IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2008-435-253

IN THE MATTER OF	an appeal against a decision of the District Court at Masterton
BETWEEN	KIRIWAI FARM LIMITED Appellant
AND	AGGIE JAKUBSKA First Respondent
BETWEEN	KIRIWAI FARM LIMITED Appellant
AND	LIDA VRIEND AND OTHERS Second Respondents

Hearing: 3 June 2009

Appearances: Mr G Paine for the appellant
Mr R Laurenson and Mr M Smith for the respondents

Judgment: 13 November 2009 at 4.15 pm

JUDGMENT OF MALLON J

Introduction

[1] Ms Marlis Kreutzfeldt, through her company Kiriwai Farm Limited (Kiriwai), is the owner of just under 41.5 hectares of land in the Wairarapa. She lives in a house on the land. The respondents occupy two houses they have erected on the land at their expense and with Ms Kreutzfeldt's permission. Ms Kreutzfeldt now wants the respondents off her land.

[2] The respondents' houses came to be erected when Ms Kreutzfeldt had a vision to establish on the land a non-patriarchal lesbian community of seven, the concept being described as "Wimminsland". With Ms Kreutzfeldt's knowledge and encouragement, Ms Aggie Jakubska erected one house and the second respondents (who, for convenience, I will refer to as the Dutch women) erected the other. Later, when Ms Kreutzfeldt had a change of heart and sought to evict them, the respondents obtained injunctive relief and an order for specific performance from the District Court, the effect of which is that the respondents have the right to continue to live in the houses for their respective lifetimes. Kiriwai (which is effectively Ms Kreutzfeldt as the sole director and shareholder of Kiriwai) appeals.

[3] The grounds of appeal and the written submissions covered a number of issues although in a somewhat general and cursory way. However, by the conclusion of the hearing, there were two points pursued in respect of each of the respondents.

[4] In respect of Ms Jakubska, who had a signed licence to occupy granted by Kiriwai, the two points were that:

a) there was no consideration and therefore no contractual licence to occupy granted to Ms Jakubska; and

b) if there was a contractual licence to occupy then damages were an adequate remedy for Kiriwai's breach of that contract.

[5] The Dutch women had an unsigned licence to occupy the other house because the relationship between Ms Kreutzfeldt and them had broken down before it was signed. The two points of appeal pursued in respect of them were that:

a) no estoppel arose because no benefit was conferred on the plaintiff. There was no benefit because any such benefit was conditional on the establishment of Wimminsland which did not occur; and

b) if there was an estoppel damages were an adequate remedy.

Ms Jakubska

The facts as found in the District Court

[6] With Ms Kreutzfeldt's consent, Ms Jakubska erected her house on the Kiriwai land in 2002 and began living in it from about that time. (The District Court judgment does not go into what arrangements were discussed between Ms Kreutzfeldt and Ms Jakubska as to this initial period and counsel have not referred me to any evidence on point.)

[7] The licence to occupy was signed by Ms Jakubska and Ms Kreutzfeldt on 1 February 2004. It was described as being "a contractual licence to occupy a designated area of land and the structure known as 'The Studio'". It was to exist "[u]ntil the death of" Ms Jakubska and was expressed to be binding on a third party acquiring the land if Ms Kreutzfeldt (then described as Ms Klein) died before Ms Jakubska. Ms Jakubska was "to be responsible for the maintenance of structures and access track and for payment of any council rates incurred by her". She was also to have "autonomy in establishing a conservation and re-forestation program and erecting temporary structures and fencing as necessary". In the event of any disagreement between the parties a third person was to be appointed to mediate the dispute. In the event that Wimminsland was established and functioning the agreement was to be reviewed.

[8] Following Ms Kreutzfeldt's change of mind about the other defendants (see below at [32]), and Ms Kruetzfeldt's view that Ms Jakubska was on their side, Ms Jakubska took steps to arrange a mediation. Ms Kreutzfeldt did not attend, the mediation, the District Court finding that by this stage Ms Kreutzfeldt had determined that all of the respondents were to leave the land. A notice of eviction was given to Ms Jakubska on 25 October 2007. Pursuant to that notice Ms Jakubska vacated her house until successfully obtaining interim relief on 13 December 2007 (and subsequently final orders from the District Court see below at [20]).

