IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2005-404-7348

UNDER	the Public Works Act 1981
BETWEEN	JANICE AILEEN BENNETT, GILLIAN MADGE CLARK AND ROSALIE HILDA MAITLAND Plaintiffs
AND	WAITAKERE CITY COUNCIL First Defendant
AND	WAITAKERE PROPERTIES LTD Second Defendant

Hearing: 26 February 2007

Appearances: C R Carruthers QC and P Cassin for Plaintiffs to oppose
M Casey and G R Milner-White for Defendants in support

Judgment: 14 May 2006 at 3:00pm

JUDGMENT OF WILLIAMS J

This judgment was delivered by
Hon. Justice Williams
on
Monday, 14 May 2007 at 3:00pm
pursuant to Rule 540(4) of the High Court Rules

……..
Registrar/Deputy Registrar
Date: ……...

A The application for review of Associate Judge Faire's judgment of 19 October 2006 is dismissed.

B Leave reserved as set out in para [100]

C Costs are to be dealt with as in para [101]

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Introduction and issue

[1] The Public Works Act 1981 ("the 1981 Act") , s 40 requires land held for public works but no longer required for such to be offered back to former owners. It has had a vexed and litigious history.

[2] This case - and six others raising near-identical issues – revolves around whether the defendants ("Waitakere City") have a legal obligation under s 40 to offer

back to the various plaintiffs land on the Te Atatu peninsula, acquired from the plaintiffs or their antecedents for public works but no longer required for such works.

[3] Waitakere City applied to strike the proceedings out on the basis that s 40 was inapplicable.

[4] In a reserved decision delivered on 19 October 2006, Associate Judge Faire dismissed the striking-out application.

[5] Waitakere City applied to review the Associate Judge's decision. This judgment deals with that application.

Striking-out principles

[6] The striking-out application was brought under both RR 186 and 477. The approach to the jurisdiction to striking out a pleading under R 186(a) or a proceeding under those Rules is well-settled. All allegations in the statement of claim are assumed to be admitted or be capable of proof. The pleading is then considered against the test of deciding whether, on material which can be properly considered, it has been shown that it is so clearly untenable in fact and law as to be incapable of success. That test has been set by the Courts as being deliberately difficult to attain to preserve citizens' access to Courts. The discretion is to be exercised sparingly and in clear cases only. Pleadings or proceedings may be struck out even though such applications raise difficult questions of law requiring extensive argument provided the Court can be persuaded that the claim is unsound, the pleading cannot be amended satisfactorily and such an order will obviate the necessity for trial (*Peerless Bakery Ltd v Watts* [1955] NZLR 339; *McKendrick Glass Manufacturing Co Ltd v Wilkinson* [1965] NZLR 717; *R Lucas & Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR 289; *Takaro Properties Ltd v Rowling* [1978] 2 NZLR 314; *Gartside v Sheffield Young & Ellis* [1983] NZLR 37; *South Pacific Manufacturing Co Ltd v NZ Security Consultants & Investigations Ltd* [1992] 2 NZLR 282).

Background: Facts and Statute

[7] Since it was not challenged, it is convenient to take the necessary factual and statutory background from Associate Judge Faire's judgment, together with his crystallisation of the parties' respective stances in relation to the claim:

> [7] Mr Casey summarised the important allegations of fact from the plaintiffs' statement of claim as follows:
>
> a) The Auckland Harbour Board [("AHB")] purchased the properties on the Te Atatu Peninsula, which are the subject of the plaintiffs' claims, in the 1950s pursuant to the Public Works Act 1928. The Auckland Harbour Board purchased and held this land in anticipation of developing an upper [harbour] port facility, being proposed harbour works and a public work purpose;
>
> b) Some time prior to the Public Works Act 1981 commencing on 1 February 1982 the Auckland Harbour Board no longer had a public work purpose for the land, nor was the land held for any alternative essential work purpose;
>
> c) The plaintiffs are the successors, for the purposes of s 40(5) of the Public Works Act 1981, and therefore the plaintiffs' claim the Auckland Harbour Board had an obligation to offer them back the land under s 40 of the Public Works Act 1981, within a reasonable time, said to be eighteen months of 1 February 1982, namely 1 August 1983; and
>
> d) The land passed to the first defendant Council, following the abolition of the Auckland Harbour Board and local authority reorganisation in the late 1980s. The plaintiffs claim that the Council is liable for the Auckland Harbour Board's alleged failure to comply with its obligations to offer the land back in 1982/83.
>
> [9] The plaintiffs rely on s 40 of the Public Works Act 1981. That section has undergone a series of amendments since 1 February 1982. Currently s 40 provides as follows:
>
> **40 Disposal to former owner of land not required for public work**
>
> (1) Where any land held under this or any other Act or in any other manner for any public work—
>
> (a) Is no longer required for that public work; and
>
> (b) Is not required for any [other public] work; and
>
> (c) Is not required for any exchange[1] under section 105 of this Act—

[1] To avoid repetition of all alternatives throughout this judgment, reference to the criteria in, first, s 40(1)(a)(b),unless expressed otherwise is to be deemed to include the less frequent exchange for which s 40(1)(c) provides and, secondly, references to local authorities are to be deemed, where appropriate, to include reference to the chief executive of the department as mentioned in s 40(1) (2) (2A) and (4). Since the Cadastral Survey Act 2002 repealed the Survey Act 19896, the s 40(1)(c)

the [chief executive of the department within the meaning of section 2 of the Survey Act 1986] or local authority[1], as the case may be, shall endeavour to sell the land in accordance with subsection (2) of this section, if that subsection is applicable to that land.

(2) Except as provided in subsection (4) of this section, the [[chief executive of the department within the meaning of section 2 of the Survey Act 1986]] or local authority, unless—

(a) He or it considers that it would be impracticable, unreasonable, or unfair to do so; or

(b) There has been a significant change in the character of the land for the purposes of, or in connection with, the public work for which it was acquired or is held—

shall offer to sell the land by private contract to the person from whom it was acquired or to the successor of that person—

(c) At the current market value of the land as determined by a valuation carried out by a registered valuer; or

(d) If the [[chief executive of the department within the meaning of section 2 of the Survey Act 1986]] or local authority considers it reasonable to do so, at any lesser price.

(2A) If the [[chief executive of the department within the meaning of section 2 of the Survey Act 1986]] or local authority and the offeree are unable to agree on a price following an offer made under subsection (2) of this section, the parties may agree that the price be determined by the Land Valuation Tribunal.

(3) Subsection (2) of this section shall not apply to land acquired after the 31st day of January 1982 and before the date of commencement of the Public Works Amendment Act (No 2) 1987 for a public work that was not an essential work.

(4) Where the [chief executive of the department within the meaning of section 2 of the Survey Act 1986] or local authority believes on reasonable grounds that, because of the size, shape, or situation of the land he or it could not expect to sell the land to any person who did not own land adjacent to the land to be sold, the land may be sold to an owner of adjacent land at a price negotiated between the parties.

(5) For the purposes of this section, the term successor, in relation to any person, means the person who would have been entitled to the land under the will or intestacy of that person had he owned the land at the date of his death; and, in any case where part of a person's land was acquired or taken, includes the successor in title of that person.

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reference presumably now is intended to relate to the chief executive or the Surveyor-General, though the statutory annotations do not as yet say as much.

[9] Two amendments to s 40 must be recorded. The Public Works Amendment Act 1982 was enacted and came into force on 1 November 1982. It introduced the present s 40(2) and (2A). As a consequence, it repealed s 40(2). Section 40(2) formerly provided as follows:

> Except as provided in subsection (4) of this section, the Commissioner or local authority shall, unless he or it considers that it would be impractical, unreasonable, or unfair to do so, offer to sell the land by private contract to the person from whom the land was acquired or to the successor of that person, at a price fixed by a registered valuer, or, if the parties so agree, at a price to be determined by the Land Valuation Tribunal.

