided:-

> "(1) Unless the Board determines otherwise, all purchases and sales of New Zealand grown wheat by the Board shall be effected through the agency of brokers authorised in writing in that behalf by the Board:
> Provided that the Board may sell wheat for export otherwise than through the agency of an authorised broker.
> (2) Any authorisation under this section may, in the absolute discretion of the Board, be at any time cancelled.
> (3) Every authorised broker shall be appointed on such terms and conditions and be paid such remuneration, whether by way of commission or otherwise, as may be prescribed by regulations under this Act."

The manner in which wheat was to be purchased by the Board is prescribed by s.29 of the Act which provides as follows:-

> "(1) All wheat offered to the Board in any season shall be purchased by the Board before a date declared by the Board as the final date on which the Board will purchase wheat in that season except:
> (a) Wheat that is not milling standard wheat or is otherwise free wheat within the meaning of this Act:
> (b) Wheat for the time being subject to a resolution under section 27 of this Act.
> (2) Notwithstanding the provisions of subsection (1) of this section, no wheat to which paragraph (a) of subsection (1) of this section applies shall be sold otherwise than to the Board unless it has been offered to an authorised broker on behalf of the Board and been rejected as not milling standard wheat.
> (3) Nothing in this section shall be deemed to preclude the Board from purchasing wheat which it is not bound to purchase under this section.

(4) The prices, terms, and conditions applicable to wheat purchased by the Board shall be such as the Board from time to time notifies, and the Board may notify varying prices for different qualities and kinds of wheat or for delivery at different times or otherwise.
(5) Delivery of wheat purchased by the Board and payment for any such wheat shall be in accordance with such terms and conditions as may be prescribed by regulations under this Act."

Regulation 5(3) of the Regulations provided that the broker shall receive commission of 1 3/8% of the price paid to the grower in respect of wheat purchased by the Board, and further provided that it was unlawful for the broker to receive remuneration of any kind from any person other than the Board in respect of such a purchase.

It is necessary also to consider the provisions of Regulations 7 and 9 of the Regulations which are as follows:-

"7(1) Subject to the provisions of this regulation, an authorised broker shall not purchase wheat on behalf of the Board unless a purchaser is available to purchase the wheat from the Board.
(2) Any wheat purchased by a broker as aforesaid shall be purchased on condition that the seller shall deliver the wheat to a purchaser from the Board as directed by the broker, whether free on board, free on rail, direct to the purchaser's store, or otherwise.
(3) The name of the purchaser from the Board and the place and method of delivery shall be stated in the contract made between the seller and the broker on behalf of the Board.
(4) No authorised broker shall accept delivery of wheat, or act as a warehouseman of wheat, on behalf of the Board.
(5) Notwithstanding the foregoing provisions of this regulation, in special circumstances and in accordance with the express directions of the Board, an authorised broker may purchase or

accept delivery of wheat otherwise than in accordance with this regulation but on such terms and conditions as may be specified by the Board."

9(1) Except as provided in subclause (2) of this regulation, payment for wheat purchased by the Boad shall be made as follows:-

(a) On delivery by the seller, the authorised broker, if satisfied that the wheat delivered is in accordance with the contract, shall forward to the Board an advice of delivery in such form as the Board may require:

(b) Payment shall then be remitted by post by the Board to the seller or to the authorised broker named in the advice of delivery or to any other person authorised in writing by the seller as his agent in that behalf:

(c) No part of the contract price payable by the Board to a seller shall be assignable or charged otherwise than by operation of law.

(2) For any harvest the Board may make it a condition of the purchase of wheat by the Board that part of the contract price shall be retained by the Board and held by it to provide for any losses in marketing and for the costs of storing and handling any wheat that may be declared by the Board to be surplus to requirements, and in every such case the payment to sellers shall be made by an initial payment of a major portion of the contract price, and, when financial results of the harvest are known, by one or more subsequent payments from any balance of the retained portion of the contract price: Provided that the Board may carry a small balance forward and take it into account in subsequent years."

The defendant, in its statement of defence, relies on Regulation 12 of the Regulations which at the relevant time was as follows:-

"(1) If any dispute arises as to whether or not any wheat offered to an authorised broker for sale to the Board is milling standard wheat, or if any dispute arises as to whether or not any weight deductions to equate the price of the wheat to milling standard wheat have been

properly made, or if any dispute arises as to whether or not any wheat delivered in fulfilment of any contract of purchase or sale entered into by an authorised broker on behalf of the Board is in accordance with the contract in respect of kind, quality, or condition, the dispute shall be determined by a grader authorised by the Board, whose decision shall be final and binding on all parties to the dispute:
Provided that if any such dispute relates to the moisture content or the milling or baking quality of the wheat, the dispute shall be determined by the Director of the Wheat Research Institute, whose decision shall be final and binding on all parties to the dispute.
(2) In any dispute under this regulation, samples shall be drawn in accordance with any method acceptable to the Board.
(3) If any other dispute arises between the parties to any contract entered into by an authorised broker on behalf of the Board, or between an authorised broker and the Board, or between an authorised broker and any seller or purchaser of wheat to or from the Board, relating to any matter concerning the functions and powers of the Board, the dispute shall be determined by arbitration under the Arbitration Act 1908, and this subclause shall be deemed to be a submission within the meaning of that Act.
(4) Subject to the provisions of this regulation as to the settlement of disputes, the following weights shall be accepted by all parties as the basis of settlement in all contracts for the purchase or sale of wheat by or to the Board:
(a) For wheat delivered direct to a mill - flourmiller's weights:
(b) For wheat delivered free on board - customary free-on-board weights:
(c) For wheat delivered ex store to mills or free on board - ex-store weights:

(d) For wheat delivered into store - into-store weights:
(e) In all other cases - such weights as may be from time to time determined by the Board.
(5) The only deductions which may be made from any such weights shall be the customary tare per sack or deductions made in accordance with these regulations for the purpose of equating the price of wheat to the price of milling standard wheat."

Neither party has claimed that this dispute should have been referred to arbitration pursuant to Regulation 12(3).

The General Position in Southland Relating to Marketing of Wheat up to 1983

Some time in or about August 1983 the Board changed its practice, to some extent, in relation to the purchase of wheat. In November 1980 the Board had introduced, commencing with the 1981 harvest, a mechanical dough development bake test to be conducted by the Wheat Research Institute. The minimum score for milling standard wheat under that test was to be 12. This test replaced an earlier test which had become obsolete. In a circular to growers dated November 1980 the General Manager of the Board said, inter alia:-

> "All wheat from the 1981 harvest which is tested by the Wheat Research Institute and which receives a score of 12 or higher will be milling standard wheat and must be handled accordingly."

