To be substituted for copy previously issued.

Privy Council Appeal No. 61 *of* 1934.

William Douglas Lysnar - - - - - - *Appellant*

v.

The National Bank of New Zealand, Limited - - - *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH JANUARY, 1934.

Present at the Hearing:

LORD BLANESBURGH.
LORD THANKERTON.
LORD WRIGHT.
LORD ALNESS.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD WRIGHT.]

This appeal arises out of an action brought by the appellant in the Supreme Court of New Zealand claiming damages as for breach of a contract made between him and the respondent bank. The respondents succeeded before the Trial Judge MacGregor J., whose judgment was affirmed, though on different grounds, by the Court of Appeal, Ostler J., dissenting.

As strict adherence to the pleadings was not observed, the action being debated on its merits in both Courts below, it will first be convenient to detail the circumstances which were before the Courts.

The appellant who is a retired barrister and solicitor of the Supreme Court of New Zealand, was, up to March, 1931, the owner of Arowhana Station and the stock upon it. The station consisted of 21,400 acres, divided into two portions, a front portion and a back portion. The former was mortgaged to the Public Trustee and the latter to the East Coast Commissioner, Native Trust Department, hereinafter called the Commissioner. The venture had not been successful; the appellant had spent about £60,000 on the back portion and owed the Commissioner £22,000 odd at the date in March, 1931, when the Commissioner

put the property up for sale and bought it in at £13,608. The respondents had made advances amounting to £70,000 to the appellant, which were outstanding: their principal, if not only, security then was a mortgage on the stock, which it was calculated could not realise more than £10,000 as things were. It was obviously desirable both to the appellant and the respondents that the Commissioner should not turn the stock off the back portion, principally because that would have involved a forced sale on a bad market. The appellant accordingly sought to make terms with the Commissioner; for that object the assistance of the respondents was necessary. In consequence, negotiations took place between the appellant and the Commissioner, the respondents being of necessity in touch with the appellant in these matters. In the result, after much discussion, the Commissioner's terms were set out in a letter of the 29th April, 1931, addressed to the appellant; that letter offered a lease to the appellant (or to a Company if one were formed) of the back land in question for five years at a rental of £650 a year, with an option to purchase at the end of five years at £13,000. Apart from certain payments of arrears which were to be made in cash at once, the material terms were as follows:—

"(4) National Bank of New Zealand Limited as Mortgagee of stock to agree that rent and rates are to be a first charge on the Company's income for the term of the Lease, after payment of working expenses.

(5) Lease to contain all usual Covenants as to fencing farming management and general. Lessee to pay rates.

(6) The income after payment of working expenses including future rent, taxes and rates on the back blocks to be applied towards interest on Mr. Lysnar's Mortgages and other taxes and rates.

In addition the Bank is to see Mr. Lysnar could provide rent as long as he pays interest on the reduced debt to the Bank, which will not be more than 5 per cent. on £30,000 plus any advances granted for working expenses. The Bank would not charge its securities with any other liability of Mr. Lysnar except in regard to advances to him as stipulated above.

(7) Subject to the payment of all working expenses and other expenses referred to in the preceding clause, including any interest payable to the Public Trustee and Bank, you have the proceeds surplus revenue as working capital. Each year's revenue from Arowhana, including the current year's revenue shall be available to meet the requirements of this agreement. It is understood and agreed that out of this current year's revenue that is, receipts since November last, the Bank is to deduct the cost actually paid by the Bank since November in earning it but not to take into account any interest.

(8) The Bank's money to remain on mortgage for five years at 5 per cent interest payable half-yearly, and upon default in interest the Bank to have right to sell the stock and take any remedies the Bank thinks fit, and if, through default in payment of interest, the Bank sells the stock, then any agreement that may be come to between the Bank and Mr. Lysnar, for the former to assure payment of the rent, would cease.

(9) It is not intended by this agreement that it is necessarily required that the whole of the revenue from the station during the currency of this agreement should be expended on it but only sufficient to properly and

reasonably manage the whole station as you may require and any revenue over and above those requirements to be disposed of as you and the Bank may consider advisable either in reducing the Bank's indebtedness or otherwise."

