16, 1937

In the Privy Council.

No. 9 of 1936.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

MARITIME ELECTRIC COMPANY LIMITED (*Plaintiff*) *Appellant*

AND

GENERAL DAIRIES LIMITED - - - (*Defendant*) *Respondent.*

CASE FOR THE APPELLANT.

CASE FOR THE APPELLANT.

RECORD.

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada dated the 28th June 1935 reversing a judgment of the Appeal Division of the Supreme Court of New Brunswick dated the 5th June 1934 which had affirmed a judgment in the King's Bench Division dated the 16th March 1934 whereby the Appellant recovered from the Respondent $1931·82 (being the amount claimed) and costs. p. 79. p. 70. p. 40. p. 36. p. 6, l. 1.

2. The facts are not in dispute and were admitted in the pleadings or agreed between Counsel for the parties. The $1931·82 claimed was the balance of the contract price (being the only price which, under the Public Utilities Act, mentioned below, the Appellant was authorised to charge or could lawfully charge) of electricity supplied to and consumed by the Respondent. The only question raised by this appeal is whether the statutory and contractual obligations can be over-ridden by an estoppel arising from the rendering of accounts in which by mistake the Appellant showed the Respondent's consumption of electricity as less than in fact it was. p. 8, l. 9.

3. The Appellant is a company incorporated under the Companies' Act of Canada with its head office at Fredericton in the Province of New Brunswick and carries on the business of generating and supplying electricity for light, heat, refrigeration and power in Fredericton and its vicinity.

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RECORD. 4. The Appellant is a public utility governed by the Public Utilities Act (Chapter 127 of the Revised Statutes of New Brunswick, 1927), which contains the following, amongst other provisions:

" 16. No public utility shall charge, demand, collect or receive a " greater or less compensation for any service than is prescribed in " such schedules as are at the time established, or demand, collect or " receive any rates, tolls or charges not specified in such schedules.

" 17. The rates, tolls and charges named in the schedules so " filed as aforesaid shall be lawful rates, tolls and charges, until the " same are altered, reduced or modified as herein provided.

" 18. (1) Every public utility which, directly or indirectly by " any device whatsoever, charges, demands, collects or receives " from any person, firm or corporation, a greater or less compen- " sation for any service rendered or to be rendered by it, than that " prescribed as provided herein, or than it charges, demands, " collects or receives from any other person, firm or corporation for " a like and contemporaneous service is guilty of unjust discrimina- " tion, which is hereby prohibited and liable to a penalty of not less " than fifty dollars nor more than five hundred dollars, which may " be imposed by the board; and if the same is not paid within " fifteen days after the imposition thereof, the non-payment of the " same shall be ground (after public notice thereof in *The Royal* " *Gazette*) for proceedings to be taken by the Attorney General to " dissolve the public utility so in default.

" 19. (1) No person, firm or corporation shall knowingly solicit, " accept or receive any rebate, concession or discrimination in " respect to any service in, or affecting or relating to any public " utility whereby any such service is by any device whatsoever, or " otherwise, rendered free or at a less rate than that named in the " Schedules in force, as provided herein, or whereby any service or " advantage is received other than is herein specified.

" (2) Any person, firm or corporation violating the provisions " of this section is liable to a penalty of not less than Fifty dollars " nor more than five hundred dollars, for each offence, which may " be imposed by the board and if said penalty is not paid within " fifteen days after the imposition thereof, the chairman of the " board may transmit a statement under his hand, to the Registrar " of the Supreme Court, of the imposition of such penalty.

" (3) On receipt of such statement, such Registrar shall issue " execution against the person, firm or corporation on whom the " penalty was imposed, directed to the sheriff of the county in " which the head office or principal place of business of the said " person, firm or corporation is situate, directing him to levy on " the goods and chattels lands and tenements of the said person, " firm or corporation, for the amount of the said penalty, with costs " of execution, sheriff's fees and poundage."

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5. The Schedule of charges to be made by the Appellant and the rules and regulations relating thereto were duly prescribed by and from time to time amended by the Board of Public Utilities (being the proper authority under the Public Utilities Act for prescribing Schedules, and being the board mentioned in the Sections of the Act above set out). The Schedule in force at all material times is printed in the Record. p. 9, l. 42. p. 11, l. 29–p. 22.

