PRIVY COUNCIL

Maritime Electric Co., Ltd.

Vs.

General Dairies, Ltd.

Privy Council Appeal No. 9 of 1936
(Lords Atkin, J.Thankerton, Russell of Killowen, Alness and Maugham JJ.)

08.02.1937

JUDGMENT

LORD MAUGHAM J.

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada dated 28th June 1935, reversing a judgment of the Appeal Division of the Supreme Court of New Nrunswick. That Court had affirmed a judgment in the King's Bench Division whereby the appellants had recovered against the respondents the sum of $19,31.82 and costs. The appellants are a private company which sells electrical power in the City of Fredericton, New Brunswick. The company is however a "public utility" company with the meaning of the Public Utilities Act of New Brunswick (Ch. 127 of the Revised Statutes, 1927). It is accordingly under a statutory duty (S. 10) to furnish reasonably adequate service and facilities. It has annually to make to the Board of Commissioners of Public Utilities established by the Act some elaborate returns. It is strictly limited as to the rates, tolls, and charges which it can make and exact, which must be in exact accordance with filed schedules open to public inspection, and these schedules must remain unchanged until altered, reduced, or modified as provided by the Act (Ss. 14 and 15). section 16 is in the following terms :

> 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.

2. By Section 18 it is provided that any public utility company charging or receiving a utility company charging or receiving a greater or less compensation for any service rendered than that prescribed as provided by the Act is guilty of "unjust

discrimination", which is thereby prohibited and is made liable to a penalty. By Section 19 no person, firm or corporation. On 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.

3. A penalty is provided for the violation of this section. The respondents during the material times carried on a dairy business in the City of Fredericton and manufactured and sold butter, ice cream and other milk products. They bought electric energy from the appellants. The amount: of $1,931 claimed by the latter is the amount remaining due for electric energy supplied from the month of December 1929 to the month of March 1932, according to the schedules in force during that period. Only $546.28 instead of $2,478.10 had been paid. The defense of the respondents is simply that of an estoppel raised on agreed facts of a some what singular nature. No viva voce evidence was given at the trial. It is important to keep closely to the principal facts as agreed and their Lordships doubt whether it is legitimate or safe to draw any further inference of fact in the existing circumstances. It will be convenient to state the important facts as agreed in a series of paragraphs:

> 1. The respondents carried on business in the city in buying cream from farmers and others and using the same in the manufacture of butter, ice cream and other milk products.
> 2. They paid to the farmers and others from whom the cream was bought a price depending amongst other things on the cost of manufacture of the butter, ice cream and other milk products.
> 3. The respondents used the electric energy supplied by the appellants for power and other purposes in connexion with their manufacture of butter, ice cream and other milk products, and the cost of such energy entered into the cost of such manufacture and directly affected the price which the respondents paid to the farmers and others for their cream.
> 4. The appellants at all material times knew that the respondents were using the electric energy in their manufacture and they rendered to the latter each month a statement purporting to show the amount of electric energy supplied to the latter, purporting to be based on the reading of the meter placed by the appellants on the respondents' premises for the purpose of registering the energy

so supplied.

5. The respondents believed the statements so rendered to be true and in accordance with the reading of the meter, and they from time to time paid to the appellants the amounts shown by such statements.

6. The respondents used the amounts so paid as part of their cost of manufacture of butter, ice cream and other milk products in determining the cost of manufacture for the purpose of fixing the price so to be paid for the said cream, and the respondents did base thereon the amount which they paid to the farmers and others for the said cream.

7. The mistake in rendering the said statements showing incorrect amounts to be due was the mistake of the appellants.

8. The respondents acted upon the said statements so rendered believing the same to be true.

9. By reason of such belief the respondents paid to the farmers and others large sums of money more than they would or could have paid for the said cream if the amounts now claimed for electric energy had been rendered to and claimed from the respondents at the several times when the said statements were rendered by the appellants.

