

41/82

IN THE PRIVY COUNCIL

No. of 1982

ON APPEAL
FROM THE SUPREME COURT OF NEW SOUTH WALES
EQUITY DIVISION

BETWEEN:

STANDARD PORTLAND CEMENT COMPANY PTY, LIMITED

BLUE CIRCLE SOUTHERN CEMENT LIMITED

Appellants (Defendants)

AND:

COLIN ELLIOTT GOOD

Respondent (Plaintiff)

CASE FOR THE APPELLANTS

SOLICITORS FOR THE APPELLANTS

Freehill, Hollingdale & Page,
MLC Centre, Martin Place,
SYDNEY, N.S.W. 2000

By their Agents:

Linklaters & Paines,
Barrington House,
59-67 Gresham Street,
LONDON, EC2V 7JA U.K.

SOLICITORS FOR THE RESPONDENT

Wm. Washington & Co.,
16 Church Street,
MUDGEE, N.S.W. 2850

By their Agents:

McGirr James Hall & Associates,
5 Gresham Street,
SYDNEY, N.S.W. 2000

By their Agents:

Barnett & Barnett,
93 Shaftsbury Avenue,
LONDON, W1V 7AE U.K.

which was sold by it to Good pursuant to a standard form contract for the sale of land dated 3 December 1979. In turn, Good claims, in effect, that he has become the legal owner of the O Mill. The contract between Standard Portland and Good did not expressly exclude the O Mill from the sale and the O Mill was not referred to in the portion of the contract headed "Description of Property". The only provision in the contract which appeared to touch the question was Special Condition 9 which was in the following terms:

"Should completion be effected before the expiration of twelve months from the date hereof the Purchaser (Good) will grant the Vendor (Standard Portland) licence to enter upon the property for the purpose of removing the O Mill situated thereon such removal to be effected in any event within twelve months from the date hereof."

p. 11
11. 21-26

3. The purchase price of the land on which was erected the O Mill was \$85,000. Evidence was presented to the learned Judge that the value of the O Mill was approximately \$180,000. It was common ground that Standard Portland did not remove the O Mill within the twelve month period referred to in Special Condition 9. It was also common ground, as the learned Judge noted on several occasions in his reasons for judgment, that the O Mill was "excluded" from the sale. Nevertheless, the learned Judge held that the O Mill was a fixture; dismissed the appellants' claim for rectification of the contract;

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and held that, as a result of the failure by Standard Portland to remove the O Mill, Good became the legal owner thereof.

4. The appellants make no submissions on the issue of whether O Mill is a fixture or a chattel. The issues which arise on this appeal are:

- (i) Whether the O Mill was excluded from the sale of the subject land.
- (ii) Whether the learned Judge was correct in construing the contract so as to "divest" Standard Portland of its title, upon failure to remove it.
- (iii) Whether the learned Judge ought to have allowed the claim by the appellants for rectification of its contract.
- (iv) Whether Good is to be estopped from asserting any rights which he may have over the O Mill.

B. THE FACTS

5. The subject land is known as Lot 11 in Deposited Plan 613183 being all the land contained in Certificate of Title Volume 14381 Folio 83. It is part of a larger site previously owned by Standard Portland which was subdivided upon the sale to Good of the subject land.

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6. The appellants Blue Circle and Standard Portland manufacture cement, lime, limestone and coal. They own cement plants, coal mines and limestone quarries.

In July 1977 Blue Circle decided to close down one of its old cement works at Charbon, a country town in New South Wales. It also decided to sell a large quantity of plant and equipment which was situated at Charbon and other cement plants which it owned. Good expressed interest in purchasing the Charbon land (subject land) and the plant and equipment which was for sale. Negotiations took place between Good and an officer of Blue Circle, Mr. Howes.