6. The Respondent at all material times carried on a dairy business in the City of Fredericton and manufactured and sold butter, ice cream and other milk products. The Respondent bought electricity from the Appellant for use in its business.

7. From December 1929 to March 1932 the Appellant supplied to the Respondent electricity for which the proper and only lawful charge was $2478·10. p. 8, ll. 11–47.

8. The quantity of electricity supplied to and used by the Respondent in its business was measured by a meter installed by the Appellant on the Respondent's premises. Such meter complied in all respects with the requirements of the Electricity Inspection Act 1928 and was inspected on the 23rd December 1927 and the 31st March 1932 and on both occasions its measurement of electricity was found to be within the limits permitted by law. p. 10, ll. 18–22.

9. The Appellant delivered to the Respondent each month a statement purporting to show the amount of electric energy supplied by the Appellant to the Respondent during the month preceding the rendering of such statement. The meter reading upon which the monthly statements were rendered was a correct reading of the dials of the meter but in order to arrive at the amount of electric energy used in the terms of Kilowatt hours (on which, with a minimum monthly charge per horse-power of installed capacity, the statutory rates were based) it was necessary to multiply the dial reading by ten. p. 11, l. 1. p. 10, ll. 23–26. p. 10, ll. 1–9. p. 10, l. 25.

10. By mistake the dial reading was not so multiplied and consequently the Respondent was only charged for one-tenth of the electric energy supplied to and used by the Respondent in its business. This mistake ran through all the accounts rendered from December 1929 to March 1932. The amount claimed in the monthly accounts during this period was only $546·28 and the Respondent each month paid the amount demanded by the monthly account in the belief that the account was correct. p. 10, ll. 26–29. pp. 8–9. p. 9, ll. 1–37. p. 9, l. 38; p. 11, l. 5.

11. The Appellant having discovered the mistake requested the Respondent to pay the statutory charge for the full amount of electricity supplied and on the Respondent's refusal issued on the 4th day of May 1933 a specially endorsed writ of summons out of the King's Bench Division of the Supreme Court of New Brunswick, claiming $1931·82 the difference between the lawful charge and the total amount of the payments made by the Respondent. pp. 3–6.

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pp. 6–7. 12. With other defences which were abandoned at the trial the Respondent pleaded an estoppel against the Appellant, alleging representations by the Appellant of the amount of electricity supplied to the Respondent month by month, belief by the Respondent that the representations were true, and action by the Respondent to its prejudice in reliance on the representations.

p. 7, ll. 8–17; 25–29; 35–40. 13. The action relied on by the Respondent was that the cost of electricity entered into the Respondent's calculations for determining the cost of manufacture of its butter, ice-cream and other products, and that the price paid by the Respondent to farmers and others for cream had directly depended, amongst other things, on the cost of manufacture.

p. 8, l. 9; p. 10, l. 30–p. 11, l. 20. p. 30, l. 47–p. 31, l. 19. 14. The Appellant admitted the facts on which the Respondent sought to found an estoppel. The Respondent did not allege however that the Appellant had any knowledge, nor had the Appellant any knowledge, that the Respondent's manufacturing costs affected the price paid to farmers or others for cream. The Respondent was not a co-operative organisation but an ordinary commercial company buying in the open market.

p. 36, l. 10; p. 23, l. 13. p. 23, l. 25–p. 27, l. 22. p. 28, ll. 13–16. p. 29, ll. 1–31. p. 30, ll. 3–17. p. 30, l. 39–p. 31, l. 21. p. 31, ll. 17–21. p. 31, l. 41–p. 32, l. 46. p. 33, ll. 4–41. pp. 34–35. 15. The action was tried by Richards J. on the 27th October 1933 and reasons for judgment were given on the 27th February 1934. After setting out the Statement of Facts agreed upon by Counsel and referring to the scheduled documents, Richards J. pointed out that estoppel was the only defence to be considered. He examined authorities on estoppel and, founding his judgment on that of Brett J. in *Carr* v. *London & North Western Railway Company* (1875) L.R. 10 C.P. 307 at 316, held that no estoppel was made out. Evidence that the Appellant intended its representations to be acted upon in the way they were in fact acted upon was completely lacking. Neither was there any ground on which the Respondent could reasonably believe that the Appellant intended the Respondent to act on the representations in the way in which it did act in making them a factor in determining the price to be paid for cream. Ordinary business practice would suggest that the Respondent would pay the market price for its raw products, irrespective of the cost of manufacture. His Lordship distinguished cases on which the Respondent relied, and then examined the argument that the Appellant could not be estopped from collecting the rates fixed and regulated by statutory authority with a prohibition from charging less or more than the fixed rates. He held the argument to be sound and to be supported by authority.