There was attached to this circular a further circular relating to a declaration as to milling grade wheat held in storage and a further circular relating to wheat sampling. The Board required the grower to provide a representative selling sample of each line of wheat being offered for sale prior to a specified date which was a date within a month or two of harvest. A Wheat Research Institute test report form was introduced and the Institute was to test the selling sample for the MDD bake score, (henceforth referred

to as the bake score), and for protein, and would inform the grower or the broker of the results. The notification to growers continued with a statement that the aim of sampling was to provide the parties to a transaction with an assessment of the quality of the line of wheat as it will be delivered. The notification relating to the declaration of milling grade wheat held in storage concluded as follows:-

> "A check on individual deliveries to mill or port to ensure that the wheat being delivered is in accordance with the sample of the line submitted to the Wheat Research Institute will continue. This check will include a comparison of the result of a protein test carried out on a sample drawn at the time of delivery with the protein recorded on the Wheat Research Institute's report of the test on the selling sample.
>
> It is therefore in the grower's interest to ensure that a properly representative sample is drawn."

That policy of the Board was continued in the Advice to Growers for the 1982 and 1983 harvest. However the first circular containing the advice that wheat receiving a score of 12 or higher will be milling standard wheat was not repeated. Nor was it withdrawn. The 1981 information enclosed a circular relating to Delaration of Milling Grade Wheat Held in Storage similar to the 1980 circular except that the Wheat Research Institute test, in addition to bake score and protein, was to include a report of sprout index and kernel weight. There was an addition, following the advice that it was in the

grower's interest to ensure a properly representative sample is drawn, by way of a further paragraph as follows:-

> "The use of suitable sampling procedures is very important but the procedures will vary according to each grain installation. Any grower requiring advice in this area is asked to contact the Wheat Board in the first instance."

There was then a brief reference to a possible problem over yellow stripe rust but coupled with an indication that it was not at that stage regarded as serious, and that further information was being sought. The 1982 information appears to have been in the same form as that in the 1981 information except that no reference is made to any yellow stripe rust problem.

I accept the evidence of the plaintiff and the other growers that following the 1983 harvest samples were submitted to the broker for the purpose of their assessment as milling standard wheat. Each sample would have been of approximately 500 grams of the line in question. The broker divided the sample in two. One part of the sample was sent away to the Wheat Research Institute where it was tested by the Institute for sprout index, protein, kernel weight, and bake score. The other sample would have been tested for moisture, and for shrivelling by screening through a sieve using a 5½A screen in accordance with the Regulations. On notification that the Wheat Research Institute return was a bake score of 12 or over, with a minimum sprout index of S1, and confirmation by

the broker that the screening test was satisfactory and that the moisture level was no more than 15%, the brokers generally would advise growers in varying terms that the wheat was regarded as milling standard wheat which could not be sold other than to the Board.

The harvesting of wheat took place over a relatively short period. It was understood and accepted by growers, brokers and the Board that it would be inconvenient for the Board immediately to purchase all milling standard wheat. The wheat which had been initially classified as milling standard wheat was stored either by the grower in his own silos or in the broker's silos. At the instance of the Board from time to time, the wheat was directed by the Board to be either placed on ship, rail, or delivered to a local mill. At the time of delivery the bulk line supplied was examined at the point of delivery by the port grader. That was a visual examination, although a screening test also was taken from time to time.

I am satisfied that until 1983 the port grader accepted all initially classified milling standard wheat on his being satisfied that the bulk wheat supplied was in accordance with the sample earlier submitted and that it had not been damaged or had sustained damage during the period from when the sample was submitted and the time of supply of the bulk. If the wheat did not pass the screening or moisture test at the time of delivery it was sent back to be dried or rescreened. If the wheat had deteriorated in storage it was rejected.

In 1982 millers drew to the attention of the Board the existence of a fungi problem in the wheat known as black point. There were also problems pointed out by the millers in relation to the wheat grown in Southland arising from shrivelling.

Although the statutory definition of "milling standard wheat" required it to be sound and sweet and free from any other blemish or damage, it had been recognised by all concerned that some degree of tolerance must be allowed in this regard. The extent of that degree was not defined but it is quite clear that wheat with some minor degree of blemish or damage was accepted by the Board as being milling standard wheat and certainly no particular attention was paid by the port grader to shrivelling or to the fungus black point, of which the grader in Southland was not even aware, until August 1983.

Regulation 2 of the Wheat Board Regulations 1965 prescribed the manner of determining whether or not wheat was marketing standard wheat as follows:-

> "(2) For the purpose of determining whether or not any wheat is milling standard wheat, the following provisions shall apply:
> (a) The amount of weed seeds and other extraneous matter contained in the wheat shall be determined by screening a representative sample of the wheat over a suitable sieve and by handpicking from the sample larger weed seeds and other extraneous matter:
>
> (b) The amount of broken, immature, and shrivelled grains in the wheat shall be determined by screening a representative sample of wheat over a 5½A metal sieve

having slotted holes 0.218 by 1.27 cm with approximately 1,614 slots per 1000 square centimetres.

(c) Where sacks are used for packing the wheat, the sacks shall be either sound, clean, once-shot 116 cm x 58 cm sacks, or sound, new, 116 cm x 58 cm sacks free from holes or other damage."

In general practice the responsibility for determining that the wheat complied with the moisture test, and that the shrivelling test had been complied with, was left first to the broker. I accept that brokers would not normally submit the wheat to the grader for examination unless they believed that the wheat would comply with the Regulations. In the event of the bulk supply not complying with the Regulations in regard to moisture or shrivelling, the wheat was normally returned to the broker for drying and further screening to enable it to comply with the tests.

I further accept the evidence of the growers that it was practically impossible to supply wheat of any kind which would be totally free from blemish or damage in accordance with the definition. As the words "blemish or damage" are qualified by the word "other", I am satisfied that what was meant was blemish or damage which would be "injurious to baking quality" in the same way as was damage caused by insect pests.

Black point in wheat is a recognised fungus which has existed in New Zealand wheat crops for a very long while. It is exacerbated by warm wet moist weather during grain crop ripening and Southland crops are the most consistently affected in this regard in New Zealand. Some cultivars are more

susceptible to the fungus than others. It is now known that there can be a very wide variety in the level of black point severity, even within a single line of wheat, since heads mature at different times. Its consequences can cause discolouration of the flour. The nature and extent of the black point is unlikely to increase in severity during storage or to spread to other grains. The extent of the incidence of black point is not as serious as the severity because not all instances of black point will have any discolouration effect on flour. After 1985 the Board adopted a more sophisticated test for black point which would have passed as milling standard wheat some wheat which was rejected in 1983 and 1984 on account of black point.

The weather in Southland for the 1982 and 1983 harvesting seasons was particularly wet. There were complaints by the millers to the Wheat Board as to the quality of Southland wheat sold by the Board to the millers. Those complaints related to the degree of shrivelling, the yellow stripe rust and the black point.