7. The negotiations culminated in a meeting between Mr. Howes and Good on 2 November 1979. Mr. Howes showed a brochure (exhibit 1) to Good setting out the plant and equipment available for sale. Certain items had been crossed out and a note added "sold" or "withdrawn". The O Mill was crossed out with a note alongside it which said "withdrawn". Mr. Howes subsequently made handwritten notes of that meeting which recorded, inter alia, that the O Mill was excluded. The total price agreed at the meeting for the subject land, and the plant and equipment, was \$350,000. Mr. Howes subsequently confirmed the total package price by letter to Good dated 5 November 1979. On 8 November 1979 Good sent a telex to Mr. Howes confirming "acceptance and agreement" of the above letter. By further letter of 13 November 1979 Good suggested to Mr. Howes a break-up of the total price to include \$85,000 for the Charbon land

pp. 138-
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(subject land), and \$265,000 for the plant and equipment. The same letter specified "This offer excludes the items marked as SOLD OR WITHDRAWN by Mr. K. Howes on November 2, 1979". As a result of the successful negotiations, two contracts were drawn up between Standard Portland and Good.

8. The first contract was an agreement between Good and Standard Portland dated 23 November 1979 for the sale by Standard Portland to Good of plant and equipment situated at various sites in New South Wales. The purchase price was \$265,000. Clause 3 of the agreement provided that Good was to remove all the plant and equipment from Standard Portland's sites within twelve months of the date thereof. It was in the following terms:
- p. 28-30
- p. 28
ll 30-34

"The buyer covenants to remove all the goods hereby sold within twelve months from the date hereof except such goods as may be situated on land being sold to the Buyer by the Seller and property and the goods shall be deemed to have passed upon removal."

9. The second contract was an agreement dated 3 December 1979 by which Standard Portland agreed to sell to Good the subject land. The purchase price was \$85,000. There was no particular reservation of the 0 Mill in the portion of the contract headed "Description of Property", and no mention of the 0 Mill other than in Special Condition 9.

10. Good defaulted in his obligations under Clause 3 of the first contract to remove his plant and equipment from Standard Portland's sites within twelve months of the date of the contract i.e. by 23 November 1980.
11. In turn, Standard Portland did not comply with its obligation under special condition 9 of the second contract to remove the O Mill from the subject land within twelve months from the date of that contract i.e. by 3 December 1980.
12. Good did not complain about Standard Portland's failure to remove the O Mill until 9 October 1981 when he consulted his solicitor and subsequently asserted that the O Mill was his. Earlier, in July and August 1981 Good had consented to representatives of Blue Circle bringing potential purchasers to the site to inspect the O Mill. In September 1981 Good had offered to purchase the O Mill himself. In addition, at all material times, Good had sought and had been granted by Mr. Howes, some relaxation of his obligation to remove his plant and equipment within twelve months, from Standard Portland's sites, in accordance with clause 3 of the first contract.
13. That the parties intended to "exclude" the O Mill from the sale of the subject land is clear. The relevant facts are set out in the judgment and the evidence as follows:

Record

- (a) "It is common ground that a building and cement-making equipment located on it, known collectively as 'the O Mill' were excluded from the sale." p. 97
11. 16-18
- (b) "It is perfectly clear from the letter of 5 November 1979 written by the second defendant to the plaintiff confirming his offer and his telexed acceptance of its terms, that the O Mill and its associated plant and the building in which it was contained was to be excluded from the sale." p. 107
11. 19-23
- (c) "I can recall saying in relation to the O Cement Mill, its building and associated equipment, words to the effect:- 'That's excluded from the sale'." p. 45
11. 28-30
- (d) "Excludes O Mill and spares and building." p. 46
1.1
- (e) "2. Exclusions
(a) O Mill, spares and building and other equipment indicated on Schedule given to you on Friday (2.11.79)."
p. 58
11. 35-36
- (f) "3. Right of access - this must work both ways as BCSC has to remove the O Mill from the land being purchased by Mr. Good.... ."
p. 61
11. 20-22

- (g) "This offer excludes the items marked as SOLD OR WITHDRAWN by Mr. K. Howes on November 2, 1979." p. 65
ll. 4-5
- (h) "We refer to our recent discussions with you and confirm our advice that removal of equipment already sold by us may result in some damage being caused to the property which you have agreed to purchase from us. In addition, removal of the O Mill by this company may damage part of that property and we appreciate that when you remove some of the equipment which we have agreed to sell you damage to our property might likewise occur." p. 66
ll. 7-14

14. The relevant facts on which the claim for estoppel was based were held by the learned Judge to be as follows:

- (a) Standard Portland was obliged to remove the O Mill within twelve months of the date of the contract i.e. by 3 December 1980. p. 116
ll. 3-6
- (b) It was a term of Good's offer, confirmed by Mr. Howes' letter of 5 November 1979, that Good be given the opportunity to quote for the work involved in removing the O Mill. p. 116
ll. 6-9
- (c) The agreement by which Good purchased the plant and equipment of Standard Portland, contained a covenant by Good to remove all p. 116
ll. 14-19

the goods within twelve months of the date of the agreement i.e. by 23 November 1980.