Consideration

[9] The District Court considered that Ms Jakubska had been granted a contractual licence to occupy on the terms of the document signed in February 2004. It viewed the consideration for this contract as being first, the obligation Ms Jakubska had to pay rates and to maintain an access way; and secondly, the presence of the house on the land with Ms Jakubska living in it and carrying out her conservation and re-forestation program and erecting temporary fencing. The Court viewed the second of these two components of consideration as of value in terms of the Wimminsland concept.

[10] It was submitted for Ms Jakubska that the District Court erred because no rates were ever paid. It was also submitted that Ms Jakubska's occupancy of the house benefitted only Ms Jakubska unless and until the Wimminsland concept was established and it was not. As to the house itself, it was submitted this could not be consideration for a licence (as I understand the submission, because the house had already been erected before the licence was entered into) and further that there was no evidence that the house was an improvement to the land.

[11] The licence document does not say what consideration, if any, there was agreed to be for the granting of the licence. It is therefore necessary to infer from the evidence what the parties intended. A difficulty about this is that the submissions for Ms Kreutzfeldt did not direct me to the evidence but instead merely raised some general points.

[12] Turning to consider those general points, there is no dispute that Ms Jakubska did not pay any rates. Counsel advise that this is because Ms Kreutzfeldt made no demand from her. That it was not paid does not, however, mean that it was not consideration. The payment of rates was an obligation assumed by Ms Jakubska when the contract was formed. Ms Kreutzfeldt is able to enforce that obligation. If she chooses not to do so, that does not mean that no contract was ever formed. (Ms Kreutzfeldt did not seek to contend that the obligation to pay rates was a condition of the promise rather than consideration for it, nor that it was somehow insufficient consideration.)

[13] Ms Kreutzfeldt's submission that Ms Jakubska's occupancy had no value unless the concept was established overlooks the value to Ms Kreutzfeldt in promoting the concept. It is clear that Ms Jakubska's occupancy was used to promote the concept. I was referred to two Kiriwai documents showing this. One of these included the following statement:

> The Land of Kiriwai is already in lesbian hands and will become a Trust as soon as we have seven committed permanent residents.
>
> At present we are two – so we need <u>you</u>!
>
> Marlis lives in the existing farmhouse and Aggie, with help from lots of women, has just finished building a straw-bale octagonal house.

[14] The other said:

> Two grumpy, past midlife crisis, lesbians, one marlis german canadian, and aggie, polish british, (not a couple) are inviting many committed wimmin to a lifestyle of freedom, individuality and co operation on a beautiful 350 acre land project overlooking the pacific ocean in the southern part of the north island of new zealand.
>
> ...
>
> The land, called kiriwai, meaning reflection in the maori culture, is a gift from the founder and you will get a building site of your choice with a "licence to occupy". When there is a reasonable wimmins population living here, the land will go into a charatable trust.
>
> Aggie lives in a selfbuilt octagonal strawbale house and i marlis live in the existing 4 bedroom, 40 year old farmhouse and am waiting to share it with 2 more compatible wimmin.

[15] Ms Jakubska's occupancy was also anticipated to involve conservation and re-forestation. That was also something of value in terms of the wimminsland concept (although I do not know whether any such work was carried out).

[16] It does not matter that the Wimminsland concept did not proceed. If it was of value to the promotion of that concept to have Ms Jakubska in residence and committed to the concept (including conservation and re-forestation) then it could be consideration for her licence regardless of the success or otherwise in establishing the concept.

[17] It may be that the house was itself erected as consideration for the licence which was to be entered into, but I have not been referred to the evidence about this. It does seem unlikely that Ms Jakubska would erect the house without some arrangement with Ms Kreutzfeldt that she could live in it on the land. It might be that Ms Jakubska's claim to the house would be made out on her promissory estoppel claim. The District Court Judge was of the view that there would be a promissory estoppel, in the alternative to the contract claim, although he did not develop the facts and reasons for that view in relation to Ms Jakubska.

[18] Regardless of the correct legal basis for Ms Jakubska's claim, if Ms Jakubska is evicted from the house then Ms Kreutzfeldt would retain the house unless Ms Jakubska was permitted to and able to remove it. If the house is to remain on the land then Ms Kreutzfeldt has retained the value of that house. Ms Kreutzfeldt may say that it has no value to her but it is the objective measure of value that counts.