That agreement obviously required that the respondents should assist the appellant, whether by joining with the Commissioner and the appellant in a tripartite agreement or by making an agreement with the appellant that they would do what was necessary on their part to carry out the Commissioner's conditions. Thus the respondents were to reduce their debt to not more than £30,000, and were not for five years to sell the stock except in default in payment of interest. But in particular, the respondents' concurrence was necessary in regard to the financial provisions relating to the disposal of revenue contained in clauses 7 and 8. The respondents had objected to clause 7, and it was to meet that objection, so far as the Commissioner was prepared to meet it, that clause 9 was inserted. It had been a grievance of the Commissioner that the respondents had sought to control the management and finances of the station with a view to their getting as much as possible of the revenue towards reduction of their debt. He had accordingly insisted that clause 7 should remain, but had inserted clause 9 as a concession to the respondents.

The respondents had, however, on the 27th April, 1931, obtained the appellant's signature to a letter which bore date the 1st April, 1931, in which he undertook to the respondents " without any responsibility on your part " that the respondents should direct and control the management of the station and the stock thereon, and that he would sell surplus stock as they should think desirable and that he would arrange for the payment of agistment fees if the mortgagee and lessor would not exercise their power of sale or distress, until the respondents should think the time propitious for the sale of stock or of stock and station together or should be satisfied that the station could be carried on at a profit.

This letter was not disclosed to the Commissioner and was inconsistent with the Commissioner's terms which by clauses 5, 7 and 9, implied that the management should be in the appellant and not in the respondents, and which by clause 8 required the respondents not to sell for five years except upon default in payment of interest to the respondents. The appellant explained that he signed the letter at the request of the respondents' manager so as to fix the position in case the negotiations with the Commissioner failed.

On the 1st May, 1931, the Commissioner wrote to the respondents, informing them that as they had given no definite intimation of agreeing to the proposed arrangement, the negotiations must be considered at an end, and the stock must be removed in five days ; further time could not be given.

Thereupon on that day interviews took place between the appellant and the general manager of the Bank, Mr. Grose and his two subordinates, the appellant having obtained from the Commissioner an extension of time till 6 p.m. that evening. After a long discussion, Mr. Grose, as General Manager, signed and handed to the appellant a letter dated the 1st May, 1931, in these terms, addressed to the appellant :—

> " Referring to the East Coast Commissioner's letter of the 29th ult. to you as amended to-day, the Bank is prepared to assist you to meet this on the lines set out therein, except that securities other than the Station and stock which it holds from you will be available to the Bank as against the balance of your debt and liabilities over the £30,000 and working expenses set against the station and stock : But no personal responsibility will attach to you for those other debts or liabilities but you must assist the Bank as required in realising those other securities.
>
> You may show this letter to the East Coast Commissioner."

This letter the appellant at once took to the Commissioner (it was just after 6 p.m.), who, having received it, wrote on the duplicate of the letter of the 1st May, 1931, the words : " The notice withdrawn and cancelled," and appended his signature.

The appellant at the same time wrote at the foot of the Commissioner's copy of his letter of the 29th April, 1931, the following, which he signed :—

> " I hereby agree and accept the terms of the above arrangement and hand you herewith the letter of approval of the General Manager of the National Bank of New Zealand bearing date the 1st May, 1931.
>
> " Dated this 1st May, 1931."

In the letter of the respondents of the 1st May, 1931, the words " as amended to-day " have been explained by the evidence. They refer to the insertion of the word " future " before rent in clause 6, and of the last sentence of clause 7 and also to a marginal note which Mr. Grose wrote and initialled against clause 9 on his copy of the letter to the effect that the clause was subject " to the Bank's approval in any new expenditure, and the Bank's decision as to the disposal of any revenue over and above these requirements will be final." The appellant did not see this note, but his evidence was that it was read over to him and that he accepted it, and repeated its effect to the Commissioner when he took the respondent's letter to him and that the Commissioner agreed to its terms.

On the 4th May, 1931, the respondents wrote to the Commissioner that on the 1st May, they and the appellant had concluded certain arrangements and they had given the appellant the letter, and that they understood that the Commissioner had agreed to grant the lease. The Commissioner did not controvert this statement.

