IN THE HIGH COURT OF NEW ZEALAND 10/7 CP No. 101/87
WELLINGTON REGISTRY

B4/1044F
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BETWEEN	WELLINGTON CITY COUNCIL	
	Plaintiff	
AND	TOWER CORPORATION LIMITED	
	Defendant	

[redacted]

Date of Hearing: 8 and 9 April 1991

Date of Judgment: 25 JUNE 1992

Counsel: P.J.H. Jenkin QC and I.G.T. Beetham for Plaintiff
C.M. Stevens and D.J. Pay for Defendant

JUDGMENT OF NEAZOR J

This is a claim for rectification of a lease of land in the central business district of Wellington City. What is sought is deletion from the lease of a provision giving the lessee the option to purchase the fee simple of the land. A similar case was the subject of the decision in *Wellington City Council* v *New Zealand Law Society* [1988] 2 NZLR 614.

A registered lease was granted by the City Council to the Drapery and General Importing Co Ltd from 1 December 1950. On 19 August 1971 a transfer of the leasehold interest in the land to the Government Insurance Commissioner, a

predecessor of the defendant, was registered, the defendant becoming the holder of the interest from 1 October 1983 by virtue of the Government Life Insurance Corporation Act 1983 and subsequent statutes including the Tower Corporation Act 1990.

The lease granted on 19 March 1951 was for a term of 21 years with a right of renewal in perpetuity in terms of 21 years.

The covenant as to renewal was in terms that if the lessee sought renewal, "after the full ground rental of the said premises that ought to be payable during the said term" had been fixed:

> "the Corporation ... shall ... at the reasonable costs of the Tenant and upon the Tenant executing and delivering to the Corporation a counterpart thereof make execute and deliver to the Tenant a new and effectual lease of the said demised premises for the said further term of Twenty-one (21) years at the new annual rental ascertained by valuation as aforesaid and with under and subject to the like covenants provisoes agreements declarations and provisions as are contained in this present Memorandum of Lease including the present covenant for renewal and all provisions ancillary or in relation thereto BUT excluding the covenant as to purchase and the erection of a new building as set forth in Clause 1(4) hereof".

The lease did not contain any right or option for the lessee to purchase the fee simple of the land.

A renewed lease for a further term of 21 years from 1 December 1971 was executed by the parties on 13 September 1976. That lease contained in a printed clause an option for the lessee to purchase the fee simple of the land.

The Council alleges that the inclusion of the option was the consequence of a common mistake, or that its inclusion was a mistake of the Council by its employees of which the defendant and its predecessor in title, the Government Insurance Commissioner, were at all material times aware. The Council has also alleged that the granting of the renewed lease containing an option to purchase the freehold of the land was beyond the powers of the Council.

The defendant has denied the allegations as to common mistake, unilateral mistake and ultra vires and has pleaded an alternative defence of estoppel. The defence of estoppel

is based on correspondence between the parties as to the terms of the renewed lease, the defendant alleging that the alteration in the memorandum of lease had been drawn to the attention of the plaintiff before the document was signed.

The defendant also sought by way of counterclaim specific performance of the obligation to transfer the land given by the option clause and relief under the Contractual Mistakes Act 1977 giving the defendant the benefit of the option clause, but at trial agreed that this second basis of counterclaim was not open to it because of the effective date of the legislation.

The original lease to DIC Ltd (No. 25338) was partly printed (with deletions) and partly typewritten. It contained a number of typewritten clauses relating to the lessee's obligation to purchase a building on the land in 1951 and within 5 years to replace it with a new building. Any building on the site was required to be insured, to be kept clean and in good order and substantial repair and condition, fair wear and tear excepted, and to be repaired or replaced in the event of damage or destruction. The premises were required to be yielded up at the end of the term in good and tenantable repair, fair wear and tear excepted.

The renewed lease was on a different printed form with no typewritten additions. The form was approved by the District Land Registrar at Wellington as No. 2440. This form as used had deletion of clauses requiring the tenant to build on the site and to paint the interior and exterior of the building, and had printed clauses requiring any building to be kept clean and repaired (without any fair wear and tear exception), and requiring the yielding up of the premises in good and tenantable repair, fair wear and tear excepted, requiring insurance, and requiring rebuilding or repair in the event of destruction or damage. The new lease contained in a printed clause the option to purchase at a sum equal to 25 times the annual rent - in the case of the subject lease a purchase price of $172,500.00. The freehold value of the land as at the time of trial was assessed at in excess of $2 million and the lessor's interest in the freehold in round figures at between $1 million and $1.3 million. A valuer called by the defendant assessed the lessor's interest in the freehold as at September 1976 at $283,883.00.

Four other leases of buildings in the central business district which had been prepared using the same printed form were exhibited (including that in contention in the New Zealand Law Society litigation). The lease presently in issue was signed in September 1976, that of the New Zealand Law Society in June 1973 and the other three in August 1973, February 1974 and July 1974.