- (d) On or about 29 August 1980 Mr. Howes told Good that his company was anxious for Good to remove his plant from the Maldon site, that they were also anxious to give him the contract for the removal of the O Mill, but that no decision would be made in that regard until Good had demonstrated that he "could perform" by cleaning up the Maldon site. p. 116
ll. 21-28
- (e) By letter dated 5 November 1980 Mr. Howes reminded Good of his obligation to remove his plant and equipment by 23 November 1980, noting that it appeared that Good had very little hope of completing his obligations by that date, and enquiring about his intentions. p. 116
l. 28
- (f) Good replied by letter dated 26 November 1980 seeking a further twelve months within which to remove his plant. The letter concluded with the words: p. 117
ll. 3-8
- "If you can recall my comments twelve months ago, that with a situation that we were undertaking at the time, there would need to be some give and take on both sides and I feel that this should be fair to both parties."
- (g) By letter dated 16 July 1981 Mr. Howes wrote to Good to the effect that the existing

Record

- situation could not be allowed to continue any longer, and that Standard Portland had no alternative but to engage other contractors to remove Good's plant and equipment.
- (h) In July 1981 Mr. Howes commenced negotiations with BHP for the sale of the O Mill. p. 117
l. 30
p. 118
ll. 21-27
ll. 3-4
- (i) In July 1981 two engineers from BHP visited the site of the O Mill and spoke to Good's manager, Mr. Webb. p. 118
ll. 7-8
- (j) In August 1981 5 or 6 representatives from BHP, together with Mr. Howes, visited the site of the O Mill and, again, spoke to Mr. Webb. p. 118
ll. 9-11
- (k) On 7 September 1981 Good made an offer to Mr. Howes to purchase the O Mill himself. p. 118
ll. 23-25
- (l) At no time until 9 October 1981 did Good make any claim to the O Mill, or assert that Standard Portland was no longer entitled to remove it. p. 119
ll. 5-8
- (m) By letter dated 21 September 1981 Blue Circle accepted the offer of BHP to purchase the O Mill for \$180,000. p. 119
ll. 18-21
- (n) Blue Circle would not have proceeded with the sale of the O Mill to BHP if Good had challenged Standard Portland's right to remove it. p. 120
ll. 8-10

C. THE JUDGMENT

15. The learned Judge granted to Good final relief restraining the appellants from entering on to the subject land to remove the O Mill, and dismissed the cross-claim which sought rectification of the contract by the insertion of the words in the description of the property, "excluding thereout the O Mill, its building and associated equipment". p. 123
11. 12-13
16. Notwithstanding the common intention of the parties to "exclude" the O Mill, and the apparent failure of the parties to make adequate provision for such exclusion in the contract, the learned Judge disallowed the appellants' claim for rectification ostensibly, it would seem, on the basis that there was, in fact, no common mistake but that "the parties turned their mind to that (sic) question and resolved it, however imperfectly by Special Condition 9". p. 109
11. 10-12
17. The learned Judge distinguished between Standard Portland's right to remove the O Mill before completion, and its right to do so after completion. p. 108
11. 18-26
- The learned Judge held that there was no provision in the contract expressly authorising removal before completion. The learned Judge held that Special Condition 9 arguably impliedly authorised such removal before completion, but if it did not, the contract should be rectified if it was necessary:

"There is no express provision in the contract authorising the first defendant to remove the Mill before completion. It is arguable that Special Condition 9 impliedly authorises such a removal but if it does not it is, I think clear enough that some such provision should be inserted in the contract by rectification if it were necessary to do so in order to resolve the rights of the parties in the circumstances which now exist. However, it is not necessary to do so because the contract has now been completed." (Emphasis added).

