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SURPLUS PUBLIC WORKS LAND: THE CROWN'S SPECIAL DUTY TO MAORI

**The Crown's obligations to Maori regarding the offer-back of surplus Crown land
under s40 of the Public Works Act 1981.**

A thesis

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Ko Te Whanau a Hinerupe te hapu

"Hinerupe wahine, Hinerupe potiki, Hinerupe rangatira e"

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Michael Grayson

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RELEVANT STATUTORY PROVISIONS

For ease of reference, statutory offer back provisions and related repealed legislation discussed in this paper are recorded as follows:

PUBLIC WORKS ACT 1981 (as at July 2017)

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 under section 105 of this Act—

The chief executive of the department within the meaning of section 2 of the Survey Act 1986 or local authority, 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.

41 Disposal of former Maori land when no longer required

Notwithstanding anything in sections 40 and 42 of this Act, where any land to which section 40(2) of this Act applies was, immediately before its taking or acquisition,—

(a) Maori freehold land or General land owned by Maori (as those terms are defined in section 4 of Te Ture Whenua Maori Act 1993); and

(b) beneficially owned by more than 4 persons; and

(c) not vested in any trustee or trustees—

The chief executive of the department within the meaning of section 2 of the Survey Act 1986 or local authority, as the case may be, shall—

(d) comply with the requirements of section 40 of this Act; or

(e) apply to the Maori Land Court for the district in which the land is situated for an order under section 134 of Te Ture Whenua Maori Act 1993.

PUBLIC WORKS ACT 1928 (repealed 1 February 1982)¹

35 Dealings with Taken Lands (Repealed)

If it is found that any land held, taken, purchased or acquired at any time under this or any other Act or Provincial Ordinance, or otherwise howsoever, for any public work is not required for such public work, the Governor-General may, by an Order in Council publicly notified and gazetted, cause the same to be sold under the following conditions:-

- (a) A recommendation or memorial, as the case may be, as provided by section twenty-three hereof shall be laid before the Governor-General by the Minister or local authority at whose instance the land was taken describing so much of the said lands as are not required for such public work, accompanied by a map thereof certified by the Surveyor-General or an authorized surveyor appointed by him in that behalf, and setting forth the reasons for disposing the same:
- (b) The Minister or local authority, as the case may be, shall cause the land proposed to be sold to be valued by one or more competent valuers, and shall offer such land at the price fixed by such valuation – first, to the person then entitled to the land from which such land was originally taken; and, if he refuses it or cannot after due inquiry be found, then to the owner of the adjacent lands, or, if there is more than one such owner, then to each of such owners in such order as the Minister or local authority thinks fit; and, if no such owner accepts such offer, may cause the land to be sold by public auction:

Provided that the Governor-General may without complying with any of the last foregoing provisions sell by private contract or grant to any Education Board any lands taken for Government works, and may execute such grants, conveyances, and assurances as may be necessary to give effect to such sale or grant:

Provided also that in the case of any land so taken, purchased, or acquired for a Government work and not required for that purpose, the Governor-General may, on such recommendation as aforesaid and without complying with any other requirements of this section, by Proclamation declare such land to be Crown land, Subject to the Land Act, 1924, and thereupon the land may be administered and disposed of under that Act accordingly.

¹ Public Works Act 1928, s35 is a carry-over from the provisions of the Public Works Act 1894, s29 except for the final paragraph of the 1928 Act which is additional.

PUBLIC WORKS ACT 1876 (repealed)

29 Land not wanted may be sold by Order in Council (Repealed)

If it is found that any land taken under this Act is not required for public use, the Governor may, by an Order in Council, publically notified and *gazetted*, cause the same to be sold under the following conditions: -

- (1) A memorial shall be laid before the Governor by the Minister, County Council, or Road Board at whose instance, as provided by the twenty-fifth section, the land was taken, describing so much of the said lands as are not required for public use, accompanied by a map thereof, certified by a certified surveyor appointed by him in that behalf, and setting forth the reasons for disposing of the same.
- (2) The Minister, County Council, or Road Board, as the case may be, shall cause the land proposed to be sold to be valued by one or more competent valuers, and shall offer such land at the price fixed by such valuation, first to the person then entitled to the land from which it was originally severed; and if he refuse it, or cannot after due inquiry be found, then to the owner of the adjacent lands, or, if there be more than one such owner, then to each of such owners, in such order as the Minister, County Council, or Road Board thinks fit; and if no such owner accepts such offer, may cause the land to be sold by public auction.