4. These remarkable facts, involving as they do the long-continued undercharging of the appellants to so serious an extent, are to some extent explained by the following admitted circumstance. The meter was accurate and conformed with the statutory requirements; but in order to arrive at the correct amount of electric energy it was necessary to multiply the dial reading by ten. Through error this was not done, and as a result the respondents were charged with only one-tenth of the electric energy supplied to them. Thus the first statement rendered, that of 18th December 1929, showed 106 k.w.h. This was a correct reading of the dial, but to obtain the actual amount of energy used the reading should have been multiplied by ten, making 1,060 k.w.h. For this the correct charge according to the schedules would be $44.50 instead of the minimum fee of $15. The same error was made in compiling every one of the statements up to 16th March 1932. To the plea of estoppel two objections were raised by the appellants. First, it was contended that, apart from any other reason, estoppel was barred or precluded by the provisions of the Public Utilities Act. "A party," it was contended (citing 13 Halsbury, Edn. 2, p. 474, section 542), "cannot by representation, any more than by any other means, raise against himself an estoppel so as to create a state of affairs which he is under a legal disability of creating." Secondly, it was contended that (apart from the statute) there could be no estoppel since the

representations contained in the monthly statements were not intended to induce any course of conduct on the part of the respondents other than the payment of the amounts stated to be due. On this point great reliance was placed by the appellants on the well known and often cited propositions relating to estoppel in pais laid down in 1875 by Brett, J., (afterwards Lord Esher) in the case of *Carr v. L. and N.W. By. Co.,* It was urged that the representation relied on as founding the estoppel must be one intended or calculated to bring about the particular course of conduct which was the cause of detriment to the party relying on the estoppel.

5. Either of these contentions, if sound, would suffice to defeat the estoppel and to entitle the appellants to judgment. Richards, J., in a careful judgment in the King's Bench Division of the Supreme Court of New Brunswick, decided both points in favour of the appellants, and gave judgment for $1,931.82 and costs. In the appellate Division this judgment was confirmed by Baxter, J. and Grimmer, Ag. C. J. on the second of the two grounds above stated, Le Blanc, J. intimating a doubt as to whether the result might not have been different if negligence on the part of the present appellants (which had not been pleaded) had been alleged. When the matter came on appeal before the Supreme Court of Canada another view was taken, and Dysart, J. delivered the judgment of the Court (concurred in by Duff, C. J. and Lamont, Cannon and Davis, JJ.) deciding both the contentions in favor of the present respondents and therefore accepting the plea of estoppel, with the result that the appeal was allowed and the judgment reversed and set aside with costs in all the Courts. In the view of their Lordships, assisted by able and exhaustive arguments by counsel on both sides, the two points are of considerable difficulty and importance. It will be convenient to deal in the first place with the contention based on the statute. The problem cannot be more admirably stated than Dysart, J. He said :

> Applied to the present case, the Act imposes a duty on the electric company to charge, and on the dairy company to pay, at scheduled rates, for all the electric current supplied by the one and used by the other, during the twenty-nine months in question. The specific question for determination here is: Can the duty so cast by statute upon both parties to this action, be defeated or avoided by a mere mistake in the computation of accounts ?

6. In the view of their Lordships the answer to this question, in the case of such a statute as is now under consideration must be in the negative. The sections of the Public Utilities Act which are here in question are sections enacted for the benefit of a section of the public, that is, on grounds of public policy in a general sense. In such a

case-and their Lordships do not propose to express any opinion as to statutes which are not within this category-where as here the statute imposes a duty of a positive kind, not avoidable by the performance of any formality, for the doing of the very act which the plaintiff seeks to do, it is not open to the defendant to set up an estoppel to prevent it. This conclusion must follow from the circumstance that an estoppel is only a rule of evidence which under certain special circumstances can be invoked by a party to an action; it cannot therefore avail in such a case to release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from a statutory obligation of such a kind on his part. It is immaterial whether the obligation is onerous or otherwise to the party suing. The duty of each party is to obey the law. To hold, as the Supreme Court has done, that in such a case estoppel is not precluded, since, if it is admitted, the statute is not evaded, appears to their Lordships with respect to approach the problem from the wrong direction; the Court should first of all determine the nature of the obligation imposed by the statute, and then consider whether the admission of an estoppel would nullify the statutory provision.