How the new lease came to be prepared in the form it was and what was present to the minds of those involved on both sides is largely a matter of inference. The plaintiff called two solicitors who had been in the employment of the Council at about the relevant time and produced an affidavit from another solicitor, now overseas, who dealt with the transaction. Also called was the one time city valuer who would have been involved in negotiations for the renewed lease.

The defendant relied essentially on the evidence of a solicitor who for many years had been a partner in the firm which handled the Government Insurance Commissioner's property work and who had dealt with the lease renewal. The Government Insurance Commissioner at the relevant time, Mr Davis, had died before trial and the Commissioner's property officer was unable to give evidence. The solicitor, Mr Mulholland, had handled transactions for the Commissioner almost as if he was an in-house solicitor, sometimes noting his advice and actions by minute on the Government Insurance Commissioner's file, and sometimes advising by formal letter under his firm's letterhead. Mr Grove, who had been assistant property officer, was called and proved a minute to which reference will be made, but he had no recollection of the details of the renewal of the lease in question. He said of it "it would have just been one of many lease renewals". He recollected that it had been the subject of a long arbitration as to rent.

Some chronology of events as indicated by correspondence produced is helpful:

18 July 1969:
Chapman Tripp and Co for the DIC Ltd wrote to the Wellington City Corporation indicating arrangements that were in hand between the DIC and the Government Insurance Commissioner in respect of Council leasehold property situated in Featherstone Street and Brandon Street. One of the pieces of land discussed in that letter was that covered by Lease 25338. The information contained in that letter was as to long-term arrangements and was all in the context that what was under discussion was leasehold land. The Council's consent to transactions in respect of Lease 25338 was sought as lessor.

20 September 1969:
The Council approved the assignment of the leases to the Commissioner.

31 May 1971:

Stone Kurta and Co gave notice (in accordance with arrangements with the Government Insurance Commissioner) on behalf of the DIC Ltd as the tenant under lease 25338 that it wished to have a valuation made of the annual rent of the premises for the 21 year period ensuing after the expiration of the term of the lease. The correspondence thus begun continued until 1974 when the new rent was agreed. In effect the negotiations were conducted between the City Council and the Insurance Commissioner.

October 1972 to May 1973:

Correspondence between the City Council and its valuer demonstrated that what was under discussion was "unit foot values" for ground rent under the lease.

25 May 1973:

Mr R.H. Rolle, valuer, wrote to Messrs Phillips Shayle-George and Co, solicitors for the Government Insurance Commissioner, providing a valuation. In that letter Mr Rolle referred to the land the subject of Lease 25338 as "so valuable a site" and recorded that in August 1971 the Commissioner had paid $235,000.00 for the lease of the site together with the lease of one of the sites in Brandon Street. Mr Rolle said that "analysis indicates that the figure for the subject site would have been $155,000.00 ... Technically the worth of a lease should be considerably less than the value of the freehold". For the purpose of calculation of the ground rent by way of an interest figure on the freehold value, Mr Rolle calculated the freehold value as at 1 December 1971 at $139,325.00.

11 April 1974:

The valuer for the tenant and the valuer for the City Corporation agreed on the valuation for the annual rental of the land throughout the whole of term of 21 years at $6,900.00. It was accepted on both sides that this was assessed on a land value of $138,000.00.

22 April 1974:

An internal memorandum by the City Valuer sought and obtained the approval of the Council Finance Committee to the preparation of a new lease in terms of the award. It is clear from the context that it was a renewal of the lease that was in mind.

15 May 1974:

A Council paper contained the following minute:

> "(a) that approval be given to the renewal of the following leases which have been negotiated by arbitrators appointed by the Council:
>
> (i) Lease No. 25338: Government Life Commissioner: 164 Featherston Street: 21 years from 1 December 1971 at an annual rental of $6,905.00. The previous rental was $1,160.00.
>
> (c) that the City Solicitor be requested to prepare the new agreement in respect of these renewals.
>
> (d) that the seal of the Corporation be authorised to be affixed to the necessary documents."

14 October 1975:

Phillips Shayle-George and Co for the Commissioner wrote to the City Council asking for a renewal of Lease 25338:

> "... On investigating the Commissioner's records we have ascertained that Lease 25338 also requires to be renewed. This lease expired on the 29th November 1971 and the new rent has been fixed by arbitration. Would you please forward a renewal of this lease as soon as possible."

19 July 1976:

That request was repeated.

26 July 1976:

The City Solicitor's office sent a renewal of Lease 25338 for execution by the Commissioner. No comment about the context of the lease was made in the covering letter.

3 August 1976:

Phillips Shayle-George and Co asked the property officer Government Life Office for the Lease 25338 so that the solicitors could check that the renewal was on the correct terms.