But on the 2nd May, 1931, the respondent's general manager, Mr. Grose, had written to the appellant a letter which began as follows :—

> " Referring to our last interview yesterday, when I gave you a letter under which the Bank agreed to assist you to meet the requirements of the

East Coast Commissioner as set out in his letter to you of 29th ulto. That there may be no misunderstanding in future as to the conditions on which the Bank agreed to do that I set them out briefly hereunder :—

> The basal condition is that you are to manage the station as if the Bank were in possession but without any responsibility to the Bank and to direct and control the management of the station and the stock thereon and sell surplus stock and produce thereof as I may direct. This is set out in the letter drafted on the 1st ulto. and which you signed on the 29th (*i.e.*, 27th) ulto."

The rest of the letter detailed other terms which do not here call for discussion.

Though this letter was in regard to management inconsistent with the terms of the Commissioner's letter of the 1st May, 1931, the respondents did not send a copy to the Commissioner nor was he warned by the respondents that they were alleging a different agreement than that set out in their letter of the 1st May, 1931. The letter of the 2nd May, 1931, followed the appellant to the country, whence, on the 7th May, 1931, he replied denying any such conditions and pointing out that if he had so agreed, particularly as regards management, he would be acting falsely to the Commissioner.

On the 11th May, 1931, the respondents telegraphed further to the appellant that as he refused to abide by the terms which had been agreed, the negotiations were at an end. They thus treated the divergence of the terms of the letter of the 2nd May, 1931, from those of the 1st May, 1931, as being a matter of the first importance, as it indeed was. On the 14th May, 1931, the respondents sent (for the first time) a copy of their letter of the 2nd May to the Commissioner and stated that as the appellant would not be bound by these conditions, negotiations were at an end.

In the result the Commissioner did not grant the lease and the writ claiming damages was issued by the appellant against the respondents.

At the trial MacGregor J. decided for the respondents. He accepted the evidence of the respondents and did not accept that of the appellant. His conclusion was summed up in these words :—

> " The Plaintiff's story was in short that the letter from the Bank of 1st May 1931 was a definite acceptance of a contract, unconditional, and concluded in all its terms. The witnesses for the Defendant Bank were its general manager, assistant general manager and inspector. Their evidence was to the effect that the letter in question was not intended as an acceptance, that the contract alleged was not finally concluded on 1st May, and in any event was subject to certain conditions which the Plaintiff accepted, but apparently failed to communicate to the Commissioner as he undertook to do. I accept that evidence as being true."

In the Court of Appeal Smith J. delivered the judgment of the Court, which was that of himself and Reed J. They did not agree with the conclusions of the Judge ; they thought—

> " that appellant's evidence that the terms of the agreement made were those comprised in the two letters of the 29th April and the 1st May

is more in accord with the realities of the situation than the Bank's evidence that there were other terms not referred to in those letters."

But they decided against the appellant on a different ground, which was, in effect, that the agreement between the appellant and respondents was conditional on its being accepted and agreed to by the Commissioner and that the appellant on whom the onus lay, had failed to establish that the Commissioner ever assented to the two variations of the terms of his letter of the 29th April, 1931, viz., that expressed in the respondents' letter of the 1st May, 1931, relating to securities other than the station and stock, and the marginal note to clause 9. Ostler J., who dissented, was of opinion that there was a completed agreement between the appellant and respondents in the terms of the letter of the 1st May, 1931, and that the effect of the evidence was to show that the Commissioner had assented to the variations of his proposal which that letter involved. He was for allowing the appeal and deciding in favour of the appellant.

Before this Board, it was urged on behalf of the appellant that the respondents' letter of the 1st May, 1931, was a complete written contract, binding the respondents, so that no evidence to add to or vary it was admissible: but that in fact, if evidence were admissible, the evidence as a whole established the appellant's case. For the respondents it was urged, that even if the letter might appear to be a contract in writing, evidence was admissible to show that it was not given or accepted as constituting a contract, or alternatively that it was subject to a suspensory condition before it could become operative and that the condition had not been fulfilled with the consequence that there never was an agreement; in the alternative, it was further contended that even if the letter of the 1st May, 1931, was a contract in writing, there was in fact, concluded at the same time a collateral oral contract in the terms set out in the letter of the 2nd May, 1931, which Mr. Grose said in evidence that he wrote from his notes of the interview of the day before. It is necessary to consider these contentions in order.