[10] The Public Works Amendment Act (No 2) 1987 omitted the words *essential* and substituted the word *public* in a number of sections in the Public Works Act 1981. In respect of s 40 it omitted from paragraph (b) of subsection (1) the word *essential* and substituted the words now appearing there *other public works.* It repealed subsection (3) and introduced the current subsection (3). Section 40(3) had formerly provided as follows:

> Subsection (2) of this section shall apply only in respect of land that was acquired or taken –
>
> (a) before the commencement of this part of this Act; or
>
> (b) for an essential work after the commencement of this part of this Act.

[11] For completeness sake I refer also to s 42(1) of the Public Works Act 1981. Section 42(1) provides:

> **42 Disposal in other cases of land not required for public work**
>
> (1) Where—
>
> (a) Any offer to sell land under section 40(2) of this Act has not been accepted within 40 working days or such further period as the [chief executive of the department within the meaning of section 2 of the Survey Act 1986] or local authority considers reasonable; or
>
> (b) Any land is no longer required for a public work and subsections (2) and (4) of section 40 of this Act do not apply,—
>
> the [chief executive of the department within the meaning of section 2 of the Survey Act 1986] or local authority may—
>
> (c) Cause the land to be offered for sale to the owner of any adjacent land at a price fixed by a registered valuer; or
>
> (c) Cause the land to be offered for sale by public auction, public tender, [private treaty,] or by public application at a specified price.

…

[13] Although the background does not set out, in its entirety, the steps through which ownership of the land passed, counsel were agreed that the above summary is sufficient to identify the precise issue raised by this application. …

The defendants' submission

[14] The defendants say that they, as the successor of the Auckland Harbour Board and the party responsible for the Auckland Harbour Board's obligations, are under no obligation to offer the land back under s 40 of the Public Works Act 1981. That is because:

(a) The land was not, on the coming into force of the Public Works Act 1981, held *for any public work* or any *essential work* or currently for any *other public work;* and

(b) For the purposes of the facts in this case, s 40 of the Public Works Act 1981 does not apply to land which had ceased to be held by the local authority for any public work at the time s 40 came into force, namely 1 February 1982.

…

The plaintiffs' submission

[16] The plaintiffs' case is founded on the submission that s 40 of the Public Works Act 1981 is said to impose a statutory obligation on the Auckland Harbour Board and, as a result of the local authority reorganisation in the late 1980s, the current first defendant, to offer back the land in issue which was acquired under the Public Works Act 1928 and which was no longer required for a public work when the Public Works Act 1981 came into force on 1 February 1982. The plaintiffs' position is that the position must be judged at the time the Public Works Act 1981 came into force.

The issue in this proceeding

[17] When the defendants' and plaintiffs' submissions are considered, the issue can be expressed as follows:

> Can land be said to be held for any public work on 1 February 1982 if at that date it was not required for any of the matters referred to in (a), (b) and (c) of s 40(1) of the Public Works Act 1981?

Judgment under review

[8] Then, after discussing *Hood v Attorney-General* (CA16/04 2 March 2005) where the matter now in issue was raised but not directly decided, and those appellants' unsuccessful application for leave to appeal to the Supreme Court (*Hood v Attorney-General* [2005] NZSC 53) followed by reference to the Interpretation Act 1999, ss 4 –7, the Associate Judge dissected s 40:

> [33] Whether s 40 applies to a particular piece of land depends on whether the land falls within the requirements of that section. On analysis they are:
>
> a) The land is held for any public work;
>
> b) It is held under the Public Works Act 1981 or any other Act;
>
> c) The land is no longer required for the public work for which it is held (ie that public work);
>
> d) The land is not required for any essential work, and after the Public Works Amendment Act (No 2) 1987 the land is not required for any other public work;
>
> e) The land is not required for any exchange;
>
> f) It would not be impracticable, unreasonable or unfair to offer to sell the land back; and
>
> g) After the Public Works Amendment Act 1982 that there has been no significant change in the character of the land for the purposes or, or in connection with the public work for which it was acquired or is held.

[9] The Associate Judge then summarised counsel's submissions, giving particular attention to Mr Casey's submission that because s 40 is expressed in the present tense, the enquiry should be whether the land is held for a public work but is no longer required for the same.

[10] The Associate Judge then dealt with counsel's submissions based on *Hansard* and the wording changes undertaken during the 1981 Act's passage to reach the conclusion (at [39]) that Waitakere City's contention that "*being held* and being *no longer required* are mutually exclusive" (italics in judgment) could not be upheld

because "s 40(1) operates on the assumption that the land can be both at one time". Thus (*ibid*):

> That leads me to the conclusion that when the text is analysed, the land can still be classified as being held for public works even where it is no longer required for public works. In short, the two positions are not mutually exclusive. Indeed, when s 40 is broken down into its constituent elements, as I have set out in [33] of this judgment, it is clear that, for the section to apply, land must be both held for a public work and, at the same time, be no longer required for that public work.

[11] Mr Casey was critical of the Associate Judge's conclusion because, he submitted, it missed the main point of the defendants' argument, namely that s 40(1) imports a temporal sequence by the use of the term "no longer", rather than a contemporaneous state of affairs. That would have required use of different wording.

[12] The Associate Judge then turned to Mr Casey's argument that though s 40(3) permitted the section to apply to land acquired before the Act came into force, the otherwise retrospective effect of the section should be limited so land required for public work was inapplicable if the requirement was earlier than 1 February 1982. The Associate Judge declined (at [44]) to accept that argument on the basis that in *Attorney-General v Morrison* [2002] 3 NZLR 372, the Court of Appeal held the point at which land should be valued for s 40 purposes was the time when the obligation to offer back arose, plus a reasonable period to make a decision. Further, the possibility of a long term lease over land to which s 40 applied might mean it was "impracticable, unreasonable or unfair" to offer the land back (at [45]).

[13] The Associate Judge then also held the Auckland Harbour Board and Waitemata City Council (Te Atatu) Empowering Act 1983 had not impliedly repealed s 40.

Submissions

[14] Mr Casey summarised his argument in the following propositions:

a) The land was not "land held for any public work" on 1 February 1982 when the Act came into force and s 40 was accordingly inapplicable whether or not "held" and "no longer required" were mutually exclusive. Before 1 February 1982, the AHB no longer had a public work purpose for the land, so it had already ceased to be held for such work.

b) Section 40 only applied to "land held … for any public work" on 1 February 1982 and such was not the case here, even though s 40 could apply to land acquired under the Public Works Act 1928 for a public work.

c) The triggering event under s 40 is that the land "is no longer required" for any public work. That, Mr Casey submitted, was in the future tense and did not simply say that s 40 operated if land was both held for and was not required for a public work.

d) Where what Mr Casey called the "triggering event" occurred before 1 February 1982, s 40 had no application. The relevant date was the date the land was no longer held for a public work, not any continuing state which may have existed at 1 February 1982.

e) Section 40 applies to land owned by any public authority which could have dealt with the land before 1 February 1982. The effect of the 1983 Empowering Act was to confirm s 40's inapplicability or to impliedly repeal it as far as it might have applied to land within the scope of the Empowering Act.

[15] Elaborating, Mr Casey noted the offer back provisions of s 40 were changed from the comparable provisions of s 35 of the 1928 Act which empowered disposal of land surplus to public works but not necessarily to former owners. He drew attention to changes made to the 1981 Act as it passed through Parliament. He also detailed changes to s 40 since 1981, in particular the 1982 enactment of s 40(2)(b) and the 1987 substitution of "any other public work" for "essential work" in s

40(1)(b). The latter, he submitted, was of particular relevance to the defendants' retrospectivity argument and the discussion in *Hood*.

