The Consequences of Accepting Conditions as Part of a Grant of Resource Consent

Mora v Te Kohanga Reo Trust [1996] NZRMA 556

Facts

The respondents applied for planning consent to remove an historic dwelling from a site they had purchased. In a letter to the Council the respondents stated:

> If our application for removal succeeds we have no plans to build three or in fact any town houses just a simple family home. If our application to remove the present building off the land at 15 Ocean View Road was declined and we were not prepared to renovate the old house we would have to consider selling the land. The developer we previously outbid or anyone else who bought from us may well choose to make a different use of this site such as building town houses, however that is not our present intention.

Residents in the neighbourhood objected to the application on the basis that the removal of the historic dwelling would detract from the overall appeal of the area.

The Takapuna Community Board who heard the matter as the delegate of the North Shore City Council did not support the application and declined to grant consent. The Council in turn did not agree with the decision of the Community Board but because of the way in which its committees were structured was bound by the refusal of consent by the Community Board. The matter was appealed to the Environment Court. The Council as second respondent endeavoured to express its disagreement at the hearing before the Court by indicating that it consented to the applicant/appellant's appeal being allowed.

At an adjournment of the Environment Court hearing an agreement was reached between the parties that the appeal would be allowed and

consent granted subject to certain conditions. The objectors were reluctant to allow the removal of the house. However, it appears that they were influenced by the desire to avoid an adverse award of costs should the appeal be granted.

After the adjournment, the Environment Court Judge made an order by consent that the appeal be allowed and that consent be granted to the appellants application to remove the house from the property, subject to the conditions listed in an appendix to the judgment.

Condition one of the appendix stated:

> We the Trustees confirm that it remains the intention of the Trustees, on the removal of the existing house, to construct a new single family dwelling on the site. The new dwelling will be designed and built to a high standard and will be occupied, as a family home, by Mr Christie and Ms Fleming.

The respondents subsequently removed the historic dwelling from the site pursuant to the order and soon after applied for planning consent to subdivide the site into two lots. They contended that cost increases had made the plan to build the original dwelling uneconomical. The North Shore City Council granted the planning consent to subdivide the property. The applicant, Mora, one of the original objectors, applied for declarations and an enforcement order to the effect that the first condition in the consent order restricted the respondent to building a single dwelling house. Counsel for both parties conferred jurisdiction on the Environment Court to revisit the order in the manner contended for by the applicants.

Submissions

It was the respondents' submission that condition one in the consent order merely signified an intention on the part of the respondents to carry out a future act. The respondents contended that such a future intention was not enforceable at law.

The applicant, in turn, submitted that the English case of *Augier v Secretary of State for the Environment*[1] should apply to the present circumstances and consequently the respondent should be estopped from denying the promise made in condition one of the consent order.

The *Augier* decision

In *Augier* the respondent applied to the local authority for planning permission to extract sand and gravel from land owned by it. An access road had to be constructed to facilitate the extraction and traffic problems were expected as a result. The respondents undertook to provide visibility splays to give satisfactory sight lines for traffic negotiating the proposed junction between the proposed new access road to the site and the existing highway. The Secretary of State granted permission subject to the condition, inter alia, that visibility splays shall be provided at the junction.[2]

The applicant applied for the Secretary of State's decision to be quashed giving as one ground that there was not "sufficient evidence on which the Secretary of State could be satisfied that the improved sight lines would be provided".[3]

In arriving at his decision his Honour, Sir Douglas Frank QC, relied on several English cases, notably *Hughes v Metropolitan Railway Co*,[4] *Central London Property Trust Ltd v High Trees House Ltd*,[5] and *Crabb v Arun District Council*.[6]

In discussing these cases his Honour illustrated how the concept of

1 (1978) 38 P & CR 219.

2 Ibid, at 223.

3 Ibid, at 224.

4 (1877) 2 App Cas 439.

5 [1947] KB 130; [1956] 1 All ER 256.

6 [1976] Ch 179.

estoppel had evolved from true estoppel or estoppel by representation[7] which "cannot arise in the instant case because the undertaking does not refer to an existing fact"[8] to promissory estoppel or equitable estoppel[9] which can apply where there has been a "promise or assurance as to future conduct".[10]

The learned Judge concluded that:[11]

> [W]here an applicant for planning permission gives an undertaking, and relying on that undertaking, the local planning authority, or the Secretary of State on Appeal, grants planning permission subject to a condition in terms broad enough to embrace the undertaking, the applicant cannot later be heard to say that there is no power to acquire compliance with the undertaking.