[19] In the minimalist way this ground of appeal has been advanced I can do no more than say that the particular points that have been raised are not made out. In any event counsel for Ms Kreutzfeldt acknowledged that the real nub of the appeal was as to the appropriate remedy. To that I now turn.

Damages

[20] The District Court granted Ms Jakubska a permanent injunction restraining Kiriwai from evicting her from the house she had erected. The District Court Judge

also said that as an alternative to the contract claim he would have also found that Ms Kreutzfeldt was permanently estopped from ending Ms Jakubska's occupation and would have granted her specific performance enabling her to live on the land for her life.

[21] As to damages the District Court said:

> The question of whether these actions can be determined by an award of damages has emerged from the evidence and the written submissions (and I think from what I said during the hearing). Firstly, damages have not been sought, except in a counterclaim which has no relevance to this question. Secondly damages cannot be awarded by the District Court in addition to or in lieu of specific performance. I decline to consider an award of damages to either plaintiff as an alternative to any other remedy.

[22] For Ms Kreutzfeldt it is submitted that the District Court was obliged to consider whether damages were an adequate remedy. It is submitted that they would have been an adequate remedy. It is submitted that if Ms Jakubska's house cannot be relocated then Ms Jakubska would have a claim for the loss of her house.

[23] I agree that the District Court erred by not considering whether damages were an adequate remedy. Both injunctive relief and specific performance are discretionary remedies (see, for example, *Attorney-General for England & Wales v R* [2002] 2 NZLR 91 (CA) at 120). One factor relevant to that discretion is whether damages are an adequate remedy (as discussed, for example, in Burrows, Finn & Todd, *Law of Contract* (3ed 2007) at para 21.4.2). Although damages had not been claimed, the Court was still obliged to consider the factors relevant to the exercise of the discretion he had. It was not a case of the Judge considering this but being economical with his reasons as counsel for the respondents submitted. Rather, the Judge expressly declined to consider damages as an alternative.

[24] In the absence of a claim for damages the Judge did not have much to work with had he considered the issue. But there was some information from which as a matter of principle the issue could have been considered. The usual remedy for a breach of contract is damages that would put the defendant in the position she would have been in if the contract had been performed (expectation damages). Here that would be the value in monetary terms of the loss of the right to live in the house for

life. That might be difficult to quantify but, alternatively, damages could be claimed for the benefit conferred on Ms Kreutzfeldt (restitutionary damages) or to compensate Ms Jakubska for the steps she took in reliance on the promise for a life occupancy (reliance damages).

[25] It was also relevant to consider whether there were other factors pointing for and against injunctive relief (or specific performance on the alternative claim) and in favour of damages. One factor for granting injunctive relief was that Ms Jakubska had been living in the house since 2002. A factor pointing against any relief which allowed Ms Jakubska to live in the house for her lifetime was the breakdown in the relationship between Ms Jakubska and Ms Kreutzfeldt. In many cases involving a contract for a disposition of land the parties need not have any ongoing relationship once the contract is completed. That was not the case here. Rather Ms Kreutzfeldt owned and was to continue to own the land and she lived in her own house on the land. She viewed the land as "sacred" and herself as "belonging" to it. There was potentially an element of hardship to Ms Kreutzfeldt if she was to be forced to have Ms Jakubska continuing to live on the land when the whole concept which Ms Jakubska was to be part of had broken down.

[26] In these circumstances I consider that the Judge erred in not considering whether injunctive relief ought to be granted or whether some other relief was appropriate. If an injunction was not the appropriate remedy in the circumstances, then consideration needed to be given to granting leave to Ms Jakubska to amend her claim to seek damages. A further hearing, on quantum, might then have been necessary.

Other points

[27] The written submissions contended that the licence was uncertain. The only basis on which this was said to be, was that the licence purported to be binding on any third party buying the land. The submission was not pursued at the hearing and it is unclear to me how that raised a question of certainty.

[28] The written submissions also referred to estoppel being used as a sword rather than a shield. Again this was not pursued at the hearing. One problem with the submission is that Ms Jakubska had succeeded on her cause of action in contract. The other is that in New Zealand promissory estoppel can be used as a cause of action (see *Burbery Mortgage Finance and Savings Ltd v Hindsbank Holdings Ltd* [1989] 1 NZLR 356 (CA); and *Gold Star Insurance Co Ltd v Gaunt* [1998] 3 NZLR 80 (CA).