[16] Mr Casey produced a list of six possible factual situations all assuming land was acquired for public work under the 1928 Act. They were continued holding for that purpose beyond 1982; change to another public work or an essential work before 1982; a change to not holding the land for a public work for a period before 1982 but being again held for that purpose before and after that date; a change to not holding the land for a public work before 1982 where that situation continued to the present; and holding for a public work with change to an essential work and that purpose ceasing before 1982.

[17] He then sought to apply each of those different factual circumstances to the wording of s 40, submitting the key was not the purpose of the original taking or the circumstances of any change in purpose, but merely consideration as to whether it was held for a public work and was no longer required for that work, that is to say in both instances emphasising what he submitted was the present tense.

[18] After analysing the decision in *Hood* and the other cases under s 40 – an exercise requiring to be undertaken later in this judgment – Mr Casey submitted that while s 40 applied to land acquired before it came into force, it was not to be given greater retrospective effect by applying it to land which was not subject to the section as at 1 February 1982 or where the "triggering event" under s 40 applied before that date. That, he submitted, would offend against the principle that statutes are not to have retrospective operation unless their terms are clear or necessary implication requires such a construction (*Board of Management of the Bank of New Zealand Officers Provident Association v McDonald* CA 244/01 23 April 2002, *Accident Compensation Corporation v Thimbleby* HC WN AP 41/02 5 August 2002 Goddard J, upheld on appeal *Thimbleby v ACC* CA43/03 12 May 2004). Relying also on the Interpretation Act 1999, s 17 provision that existing rights are not affected by repeal, Mr Casey submitted the question was whether a public authority such as the AHB, having had rights to deal with the land under the 1928 Act without s 40 constraints, was to have those rights affected retrospectively by the section. He made the point that s 35 of the 1928 Act did not oblige authorities holding land for

public works to sell at any particular time. Harbour Boards, in particular, could subdivide such land, lease it, or use it for non-public work purposes (Harbours Act 1950, s 143B enacted by the Harbours Amendment Act 1977, s 26). Local authorities holding such land were not obliged to assess likely requirements for it.

[19] Then, as introduced to Parliament, the Public Works Bill initially included no more than an option for land to be offered to the original owner if it had been held for public work at any time and was no longer required therefor. It was altered as a result of submissions at the Select Committee stage from "where any land held at any time … for any public work" to "where the land was acquired by, or under threat of, compulsion" in the 1981 Act, and then, in 1982, to "public work for which it was acquired or is held" in s 40 (2)(b).

[20] Mr Casey submitted that the AHB's right to deal with land acquired for a public work but no longer required for the same was, prior to 1 February 1982, subject only to other statutes which affected its fee simple title. Thus, giving s 40 what Mr Casey submitted was a retroactive operation would have limited AHB's rights and thus offended against the Interpretation Act 1999, s 17, and the decision of the Court of Appeal in *Waitemata District Health Board v Sisters of Mercy* [2002] 3 NZLR 764. The land acquired in 1956 from the Sisters of Mercy for the purposes of the North Shore Hospital was initially held by the Auckland Hospital Board and then by the Auckland Area Health Board. The latter was abolished in 1993 and the land transferred to a Crown Health Enterprise. That in its turn was dissolved in 2001 and its property vested in the Waitemata District Health Board. The Sisters of Mercy Trust Board claimed the Auckland AHB breached its obligation under s 40 to offer the land back to it no later than 1996/97 as the land was no longer required for the purpose for which it was taken. The Waitemata DHB applied to strike out the claim on the basis that s 40 did not apply to the land between 1993 and 2000, partly because the Health Sector (Transfers) Amendment Act 2000 precluded the Trust Board's claim as long as the Waitemata DHB held the land for its purposes. Clause 3 of the First Schedule to that Act provided that s 40 did not apply to "public work land", land owned by a transferee that was subject to s 40 in 1993 and had been transferred under the Health Sector (Transfers) Act 1993, as long as the land was held by a transferee for its purposes, irrespective of whether they were the purposes

for which it had been acquired under the 1998 Act or any earlier Act. Subcl (3) provided that if any public work land was not held or transferred under subs (2), s 40 of the 1981 Act applied as if the land were owned by the Crown but any sale proceeds were to be applied for the purpose of the transferee who owned the land immediately before sale and, when that applied, the land-owning transferee could sell the land to any person on such conditions as it thought fit within 40 days following an offer made under s 40(2) of the 1981 Act, the parties having neither agreed on a price nor that it be determined by the Land Valuation Tribunal or s 40 was inapplicable.

[21] The Sisters of Mercy Trust Board contended that if s 40 was triggered before the Crown Health Enterprise was dissolved, its right to have the land offered back to it under s 40 came into play unaffected by the Health Sector (Transfers) Act 1993.

[22] Considering whether the 2000 provision meant a claim for existing offer back rights was precluded, the Court of Appeal held (at 769-770 paras [12]-[14]):

> [12] To answer that question we go directly to the provisions of the 2000 amendment and begin with its primary operative provision in subcl (2). The buy-back provisions of the 1981 Act do not apply to public work land so long as:
>
> - it is held by a transferee (which the DHB is); and
> - for its purposes (and the parties agree that it has been so held since 2 January 2001); and
> - even if those purposes differ from those for which the land was acquired initially
>
> or in certain other circumstances with which we are not directly concerned.
>
> [13] According to subcl (1), "public work land" means land that:
>
> - on 10 May 1993 (the day before the 1993 provision came into force) was subject to ss 40-42 of the 1981 Act;
> - has been transferred by or under the Act on one or more occasions; and
> - is owned by a transferee.
>
> [14] No issue arises about the first and second matters. This land, held by the area health board until 1 July 1993, was subject to ss 40-42 of the Public Works Act on 10 May 1993, and on 1 July 1993 the land was transferred under the 1993 Act from the area health board to the CHE. The third element, in temporal sequence, is that the land is owned by a transferee. We say "in temporal sequence", first, because of the use of the present tense ("is") which is to be contrasted with the past tenses in the other two elements and, secondly, because "transferee" has a new definition as from 1 January 2001 when the new version of cl 3 became part of the law. …

[23] It having concluded that the 2000 Amendment did not override existing rights for that and other reasons, the Court of Appeal dealt with the principle against retrospectivity in the following passage (at 771, paras [20] and [21]):

> [20] Finally, if there were any doubt about the matter, the principle of non-retrospectivity would defeat the DHB's argument. Section 7 of the Interpretation Act states the presumption that "[a]n enactment does not have retrospective effect". That proposition is given greater precision in s 17(1)(b): "[t]he repeal of an enactment does not affect … [a]n existing right, interest, title, immunity, or duty."
>
> [21] The High Court, this Court and the Privy Council have discussed the nature of the right of the original owner under s 40. We see no reason to add to that discussion, preferring once again to keep simply to the terms of s 40 (see *Attorney-General v Hull* [2000] 3 NZLR 63 at para [49]). There can be no doubt, and this was not really disputed before us, that an original owner has a right to the offer-back under s 40 when its terms are satisfied. That "right", accepting for the moment the allegations in the second amended statement of claim, "exist[ed]" at the point when the 2000 enactment was passed and, if there were any suggestion that that enactment might have retrospective application, there would be a good argument that the principle in s 7 and the specific terms of s 17(1)(b) would protect the "existing right" of the original owner. Given the clarity, as we see it, of the terms of the 2000 amendment we need not get near to that point. There is no possible argument that the terms of the 2000 amendment or the context require that it be given retrospective effect contrary to ss 7 and 17(1)(b) in any way.

[24] Mr Casey reasoned those passages applied in the present case because the verbs in s 40(1) were, he said, in the present tense, s 40 does not say it applies to events occurring before its enactment, the "temporal sequence" passage was the reverse of this case and the s 40(2)(3) established procedures could not have operated before 1 February 1982 as they did not then exist.