Dr Harvey was called by the plaintiffs as a plant physiologist and a recognised expert in the subject. In 1983 he was the officer in charge of the Ministry of Agriculture and Fisheries Plant Health Diagnostic Station at Lincoln College. His records showed that in 1983 a sample was sent to the unit from Southland for testing for black point. He states, and I accept, that the Wheat Board had not been testing for black point prior to 1983 but that in 1983 it did introduce some

form of testing with its port graders which was carried out that year and in 1984. The test was somewhat crude and inexact because it did not take account of the degree or level of black point which could vary so much. I accept that the deficiencies of the testing method were such that it was possible for wheat to be rejected for milling that need not necessarily have been, but there is no evidence of any other better test until the test devised by Dr Harvey himself which was not introduced or available until 1985.

The Plaintiff's Case

I turn now to the case for the plaintiff, Mr McDonald. He had been growing wheat each year since 1964. His stock and station agent was Wrightson N.M.A. Limited, a national firm, which was also an authorised broker of the Wheat Board. He had on his farm property a sophisticated silo system for the storing and drying of wheat comprising five silos with a total capacity of just over 600 tonnes.

Between 13 April 1983 and 18 May 1983 he sent to Wrightsons for testing six samples from six lines of wheat. He was advised by telephone by Mr Anderson, the grain supervisor at Wrightsons Invercargill, the result of these tests. Some brokers had a written form of advice, but in relation to Mr McDonald he was advised by telephone and according to Mr McDonald he was always advised by Mr Anderson that if the bake test was over 12 and the wheat otherwise qualified it had been accepted as milling standard wheat. There were two

categories of milling standard wheat according to the bake test in that those 15 and over were described as Category A, reserved for bread making, and those of 12-14 were described as Category B, for biscuitmaking.' Mr McDonald produced copies of six Wheat Research Institute test report forms, one dated 19 April, three dated 27 April, one dated 23 May, and the other dated 24 May, relating to estimated tonnes of 80, 100, 150, 150, 30 and 50 tonne lines, showing bake scores respectively of 13, 14, 14, 14, 13 and 5. Mr McDonald submitted a further sample of the line with the bake score which had returned 5 after some judicious blending, but he still only received a score of 10.

Although in his estimates the line which was found to be substandard was stated to be 50 tonnes, he testified that he sold all of that line, amounting in fact to only 19.82 tonnes, independently of the Wheat Board, through a pool or syndicate of growers, recognising that it was not milling standard wheat. He received for this 19.82 tonnes payment of $3,770.12.

The first shipment of millable standard wheat from Southland to be purchased by the Wheat Board was sent from Invercargill in late April but Mr McDonald was not notified by his broker to submit any of his wheat for that shipment. He delivered 119.14 tonnes on 18 May, 25 May and 26 May, all from a 150 tonne line which he had stored in his silo number 3. This was done pursuant to an instruction from his broker and the deliveries were passed by the port grader and shipped.

On 28 June and 7 July he delivered a further 52.83 tonnes from his other 150 tonne line stored in silo 4. These deliveries were also accepted by the port grader and shipped. A further shipment of Wheat Board wheat left Bluff in August, but Mr McDonald did not contribute to it.

His position as at 26 August 1983 was that he had sold all his substandard or undergrade line. He had in his silo 1 approximately 30 tonnes of Takahe wheat which was all one line. In silo 3 he had a balance of approximately 30 tonnes of his first 150 tonne line, and in silo 4 approximately 97 tonnes of his second 150 tonne line. In silo 5 he had mixed two lines, the first of 80 tonnes and the second of 100 tonnes and both those lines were in silo 5 on 26 August. He had sold 171.97 tonnes to the Wheat Board.

On 26 August the Wheat Board wrote to Mr McDonald in a letter addressed to all Southland growers stating:-

> "In accordance with the arrangement made with Southland brokers and Southland members of the Electoral Committee of United Wheatgrowers, enclosed is a circular for your information relating to the current valuation of wheat held for delivery.
>
> If you have any matters to discuss relating to the procedures herein would you please contact Wrightson NMA Limited who supplied us with the original details relating to your wheat."

The attached circular commenced with the following paragraph:-

"Following the recent announcement that wheat held in storage was being evaluated, growers who currently consider they hold milling grade wheat are asked to note very carefully the following information as this wheat may in fact NOT be of milling grade."

The circular went on to say that because of weather conditions in Southland a large part of the Southland crop, based on the results of the Wheat Research Institute tests, in fact some 47,000 tonnes, would be rejected and that of the rest, 29,000 tonnes would be Category B, and only 14,000 tonnes Category A. The circular noted that that estimate totalled 90,000 tonnes, while Ministry of Agriculture and Fisheries estimates put the Southland crop at 78,500 tonnes with an indication that there obviously had been some repetition of tests resulting in an overestimate of wheat on hand.

It was then said that although 58% of the crop reached 12 on the MDD bake test, the problem of shrivelled grains and black point had arisen on a scale not previously experienced. There had been four shipments of grain in 1983 and the North Island mills, to whom the wheat had been delivered, claimed that only 70% to 80% of the millable grains would be usable. There then followed paragraph 9 stating:-

"Arising from this, and following meetings with representatives of the NZ Flourmillers Association Inc., North Island millers, Wheat Research Institute, Crop Research Division, the Bluff Port Grader and the Wheatgrowers Subsection of Federated Farmers, the Wheat Board concluded at its meeting on 16 August that wheat which contains black point and shrivelling of a level which makes the wheat unusable under normal flourmilling conditions will be declared by the Board's graders as non-milling grade, and will not be accepted."

It was then indicated that the Bluff port grader would re-evaluate the samples already supplied and growers whose wheat was of a milling standard after the re-evaluation would be advised immediately as would also those growers whose wheat was not of milling standard.

It transpired that of the 23,000 tonnes of total remaining wheat in Southland which had previously passed Wheat Research Institute tests, only some 2-3,000 tonnes was acceptable on re-evaluation. The method adopted by the Wheat Board's grader at Bluff was to reassess for both black point and shrivelling applying a scale of "low", "medium" and "high. Unless the wheat received a "low" result in respect of both black point and shrivelling it was rejected.

Mr McDonald was advised that one line of his wheat had been accepted with a "low" result for both tests. That line was his line of Kopara wheat comprising 80 tonnes which had been mixed by Mr McDonald with another line in silo 5. It was impossible for the plaintiff to extract the line which had qualified for acceptance.

In October 1983 a further pool of growers and brokers was formed to dispose of the rejected wheat. This was eventually sold in November 1983 at $179.22 per tonne, whereas the earlier rejected wheat of apparently inferior quality had been sold by Mr McDonald after its immediate rejection following the first Wheat Research Institute test at $196.05 per tonne. The nett payment received by Mr McDonald after allowing for additional drying costs and other expenses was $52,184.02 for a total of 310.040 tonnes.