19 August 1976:
The solicitors wrote to the City Solicitor, it is accepted in reference to Lease 25338, in the following terms:

> "We have perused the lease renewal submitted by you.
>
> Our client is entitled to a renewal of lease on the same terms as the old lease. Your new form contains a number of alterations. The alterations are all acceptable except for clause 11 [which gave the Council on demand the right to exclusive custody of insurance policies]. We would like to delete the last words of this clause reading 'will on demand be entitled ... receipts'.
>
> The Council owns the fee simple of the land. Our client has purchased the buildings and in the event of our client ever wishing to arrange a mortgage on the security of its lessee interest it would expect to be able to produce to the mortgagee the insurance policy on the buildings.
>
> In these circumstances we think that our request is reasonable. Would you please approve this alteration."

23 August 1976:
The City Solicitor's office wrote indicating that there was no objection to the alteration requested.

24 August 1976:
Phillips Shayle-George and Co wrote to the property officer, Government Life Office in relation to the renewal document in respect of Lease 25338. That letter said inter alia:

> "Under the terms of the old lease you are entitled to a renewal for a further term of 21 years on the same terms as the old lease.
>
> The renewed lease is on the new Council form of lease. It is for a term of 21 years and basically follows the same terms as the earlier lease. The only material alterations from the old form are as follows:-
>
> (a) Certain building clauses have been deleted as they are no longer appropriate.

(b) In clauses 6 and 12 your responsibility to maintain the property has been made subject to fair wear and tear and damage by fire etc. This alteration is to your advantage.

(c) Clause 16 is a new clause which provides you are to pay all electricity charges etc. We imagine you will have no objection to this as this obligation is passed on to the subtenant.

(d) The provisions for valuation of the unimproved value of the land have been altered slightly although the effect is the same. The main change in the new lease is to provide for the valuation to take place at least 2 months before the expiry of the existing lease. In our opinion none of the alterations operate to your disadvantage and they may be accepted safely.

(e) On page 2 you are given an option to purchase the freehold at a sum 25 times the annual rent payable under the lease. This is an important right that is a new addition although we have no knowledge as to whether or not the purchase price is realistic. This is a valuation matter. We comment however that as the rent is fixed for a period of 21 years presumably the best period to buy would be in about 18 or 20 years time when inflation will have effectively reduced the amount of the purchase price.

(f) We have arranged an amendment to the insurance clause as shown by the attached letter - agreed to by the Council."

On the bottom of that letter handwritten figures appear which indicate that the cost of purchase as indicated in clause (e) had been calculated at $172,500.00. In evidence the handwriting was identified as that of the then Government Insurance Commissioner, Mr Davis.

25 August 1976:
A Government Life Insurance minute indicates that the documents had been submitted to the Commissioner for approval.

26 August 1976:
A handwritten minute on the file addressed to the solicitor Mr Mulholland contained the following words:

"Commissioner has asked for

(1) clarification of the position regarding our rebuilding on this site; and

(2) whether we have been granted a right of purchase on the other renewals of land leased from WCC."

The minute then discussed the writer's understanding of the building situation as being that if Government Life did not re-build within 21 years from the date of purchase the DIC had the option to repurchase the property at the cost price. There was further discussion of the Commissioner's enquiry about the relationships between the Government Life Office and DIC and the minute ended with the words "We don't appear to have any right of purchase in Lease 202352.1 which is the only one we have here. You are holding the balance of deeds according to our file".

30 August 1976:
The solicitors sent the lease documents to the City Council for execution and registration.

31 August 1976:
The solicitor replied to the property officer of Government Life indicating that in respect of land leased by the Commisioner from the Wellington City Council three leases were involved and in respect of two of those there was no right of purchase but in respect of the lease "in course of renewal" there was a right of purchase.

3 September 1976:
The solicitor advised the property officer of the arrangements between the Government Life and the DIC including the right of DIC to repurchase for $235,000.00 if rebuilding had not taken place. There was no reference to the fact that what the right to repurchase related to, at least originally, was a leasehold interest, not a freehold interest.

6 September 1976:
The new lease was submitted to the Council for execution under a simple certificate from the solicitor that the lease was in order.

26 November 1976:
The executed document was sent to the Town Clerk's office for filing and a note at that time recorded that it was a lease renewed from 1 December 1971 for 21 years expiring on 30 November 1992.

1 September 1983:
The solicitors sought from the Wellington City Council consent to agreements to lease floors in the building which had been erected on the site. In that letter the statement was made as an introduction to the request that "the Council holds three ground leases".

2 September 1986:
An internal memorandum from the City Solicitor indicated that 5 leases had been found with the option to purchase in them.

5 September 1986:
The City Solicitor's office wrote to the Government Insurance Commissioner saying that:

> "The former registered lease obliged the Council to grant a renewed lease upon the like covenants etc as were contained in that former lease, which did not, of course, contain such an 'option' clause.
>
> There is no evidence that such an option was negotiated, and it seems that the wrong printed lease form was used for renewal. Accordingly, there are clear grounds for rectificiation of the lease by deleting the 'option' clause."

3 March 1987:
The solicitors on behalf of Government Life indicated that the option was to be exercised and rejected the Council's claim in terms that:

> "While our client was entitled under the previous lease to renewal under the same terms and conditions the current form of lease was submitted by the Council for execution by our client. Correspondence regarding the renewal of lease to the Wellington City Council clearly points out that the lease is on different terms and conditions. In addition to this our office negotiated changes to some of the terms and conditions which were unacceptable to our client. The Wellington City Council accepted the changes requested and the leases were engrossed and executed by both parties. Our client therefore does not accept your proposition that the new lease form was not negotiated nor that the option to purchase was included in error."