[25] Mr Casey next submitted:

> No local authority before 1982 would have known or foreseen that unless it undertook in a timely manner whatever might later be enacted as the requirements on it once it first had no public work purpose for the land, it would have no ability to do anything with the land other than to offer it back to its former owners once 1982 came around. This would be so, according to the plaintiffs' interpretation, even if it allowed the land to become committed for other uses, or found it later had a public work purpose.
>
> … For example, the local authority or Crown agency may have built a large industrial or commercial building on the land and leased it out or used the land itself for industrial, commercial or other uses. Worse still, if the land had been sold, it would still be covered by the section according to the

plaintiffs' interpretation i.e. it was (had been) land held for a public work for which it had become no longer required.

[26] He made the point that under the 1928 Act there was no obligation on a public authority to sell land no longer required for public works, nor to consider what alternative public work use may be required for the land by it or any public authority. So the only constraints on its freedom of action were those in any directly relevant legislation. He suggested that, if the offer back obligation was that the s 40 circumstances arose prior to 1982, then all the circumstances giving rise to the obligation should be assessed as at the date that occurred, the plaintiffs could not say that s 40(1)(a) applied retrospectively and s 40(1)(b) applied only from 1 February 1982. Both applied from that date or both applied retrospectively.

[27] With reference to the 1982 amendment to s 40(2), Mr Casey submitted the amendment did not cover the situation where a change in character occurred as the result of use of the land other than for a public work because it is only since 1982 that there has been no ability to use the land for other purposes.

[28] Under the Harbours Act 1950, Mr Casey submitted AHB was empowered to lease land for which it had no public work purpose. That applied before 1 February 1982. He therefore submitted s 40 could not have been intended to apply to land so leased and it was incorrect for the Associate Judge to hold that situation was covered by s 40(2).

[29] Mr Casey's next submission was that the 1983 Empowering Act expressly dealt with the land the subject of this claim and gave the AHB power to grant to (now) Waitakere City licences to permit the land to be used to investigate its development and power to lease the land, and enlarged Council's powers to enable it to "promote the development, subdivision, and leasing of the land". However, it is noted that s 6 of that Act provided that, apart from those express provisions, it did not affect other statutes, including the Harbours Act.

[30] Mr Casey submitted that if s 40 had been intended to apply to the land the subject of this claim, Parliament would not have enacted the 1983 Empowering Act

since it permitted commercial development for purposes which were not public or essential works.

[31] He additionally submitted the 1983 Empowering Act impliedly repealed s 40 as far as it may relate to the land subject to this claim and was wholly inconsistent with any offer-back obligation under s 40, relying on *Goodwin v Philips* (1908) 7 CLR 1, 7 per Griffith CJ, where the following appears:

> … where the provisions of a particular Act of Parliament dealing with a particular subject matter are wholly inconsistent with the provisions of an earlier Act dealing with the same subject matter, then the earlier Act is repealed by implication. … Another branch of the same proposition is this, that if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act.

[32] For the plaintiffs, Mr Carruthers QC summarised his submissions in the proposition that Waitakere City assumed that where land had been acquired for a public work under the 1928 Act but then decided it was no longer required for that work, it could use the land for some other purpose. That assumption, he submitted, was wrong because under the 1928 Act land no longer required for the purpose for which it had been acquired could only be retained or disposed of under s 35 or held for another public work under the Public Works Amendment Act 1952 s 20. The result, he said, was that over the years local authorities had "land banked" land originally acquired for public purposes but no longer needed for such. The debates on the 1981 Bill and the terms of the Act were specifically designed to end that practice.

[33] As found by the Associate Judge, Mr Carruthers submitted the straightforward position was that on s 40 coming into force land acquired for a public work and no longer required for that purpose was to be offered back to those from whom it was acquired or their successors.

[34] As the Associate Judge found, "held" and "no longer required" are not mutually exclusive because under s 40(1) land held under the section can simultaneously satisfy both requirements. He submitted the purpose of ensuring the return of "land banked" land could only be achieved by applying s 40 to all land

acquired under the 1928 Act which became no longer required for the original public work, whether before or after 1 February 1982. Land acquired under the 1928 Act did not cease to be held for the public work for which it was acquired merely because the land was no longer required for that purpose because it could only be dealt with in accordance with the limited powers in that Act. So, applying s 40 to the land subject to this action was not retrospective but merely the application of a statutory division to a state of affairs subsisting at its commencement or arising thereafter.

[35] Mr Carruthers relied on the Interpretation Act 1999 ss 5 and 6 and the Acts Interpretation Act 1924 s 5(d), the "always speaking" provision in force when the 1981 Act was passed. Those provisions, too, supported the plaintiffs' interpretation which did not and would not affect rights vested in them. The plaintiffs' interpretation conformed, too, he submitted, with *Hood*.

[36] There could be no doubt, he submitted, that the land subject to these claims was "held" by the AHB under the 1928 Act since there was no other justification for it acquiring and holding the land. Waitakere City subsequently acquired the land by the course earlier set out and was subject to the AHB's obligations.

[37] Mr Carruthers referred to the Parliamentary Debates on the 1981 Bill which, he submitted, supported the interpretation for which the plaintiffs contended, that history also being summarised in *Hood*. That meant that the mischief at which s 40 was directed was to stop local authorities "land banking" land acquired for public purposes but no longer required for the same and ensuring, as far as practicable, that the land be offered back to original proprietors or their successors. That was graphically illustrated, he suggested, by considering the different outcomes which would ensue on the defendants' argument according to whether the land in question became no longer required for the original public work purpose, just before and just after 1 February 1982. The plaintiffs' interpretation also, he suggested, conformed with the authorities on s 40.

[38] The purpose of the 1987 Amendment, Mr Carruthers submitted, was to exempt from the offer back provision land which had been acquired for non-essential

work during the period since the 1981 Act had been in force, a period when compulsory acquisition was not available for non-essential works.

[39] On the Harbours Act 1950, Mr Carruthers submitted that AHB's power to deal with the land was limited by the 1928 Act. He particularly stressed the lack of power to subdivide. As it was no longer holding the land for the original public work purpose, AHB became subject to s 40 on 1 February 1982, well before the 1983 Empowering Act came into force. The latter, he said, was never implemented in any way relevant to the present cases and, even if it had, the limited powers in the Act were not such as to cancel the offer back obligation, even if transferees under s 40 received the land subject to any lease or licence AHB may have granted (though none were). That construction, he suggested, accorded with s 6 of the 1983 Empowering Act which ensured AHB's proprietorship of the land remained subject to its limited powers in the Harbours Act 1950.

Discussion

(1) General

[40] This being essentially a review application focused on ascertaining Parliament's intention as expressed in s 40 – or, more precisely, whether the Associate Judge was wrong not to strike out the claim because of an erroneous construction of that section - it is proposed to address that question:

a) by construing the terms of s 40 and tentatively reaching a view as to Parliament's intention as embodied in the present text;

b) then to consider whether those tentative conclusions require modification having regard to :

i) changes that occurred in the text of the section between 1981-1996, the year of the most recent amendment;

ii) in light of the terms of the 1928 Act;

iii) briefly in light of comments made during the Parliamentary debates on the 1981 Bill;

iv) in light of precedent decisions on s 40

v) in light of other legislation, particularly the Harbours Act 1950 and the 1983 Empowering Act.

c) to measure the ultimate conclusion against Associate Judge Faire's conclusion in order to assess whether Waitakere City has shown the Associate Judge's decision to be wrong.

(2) Construing the present text of s 40

[41] Construing the present text of s 40 – and, indeed, the text as enacted in 1981 – makes clear the purpose for which Parliament passed it.