There has in fact been no challenge to the plaintiff's claim that he would have received for 310.040 tonnes at the Wheat Board price for millable standard wheat the sum of $69,346.54 as against the actual receipt of $52,184.02. In that respect the plaintiff's claim in breach of contract, breach of statutory duty, and based on promissory estoppel is $17,162.52. In relation, however, to the claim based on negligence there is no challenge to the plaintiff's calculations that if the wheat which was later rejected by the Wheat Board had been originally rejected so as to have enabled the plaintiff to have disposed of it earlier in 1983 at the time he sold his earlier rejected wheat he would have received a further $15.84 per tonne, making a difference of $5,382.39. In each case the plaintiff claims general damages.

Contract

Counsel for the plaintiff, in her opening and closing submissions, has followed the statement of claim which tends to combine three separate causes of action, (1) contract, (2) breach of statutory duty, and (3) promissory estoppel. It might have been preferable if the plaintiff's amended statement of claim had, in relation to the claim in contract, confined his pleadings to that cause of action and then separately pleaded the facts on which he claimed promissory estoppel and breach of statutory duty.

There is an air of unreality in applying the common law rules in relation to offer and acceptance regarding

the formation of a contract in a situation such as has occurred here, where, by virtue of statute and regulation, neither the vendor nor the purchaser has any alternative but to deal with each other. With that caveat in mind, however, there appears to be no reason why the law of contract should not be applied to the transactions between the plaintiff and the defendant. There must be an offer made by one party to the other which has received an unqualified acceptance by the other. There must be at least an apparent meeting of the minds of both parties (Halsbury's Laws of England 4th Edition, Volume 9, para 226).

The evidence satisfies me that there was not ever an intention on the part of the Wheat Board to enter into a contractual relationship to purchase wheat from Mr McDonald until, at the direction of the broker, the bulk wheat was delivered to railhead, ship or mill as directed by the Board. Mr McDonald believed that once he had submitted his sample to the Wheat Board for testing and he had been advised by the broker that the sample revealed a baking score of 12 or more and passed the other prescribed tests that a contract was created between him and the Board. Difficulties arose because of the Board's practice always to act through a broker and not to deal direct with the grower. Although the broker was clearly the agent of the Board for that purpose, it is equally obvious that in ordinary events, and in any case in so far as Mr McDonald was concerned, the broker, Wrightson NMA Limited, was his choice, was his stock and station agent, and would substantially be concerned to do the best it could for Mr McDonald. That

interest would not be entirely altruistic because under the terms of the Wheat Board Act it was very much in the broker's interest for a contract to be made between the Wheat Board and Mr McDonald resulting in the Wheat Board paying Wrightson NMA Limited a commission. I am satisfied that the plaintiff, the defendant and Wrightson NMA Limited were all aware that transactions between a wheat grower and the Wheat Board were controlled by the provisions of the Wheat Board Act 1965 and the Wheat Board Regulations 1965. I am equally satisfied that there was an intention by all those parties to comply with the Act and the Regulations, although the interpretation of the Act and the Regulations may have differed.

It may well be that the submission by Mr McDonald of his samples of the six lines of wheat in question through the broker, Wrightson NMA Limited, to the Wheat Research Institute for testing was an offer by Mr McDonald to sell the wheat to the Wheat Board. However, I am equally satisfied that there was no acceptance of that offer by the Wheat Board until the Wheat Board, through the broker, requested delivery of the wheat. The advice given by Wrightson NMA Limited to Mr McDonald as to the results of the Wheat Research Institute test was no more than just that. The purpose of the test was two-fold. It enabled the grower to take immediate steps to sell the wheat that did not comply with the standard, and it also enabled the Wheat Board, as a result of the declaration required to be made by the grower following the test, to have some indication of the probable amount of milling standard wheat available to meet the demands of the mills which the Board was required to supply.

Under the terms of the Wheat Board Act it was the obligation of the Board, in the event of there being insufficient local milling standard wheat, to arrange importation of suitable wheat for the millers. In so far as a broker may have indicated that the wheat in question was milling standard wheat and should not be sold, I do not consider that the broker at that stage was either ostensibly or actually on behalf of the Board accepting Mr McDonald's offer so as to create a binding contract.

Mr McDonald was far from specific as to what was said. In describing the position generally he said:-

> "It was at this stage the brokers would tell us whether the line had been accepted as milling or whether it was under-grade. Wrightsons' usual practice was to telephone me."

He later said:-

> "As soon as the results of each were known, Mr Anderson (the grain supervisor at Wrightsons) phoned me to let me know whether the line had been accepted as milling. Of the six lines, five were accepted as milling. All five were Category B."

Mr McDonald had earlier said that following this advice from Mr Anderson he regarded himself as from that time on storing the wheat for the Wheat Board and that he could not sell it to anyone else. Mr Anderson, in giving evidence, said:-

"Once we had received the form back, we would then contact the grower and advise him either by phone or circular what the outcome of the testing was. It was at that stage that we would tell him whether or not his line was accepted as milling. We recorded the results in the documentation book noting "U-G" under the heading "Purchaser" if it was under-grade. All milling wheat was bought by the Board.

We went by the Wheat Research Institute tests and if those were satisfied and the tests that we did were satisfied, then that was milling standard wheat. Everyone in the industry in Southland acted on that basis and had done so for a considerable number of years. It was regarded as sold to the Wheat Board subject only to the bulk matching the sample on delivery. From the moment we told the grower the line had been accepted as milling, from that point on he held the wheat for the Wheat Board and could not sell to anyone else. We impressed that upon growers. Everyone acted on that basis. That was the system."

I am satisfied that Mr Anderson in so advising his customers was himself misinterpreting the provisions of the Wheat Board Regulations and the Act as well as entirely misconstruing the Wheat Board's position.

Regulation 7(1) of the Wheat Board Regulations prohibited a broker from purchasing wheat on behalf of the Board unless a purchaser was available to purchase the wheat from the Board. This is a strong indication pointing against the Board purchasing the wheat at the time the sample was submitted for testing shortly after harvest. Certainly at some time the Board was bound to purchase the wheat if it was milling standard wheat, but Regulation 7 is a clear indication that the broker was not to purchase the wheat on behalf of the Board until the Wheat Board indicated that it required it for sale.

Regulation 8(3) made it clear that the property in the wheat passed to the Board on delivery. The provision for payment which had applied throughout and was prescribed by the Regulations was that the Wheat Board paid the broker and the broker paid the grower within a month or so after delivery. Delivery in many cases was several months after the submission of the test sample.

There is a strong argument to the contrary in the notification by the Board that from receipt of the tests from the Wheat Research Institute the grower should not sell the wheat to anyone other than the Board. That might easily imply that the Wheat Board regarded itself as having contractual rights in respect of the wheat. However, the content of the Wheat Board Act 1965 must be considered. It was an offence for milling standard wheat to be sold other than to the Board. The early testing provision was an indication to the grower of what was not milling standard wheat and which it would be in the interests of the grower to take steps immediately to arrange to sell. It was also an indication to the grower that the wheat which passed the test would probably be milling standard wheat at the time of delivery and be purchased by the Board. There was nothing, other than this indication not to sell the wheat which passed the test, in any of the communications from the Board, which gave any justification for an inference that the Wheat Board intended to purchase the wheat at the time the sample passed the test.