The evidence from those who were on the City Solicitor's staff at or about the relevant time shows that no-one knows why the form which was used for the renewal lease was used for central business district leases at all. It had been prepared in 1954 for use in a proposed mayor council housing subdivision in the Miramar peninsula. A policy decision had been made that there would be an option to purchase in those leases. Its inclusion was not surprising since the Municipal Corporations Amendment Act of 1948 (s 12) and the Municipal Corporations Act 1954 (s 331) both contained provisions as to leasing land for housing purposes which included the power to give an option to purchase the fee simple at a price equal to 25 times the annual rental payable under the lease. The document was not in fact used for that purpose.

Leases using the form had been prepared by Mr Lynch, then a solicitor in the City Solicitor's office for the four renewals in 1973 and 1974.

The solicitor who prepared the document for the Government Life renewal in 1976 deposed, on the basis of being shown the correspondence referred to above that she had no recollection of the transaction and that the most likely explanation for her use of the particular form (although speculation on her part) was that as a very junior solicitor with the City Council she would have used the file relating to one of the other similar leases as a precedent for the preparation of the renewal of Lease 25338. I accept that as the probable explanation for the use of the form in this case.

The evidence is that there were a larger number of printed lease forms in the City Solicitor's office, none of which in the view of the solicitor then responsible, Mr Lynch was suitable for renewal of the central business district leases. In his view a substantial amount of redrafting would be required for renewal documents. Mr Lynch indicated that in his opinion a number of the clauses in the new lease document were inappropriate for central business district leases, but they had either been deleted in Lease 25338 or were to be found in the original lease. The latter were regarded by a solicitor who had been, at a later stage than the period in which this lease was renewed, assistant City Solicitor, as not inappropriate for the central business district.

The form used for Lease 25338 had been used for two central business district leases in 1960 or thereabouts, but the option to purchase had been deleted.

Mr J.P. Coyle who had been City valuer at the relevant period and who had responsibility for reporting on and making recommendations on the renewal of leases gave evidence as to the Council's attitutde to option to purchase. That was that the

ground leases of reclamation land were endowment leases and the freehold would be retained by the City. That this lease was of reclamation land is not disputed. Mr Coyle had knowledge over a period of 20 years of only one case in which the freehold of a Glasgow lease had been sold and that was in respect of land which the Council had acquired for a particular purpose. It was not regarded as reclamation land.

Mr Coyle's opinion was that the inclusion of an option to purchase would affect the calculation of rent. Mr Wall, a valuer called by the plaintiff also expressed the view that the presence of an option to purchase in the lease could have an effect on a rental assessment. Mr Stewart, a valuer called by the defendant agreed that if a lessee could see an advantage in the option to purchase at the time the rent was fixed he might pay something in the form of rent for that.

No witness recollected seeing in other than the 5 leases referred to an option to purchase in a central business district lease granted by the Council. Mr Stewart, a valuer called by the defendant said that in his experience where a lease contained a right of purchase, the right normally required that the value be determined independently of rent.

As to the value of inclusion of the option, the valuers differed in figures but agreed that in 1976 land values in the central business district could be expected to increase, certainly over the period of 21 years. There was difference in the assessment made in hindsight of the value of the freehold as at 1974 and as to its projected value 21 years on as would have been seen in 1976, but the valuers agreed that:

(1) as at 1974 when the rental valuation was made the land value was less than the figure of $175,200.00 arrived at by the lease purchase price formula;

(2) that a prudent lessee would not seek to exercise the option until very near the end of the term;

(3) the land value in 1992 would have been assessed in 1974 at $2,240,000.00 (plaintiff's valuer) or if the assessment had been made in 1971 (defendant's valuer) between $695,000.00 and $1,020,000.00 or if made as at 13 September 1976 between $1,030,000.00 and $1,380,000.00.

Mr Mulholland said in evidence that he had a degree of autonomy in negotiating terms for Government Life leases and that if he reported that a lease was proper the

Commissioner's approval would be a formality. What the state of mind of the Commissioner was can, in my view, only be drawn from the correspondence and the circumstances. Although Mr Mulholland worked closely with officers of the Government Life Office he did not say that he had any oral discussion with anybody about this transaction.

He said that he was confident, having re-read the files that it was his view in 1976 that the Council had deliberately selected a more appropriate form of lease for the transaction. In his own correspondence with the Council he had referred to the new lease as "the new Council form of lease". Some clauses in the original lease required amendment or deletion, e.g. the building purchase provision. Mr Mulholland said that he regarded the new printed form as altered as having been prepared to reflect new terms which the Council now required or considered appropriate, and that there were terms in it as to a maintenance clause (no fair wear and tear exception) and a requirement to get the lessor's consent to alterations ("any alterations" instead of "any structural alterations") which were disadvantageous to the lessee. I note however that they did not impress him as significant at the time; indeed he considered the new maintenance clause advantageous to the Commissioner.