The Decision of the Environment Court

Environment Court Judge Willy had to first decide on whether the *Augier* decision had received judicial support in New Zealand. His Honour found support for the decision in the case of *Hearthstone Properties Limited v Waitakere City Council*.[12] His Honour stated:[13]

> The subject matter of that particular case is of no great interest in the context of determining the matters in issue in this case. What is important is that the Tribunal has adopted and relied upon the general propositions of law relating to the imposition of conditions (valid or otherwise) upon otherwise unwilling parties to

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7 Also known as estoppel in pais: see Halsbury's Laws of England (4th Ed) para 1038, at 902.

8 Supra, note 1, at 226.

9 See Halsbury's Laws of England (4th Ed) para 4071, at p 931.

10 Supra, note 1, at 226.

11 Ibid, 227.

12 (1991) 15 NZTPA 93.

13 *Mora* v *Te Kohanga Reo Trust* [1996] NZRMA 556, 570.

> resource management applications where those parties accept such conditions as part of a grant of a consent.

Judge Willy then proceeded to outline the facts of the *Augier* case and analyse the reasoning behind the learned Judge's decision. His Honour observed that "it is clear that the principle which actuates the judgment in *Augier* is therefore clearly one of equitable estoppel".[14]

Judge Willy then commented on the distinction drawn in the case between true estoppel "where the assurance relied on is as to future conduct only and not an existing fact"[15] and equitable estoppel which "may sound in equity in cases involving assurances as to future conduct rather than establish its existing facts".[16] His Honour said that the latter type of estoppel was "precisely the issue in this case it being alleged on behalf of the first respondents that at best they made some future promise as to how they might conduct themselves, a promise from which on the first respondent's argument they were at all times free to resile".[17]

It was then left for His Honour to explore the law on estoppel as it had developed in New Zealand. In doing so, he examined the recent decisions of the New Zealand Court of Appeal in *Burbery Finance & Savings Limited v Hindsbank Holdings Limited*,[18] *Gillies v Keogh*,[19] and *Goldstar Insurance Co Limited v Gaunt*.[20] His Honour then stated: [21]

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14 Ibid, 572.

15 Ibid, 572.

16 Ibid, 573.

17 Ibid, 572.

18 [1989] 1 NZLR 356.

19 [1989] 2 NZLR 327.

20 [1992] 7 ANZ Insurance Cases 77,393.

21 Supra, note 13, at 575.

> It is in my view clear that the combined effect of those cases is to substantially equate common law estoppel with equitable estoppel ... and to make it clear that a representation by the promisor or representor be it an existing fact or a future course of conduct is all that is necessary to satisfy that particular ingredient of the cause of action (as it has now clearly become) in equitable estoppel.

Quoting Richardson J's judgment in *Gillies* his Honour concluded that the modern approach to equitable estoppel required proof of at least three elements:[22]

1. The making of a representation;
2. The reliance on that representation; and
3. The detriment in so relying.

The learned Judge concluded:[23]

> Clearly there has been a representation as to what the first respondents intended to do. The objectors took that representation at face value and relied upon it. They have done so to their detriment because the appeal which they so strenuously opposed has been decided against them and as a result of that outcome the historic home has been removed to another site. It is now, in any practical way, impossible to return the parties to the position which there were in at the time the representation was made, and it is therefore in my view clear beyond any doubt that the first respondent must be held to that representation. Not to do so would be inequitable and unconscionable.

Conclusion

The decision in *Mora* is illuminating in its analysis of the principles of estoppel and the current applicability of that substantive rule of law to pre-consent promises and undertakings with respect to resource consent

22 Ibid, 574.

23 Ibid, 575.

applications. In the future, objectors can watch closely to ensure that applicants abide by written and oral representations made in respect of resource consent applications whether or not those representations form part of the conditions of any consent. However, as Grinlinton points out, there is a deal of uncertainty in relying on such a remedy.[24] The remedy is discretionary and only available to the parties to whom the representations were made.

The decision in *Mora* can be seen as "a manifestation of a broad general principle that the Court will prevent a party from going back on that party's words (whether express or implied) when it would be unconscionable to do so".[25] To this extent, it will be interesting to see how the Court rules on future cases. Will the three probanda test continue to be adopted or will the wider test of unconscionability be put to use?[26] The case sets the scene for some interesting developments in the Resource Management area.

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24 (1996) 1 BRMB 261, 262.

25 *See Laws NZ,* Estoppel para 1 n 4 and accompanying text.

26 Note the furore which was caused in the banking industry when Justice Thomas adopted a broad test of unconscionability with respect to knowing assistance in *Powell v Thompson* [1991] 1 NZLR 597

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