18. In contrast, the learned Judge held that the

contract did make some provision for removal of the O Mill after completion. This was the basis for the learned Judge's disallowance of the claim for rectification:

p. 108
11. 27-28

p. 109
11. 3-7

"The agreement by the parties that the Mill should be excluded raised for consideration the question whether the first defendant should have any right to remove it after completion and, if so, for how long. It seems to me that it must be concluded that the parties turned their mind to that question and resolved it, however imperfectly, by Special Condition 9." (Emphasis added).

p. 109
11. 7-12

19. Accordingly, the learned Judge concluded that the parties "turned their mind" to the question, and that the proper interpretation of Special Condition 9 was as follows:

"The whole effect of the contract in the present circumstances is, in my opinion, that the O Mill was to be excluded from the sale to the extent to which Special Condition 9 provided an opportunity for the first defendant to remove it from the land."

p. 115
11. 16-20

20. The learned Judge's relevant findings on this point was therefore as follows:

- (a) Standard Portland was obliged to remove the
O Mill from the subject land within 12
months of the date of the contract; p. 112
11. 18-20
- (b) Standard Portland breached the contract by
not performing this obligation, and p. 112
11. 21-22
- (b) completion of the contract has taken place
and the O Mill has vested in Good. p. 112
11. 23-25

21. On estoppel, the learned Judge disallowed the
appellants' claim based on "promissory" estoppel,
common law estoppel, and proprietary estoppel,
holding:

"In all the circumstances it seems to me to
be unrealistic to regard the conduct relied
upon as giving rise to the implied
representations mentioned above under the
headings of promissory or common law
estoppel." p. 121
11. 12-15

"The conduct of the plaintiff was an
acquiescence in the assertion by the first
defendant of its claimed right to remove the
Mill rather than any representation that the
right existed." p. 121
11. 15-18

"It seems to me that the post contract
correspondence does not give rise to any
inference that the plaintiff would adopt a
flexible approach to the time for removal of
the Mill." p. 121
11. 18-21

"The inspections by BHP commenced in July and
it was against the background of these
inspections which, of course, indicated to the
plaintiff that the first defendant was
negotiating to sell the Mill to BHP, that he
himself made his offer to purchase. His offer
should be seen as an acceptance of the first
defendant's position rather than as a
representation that the position was correct." p. 121
11. 21-28

22. In disallowing the claim for proprietary estoppel, the learned Judge specifically held:

"So far as proprietary estoppel is concerned it seems to me that the evidence does not establish that the conduct of the plaintiff led the first defendant to believe that it was entitled to remove the Mill. That was a belief entertained by the first defendant quite independently of the conduct of the plaintiff as is shown by the commencement of negotiations with BHP in July 1981."

p. 121
l. 28
p. 122
ll. 3-8

"It can hardly be said to have been dishonest of the plaintiff not to object earlier than he did because his evidence is, and it is not challenged, that it was not until 9 October 1981 that he became aware that he had a right to prevent the first defendant from removing the Mill."

p. 122
ll. 8-12

23. In regard to all three types of estoppel, the learned Judge further held:

"In respect of each kind of estoppel relied upon it seems to me to be not established by the evidence that the first defendant changed its position in reliance upon any representation by the plaintiff. There is no evidence that the attitude of the plaintiff was a factor which was taken into consideration in the decision by the defendants to sell the Mill to BHP."

p. 122
ll. 13-19

D. SUBMISSIONS OF THE APPELLANTS

(i) Whether property in the O Mill passed to Good

24. Although if the mill was a fixture property in the mill would usually pass with the land, this is always subject to a contrary intention being expressed or implied: Hare v. Horton (1833) 5 B & Ad 715. The appellants submit that special condition 9 and the facts set out in paragraph 13 clearly show an intention that the O Mill was not to form part of the Sale of the land.

25. In these circumstances the O Mill remains the property of the appellant despite completion of the Contract of Sale of the land to Good. Further, Good is under an obligation not to prevent the appellants taking possession of it.

(ii) Whether the Contract 'divested' Standard Portland of its title to the mill, upon failure to remove it

26. The appellants submit that the learned Judge fell into fundamental error in holding:

"The whole effect of the contract in the present circumstances is, in my opinion, that the O Mill was to be excluded from the sale to the extent which Special Condition 9 provided an opportunity for the first defendant to remove it from the land."

p. 115
11. 16-20

27. In the appellants' submission, Special Condition 9 is a procedural provision, not intended to have any effect in relation to legal title to the O Mill. The appellants submit that Special Condition 9 had a two-fold function as follows:

- (a) to ensure that Standard Portland did not delay excessively in removing its mill from the subject land, and to that end, it imposed a twelve month time "limit"; and
- (b) to allow for a licence in favour of Standard Portland to enter and remove the O Mill if completion took place within the time "limit".