In their Lordships' judgment the respondents' letter of the 1st May, 1931, is according to its apparent tenor a complete written contract binding the respondents. But though that is so, it must be established that the writing was intended as between the parties to embody an agreement which had in that form been reduced to writing. Evidence on this issue is on well known principles admissible and indeed is essential in a case like the present, where a simple writing is signed by one party only: it is essential to prove that it was accepted by the appellant to whom it was addressed, so as to constitute a bilateral bargain. In their Lordships' judgment, such proof is forthcoming in the present case. The letter of the 1st May, 1931, is a complete written document since it also embodies the terms as amended of the Commissioner's letter of the 29th April, 1931; what that means

can properly be shown by oral evidence : it was plainly intended to be shown to the Commissioner in order to induce him to grant the lease to the appellant ; the respondents were interested that the lease should be granted, as otherwise they were under notice from the Commissioner to remove within five days the stock of which they were mortgagees ; it is not suggested and cannot be assumed that the respondents, in signing and delivering the letter as they did, were merely making the pretence of a contract so that the Commissioner, believing what was pretence to be genuine, should be induced to grant the lease. The respondents' letter of the 4th May, 1931, quoted above, would by itself show, if it were necessary, that no such idea was present in anybody's mind.

But though the letter of the 1st May, 1931, must, so far, in their Lordships' judgment, be taken to be the written contract, it is necessary to consider the further point raised by the respondents, which indeed found favour with the majority of the Court of Appeal ; this point is that the contract was subject to a suspensory condition, which was never fulfilled so that the contract never became operative, or more strictly, never was a contract at all ; it is said that the suspensory condition was that the Commissioner should accept the respondents' letter as satisfactory and should be willing to grant the lease.

That evidence to this effect is admissible in law is beyond question. Strictly it is merely another illustration of the same rule that what appears to be an agreement may be shown by oral evidence not to be one in fact ; according to the old pleading the evidence was admissible in any such case on the plea *non est factum*. Thus in *Pym* v. *Campbell*, 6 E. & B. 370, a paper had been signed by both parties, but the Court held, on the plea that the defendant did not agree, that it was not intended that the paper should be an agreement until a third party had been consulted and had approved of the inventions concerned ; he did not approve ; it was held there was no agreement. Coleridge J. said : " the parties may not vary a written agreement but they may show that they never came to an agreement at all and that the signed paper was never intended to be the record of the terms of the agreement ; for they never had agreeing minds." Such a conditional agreement is no agreement unless and until the condition is fulfilled.

In the present case their Lordships are of opinion that the agreement was conditional. In their Lordships' judgment, this was not the case of a tripartite agreement ; the respondents never intended to enter into and did not enter into privity with the Commissioner. Their contract was with the appellant ; there was another and separate contract between the appellant and the Commissioner, the former contract being conditional on the latter being effected ; without that the respondents' object would be frustrated ; indeed, the letter could have no operation unless

the appellant and Commissioner agreed. But in their Lordships' judgment the condition was fulfilled, because the Commissioner did act upon the letter: on the faith of it he indorsed his letter of the 1st May, 1931, with a withdrawal and cancellation of the notice and in the words of the respondents' letter of the 4th May, 1931, he "agreed to grant the lease." With all deference to the majority judges in the Court of Appeal, their Lordships cannot accept the view that the appellant failed to tell the Commissioner of the terms of the marginal note to clause 9 of the Commissioner's letter of the 29th April, 1931. There is no evidence that the Commissioner raised any objection either to that amendment of his offer or to the exceptions set out in the respondents' letter of 1st May, 1931; all the evidence and all the realities of the situation are to the contrary. It is true that the appellant was guilty of a technical irregularity in endorsing his acceptance on a copy of the Commissioner's offer which had not upon it a copy of Mr. Grose's note to clause 9: but there is no reason to think that the Commissioner would ever have sought to take advantage of such a technicality, or could have done so successfully. Their Lordships agree with Ostler J. that the condition was fulfilled. Thus it is established that the respondents' letter of the 1st May, 1931, constituted an agreement between the appellant and respondents. But even on that assumption there still remains a further contention on behalf of the respondents, that is, that there was concluded at the interviews of the 1st May, 1931, an oral agreement collateral to the written agreement of the same date, in the terms afterwards set out in the letter of the 2nd May, 1931. That evidence of such a collateral oral agreement is admissible is well established: the position is well stated by Lord Moulton in *Heilbut Symons & Co.* v. *Buckleton* [1913], A.C. 30 at page 47 as follows:—

> "It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. 'If you will make such and such a contract I will give you one hundred pounds,' is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract. But such collateral contracts must from their very nature be rare. The effect of a collateral contract such as that which I have instanced would be to increase the consideration of the main contract by £100, and the more natural and usual way of carrying this out would be by so modifying the main contract and not by executing a concurrent and collateral contract. Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an animus contrahendi on the part of all the parties to them must be clearly shown. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter."