MAORI AFFAIRS ACT 1953 (repealed 1 July 1993)

436 Land Acquired From Maoris For Public Work May Be Revested In Maoris (Repealed)

(1) Where any Maori land or any [General land] owned by Maoris has been at any time acquired by the Crown or by any local authority or public body for the purposes of a public work or other public purpose, and is no longer required for [the public work or other public purpose for which it was acquired or is held] [the []] Minister or authority under whose control the land is held or administered may apply to the Court to vest the land in accordance with the provisions of this section. In any application made for the purposes of this section the Minister or other applicant may nominate the person or persons in whom the land shall be vested, and may stipulate the price to be paid for the land, the terms and conditions of payment, and any

other conditions subject to which a vesting order under this section may be made, or may leave all or any of such matters to be dealt with in the discretion of the Court.

(2) An application may be made to the Court and the Court may exercise its jurisdiction under this section notwithstanding the provisions of any Act to which the land is subject and notwithstanding any terms and conditions imposed by any Act on the sale or other disposition of the land.

(3) On application being made under this section the Court may make one or more orders, subject to such terms and conditions as may have been specified in the application or subject to any other terms and conditions not inconsistent with any terms and conditions so specified as it may think fit to impose, vesting the land or any parts thereof, freed from any trusts and restrictions subject to which the land may previously have been held, in such person or persons as may be nominated by the applicant or, if no such nomination has been made, in such person or persons as may be found by the Court to be justly entitled thereto, for an estate of freehold in fee simple and, if more than one, as tenants in common in the relative shares or interests defined by the Court.

(4) Instead of making a vesting order under this section or in addition to any such order the Court if it thinks it necessary or convenient so to do, may amend any existing instrument of title so as to include therein the land or any part of the land to which the application relates, and the land so included shall thereupon become subject to all reservations, trusts, rights, titles, interests, and encumbrances affecting the other land comprised in that instrument of title.

(5) Any land vested in a Maori pursuant to this section shall thereupon be deemed to become Maori freehold land, unless the Court otherwise expressly orders.

(6) The District Land Registrar is hereby authorised to make all such alterations and amendments in the register and to issue such new certificates of title as may be necessary to give effect to any order made by the Court under this section.

SURPLUS PUBLIC WORKS LAND: THE CROWN'S SPECIAL DUTY TO MAORI

Introduction

During the 1970s there was increased public awareness concerning the disposal of land no longer required for public works. That awareness was largely due to the voice of Maori protest making known specific situations where the Crown sought to sell land it had taken without first considering the interests of former owners. At that time, the Crown did not have to consider how it had originally come to hold subject public works land nor was it required to consider the interests of those former owners adversely affected by such taking. Parliament changed that in 1981 by enacting enforceable offer back provisions under ss40 and 41 of the Public Works Act 1981. The Crown is now obliged to offer surplus public works land back to its former owners or their successors unless exceptions under the offer back scheme apply.²

The offer back scheme is remedial in nature and purpose. It is not to be confused with Treaty of Waitangi settlement policy which addresses broader failures of the Crown regarding its obligations to an iwi or hapu. It is individual owners who lose or surrender their lands for public works. The Crown's duty under s40 offer back provisions is directed specifically toward those former owners and their successors. Offer back rights may be held by former owners or their successors whether or not they identify as Maori. They are granted the first right to buy land back at market value when the subject land is no longer required for a public work or for exchange.³

² Public Works Act 1981, s40(2)

³ *Ibid*, s40(1)

The Crown and Maori hold a special relationship first recognised under terms recorded in the Treaty of Waitangi of 1840.⁴ That relationship endures to the present day and remains part of the constitutional arrangement for Aotearoa New Zealand as a sovereign state. Developing public infrastructure and services throughout Aotearoa New Zealand has benefitted the nation but has been achieved at the expense of individual land owners who have been required to sell or surrender their land for public works. The surrender of land for public works has often been carried out under compulsion or an element of compulsion. Such circumstances concerning Maori owned land taken for public works have breached the terms of the special relationship between the Crown and Maori.⁵

The Crown owes a special duty to Maori regarding the offer back of surplus public works land. This duty is constitutional and is in keeping with the special relationship between the parties since 1840. The enactment of offer back provisions under the Public Works Act 1981 further enhanced the Crown's responsibility to Maori. Surplus public works land must be offered back to its former owners or their successors unless specified exemptions apply.