p. 40. pp. 37–39. p. 39, l. 6. p. 37, l. 32–p. 38, l. 18. p. 38, ll. 19–39. 16. The Respondent appealed to the Appeal Division of the Supreme Court of New Brunswick which on the 5th June 1934 dismissed the appeal Baxter J. with whose reasons Grimmer, Acting C.J., agreed, summarised the facts and held that they did not constitute an estoppel within the rules formulated in *Carr* v. *London & North Western Railway Company* and in a more simplified form in *Greenwood* v. *Martin's Bank Limited* (1933) A.C. 51 at 57. In the latter case a breach of duty was established, but his Lordship

expressed the view that there was no principle of law which imposed a duty upon a creditor to render at his peril to his debtor an absolutely accurate account. As the facts did not show an estoppel it was unnecessary to consider the other ground on which Richards J. had also decided in the Appellant's favour. RECORD. p. 38, l. 42—p. 39, l. 3.

17. Le Blanc J. reluctantly agreed to dismiss the appeal, although the admitted facts did not thoroughly convince him that they did not fall within the fourth proposition in *Carr* v. *London and North Western Railway Company* under which an estoppel arises from culpable negligence. The admitted facts did not expressly admit negligence but the Court could draw its own deduction. His Lordship, however, concurred in dismissing the appeal without considering the other ground on which Richards J. had based his decision. p. 39, l. 29. p. 39, ll. 8–28. p. 39, l. 18.

18. The Respondent appealed to the Supreme Court of Canada which heard the appeal on the 26th and 27th February 1935 and on the 28th June 1935 unanimously allowed the appeal. p. 41. p. 70, l. 23. p. 70.

19. The reasons for judgment were delivered by Dysart J. with the concurrence of Duff C.J. Lamont, Cannon and Davis, JJ. After summarising the facts and pointing out that the Appellant was not charged with negligence nor with knowledge of the Respondent's method of fixing cream prices Dysart J. considered two questions (1) whether on general principles an estoppel was created, (2) if so whether the Public Utilities Act barred or precluded the estoppel. pp. 71–79. p. 71, l. 5–p. 72, l. 5. p. 72, l. 3. p. 72, ll. 16–20.

20. Dysart J. considered the second question first, and in doing so pointed out the obligatory language of Section 16, and reviewed a number of cases in the courts of England and the United States. He pointed out that Section 16 was in effect the same as Section 6 of the United States Interstate Commerce Act and that decisions of the Supreme Court of the United States and several State Courts had established that the duty to charge and collect full compensation under the latter Act is absolute and is not subject to any relaxation or variation in any circumstances whatever, whether by estoppel or otherwise. The learned Judge then referred as follows to his previous discussion of cases on the provision of English Companies Acts by which every share is deemed to have been issued and held subject to the payment of the whole amount thereof in cash unless otherwise determined by written contract filed with the Registrar of Joint Stock Companies at or before issue : p. 72, l. 20–p. 77, l. 17. p. 76, l. 30. p. 76, l. 38–p. 77, l. 17. p. 77, l. 18.