The Dutch women

The facts as found by the District Court

[29] The other defendants are from the Netherlands. They became aware of the land from a website advertisement signed off by Ms Kreutzfeldt and Ms Jakubska. The website was for "Kiriwai Wimminsland – In New Zealand". It said there was 350 acres in lesbian hands which would become a trust when there were "seven committed permanent residents". It said "At present we are two – so we need you!" (see [13] above).

[30] In response to this, two of the Dutch women visited the land in February 2006. Four of them made another visit in March 2006. In August 2006 Ms Kreutzfeldt visited some of them in the Netherlands. At this time Ms Kreutzfeldt showed them the licence which Ms Jakubska had. The Dutch women decided to proceed.

[31] Ms Kreutzfeldt prepared the application for the building consent on behalf of the Dutch women. She suggested to the Dutch women a suitable site, went with some of them when a relocatable house was chosen and gave practical assistance such as acquiring tools and furniture. She was aware of the work which was then carried out on the land for the erection of house. The Dutch women eventually spent at least $100,000 to have the house able to be occupied as a dwelling. They moved in around January 2007.

[32] A contractual licence to occupy was prepared at some point, had been seen by Ms Kreutzfeldt and was signed by one of the Dutch women. It was to have been signed at a ceremony on 10 March 2007. Ms Kreutzfeldt did not attend the ceremony. Instead, on 18 March 2007 Ms Kreutzfeldt wrote to the Dutch women saying that her vision for the land was shattered and her sacred spot on the land had been desecrated. She advised the Dutch women that their only choice was to sign a contract on Ms Kruetzfeldt's terms and conditions. A week or so later she also wrote to Ms Jakubska saying that the land was sacred, she belonged to the land and that she would eject all who desecrated it.

[33] The Dutch women attempted mediation with Ms Kreutzfeldt but Ms Kreutzfeldt refused to see them. Ms Kreutzfeldt gave them an eviction notice on 25 October 2007. Pursuant to that notice the Dutch women vacated the house. Like Ms Jakubska they also obtained interim relief from the District Court enabling them to re-enter on 13 December 2007 (and subsequently they obtained final orders – see below [37]).

Estoppel

[34] The District Court found against the Dutch women on their contract cause of action. This was because the Court considered that there was no consensus ad idem on the extent of the land to be occupied (this relating to whether a lake was to be part of the area.) The District Court found in their favour on their second cause of action which was for promissory estoppel. The Court held that through Ms Kreutzfeldt, Kiriwai had represented to the Dutch women that if they came to New Zealand they would be given a licence to occupy the land; the Dutch women relied on that representation; that while the Dutch women expended their work and money on the land Ms Kreutzfeldt did nothing to resile from that representation; the Dutch women would suffer detriment if their expectation for a contractual licence to occupy was not met; and it would be unconscionable for Ms Kreutzfeldt to not fulfil their expectation.

[35] The submission from Ms Kreutzfeldt is that some benefit to Ms Kreutzfeldt must be shown for estoppel to be made out. It is said that there is no benefit because

the benefit would only arise if the Wimminsland concept proceeded, it did not, and Ms Kreutzfeldt does not want the house on the land nor the respondents' occupancy of it.

[36] I reject this submission. In the first place, the estoppel arises because of detriment to the Dutch women (the time and cost in erecting the house on the basis of Ms Kreutzfeldt's representation) rather than on whether a benefit is conferred on Ms Kreutzfeldt. Secondly, there is a house on the land which objectively would likely qualify as an improvement to the land increasing its value. The Dutch women have conferred that benefit, to their detriment, through their time and money. If the Dutch women were to be evicted without compensation it would be unconscionable for Ms Kreutzfeldt to retain that benefit (even though she says it is of no benefit to her).

Damages

[37] The District Court ordered that Kiriwai execute a contractual licence to the Dutch women to occupy the house which they had erected. The licence was to be on the same terms as Ms Jakubska's licence and was not to include the lake area.

[38] As with the appeal against Ms Jakubska, the submission is that the District Court erred by not considering whether damages would be an adequate remedy. The Dutch women submit that specific performance is appropriate because the nature of the remedy of estoppel is to give effect to the equity created by the estoppel. They also say that they have an interest in the land and the courts traditionally grant specific performance for interests in land.