28. The appellants respectively accept, as partially correct, the following description of the ambit of Special Condition 9 adopted by the learned Judge at an early stage of his reasons for judgment:

"The only provision made in the contract in these respects is Special Condition 9 which does no more than provide a licence to remove the Mill after completion should completion take place within twelve months and then only between its date and the expiry of that period".

p. 108
ll. 13-18

29. In the appellants' submission, Special Condition 9 was not intended to, and does not, have any relevance to the question of title to the O Mill. In the appellants' submission, Special Condition 9 should be construed in the context of the surrounding circumstances including, inter alia, the contract for plant and equipment which similarly imposed a twelve month time limit for removal. Prenn v. Simmonds (1971) 1 WLR 1381; Reardon-Smith Line v. Hansen-Tangen (1976) 3 All ER 570.

30. In the appellants' submission the mere procedural effect of Special Condition 9 was foreshadowed by the memorandum dated 12 November 1979 from Mr. Howes to Blue Circle's corporate solicitor as follows:

"(3) Right of access - this must work both ways as BCSC (Blue Circle) has to remove the O Mill from the land being purchased by Good and likewise Mr. Good has to remove the equipment from Brogans Creek, the ropeway and from other buildings on the western side of the railway lines. It is suggested that the contract should contain a clause giving access for a reasonable period, but stipulating that plant, etc. to be removed must be completed within twelve months from exchange of contracts."

p. 61
ll. 20-28

31. The appellants submit that Special Condition 9 does not represent an "imperfect" attempt to resolve the question of title to the O Mill, and in so holding, the learned Judge fell into error.

(iii) Rectification

32. The appellants submit that the question of whether the contract should be rectified by the insertion in the description of the property of the words "excluding thereout the O Mill, its building and associated equipment", depends upon the application of well settled principles of law to the facts of this case. The appellants rely on the following statement:

"In order to get rectification it is necessary to show that the parties were in complete agreement with the terms of their contract but by an error wrote them down wrongly."

Frederick E. Rose (London) Ltd. v. William H. Pim Jnr. & Co. Ltd. (1953) 2 QB 450 at 461 per Denning LJ; see also Maralinga Pty. Ltd. v. Major Enterprises Pty. Ltd. 128 CLR 336 per Barwick CJ at 345, per Mason J at 349, 350.

33. The appellants submit that there was complete agreement between Standard Portland and Good that the O Mill should be excluded outright, and not conditionally, from the sale. In the appellant's submission, the evidence is compelling. From the first meeting between Good and Mr. Howes on

2 November 1979 it was made clear that the O Mill was simply "not for sale". The subsequent correspondence to the date of contract confirmed this position.

34. The appellants submit that Standard Portland and Good made no express provision in the contract excluding the O Mill because of a mutual mistake, or oversight, of which neither party became aware until 9 October 1981.

35. The appellants further submit that it is no objection to their claim for rectification, that the mistake of the parties be categorised as an error of law (which, in any event, is not conceded). The appellants' case is supported by Burroughs v. Abbott (1922) Ch 86 and Jervis v. Howle & Talke Colliery Co. Ltd. (1937) Ch 67.

36. The cases of Barrow v. Barrow (1854) 18 Beav. 529 and Frederick E. Rose (London) Ltd. v. William H. Pim Jnr. & Co. Ltd. (1953) 2 QB 450 are distinguishable. In both cases, there was no issue of "error of law". In both cases the parties were labouring under a misapprehension when they reached their oral agreement, and that misapprehension was continued in the written document. There was no disconformity between the oral agreement and the written document.

In this case, there was a clear disconformity between the oral agreement reached between Mr. Howes & Good, and the written form of contract.