> " We know of no reason why public policy in New Brunswick
> " should demand so rigid a rule of construction of the Public
> " Utilities Act of that Province. We see no reason why Section 16
> " of that Act should not be construed in the spirit in which the
> " Companies Act and other such Acts in England are construed.
> " The section in conjunction with others of the Act imposes a

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" duty which cannot be avoided by contract nor ' by any device '.
" It aims, we think, to prevent all ' unjust discrimination ' and all
" dishonest evasion. At the same time, there is nothing to suggest
" that it ought not to be construed in the light of the law of the
" land and enforced in courts according to the prevailing law as to
" evidence and procedure. When viewed in this way, it does not
" preclude estoppel which, as we have seen, is only a rule of
" evidence available in courts, and when applied may assist in
" ascertaining that the statute has been not evaded but fully met
" in its requirements."

p. 77, l. 32. Accordingly the learned Judge decided that the Statute was not inconsistent with an estoppel.

p. 77, l. 37–p. 79, l. 10. 21. Dysart J. then held that, on the general principles of estoppel the Appellant came within the principle

" If a man whatever his real meaning may be, so conducts
" himself that a reasonable man would take his conduct to mean a
" certain representation of facts, and that it was a true representa-
" tion, and that the latter was intended to act upon it in a particular
" way, and he with such belief does act in that way to his damage,
" the first is estopped from denying that the facts were as represented."

p. 78, ll. 39–43. He considered that the principle was broadened by Lord Tomlin's statement in *Greenwood* v. *Martin's Bank* (1933) *Appeal Cases* 51 *at p.* 57 that the representation must be " intended to induce a course of conduct."

p. 78, ll. 6–17. 22. In the opinion of Dysart J. the Appellant must be taken to have intended and expected the Respondent to act on the representations in the ordinary course of its business such as to devote uncollected electric money to profits, dividends, building up reserves, improving plant, advertising or lowering selling prices. His Lordship continued :

" If the money might be used for these things, or any of them,
" why may it not be used to increase the price of raw materials, and so,
" perhaps, in a competitive field, increase the volume of business, with
" beneficial results that might follow therefrom. Such a use of
" moneys does not appear to me to be so unusual as to cause surprise
" in the minds of business men familiar with the management of
" such businesses."

23. The Appellant respectfully submits that the action so indicated as founding an estoppel is wholly inoperative for that purpose. Only by assuming that the action might well be beneficial and not detrimental does the learned Judge bring it within conduct which might reasonably have been intended or anticipated by the Appellant; and the allegation of a like estoppel because money not demanded had been paid away in dividends was held to be no answer in *The Queen* v. *Blenkinsop* (1892) 1 Q.B. 43, which Dysart J. distinguished by saying that the elements of estoppel did not there appear.

p. 73, l. 42–p. 74, l. 3.

24. The Appellant also respectfully submits that the Supreme Court of Canada were in error (1) in refusing to construe Section 16 of the Public Utilities Act in accordance with the settled interpretation of similar words by the Supreme Court of the United States of America; (2) in holding that Section 16 does not preclude the setting up of the estoppel pleaded against the Appellant; (3) in applying the cases which establish the principles on which estoppel by conduct may be set up and in holding that the conditions in which an estoppel can be set up are satisfied in the present case; (4) in holding that the Appellant can and did raise itself against an estoppel which in the Appellant's submission the Appellant is under a legal disability from creating; and (5) in holding that the Appellant can and was bound by estoppel to do something beyond the Appellant's powers. RECORI

25. The Appellant, therefore, submits that the judgment of the Supreme Court of Canada was wrong and should be reversed and the judgment of Richards J. should be restored for the following, amongst other,

REASONS

1. BECAUSE the Appellant supplied and the Respondent consumed electricity for which the agreed and authorised charge exceeded the sums paid by $1931 · 82.

2. BECAUSE the Respondent has not paid or otherwise discharged its debt to the Appellant of $1931 · 82.

3. BECAUSE the admitted facts do not estop the Appellant from recovering the debt due to it.

4. BECAUSE the law governing estoppels was properly applied by the Supreme Court of New Brunswick but was misapplied by the Supreme Court of Canada.

5. BECAUSE no estoppel can operate to prevent the Appellant from collecting from the Respondent the full amount of the charges for electricity which the Appellant is authorised and bound by the Public Utilities Act to collect from the Respondent.

6. For the reasons stated in the judgments of Richards J. and Baxter J.

HAROLD L. MURPHY.

FRANK GAHAN.

In the Privy Council.

No. 9 of 1936.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

MARITIME ELECTRIC COMPANY LIMITED
(*Plaintiff*) *Appellant*

and

GENERAL DAIRIES LIMITED
(*Defendant*) *Respondent.*

CASE FOR THE APPELLANT.

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