7. A similar conclusion will be reached if the question put by the learned Judge is looked at from a somewhat, different angle. It cannot be doubted that, if the appellants, with every possible formality had purported to release their right to sue for the sums remaining due according to the schedules, such a release would be null and void.

8. A contract to do a thing which cannot be done without a violation of the law is clearly void. It may be asked with force why, if a voluntary release will not put an end to the obligation of the respondents, an inadvertent mistake by the appellants acted upon by the respondents can have the result of absolving the appellants from their duty of collecting and receiving payment in accordance with the law. To collect the money due will, in one sense, cause loss or injury to the respondents, to the extent of $1,931.82. Their Lordships do not know, because the admission (No. 9 above) does not cover the point, whether to allow the estoppel will not leave the respondents with an advantage consisting of the difference between the sum of $1,931.82 and the total amount by which the respondents were led to increase their payments of cream to farmers and others. It is however clear that to disallow the estoppel will leave the respondents out of pocket to the extent of the increased amounts just referred to. It is an unfortunate result; but the obligation to obey a positive law is more compelling than a duty not to cause injury to another by inadvertence. In the present case it may be observed that the injury is not a cause of action. Their Lordships are unable to see how

the Court can admit an estoppel which would have the effect pro tanto and in the particular case of repealing the statute.

9. If we now turn to the authorities it must be admitted that reported cases in which the precise point now under consideration has been raised are rare. It is, however, to be observed that there is not a single case in which an estoppel has been allowed in such a case to defeat a statutory obligation of an unconditional character. The text-books have regarded the case as one closely analogous to the cases of high authority where it has been decided that a corporation could not be estopped from contending that a particular act was ultra vires. Their Lordships propose to deal briefly with the more relevant authorities. In *Carr v. L. and N.W. By. Co.,* a Municipal body under a mistake of law had sent demands to a railway company for only one third of the sums legally due. The error continued for four successive years. In the fifth year the overseers took steps to recover the amounts unpaid. The company set up an estoppel based on the contention that the company had acted on the statements sent to them and had paid out the money in dividends ; but the estoppel was disallowed. In the case of *Anctil v. Manufacturers' Life Insurance Co.,* a question arose in reference to a condition in a policy of life assurance which provided for the policy becoming incontestable on any ground if the same should have been in force for a year, the premiums having been promptly paid. The policy was attacked on the ground of a lack of insurable interest within the meaning of the civil Court of Lower Canada. The condition was relied on and estoppel was pleaded but was not allowed. Lord Watson in delivering the judgment of the Privy Council observed on this point, concurring in the opinion expressed by the majorities of the Supreme Court of the Superior Court sitting in review :

> The rule of the Code appears to them (i. e. their Lordships) to be one which rests upon general principles of public policy or expediency, and which cannot be defeated by the private convention of the parties.

10. More recently in *In re A Bankruptcy Notice,* a similar point arose in reference to the Deeds of Arrangement Act, 1914. The main question was whether a party could be estopped by a letter of assent acted upon by the recipient from contending that a certain agreement was void for want of registration. Various points were involved, but it is to be noted that Lord Atkin (then Atkin, L. J.) at p. 97 remarked:

> Whatever the principle may be (referring to a contention as regards approbation and reprobation), it appears to me that it does not apply to this case, for it seems to me well established that it is impossible in law for a person to allege any kind

> of principle which precludes him from alleging the invalidity of that which the statute has, on grounds of general public policy, enacted shall be invalid.