It was suggested that the alteration to remove the requirement to rebuild on the land was an appropriate alteration showing, with others, that particular care had been given to the re-drafting. In that respect the drafting was appropriate since the deletion was in accordance with the terms of the covenant for renewal, but if there had been any negotiation about the terms of the renewed lease, that deletion might have been discussed, since Mr Mulholland's evidence was that redevelopment work would not have commenced until two or three years after the renewed lease was signed.

As to the presence of the option to purchase, Mr Mulholland said that he assumed the option was part of the total new leasing deal being offered by the Council. He was not clear at the time whether or not the option provided any realistic benefit to the Commissioner and to the best of his recollection there was no suggestion at that time that the option to purchase provision was necessarily a windfall for the Commissioner. He had no recollection of the clause being peculiar although he did not believe that he would have seen such a formula for assessing the purchase price of the lessor's interest before that. It would have been his guess at that time that the price under the option clause would have been in excess of the value of the land, but he did not know whether it was favourable or unfavourable from Tower's point of view. Mr Mulholland suggested that a comparison with the other four similar leases suggested that the one

now in issue had been prepared more carefully in terms of deleting clauses not thought appropriate than the others had been.

Mr Mulholland's final assessment of the position was:

> "it was my view that Tower [the Commissioner] believed that a new lease had been negotiated and completed by agreement between the parties. I had informed the Council that the New Lease was on a different form with a number of altered clauses. The Council agreed to a requested amendment. Both myself and Tower considered a new contract had been negotiated and completed and that both parties were in agreement with its terms as evidenced by their execution of the document. Tower made its redevelopment decision therefore conscious of the option to purchase. Further, as set out previously, that option constituted only part of a new 'deal" in respect of leasing the site with provisions both favourable and unfavourable to the Corporation. Neither Tower nor myself knew of the alleged mistake by the Council in respect of option to purchase until it was first raised by the Council in September 1986 (refer document 59)."

It is clear that there is no evidence of any formal valuation of the value of the option having been made by or for officers of Government Life in 1976. The most that anybody could say was that Mr Davis had arithmetically worked out what the Commissioner would have to pay if it was required, that he had probably regarded the renewal as largely routine and that he might have thought the option was valuable.

Mr Mulholland agreed that the renewal of the lease in question might well have been the first occasion on which he had acted in relation to a large central city ground lease and that on his experience at that time he would not have known whether the insertion of the option to purchase was ordinary or extraordinary. On his experience since he had never seen an option to purchase inserted, without comment by the lessor. Where they were included it would be as part of a negotiated deal. He agreed that at the time he thought the changes in the lease to have been fairly inconsequential. The addition of the option was the only matter to which he drew attention as an important right.

Mr Davis was described by Mr Grove as a "straight up and down", very fair, man who "would not have had a bar of" any business dealing or proposal that might have smacked of sharp practice.

It is an inescapable inference from the evidence in my view that when the Council executed the renewed lease it was unaware that an option to purchase the freehold of the land was given in it. Nor, notwithstanding attempts by a then inexperienced solicitor to adopt the document used so that it followed "in like terms" the original lease, in my judgment did anyone in the Council offices involved in decision making about the lease advert consciously to the fact that the lease included an option to purchase which had not been in the previous lease.

Apart from the five instances discovered, there was general agreement amongst the witnesses that the inclusion of an option to purchase was unusual, and certainly that inclusion without comment by the lessor was. I accept also that the basis of valuation of the land in the event that the option was taken up was unusual for a central business district lease, and that to give an option to purchase such land, being reclaimed land, was contrary to the Council's general attitude in respect of such land. Finally, there was no discussion or negotiation of the grant of a lease with what I consider to have been such a significantly different term in it or any assessment on either side of the value of the right or of its effect (if any) on what should be the proper rent for the ensuing 21 years. Unquestionably, the Council was acting under a mistake as to the content of the document when it was signed.

The Government Insurance Commissioner was not mistaken as to the presence of the option when he executed the document. His solicitor had advised that the option was in the document and was a new provision; and that it was of value, although of what value was unknown, and that its relative value was likely to increase with the passage of years as an effect of inflation. I draw the inference from the calculation of cost and the enquiry made the day after execution that the Commissioner personally knew that that was the position at the time of execution.

In reaching those conclusions I do not accept that Mr Mulholland's final assessment of the position (made in retrospect) was correct that those concerned on the defendant's side believed that a new lease had been negotiated and completed by agreement on both sides in so far as that assessment related to the inclusion of the option to purchase. There is no suggestion of any negotiation in respect of, or even reference in correspondence to, the option. Nor do I accept that the option appeared in the lease in any way as part of a 'new deal' with provisions favourable and unfavourable to the Corporation. The fact that the provision now said to be unfavourable was not recognised as such at the time sufficiently belies that view.