37. Maralinga v. Major Enterprises 128 CLR 336 is distinguishable. A majority of the High Court of Australia in that case was satisfied on the evidence that the relevant provisions of the written instrument were not intended to record the antecedent oral agreement of the parties, and that therefore, any disconformity between the written instrument and the antecedent agreement did not arise out of a common mistake. Insofar as the learned Judge held (Judgt. p. 10.9):

"Essentially Clause 9 provided for a matter which had not been previously agreed and does not embody any mistake in giving expression to the intention of the parties".

the learned Judge was correct only to a point. True it was that access to the land and the details of removal of the mill had not been previously agreed. Special Condition 9 attempted to deal with that question. But, in the appellants' respectful submission, Special Condition 9 was not inserted for the purpose of overriding the unequivocal antecedent oral agreement that the mill was "not for sale", and in so construing that clause, the learned Judge was, in the appellants' submission, giving an interpretation to Special Condition 9 which is wholly wrong for the reasons stated above.

(iv) Estoppel

38. The appellants further submit that the proper interpretation of the whole of the contract, including Special Condition 9, having regard to the "matrix of facts" in which it is set, is that, by implication, the O Mill, its building and associated equipment do not form part of the sale of the subject land. To hold otherwise would be to defeat the intention of the parties. Luxor v. Cooper (1941) AC 108; B.P. Refinery (Westernport) v. Shire of Hastings 52 ALJR 20 (Privy Council).

39. If the appellants' submissions on rectification, or on the interpretation of Special Condition 9, are not accepted, the appellants further submit that the defence of estoppel is open to them, because it would be unconscionable and fraudulent (in the equitable sense) to allow Good to assert his strict legal rights (such as they may be) in the circumstances of this case. Notwithstanding that he disallowed the defence of estoppel, the learned Judge nevertheless categorised the factual situation as follows:

"The conduct of the plaintiff was an acquiescence in the assertion by the first defendant of its claimed right to remove the Mill rather than any representation that the right existed".

p. 121
ll. 15-18

40. It is the appellants' submission that, even accepting at its lowest the learned Judge's above

interpretation of the conduct of Good, the defence of estoppel is made out in the circumstances because:

- (a) It is not always necessary to ground an estoppel, that there be a representation by the party against whom the estoppel is sought. Amalgamated Property Co., Ltd. (in liquidation) v. Texas Commerce International Bank Ltd. (1981) 3 WLR 565 per Lord Denning MR at 575, per Eveleigh LJ at 579, per Brandon LJ at 583.
- (b) The defence of estoppel is available to prevent a party going back on an assumption of fact or law which has formed the basis on which the parties have conducted the dealings between themselves. Amalgamated Property v. Texas Bank, op.cit. per Denning MR at 575; Spencer Bower and Turner, Estoppel by Representation, 3rd. ed. (1977) at 157.
- (c) Between 3 December 1979 and 9 October 1981 Standard Portland and Good proceeded on the basis of an underlying assumption as to legal title to the O Mill, as a result of which Standard Portland arranged to sell the mill to BHP for \$180,000.00, and it would be manifestly unfair and unjust in the circumstances to allow Good to go back on that assumption.

41. Alternatively, the appellants submit that, properly construed, the facts give rise to a so called "promissory estoppel" by representation of future intention, because:

(a) The learned Judge erred in holding that "the post-contract correspondence does not give rise to any inference that the plaintiff (Good) would adopt a flexible approach to the time for removal of the Mill.

p. 121
11. 18-21

(b) Good's attitude to Standard Portland's obligation to remove the 0 Mill should be seen in the context of the extension of time given to him by Standard Portland to remove his plant and equipment under the first contract. By letter dated 26 November 1980 Good wrote to Mr. Howes of Blue Circle:

"Re the further extension of time for removal of the goods purchased in the overall package, we beg your indulgence of a further period of twelve months. This, I am sure, will benefit both parties to future prosperity.....

p. 32
11. 14-17

If you recall my comments twelve months ago, that with a situation that we were undertaking at the time, there would need to be some give and take on both sides and I feel that this should be fair to both parties."

11. 21-24

(c) Good impliedly represented by his conduct that Standard Portland would not be bound by the twelve month time limit relating to

removal of the O Mill. In the appellants' submission, this representation is not only foreshadowed by the above letter, but evidenced by the subsequent conduct of Good in failing to take any action whatsoever in relation to the twelve month period for removal of the O Mill until after he had consulted his solicitor on 9 October 1981.