Since 1981, offer back cases before the Courts have identified advantages and some shortfalls in the statutory offer back regime. The stories of people and land holding institutions are brought out in these cases. It is only possible to assess the appropriateness and relevance of the offer back scheme after it has been played out in real life situations. The implications for Maori is concerning. The scheme despite being a significant advancement in 1981, has failed to keep pace with developments since then. Since 1981 there have been significant developments in the relationship between the Crown and Maori particularly regarding land and Treaty of Waitangi matters. Other developments include decisions from the Courts in numerous offer back cases that have shaped how the Crown must deal with its responsibilities under the statutory scheme. There is now a need to revise and improve the offer back scheme to ensure its remedial purpose is properly served. One aspect of this is

⁴ Treaty of Waitangi, United Kingdom – New Zealand (opened for signature and entered into force 6 February 1840)

⁵ *Ibid*, art 2

to ensure Maori stand a reasonable chance of exercising their rights to offer back and be reunited with land previously taken from them. There is little point in having an offer back scheme if there is a high probability Maori will not meet the terms.

PART I

THE CROWN'S SPECIAL DUTY

Introduction

Public works legislation in Aotearoa New Zealand enabled the development of public facilities and infrastructure for the greater public interest. Schools, hospitals, roads, railways, telecommunication and electricity networks are but some of the public facilities and infrastructure essential to advance the wellbeing of the population. Public works are part Aotearoa New Zealand's history of settlement and development and will continue to be an important part of national development into the future.

Settlement and development comes at a cost. Private individuals must surrender their land, sometimes under protest, when statutory powers of compulsory acquisition are exercised. An offer back requirement regarding surplus public works land was introduced by Parliament in 1981 to address the perceived injustice arising from losing land compulsorily taken.⁶

Part I of this paper summarizes laws relevant to the disposal of surplus public works land and resulting obligations of the Crown to former Maori owners.

Constitutional Arrangement by Treaty

A special constitutional relationship in Aotearoa New Zealand was established by treaty between the Crown and Maori at Waitangi in 1840. Due to this arrangement, legal principles from England regarding land ownership and tenure were deemed to take effect in Aotearoa New Zealand. The full

⁶ *Rowan v Attorney-General* [1997] 2 NZLR 559 at 568

implication of this new constitutional arrangement would likely have been unknown to those Maori signatories of the Treaty, particularly the Crown's ultimate dominance over estates in land. Notwithstanding Treaty provisions for protecting Maori interests in land, the Crown must at times rely upon its constitutional dominance. Acquisition of land for public works is enabled by powers conferred by Parliament which includes the power to compulsorily acquire land if need be. These powers may be exercised over all land held in private ownership, including land held by Maori. The Crown's exclusive right of pre-emption over land, alluded to in the Second Article of the Treaty, is more than a first option to purchase in favour of the Crown.⁷ It is the ultimate right of the Crown to take back the fee simple estate it has conferred upon private land owners.

The constitutional relationship established by way of the Treaty of Waitangi in 1840 endures and has subsequently been affirmed by contemporary Treaty settlements. The relationship links Maori and the Crown in a partnership for all time.⁸ The nature of this arrangement is that Maori pursue their own goals but do not aspire to take over the role of central government in meeting its obligations to all New Zealanders.⁹

There is an inherent conflict in the 1840 treaty provisions between the principle of 'kawanatanga', being the right of the Crown to govern and make laws,¹⁰ and the guarantee to protect Maori 'tino rangatiratanga', being the Maori right of self-governance. Both principles are the subject of much debate. This paper does not justify or explain the conflict. There has been much said about this subject at hearings before the Waitangi Tribunal and recorded settlements between the Crown and Maori which acknowledge and address failings of the Crown. However, it is worth noting a particular observation of the Waitangi Tribunal regarding Public Works legislation. The observation is recorded in its 1994 *Te Maunga Railways Land Report*:

⁷ Treaty of Waitangi, United Kingdom – New Zealand (opened for signature and entered into force 6 February 1840), art 2