The defendant's solicitors letter of 19 August 1976 City Council referred to the new lease document containing "a number of alterations" but it made no reference to the option clause. I accept that there is no justification for finding that the Commissioner or his adviser deliberately avoided mentioning the option to try to retain the benefit of a provision known to have been included by mistake. I do not accept however that that letter should be taken to have put to Council or its officers on notice that the defendant had seen a significant change in the terms of the lease.

In my view the proper inference is that the defendant and its advisors knew that the defendant was entitled to a renewal on "like terms and conditions" of those in the original lease, knew that that was a perpetually renewable lease, knew that the option which was not in the original lease had been included in the new document, and did not know why it had been included. Further, I draw the inference that a person in Mr Davis's position and with his experience would have known that such an option over a central business district site had value (although what the value might be was not assessed), would have been aware that the value at the very least could increase by virtue of changes in land values over the ensuing 21 years, and would have known that it would be unusual for a lessee to receive such an option in respect of land in the central business district of Wellington without negotiation or giving consideration. I also draw the conclusion that those concerned on the defendant's side thought it unnecessary to do anything about the inclusion of the option because its inclusion was not disadvantageous to the lessee.

Submissions for the defendant were postulated on the basis that these findings could only be made if I disregarded the evidence given as to Mr Davis being a "straight" man who would have nothing to do with sharp practice. I do not believe that that follows at all. It may well be that Mr Davis (assuming that he was told of Mr Mulholland's reply) thought that the inclusion of the option was of no great moment in 1976 since, on the evidence, what was then under consideration was the erection of a building covering not one, but three, leasehold areas and it was ascertained within days of signing the lease, as a result of the enquiry made of Mr Mulholland, that two of the parcels of land were held on leases which did not contain any option to purchase. Nothing more was done, to have any error cleared up, but it is unlikely in my view that the Government Insurance Commissioner had so little to do that he would necessarily have pursued a question of little practical moment and of no disadvantage to his organisation.

There is no evidence that the Commissioner altered his position or made his later decisions in respect of the use of the land by the erection of a multi-storey building on it, in consequence of the inclusion of the option in the lease.

The case is therefore one of unilateral mistake on the part of the City Council. That mistake was as to the content of the document executed in pursuance of a previous contractual relationship between the parties, which was the original lease. There was no difference between the parties' intentions up to the time when the Commissioner executed the new lease. The Commissioner's solicitor had asked for renewal of the lease, necessarily impliedly in accordance with the terms of the original lease; it was contemplated, as witness the solicitor's letter of 19 August 1976 that the renewal would be in the same (or as the original lease had it "like") terms as the original lease, which was what the defendant was entitled to. At the time of execution, however, it is argued that the Commissioner intended to obtain what was contained in the new lease document.

The plaintiff relies on the decisions in *Thomas Bates* v *Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077, *Barber* v *Barber* [1987] 1 NZLR 426 and *WCC* v *NZ Law Society* [1990] 2 NZLR 22. The defendant relies principally on the decision in *Agip* v *Navigazione Alta Italia* [1984] 1 Lloyds LR 353 (CA) in which the decision in *Thomas Bates* was considered.

Thomas Bates, like this case, involved a request for rectification of a lease granted pursuant to an option in an earlier lease. The option was to take a new lease at a rent to be agreed between the landlords and the tenants but in default of such agreement at a rent to be fixed by an arbitrator. The renewed lease document by an oversight omitted to include provision for the fixing of the rent by arbitration in default of agreement on a rent review. It had not been agreed by the parties that the reference to arbitration should be omitted and the tenants, although aware of the omission at the time they executed the new lease, did not bring it to the landlord's attention. The landlord sought rectification of the clause to provide for determination of the rent by arbitration in default of agreement.

That the issue there related to an omission of a term which would have been included if the previous agreement had been adhered to, but in this case there is inclusion of a provision not required under the previous agreement in my view is not significant.

Buckley LJ, with whom Brightman LJ agreed, referred to the statement of principle in *Snell's Principles of Equity* (25 Ed 1960 p 569) which Pennicuick J had adopted in *A Roberts & Co* v *Leicestershire County Council* [1961] 2 All ER 545:

> "By what appears to be a species of equitable estoppel, if one party to a transaction knows that the instrument contains a mistake in his favour but does nothing to correct it, he (and those claiming under him) will be precluded from resisting rectification on the ground that the mistake is unilateral and not common."