11. A statement made by Lord Shaw of Dunfermline in a case, Bradshaw y. M'Mullan., , supports the same view. It should, be added that as regards estoppel by deed it was long ago held that if the deed were executed in contravention of a statute there could be no estoppel. The, leading case, is *Doe d. Chandler v. Ford, (1835) 3 Ad and Ell 649=5 N and M 209=1 H and W 378=5 LJ KB 25*. The Supreme Court appears to have attached great, if not decisive, weight to the decisions of English Courts in relation to the Companies Acts and in particular in relation to the effect of Section 25 Companies Act, 1867. That unfortunate section led to much injustice and was finally repealed in 1900; but it was not so worded as to cause the disastrous results which would, nave followed from a decision that the section precluded a purchaser in the market of shares purporting to be fully paid by certificates under the seal of the company from relying on the certificates. The leading case was that in *Burkinshaw v. Nicolls*and Lord Cairns in making the leading speech was careful to point out that the purchaser of the shares was not violating the terms of the statute. At p. 1017 Lord Cairns observed as follows :

> He comes before the Court not in any way affecting to break in upon the enactment which I have read. He says: I bow to the words of the enactment. I have not in any way attempted, to interfere with it, "but I have taken, in the course of business, a share in regard to which I have the representation of the company that that section has been complied with.'

12. Lord Cairns went on to point out that the whole of the dealings with shares in public companies would be paralysed if, a share being dealt with in the ordinary course of business in the market with a representation upon the certificate by the company that the while amount of the share had been paid, the purchaser was hound to disregard the assertion of the, company and must embark on what might be a most difficult investigation as to the mode in which the section had been complied with. It is therefore plain, that the House of Lords decided the case on the view that the estoppel in question was not an attempt in any way to break in upon the terms of the enactment. In the later, cases such as *Bloomenthal v. Ford,* the contrary was not even suggested. In comparing the facts of the present case and those which existed, in *Burkinshaw v. Nicolls,* it may be desirable to note that in the present case, as above pointed out, the appellants, are acting in direct violation, of the statute, if they do not collect and receive from the respondents the amount remaining due, whilst in the latter; case a duty was not imposed on the company under Section 25 to recover in

cash from the shareholder the full amounts of the shares in cash. It must be remembered that the amounts paid up on shares generally depend on calls duly made and that shares are constantly transferred from one shareholder to another. In these circumstances Section 25 makes no attempt to affix a duty upon the company to exact payment from specific shareholders. In truth the position of a shareholder is very widely different from that of a purchaser of electric energy who is bound by such a statute as the Public Utilities Act of New Brunswick.

13. Their Lordships having thus arrived at the conclusion, that estoppel, is not open to the respondents for these reasons, which are in effect the same reasons as those given by Richard, J. in the King's, Bench Division on this part of the case, it becomes unnecessary for them to express an opinion as to other ground on which the appellant have challenged the estoppel. As above, pointed out, the, agreed facts are of a very unusual character and the diligence, of counsel was unable to find any authority in which the invalidity of estoppel was held to turn on the circumstance that the course of conduct induced induced by the representation was not that intended, to be caused by the person making the representation. The question must to a great extent on a consideration of the numerous authorities referred to in the Canadian Courts. On the whole it seems to their Lordship's are of opinion course will be to leave this part of the case undecided so far as they, are concerned, and they propose to express no opinion on it, For the reasons above given their Lordships are of opinion that the appeal succeeds, and that the judgment of the Appeal Division of the Supreme Court of New Brunswick and of Richards, J. ought to be restored with costs here and below. Their Lordships will humbly so advise His Majesty.

Appeal allowed.

Cases Referred.

(1875) 10 CP 307 =44 LJ CP 109=31 LT 785=23 WR 747 at p. 316.

(1875) 10 CP 307 =44 LJ CP 109=31 LT 785=23 WR 747

(1899) AC 604=68 LJ PC 123=81 LT 279

(1924) 2 Oh 76=93 LJ Ch 497=131 LT 307=68 SJ 458=1994 B and Cr 188

(1920) 2IR 412=54 ILT 109 ILT 109 , at p, 425

, (1878) 3 AC 1004=48 LJ Ch 179=39 LT 308=26, WR 819

(1897) AC 156=66 LJ Ch 253=76 LT 205=45 WR 449

(1878) 3 AC 1004=48 LJ Ch 179=39 LT 308=26,WR 819