Similarly, the broker's conditions of appointment and duties and responsibilities sent by the Board to all brokers, including Wrightson NMA Limited, on 18 December 1981 could not be said either expressly or impliedly to have authorised the broker to have purchased the wheat at that time. In that list of duties, under the heading "Wheat Samples", the broker was instructed to advise the grower of the test results as received from the Wheat Research Institute. The next paragraph is headed "Wheat Purchase and Sale". It contemplates a sale to the Board either by delivery to a mill in respect of a specific order or by shipment in accordance with the Board's instructions. In relation to wheat delivery to a mill the broker is required "on receipt of acceptance advice from the mill in respect of local wheat, send notification of sale to grower with delivery instructions." In relation to wheat to be shipped at the direction of the Board, the requirement is "on receipt of wheat requirement advice through Board in respect of shipped wheat send notification to growers with delivery instructions".

Although it may well be that the conduct of the Board through the brokers over the preceding years had created a genuine belief in both growers and brokers that once the sample passed the test the wheat would be purchased by the Board, that falls far short of creating a situation whereby on the sample passing the test the wheat was purchased by the Board.

The plaintiff's claim in contract must fail.

Promissory Estoppel

It is trite to record that in the last ten years the law in relation to promissory estoppel, whereby Courts have held people to their promises, or to their conduct leading other persons to believe that they are making promises, if it is unconscionable not to do so, has developed apace. In Gillies v Keogh (1989) 2 N.Z.L.R. 327 the Court of Appeal referred to such development, although on facts which bear no relationship to the present. Cooke P. at p331 referring to arrangements between partners of what is called a de facto union said:-

> "Whatever legal label or rubric cases in this field are placed under, reasonable expectations in the light of the conduct of the parties are at the heart of the matter."

Richardson J. in the same case at p345 referred to a statement of principle by Lord Denning in Crabb v Arun District Council (1976) Ch. 179 and approved by the Privy Council in Attorney General of Hong Kong v Humphrey's Estate (Queen's Gardens) Limited (1987) A.C. 114 Lord Denning at p188 said that if a person:-

> "... 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."

In delivering the judgment of the Privy Council in Attorney General of Hong Kong v Hymprhey's Estate (supra), Lord Templeman at p124 said that more than some unfairness or unjustness must be established. He said:-

> "But in order to found an estoppel the government must go further. First the government must show that HKL created or encouraged a belief or expectation on the part of the government that HKL would not withdraw from the agreement in principle. Second the government must show that the government relied on that belief or expectation."

In Burbery Mortgage Finance & Savings Ltd v Hindsbank Holdings Ltd (1989) 1 N.Z.L.R. 356, Cooke P. made it clear that the principle of promissory estoppel was not limited to dealings between parties who have prior contractual rights inter se (see p359). Richardson J. at p361 said:-

> "This then is a straight forward application of modern principles of equitable estoppel. It is well settled that where one party has by words or conduct made to the other a clear and unequivocal promise or assurance intended to affect the relations between them and to be acted on accordingly, then once the other party has taken him at his word and acted on it, the one who gave the promise or assurance is bound by that assurance unless and until he has given the promisee a reasonable opportunity of resuming his position (16 Halsbury's Laws of England (4th ed) para 1514). Although there are indications in some of the authorities that there must be a pre-existing contractual relationship between the parties, I am of the view that the doctrine applies in appropriate cases where there is a pre-existing legal relationship (Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd (1968) 2 QB 839, 847); or where the promise affects a legal relationship which will arise in the future

(Bank Negara Indonesia v Hoalim (1973) 2 MLJ 3 (PC); or more broadly where, as here, the promisor and promisee have interests in the same subject-matter."

Historically it has been held in the past that the doctrine of estoppel was available only as a sword and not as a shield. The recent cases above referred to have indicated that that is no longer so, if indeed it ever was so. The High Court of Australia has in two recent cases demolished any ground for so restricting such a doctrine. They are Walton Stores Ltd v Maher (1988) 62 A.L.J.R. 110, and Commonwealth v Verwayen (1990) 64 A.L.J.R. 540. I also refer with respect to the decision of Fraser J. in Harris v Harris (1990) 1 Company Cases 190-406 at 190-416. I do not find it necessary to refer any further in detail to those cases.

I am satisfied that the Wheat Board had by its conduct and words, up until August 1983, "created or encouraged the belief or expectation" on the part of Mr McDonald that the Board would purchase from Mr McDonald all of the wheat contained in the lines, the samples of which had been sent by Wrightson NMA Limited to the Wheat Research Institute and which had received a grade of 12 or more and otherwise passed the sampling tests, as milling standard wheat provided that it had not deteriorated from the sample submitted and that it passed a moisture and screening test in the way conducted by the port grader in preceding years. I am likewise satisfied that Mr McDonald relied on that belief or expectation in simply storing the wheat and in one case amalgamating one line with another in a silo and in failing to take steps to sell the

wheat to a source other than the Board on a market which was apparently available.

The reasons why I reach this conclusion are as follows:-

(1) The circular letter from the Wheat Board dated November 1980 stating that "all wheat from the 1981 harvest which is tested by the Wheat Research Institute and which receives a score of 12 or higher will be milling standard wheat and must be handled accordingly" was never specifically withdrawn. It was not repeated in 1981 and 1982, but there was nothing in the information supplied by the Wheat Board to indicate that that statement was incorrect and should not be relied on in the future.

(2) The conduct of the Wheat Board and its brokers from 1980 until August 1983 led growers, and in particular the plaintiff, to believe that wheat which received a score of 12 would be accepted by the Wheat Board as millable wheat provided that it had not deteriorated in condition between the date of the sample and the date of delivery, and provided further that the sample was truly representative of the bulk supplied.

(3) The Wheat Board should have been aware of the practice of the brokers, and in particular the practice of Wrightson NMZ Limited, in advising the plaintiff that wheat which received a score of 12 or higher could not be sold other

than to the Board. By inference I would hold that the Wheat Board was aware of this general practice, but even if it were not I am satisfied that it was bound by the conduct of its brokers in this regard.

(4) I accept the evidence of the plaintiff that he believed, because of the conduct and representations of the Wheat Board, that in respect of the 1983 lines which had received a score of 12 or more the Wheat Board would purchase those lines as millable standard wheat subject only to there having been no deterioration during storage and to the bulk supply being in accordance with the sample.

(5) The plaintiff relied on this belief and acted to his detriment in taking no steps to dispose of the wheat to other available sources and in one case of mixing one line with another in the same silo.

It follows that I find that it is unconscionable to permit the Board to act otherwise than in accordance with its representations and conduct.