[42] Parliament's intention was to impose a continuing obligation on any on local authority which had or has acquired land by any means for a public work but no longer required or requires it for that or any other public work to try to sell the land back to those from whom it was acquired or their descendants in accordance with the formulae set out in the section. No such re-sale obligation arose or arises in the various circumstances in the section, including if the local authority considered or considers it "impracticable, unreasonable or unfair" to re-sell or there has been a "significant change in the character of the land for the purposes of, or in connection with, the public work for which it was acquired or is held".

[43] Perusal of the Parliamentary debate on the 1981 Bill shows that, even in its original form, s 40 was intended to terminate the "land banking" which had occurred on the part of local authorities since the 1928 Act and to require them to sell land so "land banked" back to those from whom it had been acquired or their successors if the s 40 criteria applied. As a matter of fairness, those from whom land had been acquired by any means for public work purposes or their descendants were to have the opportunity to re-acquire land acquired by those local authorities for a public

work but no longer required for that or any other public work at current market value or at a lesser price calculated in accordance with s 40(2)(d) before the local authority was at liberty to sell the land to any other persons and at any other price.

[44] Seen in that light, the fulcrum of s 40 is on the sale of land by local authorities which qualifies under the section by the means for which the section provides. The other provisions of the section, particularly those of subs (1) and subs (2)(a)(b) are statutory prerequisites to the re-sale obligation arising.

[45] The first of those prerequisites and, as the review of counsel's submissions demonstrates, one of importance in these cases, is where the land is "held under this or any other Act or in any other manner for any public work".

[46] "Held" in that phrase must be taken in its dictionary definition as the past participle of "hold" and thus to be used in its dictionary sense of "to own, have as property" or "to keep, preserve, retain, not to lose, let go, part with" (*Oxford English Dictionary* 2nd ed Vol.VII p 296), that is to say, it refers to the local authority's continuing ownership of the land following acquisition.

[47] Then, the holding of the land must be for a "public work" as defined in s 2 of the 1981 Act with the intervening phrase intended to avoid any limitation arising out of the manner of the land's acquisition, including whether the acquisition was by way of compulsory purchase or purchase in the ordinary way. Section 40 appears capable of applying to land acquired by a local authority for purposes other than holding for a public work but later declared by the authority to be held for a public work purpose. Indeed, s 40(2)(b) appears directed at that situation.

[48] However, the essence of the first prerequisite is that to trigger the offer back obligation, the local authority must be retaining ownership of the land and it must be held for a public work.

[49] The second qualification is that the land "is no longer required" for that or any other public work or for exchange. That plainly requires the local authority to make three decisions concerning its future use of the land, namely, that it is no

longer required for use for the public work for which it was acquired, nor is it required for any other public work, nor is it required for exchange.

[50] There would appear to be at least two possible factual difficulties in considering when the offer back obligation arises: can a local authority, having made those three decisions, later rescind them and thus rescind the offer back obligation which may have arisen, and does s 40 cast on local authorities a positive duty of regular review of land held by them for public works and decisions as to whether s 40(1)(a)(b)(c) apply to it? As will be seen, these have been addressed in precedent cases.

[51] The third prerequisite to a local authority offering the land back is that, once it has answered the questions posed by s 40(1)(a)(b)(c) "Yes", "No" and "No", then it must consider whether it would be "impracticable unreasonable or unfair" to offer the land back and so decide the offer back obligation is not triggered because there has been a "significant change in the character of the land" – not the easiest phrase to construe – for the purposes of the public work for which it "was acquired or is held" or in connection with that public work.

[52] Mr Casey sought to draw substantial support from the change in tenses in the phrase "was acquired or is held", but all the phrase seems designed to cover is the possibility of a change in the public work purposes for which the land is held over the period between its acquisition and the time at which the local authority must make the decision as to whether there has been a "significant change in the character of the land" associated or connected with the various public work purposes for which it may have been held during the local authority's ownership. Seen in that light, "was" merely fixed the public work purpose which resulted in the acquisition of the land (or the date of any change from one to another public work purpose), while "is held", far from being in the future tense as Mr Casey submitted, is no more than a conventional use of the continuous present, that is to say the holding is still continuing and is not complete in the sense of the required resale being effected.

[53] The local authority must then decide whether the various other qualifications in s 40 apply but since it was not suggested they are of present relevance, no detailed

consideration needs to be undertaken. It needs to be recalled in this context that, in a striking-out application, all the allegations in the claim are to be regarded as provable.

[54] Then, if the result of those decisions is that the offer back obligation is triggered, the local authority must make the offer to sell the land in compliance with s 40(2).

[55] Construed thus, s 40, in the form effectively operative since 31 March 1987, the date the Public Works Amendment (No.2) Act 1987 came into force, has a coherence which matches what would appear to have been Parliament's intention.

(3) Section 40 between 1 February 1982-31 March 1987 (and beyond)

[56] There were several relevant differences between s 40 in its form on 1 February 1982 and 31 March 1987. First. s 40(1)(b) originally spoke of the land being acquired for any "essential work" as that phrase was defined in s 2. Secondly, s 40(3) originally limited the offer back obligation to land that was "acquired or taken" before 1 February 1982 or for an essential work after that date. Thirdly, the amendment to the original form of s 40(3) led to the substitution of the present s 40(2)(b).

[57] Those differences, however, do not affect the coherence of the essential structure of s 40 nor its interpretation, other than applying different criteria and providing an additional step to be satisfied before the offer back obligation arose.

[58] Other amendments in the period under consideration were minor and do not influence the interpretation of s 40.

(4) Public Works Act 1928

[59] The 1928 Act contained provisions empowering the Minister of Public Works or a local authority to enter into contracts or take land for public works on payment of compensation (s 32), and provided a régime in s 35ff for "land held, taken, purchased or acquired" under the Act or otherwise for public works and not

required for the same. By Order-in-Council, the land could be sold and was required to be offered at valuation to the person from whom the land was taken or, if they refused the offer or could not be found, then to adjacent owners and, in default of acceptance, by public auction.

[60] The obligation to offer the land back to former owners was deleted when s 35 was re-enacted by the Public Works Amendment Act 1954 s 4(1).

[61] By the time the 1981 Bill was before Parliament, it was clearly thought that s 35 of the 1928 Act as so substituted was unfair and the position of former owners should again be recognised.

[62] That conveniently brings the Court to the next question.

(5) The 1981 Bill

[63] As introduced, cl 39 of the 1981 Bill (which became s 40) provided that land held, but not required, for a public work should be sold back to persons from whom the land was acquired or their successors or to owners of adjacent land or, then, by public auction but the offer back process was only triggered by a request by the Commissioner of Works or the local authority to the Governor-General and the making of an Order-in-Council consenting to sale.

[64] When the Bill was reported back to Parliament from the Lands and Agriculture Committee, cl 39 was in effect in the terms in which s 40 was originally enacted.

[65] During the debates in Parliament, it is clear from the speeches of the chairman of the Select Committee and the Minister of Works and Development that the overall intention of cl 39 was, to take but one example, (440 NZPD 3165):

> … when land has been acquired by the government or by a local authority for a public work, and subsequently ceases to be required for a public work in respect of which there is a power of compulsory acquisition, the land should be offered back to the original owner, or his representative …"

(6) Judicial consideration of s 40

[66] As mentioned at the outset, s 40 has been much litigated.

[67] In *Auckland City Council v Taubmans (New Zealand) Ltd* [1993] 3 NZLR 361, 365-366 it was held:

> … that the natural meaning of s 40(1) is that where any land held under the Act for any public work is no longer required for that work or any other public work then the provisions of s 40(2) must apply.
>
> …
>
> If the land is still required for a public work there is no power for the council to transfer the land under the 1981 Act …

[68] The mechanism of s 40 was discussed in *Attorney-General v Methodist Church of New Zealand* [1996] 1 NZLR 230, 233-234 in a passage which reflects the earlier analysis in paras [41]-[55]. The former owner's position was described (at 238) as a "right of pre-emption or of first choice". (See also *Auckland Regional Services Trust v Palmer* [1996] 3 NZLR 752, 755).