Buckley LJ continued:

> "The principle so enunciated by Pennicuick J was referred to with approval in this Court in *Riverlate Properties Ltd* v *Paul* [1974] 2 All ER 656 at 660, [1975] Ch 133 at 140, where Russell LJ, reading the judgment of the Court, said:
>
> > 'It may be that the original conception of reformation of an instrument by rectification was based solely on common mistake: but certainly in these days rectification may be based on such knowledge on the part of the defendant: see for example *A Roberts & Co* v *Leicestershire County Council*. Whether there was in any particular case knowledge of the intention and mistake of the other party must be a question of fact to be decided on the evidence. Basically it appears to us that it must be such as to involve the lessee in a degree of sharp practice.'
>
> In that case the lessee against whom the lessor sought to rectify a lease was held to have had no such knowledge as would have brought the doctrine into play. The reference to 'sharp practice' may thus be said to have been an obiter dictum. Undoubtedly I think in any such case the conduct of the defendant must be such as to make it inequitable that he should be allowed to object to the rectification of the document. If this necessarily implies 'some measure' of sharp practice, so be it; but for my part I think that the doctrine is one which depends more on the equity of the position. The graver the character of the conduct involved, no doubt the heavier the burden of proof may be; but, in my view, the conduct must be such as to affect the conscience of the party who has suppressed the fact that he has recognised the presence of a mistake.
>
> For this doctrine (that is to say the doctrine of *A Roberts v Leicestershire County Council*) to apply I think it must be shown: first, that one party, A, erroneously believed that the document sought to be rectified contained a particular term or provision, or possibly did not contain a particular term or provision which,

> mistakenly, it did contain; second, that the other party, B, was aware of the omission or the inclusion and that it was due to a mistake on the part of A; third, that B has omitted to draw the mistake to the notice of A. And I think there must be a fourth element involved, namely that the mistake must be one calculated to benefit B. If these requirements are satisfied, the Court may regard it as inequitable to allow B to resist rectification to give effect to A's intention on the ground that the mistake was not, at the time of execution of the document, a common mistake."

In a passage which I take to be an indication of how the question whether there had been a mistake on the part of the landlord might be resolved, Buckley LJ said (p 1086):

> "It seems to me, as I have already said, that the omission from the review clause of any reference to arbitration was one which was clearly contrary to the landlords' interests, one which must have occurred as a result of a mistake on the part of Mr Bates."

Eveleigh LJ took a different view from that expressed in *Riverlate Properties* as to the need to show sharp practice (p 1090):

> "I also think that the evidence established that Mr Avon knew that the lease did not contain the appropriate clause, and knew that Mr Bates intended that it should. Where a party is aware that the instrument does not give effect to the common intention of the parties as communicated each to the other, there may well be an inference of sharp practice or unfair dealing. In my opinion, this will not always be so. I do not think that it is always necessary to show sharp practice. In a case like the present if one party alone knows that the instrument does not give effect to the common intention and changes his mind without telling the other party, then he will be estopped from alleging that the common intention did not continue right up to the moment of the execution of the clause. There is no need to decide whether his conduct amounted to sharp practice. I think he might at that time have had no intention of taking advantage of the mistake of the other party. I do not think that it is necessary to show that the mistake would benefit the party who is aware of it. It is enough that the inaccuracy of the instrument as drafted would be detrimental to the other party, and this may not always mean that it is beneficial to the one who knew of the mistake."

That judgment was the subject of detailed reference in *Agip* v *Navigazione Alta Italia* [1984] 1 Lloyds LR 353. That case related to an escalation clause in a charter-party where the basic amount above which increased costs were to be assessed was expressed as US$1.120 million in round terms. The plaintiff sought rectification of the clause by substitution for the US$ figure 700 million lire, which it was estimated would result in an increase of half as much as would be produced if the dollar figure was used.

The defendants had had the charter-party drafted after discussions which had referred to 700 million lire, but had used the dollar figure. The draft was subsequently discussed between the parties. In that discussion the defendants had not specifically drawn attention to the introduction of the dollar figure. The plaintiffs admitted that they had been negligent in failing to notice its introduction. The defendants did not realise that the plaintiffs had not noticed it. The trial Judge held that the defendants neither knew of the plaintiffs' misapprehension nor so conducted themselves as to make it inequitable for them to take advantage of it; that the plaintiffs had no-one to blame but themselves for having entered into a contract which had worked out much more adversely for them than they could reasonably have foreseen; and that was not a ground for rectifying the charters.

Proceeding on the basis that there was no common mistake and that the plaintiffs could only succeed on the basis of their unilateral mistake Slade LJ, in a judgment with which Oliver LJ and Robert Goff LJ agreed, reviewed earlier decisions including *Thomas Bates* and said:

> "One significant feature, however, is common to all of the *Roberts, Riverlate* and *Bates* decisions. In all the various formulations of the relevant principle in the judgments in those cases, none of the members of the respective Courts suggested that rectification can properly be granted on account of unilateral mistake unless the defendant had *actual knowledge* of the existence of the plaintiff's mistake at the time when the contract was signed. Since, in the present case, the Judge has specifically found that the defendants were not aware of the mistake of IIP at the time of signature of the charter-parties, and there is no appeal against this finding, it is obvious that the plaintiffs, if they are to succeed on this appeal, must in some way succeed in persuading the Court to extend the frontiers of the circumstances in which rectification may be granted on the grounds of mere unilateral mistake, beyond the frontiers established by any of the cases cited. The Court, therefore, must in my opinion proceed all the more cautiously before granting rectification of these two written instruments against defendants who at the time when the negotiations first ripened into a binding contract, intended to contract on the terms which were reflected in the written charter-parties and on no other terms.