The plaintiff has sensibly acted by way of reducing his loss by selling the wheat to another party. The relief that is sought is a claim for damages. There is no dispute between counsel that although the relief is being granted in equity, damages can be awarded. Counsel were in

agreement that in such a case damages were in the discretion of the Court. Counsel for the plaintiff submitted that the damages were clearly the difference between the price received by the plaintiff on sale and the price which the Board would have paid if it had purchased the wheat as millable standard wheat. Counsel for the defendant on the other hand submitted that equally clearly such an award of damages would be wrong because the wheat was not in fact millable standard wheat and that the damages should be no more than compensation for the detriment suffered by the plaintiff because of his reliance on the representations and conduct of the defendant causing the plaintiff not to sell the wheat earlier. Neither counsel supported their submissions with any reference to authority of assistance in this regard.

In a matter such as this where a plaintiff has shown that he is entitled to compensation for the unconscionability of a state of affairs it is probably right that there should be no hard and fast rules. For reasons which I shall shortly explain further the evidence does not satisfy me that any of the lines of wheat of the plaintiff in issue in these proceedings, other than the one line of 80 tonnes which the plaintiff could not supply because of it having been mixed with other lines, was millable standard wheat. While it may be unconscionable for the plaintiff not to receive compensation for the state of affairs, it may equally be unconscionable in the circumstances of this case for the plaintiff to be paid for substandard wheat the price

which he would have reached if it had been millable standard wheat.

I am also concerned that in this case the plaintiff has, in my view, a cause of action at common law. That cause of action is in negligence. It was recognised by counsel for the plaintiff that the common law remedy in damages could be no more than the difference in price between the amount received by the plaintiff on sale and the amount which he would have received for selling wheat of the same grade at an earlier date. For some reason not clear to me the plaintiff has not claimed as a loss under the head of negligence the loss of not receiving the millable standard wheat price for the 80 tonnes mixed with under grade wheat.

I have been troubled whether it is right to resort to equity at all when there is a remedy available at common law. For many years the doctrine of promissory estoppel was described as merely a shield able to be used as a defence to a plaintiff's claim but not capable itself of creating a cause of action. Those days have gone and it is recognised that the claim may now be used as a sword as well as a shield and thus support a cause of action in its own right. There must be some doubt as to whether there is any need for the Court to resort to equitable principles because the Court considers a state of affairs to be unconscionable if a remedy is available at common law which might eliminate the element of unconscionability. In converting promissory estoppel from a "shield" to a "sword" care must be taken not

to extend it further into a weapon of the nature of an atomic bomb that will destroy the existing framework of legal principle by way of provision for compensation in the fields of both contract and tort. On the other hand, it may equally be said that a state of affairs is unconscionable even if it also amounts to a breach of contract or a breach of duty compensatable in tort.

I do not consider that the conduct or representations of the Board in any way affected the plaintiff's decision to grow wheat for the 1983 harvest. In doing so the plaintiff took the risk that the weather, or lack of disease, or damage by insects, birds or other animals, would result in him producing wheat of an adequate quality. In the ordinary course of events a farmer also takes the risk of there being a purchaser available for his product, but that was not so in relation to wheat where, if the quality was reached, the Wheat Board was a compulsory purchaser. The fact is that the plaintiff's wheat was not up to standard. Had the Board at the time of testing the wheat by the Wheat Research Institute indicated to the grower that its policy was changing and that a much higher standard of purity from black point and shrivelling would be required than had occurred in the past but nevertheless within the scope of, and indeed in accordance with, the definition of millable standard wheat in the Regulations, the plaintiff would have no remedy if at that stage the Board had rejected the wheat because of excessive black point and shrivelling. However, the representation and

conduct of the Wheat Board was such that the plaintiff, after receiving a score of 12 or more, regarded the wheat as such as would be accepted by the Board at a later stage. He was justified in that belief but he had no contract.

I accordingly conclude that the remedy to which the plaintiff is entitled against the Board by way of promissory estoppel is the difference between the price which he received and the price which he would have received had the wheat been rejected at the initial stage and sold at the time the other rejected wheat of the plaintiff was sold. The position is, however, different in respect of the 80 tonne line which was ultimately accepted by the port grader but which could not be supplied by the plaintiff because it was inextricably mixed with other lines. I am satisfied that the plaintiff acted reasonably in the circumstances in mixing those lines, and in respect of that line, namely for 80 tonnes, the damages should be the difference between the price he received and the price he would have received from the Wheat Board if a contract had been able to be completed for the sale of milling standard wheat.

Breach of Statutory Duty

The plaintiff's claim under this head can be shortly disposed of. There is no dispute that the defendant Board was required to purchase all milling standard wheat offered to it by a grower and if any of the wheat offered to the Board by the plaintiff was milling standard wheat there was a breach of statutory duty in it failing to do so.

I am not satisfied that the plaintiff, in respect of the wheat the subject of this litigation, did offer, in bulk, any milling standard wheat to the Board. Miss French drew attention to Regulation 2(2b) in relation to shrivelling. It is necessary to consider the whole clause. Regulation 2(2) is as follows:-

> "(2) For the purpose of determining whether or not any wheat is milling standard wheat, the following provisions shall apply:
> (a) The amount of weed seeds and other extraneous matter contained in the wheat shall be determined by screening a representative sample of the wheat over a suitable sieve and by handpicking from the sample larger weed seeds and other extraneous matter:
>
> (b) The amount of broken, immature, and shrivelled grains in the wheat shall be determined by screening a representative sample of wheat over a 5½A metal sieve having slotted holes 0.218 by 1.27 cm with approximately 1,614 slots per 1000 square centimetres.
>
> (c) Where sacks are used for packing the wheat, the sacks shall be either sound, clean, once-shot 116 cm x 58 cm sacks, or sound, new, 116 cm x 58 cm sacks free from holes or other damage."

Miss French submitted that the Board had used another method of assessing the level of shrivelling when the wheat was rejected by the port grader by considering the sample. I am not satisfied that any alternative method was used by the grader, but in any event the totality of the evidence satisfies me that the wheat did contain more than 5%

by weight of shrivelled grains and was not free from any other blemish or damage.

In this respect I have considered carefully the evidence of Dr Harvey. He adopted a "thousand grain test" for the purpose of shrivelling which was not the prescribed test. In this regard the onus was on the plaintiff to establish that the wheat offered was of milling standard. It may well be that in the passage of time there was damage to the wheat samples, and certainly in the case of the plaintiff it was acknowledged that there had been. However, regardless of the particular damage admittedly caused to the samples of wheat stored by the plaintiff I am not satisfied that any of the wheat sampled by Dr Harvey has been shown to have complied with the definition in the Regulations.