[69] In *Deane v Attorney-General* [1997] 2 NZLR 180, 191-193, Hammond J reviewed the history of the Crown's power of compulsory acquisition of land and, in reliance on precedent, defined the broad purpose of s 40 as being "vindication of the inchoate rights of the former owner".

[70] In *Rowan v Attorney-General* [1997] 2 NZLR 559, part of the Rowans' land was acquired by the Crown for an intermediate school. It was later declared surplus to requirements but by that stage the plaintiffs had sold the balance of the land. The question for decision was whether it was the Rowans or their transferee who were entitled to have the land offered back.

[71] After referring to the Acts Interpretation Act 1924 s 5(j) and the Parliamentary debates on the 1981 Bill, Smellie J held (at 569) the Rowans were "entitled to the first option to re-purchase the land originally taken from them".

[72] Section 40 was considered by the Privy Council in *Attorney-General v Horton* [1999] 2 NZLR 257. There, land was compulsorily acquired for a coal mine but government policy changed and the project abandoned. Part of the land was then transferred to Coal Corp, a State-Owned Enterprise, with the Crown appointing Coal Corp as its agent to sell the balance of the land or buy it at auction. Though some of the surplus land was offered back by Coal Corp to previous owners, no offer was made in relation to the land the subject of the litigation because Coal Corp had decided it may wish to open a coal mine on it. Holding Coal Corp was obliged to offer the land back to the former owners because there was a period when it was no longer required for a public work, the Judicial Committee observed (at 262):

> The right to an offer vests, subject only to being defeated by the exercise of the discretion conferred by s 40(2)(a) or by the state of facts described in s 40(2)(b). There is no provision for the right being divested simply by a change of mind on the part of the government department or state-owned enterprise.
>
> … If s 40 confers an enforceable right to buy, then Their Lordships consider that when the conditions upon which it comes into existence have been satisfied, it must vest subject only to those grounds of defeasibility expressly stated in the statute.

[73] In *McLennan v Attorney-General* [1999] 2 NZLR 469, 481 Smellie J held the date on which the current market value of land offered back was to be determined was the date of the valid offer back or the date on which such an offer should have been made if there has been

> "a failure to act timeously and with due expedition in all the circumstances of the particular case in determining to make an endeavour to sell the land in terms of s 40(1) and in determining the offer to sell the land in terms of s 40(2)".

(Though on a different point, *McLennan* ultimately went to the Privy Council which appeared to adopt Smellie J's formulation (*McLennan v Attorney-General* [2003] UKPC 25 and the prevalence of litigation on s 40 and its predecessors is evidenced by no fewer than 20 cases on the section being listed in a schedule to the first instance judgment but omitted from the report (at 474-475)).

[74] In *Port Gisborne Ltd v Smiler* [1999] 2 NZLR 695 the land the subject of the litigation was agreed to be sold to the Crown in 1879, vested in the Crown in 1881

and proclaimed to be "waste lands" – lands held for no defined purpose – the same year and thus available for disposal. The land was endowed by statute on the Gisborne Harbour Board in 1884 and transferred to Port Gisborne in 1993 pursuant to the Port Companies Act 1998. In the 1990s Port Gisborne offered it for sale by public tender. Litigation was brought by those claiming to be the successors to the original owners. They unsuccessfully claimed to be entitled to a buy-back offer. As far as is relevant to the present case, the Court of Appeal observed (at 704-706 paras [32]-[35], [37] and [40]):

> [32] For the first time, the 1981 Act required the offer back to be made to "the person from whom (the land) was acquired". It also reduced the words qualifying the land in question to the single concept of "held".
>
> [33] Subsection (3) of s 40 as originally enacted in 1981 and in force until amended to its present form in 1987 is important. It read:
>
> > (3) Subsection (2) of this section shall only apply in respect of land that was acquired or taken –
> >
> > (a) Before the commencement of this Part of this Act; or
> >
> > (b) For an essential work after the commencement of this Part of this Act.
>
> It can be noted that this is the apparent reason why subs (1) refers to the obligation to sell under subs (2) as applying "if that subsection is applicable to that land." Accordingly land which was acquired or taken after the commencement of Part III of the Act for a public work which was not an essential work was excluded from the operation of subs (2). The obvious purpose of the change from the earlier legislation was to restrict the nature of the public work which would give rise to the offer-back provisions. There is however no discernible reason for extending the offer-back concept to cover land which had not been obtained from private ownership for a public work – the intent was to restrict it to land acquired for a limited kind of public work. The use of the phrase "acquired or taken" in defining the application of subs (2) and repeated in subs (5), is itself a strong indication that the section as a whole was addressing, and only addressing, land obtained for public work purposes. Land "taken" prior to 1981 is clearly a reference to land compulsorily taken for a public work under earlier legislation, in respect of which the offer-back concept, already established, was being retained. In the overall context and background, the absence of an express qualification to the old para (a) did not require a different construction. Neither is the distinction drawn in the present subs (2)(b), (introduced in 1982) concerning change in character of land for the purposes of the public work for which it "was acquired or is held" inconsistent with this approach. That provision covers an original public work purpose, and a subsequent or changed public work purpose.

[34] Although the drafting technique adopted has removed without replacing the express provision as to the applicability of subs (2), the purpose of the 1987 No 2 amendment was to remove the earlier restriction to land obtained for essential work, but making that removal to apply only to "acquisitions" after the amendment came into force. If the argument is accepted that s 40(2) now applies to all land owned by the Crown or local authority as at the relevant date dictated by subs (1)(a), (b) or (c), regardless of the purpose of the original acquisition, then an anomaly arises. Land acquired within the period nominated by subs (3) for public work which was not an essential work is excluded, but land acquired within that very same period for a purpose which is not a public work, but which at any time after acquisition happens to be used for a public work, is caught by subs (2). That cannot represent the legislative intention.

[35] Section 40, which comes under Part III of the Act and is headed "Dealing With Land Held for Public Works", is in the context of legislation which is directed to public works, and in particular to the acquisition of land *for public works* (s 16). It is not, and has no reason to be, concerned with land which has been acquired for other purposes. The Crown has the right to acquire land for other purposes, as a local authority (which is defined in wide terms), may well have. The Act clearly has no application to land which has been acquired, and is currently being used, for purposes other than public work. It is difficult to see why, or in which ways it should or could apply to land which has been acquired outside any contemplation of the Act, but then subsequently and quite independently of the provisions of the Act, is used for a public purpose. The background to the offer-back concept is that land is being acquired from a private person for a public work purpose, possibly under the threat or contemplation of compulsion. The rationale must be that it is only fair, if that purpose disappears, the land should so far as practicable revert to the previous or equivalent private ownership.

…

[37] There is therefore a strong argument that the offeree is the person from whom the land was originally acquired for a public work. That is the person who is given the right at the outset, and whose right is to be preserved. If there is no public work purpose behind the transfer of ownership, there is no cause for s 40 to bite in respect of that ownership. That would give effect to what appears to be the true intent of the legislation, and to be a justifiable construction of the section as a whole when read in the context of the Act. It is also consistent with observations made in other cases, and referred to with apparent approval by the Privy Council in *Attorney-General v Horton* [1999] 2 NZLR 257. Lord Hoffmann there said at p 261:

> "This right has sometimes been described as a right of preemption, although Their Lordships think it bears a closer resemblance to an option: the purchaser's right is not dependent upon the vendor choosing to sell but arises as soon as the land is no longer required. Hammond J described it as an inchoate right which an owner of land taken by the Crown preserved throughout the latter's ownership and

> which came to fruition when the land was no longer required. It has been said in a number of cases to be the expression of a strong legislative policy to preserve the rights of an owner subject only to the continuing needs of the state."