[39] I do not accept the respondents' submission if it is intended to assert that specific performance is the only remedy where an estoppel is made out. Equitable relief is flexible and the appropriate relief will depend on the circumstances: Butler *Equity and Trusts in New Zealand* (2ed 2009) at paras 19.6.1 and 19.6.2; Bennion Brown & Toomey *New Zealand Law* (2005) at para 7.7.04. Further, the interest the respondents have is a licence to occupy rather than an interest in the land and, unlike other cases, Ms Kreutzfeldt retains her interest in the land.

[40] In this case it was necessary to consider whether specific performance was the appropriate remedy "to do justice to the equity" created by the estoppel. It was not sufficient to order specific performance, which is a discretionary remedy, simply because no other relief was claimed. The same factors as discussed in respect of Ms Jakubska are relevant to whether it ought to have been ordered.

Other points

[41] For Ms Kreutzfeldt it was submitted that promissory estoppel could not be used as a sword. I have discussed this in relation to Ms Jakubska's claim.

[42] It was also submitted that, as per the website, the land was to be used by "seven permanent committed residents". It was submitted that the evidence was clear that the Dutch women travelled between New Zealand and the Netherlands and were considering using their dwelling for commercial uses. It was said that the licence could not be granted until the trust for Wimminsland was established and this did not occur. On this basis it was submitted that there was no inducement or misrepresentation but rather an opportunity to take part in a unique development which did not occur.

[43] This submission was not really advanced any further at the hearing and I was not referred to any evidence that the Dutch women did not intend to comply with the Wimminsland concept as described to them. In respect of what appears to have been a similar point raised in the District Court the Judge said:

> The defendant seems to be suggesting that the plaintiffs had some sort of agenda to do more than just occupy the land. I repeat that, in my view, the plaintiffs were a group of women who took Marlis at her word, who were excited and won over by the concept of a wimminsland and who were prepared to put their bodies and souls into it without expectation of material advantage other than the use of the land to live on.

[44] In the absence of reasons advanced as to why the District Court erred in this finding on the evidence, there is no basis for me to reach any different view. I note that, if there was a difference in view between the parties about the concept, the representation made to the Dutch women (via the licence shown to the Dutch women

before they committed their expenditure) was that they would endeavour to resolve it through mediation. The Dutch women attempted to do this but Ms Kreutzfeldt was not interested.

[45] The written submissions contended that it was an error to grant specific performance when there was no consensus ad idem on the terms of the licence. I do not agree. The only lack of consensus was as to whether the lake was to be included. The District Court Judge found that Ms Kreutzfeldt did not represent or agree that it was to be included. The licence to be executed under the District Court's order excluded the lake. That exclusion dealt with the only uncertainty identified.

Result

[46] The appeal against all respondents succeeds. The District Court was in error in granting a permanent injunction to the first respondent and specific performance to the second respondents, without considering whether damages were an adequate remedy and whether injunctive relief and specific performance were an inappropriate remedy when Ms Kreutzfeldt owned the land and would continue to do so and the relationship between Ms Kreutzfeldt and the others, and the Wimminsland concept, had collapsed.

[47] On the basis of the information before me it seems that damages may have been the appropriate remedy, but because they were not claimed and all relevant information is not necessarily before me (for example as to whether Ms Kreutzfeldt is able to pay an award of damages) I consider that the proceeding needs to be referred back to the District Court to consider this issue. The respondents will need to seek leave to claim damages in the alternative. I see no reason for that leave not to be granted by the District Court.

[48] In the meantime the respondents remain entitled to reside in their respective dwellings. The sensible outcome would be for the parties to negotiate a resolution of their dispute which, if it is not to involve the continued occupation by the respondents of the two houses, would involve compensation paid to them. The parties should endeavour to do so and thereby avoid the need for yet another hearing

in the courts. To avoid difficulties of the kind that have arisen here any such settlement that may be reached should of course be properly documented.

Mallon J

Solicitors:
B Buckett, Barbara Buckett & Associates, Wellington, teresa@buckettlaw.co.nz
D M Smith, Stephens Lawyers Limited, Wellington, dave.smith@slaw.co.nz