...

In the light of the evidence adduced at the trial, the plaintiffs were unable to rely on common mistake, but ultimately had to rely solely on their own unilateral mistake. The Judge, as I have already indicated, found as a fact that the defendants did not know that the charterers' representatives engaged in concluding the agreement were mistaken as to the contents of the clause. There is no appeal against this finding of fact. The Judge also rejected, as a matter of law, an argument put forward by leading Counsel for the plaintiffs. Mr David Johnson, Q.C. that the defendants must be 'taken to have been' congnizant of this fact. As he put it (at p 343 of the report):

> 'Knowledge means knowledge. If it be negatived subjectively it cannot be reinstated by some objective test. There is no room for any doctrine of constructive knowledge.'

Mr Johnson, on this appeal, expressly disclaimed any further challenge to this important conclusion of law. In these circumstances it was not immediately apparent how the plaintiffs could get this appeal on its feet consistently with their pleaded case."

Slade LJ further commented at page 365:

> "While it is not necessary to go so far for the purpose of this present decision, I might perhaps add that I strongly incline to the view that in the absence of estoppel, fraud, undue influence or a fiduciary relationship between the parties, the authorities do not in any circumstances permit the rectification of a contract on the grounds of unilateral mistake, unless the defendant had actual knowledge of the existence of the relevant mistaken belief at the time when the mistaken plaintiff signed the contract. In view of the drastic nature of such an order, so far as the non-mistaken defendant is concerned, the consequences of any such conclusion may not appear unduly harsh. I do not say that even where estoppel, fraud, undue influence or a fiduciary relationship exists rectification will necessarily be an available or appropriate remedy."

In my view there is a significant difference between the circumstances of this case and those of *Agip* v *Navigazione Alta Italia* [1984] 1 Lloyds LR 353. In that case the written agreement was the first agreement in writing between the parties. As well they had discussed it in draft when it included the disputed provision in the terms appearing in the concluded agreement. Neither of those factors is present here. There was, as indicated, in my judgment no discussion or negotiation concerning the contents of the

lease other than in one respect, and that document was not the first concluded contract between the parties. The first contract was the original lease which provided not only that the lessee's right would be renewed, but also the terms on which that would be done. The renewed lease was to have provision "like" those of the original lease although Mr Mulholland believed and the Commissioner would have believed, on the basis of the letter of 24 August 1976 that they were to be the "same" as those of the original lease. "Like" indicates in ordinary usage that there may be changes in detail but not of substance. The option clause was plainly a change of substance.

In those circumstances, applying the view of the position between the parties expressed by Somers J in *Barber* v *Barber* [1987] 1 NZLR 426, 431 the defendants cannot, on the evidence, succeed:

> "There is however another reason why I think rectification was inevitable. A decree may be made, although there is no antecedent contract, provided that a common intention is shown to exist at the material time: see *Dundee Farm Ltd* v *Bambury Holdings Ltd* [1978] 1 NZLR 647. In this case there was an antecedent contract. In such circumstances I am of opinion that it was for Mr B O Barber [who was opposing rectification] to show that the intention manifested by that contract had been replaced - in short that the contract was varied. The case against rectification called for evidence not only as to his state of mind but also testimony of a coincident intention by the trustees. The evidence does not begin to establish that."

Be that as it may, looking at the matter in terms of unilateral mistake by the Council, in my view the case is squarely within the criteria indicated by Buckley LJ in *Thomas Bates*. What I infer necessarily to have been the Commissioner's knowledge that the provisions of the new lease did not accord in a significant and unusual respect with the old, in a way having value for the Commissioner and a corresponding detriment for the Council, in my view constituted sufficient knowledge that the Council would be acting under a mistake in executing the lease in that form.

I have no doubt that it would be unconscionable in the circumstances to allow the Commissioner or his successors in title (who have acquired title by statutory devaluation and not by purchase) now to take advantage of the mistake when their position is not shown in any way to have changed in reliance on the new lease as signed. Accordingly in my view the new lease should be rectified by deleting the option clause VI 2 of the lease.

There will be judgment for the plaintiff accordingly.

I record that argument was advanced for the Council on the basis that the option provision in the new lease was invalid as in effect providing a gift of Council property. Reliance was placed on *Petone Borough* v *Lower Hutt Borough* [1918] NZLR 844, *AG* v *Wellington City Corporation* [1924] NZLR 818 and *Rhyl UDC* v *Rhyl Amusements* [1959] 1 All ER 257.

That argument was advanced in answer to the defendants' pleaded alternative defence of estoppel. Counsel for the defendant conceded, however, that the defendant would at least have difficulty in establishing that defence in the absence of evidence as to the extent of the defendant's reliance on the presence of the option in the lease. In my opinion there is no evidence of reliance to the detriment of the defendant and the issue accordingly requires no further consideration.

The plaintiff is entitled to costs.

D.P. Neazor J

Solicitors; City Solicitor, Wellington for Plaintiff
Phillips Fox, Wellington for Defendant