…

> [40] Where land has continued to be held by successive public bodies for a public work throughout, the true intent and spirit of s 40 is that the land should be returned to the original owner. … In the situation that the land was held throughout for a public work, there is merely a preservation of rights that the original owner would have enjoyed under s 40 had there not been a change of public owner. Where, however, the land was acquired and held by the first public owner for something other than a public work, there are no rights to preserve and it is not possible, given the wording of subs (2), to find that those rights accrue when ownership changes.
>
> [41] What has been described as the inchoate right given by subs (2), arises and can only arise at the time when the land first becomes subject to the possible application of s 40, crystallising if and when the land is no longer required. A change of ownership while a public work purpose for holding the land continues does not affect the inchoate right, and there is no justification for reading the section as bringing it to an end. The land remains required for a public work, and s 40 does not come into play.

[75] The Court of Appeal in *Attorney-General v Hull* [2000] 3 NZLR 63 concluded the land in question was held for State housing purposes when it was to be used for a new urban community including industrial and commercial components. *Hull* was followed in *Attorney-General v Morrison* [2002] 3 NZLR 373 at 377-378 paras [17]-[21]. For present purposes, however, that decision is instructive, though obiter (at 76 para [40]), in its views as to the character of the entitlement under s 40 of a former landowner. On that question, the Court of Appeal observed (at 77 paras [41], [43]-[44]):

> [41] The first, and usually determinative criterion in s 40 is satisfied when in terms of subs (1)(a) the land is no longer required for the purpose for which it was taken. Whether that is so is a question of fact involving an assessment of intention in the light of objective circumstances. Proof that the land is no longer required for the relevant public work may be achieved by demonstrating an affirmative decision to that effect. The point can also be established by examining the conduct of the body holding the land and, if appropriate, drawing an inference that the body has concluded that it no longer requires the land for that work. Alternatively, the evidence may establish that that was not the case and, for instance, that the landholding agency remained in a state of genuine indecision. But if

> any reasonable person would undoubtedly have concluded that in all the circumstances the land was no longer required for the relevant public work, the agency may well have difficulty asserting that it had not so concluded, and therefore had not come under any obligation to proceed in terms of the section.
>
> …
>
> [43] Once para (a) of s 40(1) is satisfied, we consider that the landholding agency, the Chief Executive of the Department of Lands or both are obliged to take reasonable steps to ascertain whether the land is or is not required in terms of paras (b) and (c). If, after reasonable inquiry, no such requirement emerges, the Chief Executive must act in respect of the land in accordance with s 40(2).
>
> [44] The Chief Executive must give bona fide and fair consideration to whether the statutory course of offer back would be impracticable, unreasonable, or unfair under subs (2) or whether in terms of subs (4) the land is instead to be sold to an adjacent owner. Unless one of those exceptions applies, the Chief Executive must offer the land back to the original owner.

[76] Finally, the Court turns to the decision in *Hood*, the case which counsel submitted was closest to the issue raised in this application.

[77] As the report in this Court shows (*Hood v Attorney-General* (2004) 4 NZConvC 193,880) the land in question was compulsorily acquired from the plaintiffs' father in 1960 for a Queenstown school but had not been used for that purpose since early 1980, thereafter being used for a play centre. It was never offered back to the original owner or his successors and the proceeding was brought seeking a declaration that the land was no longer required for any of the purposes in s 40(1) and should be offered back.

[78] After careful review of the complicated facts, Wild J held (at 193,896 para [88] relying on *Deane* and *Port Gisborne*) that whatever might have been the nature of the former owner's inchoate rights they did not become legally enforceable until 1 February 1982.

[79] Much of the judgment in the unsuccessful appeal is occupied with considering whether a play centre was a "essential work" and whether it would have been impracticable, unreasonable or unfair to offer the land back but it is noteworthy that the Court of Appeal observed (p 19 para [97]) that:

> [97] The scheme of the 1981 Act is to require land compulsorily acquired but no longer required to be offered back to the previous owners. Whether it would be unfair or unreasonable to offer the land back must be assessed in light of this obligation on the part of the Crown. This means that the interests of the former owners must be considered and there must be good reason for these interests to be disregarded.

[80] The Hoods were also unsuccessful in seeking leave to appeal to the Supreme Court (*Hood v Attorney-General (*supra) but Mr Casey nonetheless relied on the Supreme Court noting that the Court of Appeal had reversed Wild J by holding that use of the land for a play centre was not the public work for which the land was taken and a play centre was not an essential work. Although the Court of Appeal held that thereby the obligation to offer the land back had arisen, it found against the Hoods on the basis that it was impracticable, unreasonable or unfair under s 40(2) for that obligation to be implemented. The application for leave to appeal to the Supreme Court related to the Court of Appeal's last finding. However, the Supreme Court observed (p 4 para [7]):

> [7] In the Courts below and in the argument of counsel it was apparently assumed that the application of s 40 turned on the circumstances at the date the obligation to offer back arose. In the present case that was treated as the date upon which s 40 came into effect, because by that date the land was no longer being used for the purposes of a school. No argument on the correctness of this approach was addressed to us. Our refusal of leave to appeal should not be taken to indicate agreement with it. Similarly, the parties appear to have been content to have the application of s 40(2) dealt with by the Courts on application for declarations as to what the Chief Executive of LINZ should have done. … Again, the basis on which leave is declined should not be taken to indicate approval of the course the litigation has taken.

(7) Conclusion on construction of s 40

[81] Section 40 was construed earlier solely on the basis of its terminology. It is now pertinent to consider whether that construction is altered by the issues discussed in this judgment to this point.

[82] They show - though judicial descriptions of the rights of former owners and their successors vary - a first option to repurchase, a right of pre-emption, an inchoate right coming into effect once the land is no longer required for a public

work. All agree that Parliament's intention in enacting s 40 was to ensure that those holding land acquired for public purposes but now surplus to such purposes were bound by an obligation to offer the land back to former owners or their successors by means of the mechanism detailed in s 40. That such was the policy was particularly emphasised in *Port Gisborne* and *Hull* in the passages earlier cited. The obligation enures even if the land had only not been held for a public purpose for a period (*Horton*). Notably, ascertainment of the current market value of the land must be at the date of the valid offer back, the date when such should have occurred if the local authority acted "timeously and with due expedition" (*McLennan* at first instance).

[83] The authorities demonstrate there are limitations on that broad principle. Only those from whom the land was acquired for a public work or their successors are entitled to an offer back: if the land was not acquired for a public work, later use for a public work purpose does not create an offer back obligation (*Port Gisborne* at 37, 40). A factual enquiry must be undertaken as to when the land was no longer required for a public work (*Morrison* at 41) but since, on a review application such as this, the Court is required to treat all allegations in the statement of claim as provable, that is not an issue which can arise in the present case. Similarly, an investigation needs to be undertaken, if offer back to former owners is to be avoided, as to whether it is impracticable, unreasonable or unfair for the land to be offered back. But that question, too, does not arise on this review for the reasons just mentioned, although it is to be noted that in *Hood* (at para [97]) the Court of Appeal said there must be "good reason for these interests to be disregarded".

[84] And while the Supreme Court in *Hood* (at para [7]) may have sounded a cautionary note as to the correct date on which s 40 was to be applied, including the date the section came into force, it made no finding in that regard because it was not an issue on the leave application and accordingly should be put to one side.