- (d) In furtherance of this belief, Standard Portland commenced negotiations in July 1981 for the sale to BHP of the O Mill. p. 117
l. 30
- (e) Good encouraged Standard Portland in the acceptance of this belief by his own offer to purchase the O Mill on 7 September 1981. p. 118
ll. 3-4
- (f) BHP's offer for the O Mill was accepted on 21 September 1981 and a formal order was sent to Blue Circle dated 9 October 1981. p. 118
ll. 23-28
- Blue Circle would not have proceeded with the sale to BHP if Good had challenged Standard Portland's right to remove the Mill. p. 119
ll. 18-24
- (g) It would be inequitable and unjust to allow Good to resume and exercise his strict legal rights (such as they may be) when the appellants had been led to expect, by Good's own conduct, that the strict time limit for removal of the Mill would not be enforced. p. 120
ll. 8-10

- removal of the O Mill. In the appellants' submission, this representation is not only foreshadowed by the above letter, but evidenced by the subsequent conduct of Good in failing to take any action whatsoever in relation to the twelve month period for removal of the O Mill until after he had consulted his solicitor on 9 October 1981.
- (d) In furtherance of this belief, Standard Portland commenced negotiations in July 1981 for the sale to BHP of the O Mill. p. 117
l. 30
- (e) Good encouraged Standard Portland in the acceptance of this belief by his own offer to purchase the O Mill on 7 September 1981. p. 118
ll. 3-4
- (f) BHP's offer for the O Mill was accepted on 21 September 1981 and a formal order was sent to Blue Circle dated 9 October 1981. p. 119
ll. 18-2
- Blue Circle would not have proceeded with the sale to BHP if Good had challenged Standard Portland's right to remove the Mill. p. 120
ll. 8-1
- (g) It would be inequitable and unjust to allow Good to resume and exercise his strict legal rights (such as they may be) when the appellants had been led to expect, by Good's own conduct, that the strict time limit for removal of the Mill would not be enforced.

Hughes v. Metropolitan Railway Co. (1877) 2 App. Cas. 439; Birmingham & District Land Co. v. London & Northwestern Rail Co. (1888) 40 Ch. D 268; Central London Property Trust Ltd. v. Hightrees House (1947) KB 130.

42. Alternatively, the appellants submit that, properly construed, the facts give rise to a so called "common law" estoppel by representation of existing fact, because:

- (a) Good impliedly represented at all material times that Standard Portland was the legal owner of the O Mill, and he expressly so represented, at least when he offered to purchase the mill on 7 September 1981.
- (b) In reliance upon, and encouraged by, inter alia, those representations, the appellants made arrangements for the sale of the O Mill.
- (c) Good cannot now deny that the fact is otherwise than as represented by him to Standard Portland. Pickard v. Sears (1837) 6 Ad & E 469; Jorden v. Money (1854) 5 H.L.Cas. 185; Chadwick v. Manning (1896) AC 231.

43. Alternatively, the appellants submit that, properly construed, the facts give rise to a so called "equitable estoppel by acquiescence" (Ramsden v. Dyson (1866) LR 1 HL 129; Willmot v. Barber (1880) 15 Ch. D. 96) because:

- (a) It may be assumed (but it is not conceded) that Standard Portland made a mistake as to its legal rights.
- (b) Standard Portland expended time and money (resulting from negotiations with potential purchasers and preparation for the actual sale of the mill) on the faith of this mistaken belief.
- (c) Good encouraged, or acquiesced in, knowingly or unknowingly, the assumption by Standard Portland that it was legally entitled to the O Mill.
- (d) It is no objection to this claim for estoppel that Good did not know of his claimed legal rights until 9 October 1981. Taylor's Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd. (1981) 2 WLR 576 per Oliver J at 593; Amalgamated Property Co. v. Texas Bank (1981) 2 WLR 554 per Robert Goff J at 570.
- (e) The true principle is "whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment." Taylor's Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd. Op. cit. per Oliver J at 593.

E. SUMMARY

44. Wherefore, the appellants submit that the appeal should be allowed for the following, among other reasons:

- (a) Because on the proper construction of the contract, the O Mill, its building and associated equipment were excluded from the sale of the subject land.
- (b) Alternatively, because the parties through mutual mistake omitted to insert in the description of the property in the contract words excluding the O Mill from the sale, and accordingly because the contract should be rectified to remedy the omission.
- (c) Alternatively, because the respondent is estopped from asserting his rights over the "O" Mill.

JOHN PHILLIPS

PEREGRINE SIMON