The practice in the past had been for the test for shrivelling to be carried out by the broker, but nevertheless the wheat was examined for shrivelling by the Board's grader on delivery. Although the broker was undoubtedly the agent of the Board for some purposes, the broker was of course also the agent of the farmer in others. The evidence indicates that the wheat of the plaintiff had been tested by the broker for shrivelling and found to be adequate. In the light of the subsequent tests by the port grader, Mr Henderson, I am not satisfied that those tests by the broker were adequately carried out. Too great a proportion of shrivelled grains as a defect could be remedied by further screening. It was clearly in the grower's interest

to ensure that his wheat had been adequately screened so as to comply with the Board's test when the bulk supply was delivered. In conducting a sieve test of the sample submitted shortly after harvest, the broker was acting on behalf of the grower in conducting some form of test to indicate to the grower whether further screening would be required before the wheat was offered for sale. I do not consider that in conducting that preliminary test the broker was acting as agent for the Board, and I certainly do not consider that the Board was bound by the broker's conclusion in that regard. I likewise am not satisfied on the totality of the evidence that the conclusion of Wrightson NMA Limited that the plaintiff's wheat did not contain more than 5% by weight of shrivelled grains was correct in so far as the total bulk supply was concerned. I repeat, the evidence did not satisfy me that the plaintiff's wheat on this ground was milling standard wheat.

The more substantial point arose over black point. It is not difficult to infer that in years prior to 1983 wheat subject to defect by way of black point had been accepted by the Board as milling standard wheat.

I also accept the evidence that the words "free from any other blemish or damage" in the statutory definition of milling standard wheat cannot be literally applied. I have earlier said that I interpret the phrase as being free from any other blemish or damage which is injurious to baking quality. That is a matter of degree. It is quite clear from the evidence of Dr Harvey that knowledge of the extent of the

injury to baking quality of wheat by black point developed between 1983 and 1985 and thereafter. It was submitted by counsel for the plaintiff that because of the tests conducted by Dr Harvey in 1991 to samples of the plaintiff's wheat and that of a number of other growers, the degree of the extent of black point in accordance with a black point index devised by Dr Harvey in 1985, and apparently accepted as a valid testing measure thereafter, was such that the wheat rejected for black point in 1983 would probably have been accepted from 1986 onwards. Dr Harvey acknowledged that in so far as testing of wheat is concerned, in relation to it being a satisfactory standard for milling, the process had been an evolutionary one over the years.

Regulation 12 of the Regulations provides that in the event of any dispute as to whether wheat offered to the Board is milling standard wheat, the dispute shall be determined by the Board's grader. There must no doubt be some qualification to the basis on which the Board's grader is required to determine that dispute, but in my view it must be in relation to the genuine and honest belief of the grader in the light of existing knowledge as to the extent of the injury to baking quality of the obvious blemish or damage to the wheat by virtue of the existence of black point. The fact is that the grader honestly and reasonably in the light of existing knowledge rejected the wheat because of the existence of black point which he, the Wheat Board, and others

knowledgeable as to the qualities of wheat at that time, regarded as injurious to baking quality.

The evidence of Dr Harvey is that in the light of 1991 knowledge or 1986 knowledge this wheat would not have properly and honestly been deemed to have been injurious to baking quality. However, it is significant that although Dr Harvey at the Wheat Research Institute was first consulted about this matter in 1983 it was not until the 1986 harvest that the scheme of testing devised by him was applied. It is not disputed that the wheat in question was affected by blemish or damage in the existence of black point. I am accordingly satisfied that the Wheat Board was justified in rejecting this wheat as not being of milling standard in accordance with the Regulations in 1983 and that accordingly in respect of the plaintiff's wheat, with the exception of the 80 tonne line which received a low score for both black point and shrivelling, none of the plaintiff's wheat was of milling standard.

Although the Wheat Board Act 1965 and the Regulations required the Board to purchase all milling standard wheat, the evidence does not satisfy me that at any stage the Board refused to purchase milling standard wheat offered to it by the plaintiff. Like the claim brought based on contract, the claim brought on breach of statutory duty fails.

Negligence

The plaintiff claims further in negligence. This claim is of course brought on the assumption, as I have found, that no contract for sale of the wheat ever came into existence. I am satisfied that in the circumstances the Wheat Board did owe a duty of care to growers and that is regardless of whether in New Zealand Anns v Merton London Borough (1978) A.C. 728 still prevails as to the manner in which liability in tort is to be considered, or whether in the light of more recent decisions of the House of Lords the position should be examined on a different basis. The Wheat Board Act 1965 created a Board as a total monopoly obliged to purchase all milling standard wheat grown in New Zealand. It is required under its Act to exercise a general control over the marketing of wheat and flour, to encourage wheat growing in New Zealand, and the use of wheat grown in New Zealand, to ensure that adequate supplies of wheat are available throughout New Zealand, and to promote and organise the orderly development of the wheatgrowing industry (s11). It follows that wheat growers in New Zealand had a very close degree of proximity to the Board and in such circumstances there is no difficulty in finding that the Board owed a duty to take reasonable care to act within its powers as was held in respect of a local authority in Craig v East Coast Bays City Council (1986) 1 N.Z.L.R. 99.

The plaintiff submits that it breached its duty in this regard in no less than nine ways:-

(1) It represented to the plaintiff and other wheat growers that it would purchase all wheat which satisfied the Board's criteria. For the reasons that I have earlier expressed, no such representation was made.

(2) That it represented to and advised the plaintiff and other wheat growers that wheat which satisfied the Board's criteria was milling standard wheat. Quite apart from the statements of the various brokers to their customers, the Wheat Board did make this representation in 1980. It was an incorrect representation made without due care in the circumstances, and although the Board did not repeat this representation in subsequent years, it was negligent in not withdrawing it or clarifying it. I am satisfied that this negligent representation influenced the decision of the plaintiff not to sell the wheat once it received a score of 12.

(3) It altered the Board's criteria after the wheat in issue had been harvested and held back by the plaintiff for sale to the Board. I am not satisfied that the Board was in any way negligent in this regard. The Board had a duty not only to the grower but to the miller. If it were drawn to the Board's attention that it had been incorrectly purchasing wheat which was not of milling standard and selling that wheat as milling standard wheat to the miller it owed a duty to the miller to do so.

(4) & (6) Failure to notify the plaintiff and other wheat growers adequately that it had decided to apply new criteria and that black point was to become one of the Board's criteria of milling standard. I am satisfied that the Board did notify the plaintiff and other wheat growers as soon as it decided to change its attitude in relation to black point and there was no element of negligence in its conduct in this regard. It acted as early as it reasonably could have been expected to.

(5) Failure to notify the plaintiff and other wheat growers prior to August 1983 of the alleged existence and significance of black point. It is true that there was some complaint by millers in 1982 concerning black point, but the evidence satisfies me that their serious complaints did not arise until 1983. Apart from notifying growers that there had been a complaint, there is little that one could have expected the Board to have done prior to its action in 1983. I am not satisfied that in this regard it acted unreasonably or without due care.

(7) Failing to advise the plaintiff and other wheat growers of the steps to be taken to guard against black point and/or to prevent or control it. Little was known about black point in 1983 and there is no evidence of any steps which could reasonably have been taken to guard against black point or to prevent or control it at that time.

(8) Failing to provide any adequate means of testing the incidence of black point and of its alleged effect. I have dealt with this in relation to Dr Harvey's evidence. I am satisfied that in 1983 no better means of testing the incidence of black point was available or could reasonably have been made available.