[85] Seen in that light, all those cases are glosses, qualifications on the coherence of s 40 and illustrations of its application. As earlier described, from the terms of the section itself, it applies in all circumstances where at any time land has been acquired by any local authority for a public work and where at some stage during the local authority's ownership the land is "no longer" required – the continuous present

lasting for the whole of the period it is not required – for that or any other public work. That triggers an obligation to "endeavour to sell the land" in accordance with s 40(2) or the remaining provisions of the section. The change of tenses in s 40(2)(b) – the public work for which "it was acquired or is held" – merely reflects the possibility of change in the public work purposes for the land between acquisition and the date the owner is required to consider whether there "has been a significant change in the character of the land".

[86] All of that is consistent and coherent and does no damage to the plain words of s 40, especially s 40(1). Mr Casey submitted, for the reasons outlined earlier, that the 1981 Act could not apply to the land the subject of this claim because the land was, at 1 February 1982, already held for a public work and was already no longer required for that or any other public work. However, that submission runs counter to the terms of the section and the Parliamentary policy underlying it and there is no reason to suppose that Parliament did not intend to create rights and obligations on local authorities and on former landowners and their successors which came into force contemporaneously with the Act coming into force.

[87] That is a common Parliamentary technique which does not raise the question of retroactivity nor offend against the Interpretation Act 1999 s 17. In fact, construing s 40 in that way merely results in the Court holding that whatever rights and obligations local authorities and former landowners may have had on 31 January 1982 were significantly altered and became different rights and obligations the following day. Examples of Parliament so acting abound. Tax Acts often change the law for those in certain factual situations immediately on the passing of the relevant statute. A more familiar example may be the Matrimonial Property Act 1976. On 1 February 1977, the day the Act came into force, the rights, obligations and entitlements of all spouses, property owners or not, were radically changed. There was no qualification period. The Act expressly applied to all marriages, not just those which occurred after it came into force. Indeed, the transitional provisions were so precise that even proceedings commenced under the Matrimonial Property Act 1963 before 1 February 1977 could only continue under the 1963 Act if the hearing of those proceedings had commenced before that date (Matrimonial Property Act 1976 s 55(2)(3)). On one day, 31 January 1977, non property-owning spouses

had few rights and property-owning spouses few obligations. The next day, 1 February 1977, the former's rights were significantly enhanced and the latter's obligations significantly affected.

[88] The same is true of s 40. On 31 January 1982, local authorities and former owners had only the rights and obligations in the 1928 Act (as amended). On and from 1 February 1982, their rights and obligation were as set out in s 40. Had a local authority acted in accordance with the 1928 Act and satisfied its obligations on or before 31 January 1982, former owners could have had no objection that their rights may have been increased the day the 1982 Act came into force.

[89] In this case, according to the statement of claim, on 1 February 1982 Waitakere City held the land the subject of this litigation, having acquired it through the succession earlier described. By that date it no longer required the land for the original or any other public purpose or for exchange and accordingly, in terms of s 40 and *McLennan*, it was obliged "timeously and with due expedition" to set the offer back provisions of s 40 in train. According to the statement of claim, it failed in that regard. That may ultimately result in what the defendants see as a windfall for the plaintiffs but, in the Court's view, that result would nonetheless conform to Parliament's intention as expressed in s 40.

(8) Do other statutes – or implied repeal - affect the construction of s 40?

[90] Dealing first with the argument based on the Harbours Act 1950, the principal statute contained, in ss 136ff, empowering provisions giving Harbour Boards power to acquire and dispose of land. Those powers were augmented by the Harbours Amendment Act 1977 which enacted s 143A-C of the principal Act. Section 143B gave Harbour Boards power to subdivide land vested in them as a "harbour work" under the Act but debarred Boards constructing buildings on such land other than to carry out work under the section or for the purpose of "harbour works". Section 143C gave Boards power to sell land vested in them in the manner authorised by the section other than reserves or land held on trust. As earlier noted, Mr Casey argued that because those provisions were in force before 1 February 1982, s 40 could not have been intended by Parliament to apply to the land the

subject of this litigation as, by then, the land might have been leased, subdivided and sold.

[91] The short answer to that submission, however, lies in s 143A(1)(b) which expressly provided that ss 143B and C did not authorise Harbour Boards to deal with land "taken or acquired under the Public Works Act 1928 otherwise than in accordance with the provisions of that Act". From 1977 on, therefore, AHB continued to be obliged to deal with the land the subject of this litigation in accordance with the 1928 Act.

[92] A further reason for holding against the argument based on the Harbours Act 1950 is that had AHB leased the subject of this claim or subdivided it, but still retained ownership at any time after 1 February 1982 when the buy-back obligation was triggered, what, as a matter of fact had happened to the land would have been an issue to be taken into account in deciding whether s 40(2)(a)(b) applied and was satisfied as a prelude to any offer back being made. No more than title to the land subject to any such lease may have been able to be offered back.

[93] Further, this is a review of the Associate Judge's refusal to strike out the claims. The Court is accordingly obliged to treat all the allegations in the claim as provable. In the present case the plaintiffs plead the land was acquired by AHB for the purpose of providing port facilities and associated works but that the scheme had been abandoned by 1 February 1982 and accordingly s 40 applied after that date. The claim contains no suggestion that the AHB had utilised any of its powers under the Harbours Act 1950 ss 143A-C before 1 February 1982.

[94] It accordingly follows that, as far as the land in question in this litigation is concerned, there is nothing in the Harbours Act 1950 to disturb the earlier findings as to s 40.

[95] The final aspect of this matter is to consider whether the 1983 Empowering Act affects the conclusions already reached throughout this judgment.

[96] This requires only brief consideration because the answer is essentially the same as that relating to the Harbours Act 1950.

[97] The provisions of the 1983 Empowering Act were earlier summarised. During the period it was in force – 2 December 1983-1 July 2003 –AHB had power to lease the land the subject of this claim or grant options so to do, and it could also grant Waitakere City licences to use the land to investigate its development. Again, however, s 6 of the Act said that it should not be construed as limiting the application of the Harbours Act 1950 and the statement of claim suggests no action by AHB or Waitakere City pursuant to the provisions of the 1983 Empowering Act. This is not, therefore, a case of implied repeal because the 1983 Empowering Act expressly did not limit the provisions of the Harbours Act and the empowering provisions of the Harbours Amendment Act 1977 ensured the 1928 Act remained applicable to the land in question.

[98] The conclusion must therefore be that the provisions of the 1983 Empowering Act in relation to the land the subject of this litigation do not affect the interpretation of s 40 earlier appearing.

Result

[99] For all those reasons, though by a perhaps more detailed route, the conclusion must be that the defendants have not shown that the Associate Judge's refusal to strike out the claim was wrong. The application for review is accordingly dismissed.

[100] The striking-out and review applications related only to this claim, Civ.2005-404-7348, but counsel advised that they had agreed between themselves as to what would happen in relation to this and the six other cases earlier mentioned once the result of the review application was known. Be that as it may, as a precaution, leave is reserved to the parties to apply in the event of any difficulty as far as the implementation of this judgment is concerned in this or any of the other cases.

[101] If costs are in issue and counsel are unable to agree on category or quantum, memorandum may be filed (maximum five pages) with that from the plaintiffs being

due 28 days from the date of delivery of this judgment and that from the defendants within 42 days of delivery with counsel certifying in their memoranda, if they consider it appropriate so to do, that the Court may determine all issues of costs without further hearing.

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WILLIAMS J

Solicitors:
Paul Cassin, P O Box 51194 Pakuranga, Auckland, for plaintiffs
Kensington Swan, Private Bag 92101 Auckland, for Defendants

Counsel:
C R Carruthers QC, P O Box 305 Wellington, for plaintiffs
Matthew E Casey, P O Box 317 Shortland Street, Auckland, for defendants

Copy for:
Associate Judge Faire, Auckland High Court
Wendy Pukeiti, Case Officer, Auckland High Court