It might seem that in strict logic any such collateral matter should have been dealt with by amending the written contract before it was signed and that if the contracting party signed the written contract without embodying the new term, he should be shut out from giving evidence that what he signed did not contain all that was agreed at the time ; hence the warning of Lord Moulton that the rule must be applied most guardedly. But though the rule is established, it is subject at least to one definite limitation ; though the collateral contract must inevitably, it seems, add to the written contract, it must not vary it in the sense of being inconsistent with, or contradictory of, the written contract to which it is collateral ; thus in *New London Credit Syndicate Ltd.* v. *Neale* [1898], 2 Q.B. 487, evidence of a contemporaneous oral agreement to renew a bill of exchange was rejected on the ground that it would contradict the term of the bill whereby it was payable in three months. The line between what is contradictory of, and what is merely supplemental to, the written instrument may not be easy in all cases to draw, as appears from *Erskine* v. *Adeane*, L.R. 8 Ch. App. 756 ; but in the present case it seems beyond question for reasons sufficiently explained earlier in this judgment that the terms contained in letter of the 2nd May, 1931, were not consistent with those of the letter of the 1st May, 1931, particularly in regard to the management of the station ; in their Lordships' judgment evidence of any such collateral oral agreement was not admissible. But even if it were, their Lordships cannot agree with the trial Judge in finding (if indeed, he does so find and does not simply find that the matter was left in negotiation, which was not in the end contended before this Board) that in fact there was any such agreement on the 1st May, 1931, at the interviews about which evidence was given. It is said that the Judge saw the witnesses and expressly accepted the evidence of the three gentlemen called on behalf of the respondents, and that his finding of fact should not be upset. But in addition to the oral evidence, a vital part of the evidence in this case consists of the documents and the admitted circumstances—what have been called the realities of the situation—and their Lordships, like the Judges in the Court of Appeal, cannot, in view of that other evidence, treat the matter as concluded by the Judge's opinion as to the credibility of the oral witnesses. Though it is important to give the fullest possible weight to the findings of a Judge who has seen and heard the witnesses, every appeal from a Judge alone is by way of rehearing. In this case, it is not easy to reconcile with the idea of the suggested oral agreement the fact that Mr. Grose signed the letter he did sign, with the intention that it should be passed on to the Commissioner, who, as he knew, had taken a strong stand throughout on the question of management. He intended his letter to be shown to the Commissioner as the condition on which a lease should be granted ; if he had intended to insist on the terms quoted above which appeared in the letter

of the 2nd May, 1931, in particular, the terms putting him in the position of a mortgagee in possession, and about management and control, it is scarcely credible that he would not have expressed them in his letter which he wrote at the interview. No doubt there was at the interviews of the 1st May, 1931, strenuous debate on these points between him and the appellant; but the acid test for determining what was ultimately decided as a result of these interviews, must be what he eventually wrote and signed. Their Lordships have felt some difficulty in understanding why, if Mr. Grose was insisting that what he agreed was contained in the letter of the 2nd May, 1931, he did not at once inform the Commissioner instead of waiting to do so until he had decided to repudiate the whole transaction, and why on that assumption he came to write to the Commissioner the letter of the 4th May, 1931.

In the result, their Lordships are of opinion that the appeal should be allowed with costs here and below and that judgment should be entered for the appellant; that there should be a declaration that the respondents' letter of the 1st May, 1931, constituted a binding contract between the parties; and that the case should be remitted to the Supreme Court of New Zealand to deal with the proceedings on that basis.

They will humbly so advise His Majesty.

In the Privy Council.

WILLIAM DOUGLAS LYSNAR

v.

THE NATIONAL BANK OF NEW ZEALAND, LIMITED.

DELIVERED BY LORD WRIGHT.

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