(9) Failing adequately to check the samples of the wheat rejected for black point or shrivelling. The evidence falls short of satisfying me what could reasonably have been done by the Board, other than the steps it took, once it decided that black point and shrivelling was a more material factor which it was bound to take into account, in considering whether or not wheat was of a milling standard.

The plaintiff succeeds, however, on the second ground in negligence.

The defendant has alleged contributory negligence. This is in respect of the 80 tonnes of wheat which would have been accepted by the Wheat Board which the plaintiff was unable to supply because of mixing the wheat in a silo with another line which turned out later to be not milling standard. The evidence satisfies me that in this regard the plaintiff acted reasonably. The mixing of what was regarded as milling standard wheat was not only carried out by the plaintiff but also by the brokers in their bulk stores for

growers who did not store their own wheat. It was a practice which must have been known by the Wheat Board, at least by its grader, and no doubt by others. It was a practice which was adopted because of the belief of all concerned that once wheat had received a baking score of 12 or over from the Wheat Research Institute, then subject to it not deteriorating in storage and being in accordance with the sample, it would be accepted by the Wheat Board as milling standard wheat. Any failure in regard to shrivelling was capable of being remedied by further screening, and any failure by way of moisture content was able to be remedied by a drying process. There was no contributory negligence on the part of the plaintiff.

For the reasons which I have expressed earlier I do not consider that the plaintiff should be debarred from proper compensation on the grounds of promissory estoppel merely because it has a remedy in negligence. There will be judgment for the plaintiff for $7,731.83 calculated as follows:-

230.04 tonnes @ $15.84 per tonne
being $195.06 (Pool 1 Price)
less $179.22 (Pool 2 Price) = $3,643.83

80 tonnes @ $46.10
being $225.32 (Millable Grade Wheat Price plus storage increment)
less $179.22 (Pool 2 Price) = $4,088.00

$7,731.83

Under each cause of action the plaintiff claims general damages of $5,000. In a claim such as this for pure economic loss an award of general damages is not usual. I can accept that the plaintiff was disappointed at the actions of the Wheat Board but I am not persuaded that it would be appropriate under any cause of action to award general damages other than some compensation to the plaintiff for the additional storage cost of the 230.04 tonnes of wheat until its sale to another purchaser. It is difficult to assess precisely what the plaintiff's costs or loss in addition to the 230.04 tonnes would have been.

If the Wheat Board had purchased the wheat on 31 October 1983 the plaintiff would have received a further $21.32 per tonne in respect of this 80 tonnes and allowance has already been made for this. In the circumstances it would be just to award general damages of $500 to reflect storage cost and general inconvenience in relation to the unnecessary storage of the rejected wheat. It represents no more than an attempt to provide adequate and full compensation for the plaintiff's loss in the circumstances.

There will accordingly be judgment for $8,231.83.

The plaintiff seeks interest on the amount awarded at 11% per annum from 16 November 1983 to the date of judgment. It is not unusual to award interest in claims of tort or in equity from the date when the cause of action arose. Nevertheless, interest is a discretionary remedy and

in considering a claim for interest it is proper to have regard to the conduct of the litigation as well as to the fact that the plaintiff has been without the money to which the Court has held him to be entitled over the period.

At the hearing I expressed my great concern that it had taken so long for this matter to be brought before the Court. Counsel for the defendant in response to a request from me provided a useful chronology. As early as October 1983 the solicitors for the plaintiff representing a group of farmers wrote to the New Zealand Wheat Board indicating that a claim would be brought. A year later a request was made as to whether the dispute should be referred to arbitration. The reply was that the Board did not recognise a contract and the plaintiffs should choose their forum. On 2 April 1986 the proceedings were for the first time served on the Board. On 17 June 1986 Parliament enacted the Wheat Board Amendment Act providing that as from 31 January 1987 the Board should cease trading and ultimately be dissolved. Meanwhile in May 1986 the defendant filed a statement of defence, but this was followed by discovery, request for further particulars, and other interlocutory steps. I do not wish to go into detail into all of those steps. It may be that some of them were due to some delay on behalf of the defendant, but that delay can readily be explained once proceedings were delayed until the Board was about to go out of existence. There clearly were some delays in 1989 by the defendant in relation to production of documents for inspection. The fact is, however, that it

was not until 21 August 1990 that the plaintiff submitted a praecipe seeking a fixture to the solicitor for the defendant for signature. That was returned immediately by the solicitor for the defendant, and following the matter being set down, the Court convened a pre-trial conference for 5 December 1990. At that conference the plaintiff sought a fixture, but not until after 30 April 1991. An estimate of ten days for the hearing was given. The fixture was allocated for 13 May 1991.

The Court is sufficiently aware of matters relating to litigation to know that there may be many reasons for delay and that it would be unjust to attach the blame for delay in most cases to one party alone. However, where there has been delay the plaintiff usually must accept the greater part of the blame for that delay. I am satisfied that that delay has been of such a nature and extent as to render it unjust to award interest against the defendant for the total period since the cause of action arose. In any event, there is of course no such rule requiring this to be done, and in cases of tort or on an award of equitable damages it has often been held that because of the lack of certainty about the position interest should not accrue until the date of judgment. However, I am conscious that the plaintiff, and, if this judgment is to have any effect on the 46 other plaintiffs, all plaintiffs have not received proper compensation in respect of their wheat for the year 1983. Taking all matters into account, I am satisfied that it is just that the plaintiff should have interest on the amount of

the damages at 11% per annum for four years up to the date of judgment.

The plaintiff is entitled to costs. This has been regarded as a test case affecting a large number of plaintiffs and no doubt in total a substantial sum of money. I do not consider that an award of costs based on the damages awarded to the plaintiff would properly reflect the costs which have been incurred by the plaintiff in bringing this test case. It would be hoped that as a result of this test case any costs payable by the defendant in resolution of the other claims by the farmers should be substantially less. Paragraph 36 of the scale of costs in the High Court Rules retains the somewhat out of date ceiling of costs of $5,750 exclusive of any award for disbursements unless the Court certifies to the contrary. Bearing all these matters in mind, there will be an order that the defendant pay to the plaintiff costs in the sum of $10,000 together with disbursements, witness expenses and other necessary payments to be fixed by the Registrar.

C D Holland J

Solicitors:

French Sons Burt & Co, Invercargill, for Plaintiff
B. McConnell, Christchurch, for Defendant

Reserve decision delivered this 20th day of June 1991 at 9.30 am.

Registrar.

Copy to Tony Irvine => 20/6/91
" " Ann Robertson => 20/6/91

IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

No. CP13/86

BETWEEN RUSSELL JOHN McDONALD

Plaintiff

A N D ATTORNEY-GENERAL

Defendant

JUDGMENT OF HOLLAND, J.

Reserve decision delivered this 20 day of June 1991 at 9.30 am

Registrar