⁸ Dr Nin Thomas "Coming Ready or Not! The emergence of Maori Hapu and Iwi as a Unique Order of Governance in Aotearoa New Zealand" (2011) *Journal of Maori Legal Writing* 14 at 51

⁹ *Ibid*

¹⁰ Waitangi Tribunal *Te Maunga Railways Land Report* (Wai 315, 1994) at chapter 6 – Public Works Legislation paragraph 2 (no page or paragraph references on report)

Article 2 of the Treaty of Waitangi guaranteed protection of tino rangatiratanga. This was a promise made by the Crown that Maori would remain in possession of their lands and resources unless and until Maori themselves willingly decided to dispose of them at an agreed price. On the face of it, a Crown right to compulsory acquisition of land cuts right across this guarantee of Maori rangatiratanga.¹¹

The role of the Crown as protector of Maori interests in land can be at odds with the role of the Crown as government and lawmaker. The Crown's responsibility for public works overrides the rights of private land owners and rights conferred to Maori under the Treaty of Waitangi.¹²

Overview of Public Works Legislation

The history of consolidated public works legislation applicable to Aotearoa New Zealand dates from the industrial revolution in England. Holders of private interests in land had to give way to the demands of economic expansion for the national good. Privately owned land was required for various public purposes such as canals, roads and railways.¹³ The Lands Clauses Consolidation Act 1845 (UK)¹⁴ was the first English statute to consolidate laws authorising the acquisition of land for public works.¹⁵ In Aotearoa New Zealand, privately owned land was also required for public purposes to enable settlement and promote economic development throughout the country. Consolidated public works legislation in Aotearoa New Zealand follows through from the Land Clauses Consolidation Act 1863, Immigration and

¹¹ Waitangi Tribunal *Te Maunga Railways Land Report* (Wai 315, 1994) at chapter 6 – Public Works Legislation: paragraph 2 (no page or paragraph references on report)

¹² Treaty of Waitangi, United Kingdom – New Zealand (opened for signature and entered into force 6 February 1840), art 2

¹³ Waitangi Tribunal *Te Maunga Railways Land Report* (Wai 315, 1994) at chapter 6 – Public Works Legislation: Kawanatanga: The Powers of the Crown to Take Land
Peter Salmon *The Compulsory Acquisition of Land in New Zealand* (Butterworths, Wellington 1982) at 8

¹⁴ Land Clauses Consolidation Act 1845 8 Vict 18 (Repealed)

¹⁵ Frank A Sharman “The History of the Lands Clauses Consolidation Act 1845-2*” (1986) 7(2) Statute Law Rev 78 at 78, Also see: Land Clauses Consolidation Act 1845 8 Vict 18 (Repealed) - Long title of Act

Public Works Act 1870, to the Public Works Acts of 1876, 1882, 1894, 1905, 1928 and 1981.¹⁶

Compulsory acquisition of land for public purposes is today enabled by statute, principally Part 2 of the Public Works Act 1981. The rationale behind this statutory power is essentially for advancement of the public good generally. This is determined by the government of the day from its own view point. The Crown's right of eminent domain, a generic term referring to the existence of inherent and dominant rights in favour of the State, is exercised by means of the statute. It is the basis upon which the State may pursue its public works policy agenda. The Crown, which for practical purposes is best described as the government of the day, has been authorised to exercise this privilege in Aotearoa New Zealand since 1840.¹⁷ It is the Crown's constitutional right.

The private citizens of Aotearoa New Zealand are Crown subjects. This order is also apparent with estates over land. The status of the Crown's tenure in land is paramount. The parent estate, or radical Crown title, is dominant over the inferior fee simple estate held by private citizens. Since 1840, all land in Aotearoa New Zealand is subject to this doctrine of tenure, including Maori customary land and Maori freehold land.

Historically in England and consequently relevant to constitutional arrangements in Aotearoa New Zealand, the Crown held absolute and unfettered rights over land. However, these rights were restrained in 1215 AD under the Magna Carta. Compulsory acquisition of land by the Crown from its subjects is now limited to that as authorised by the law of the land.¹⁸ Parliament determines whether or not the Crown's powers are acceptable. The judiciary keeps watch to remind the Crown of its powers and limitations that apply.

¹⁶ Waitangi Tribunal *Te Maunga Railways Land Report* (Wai 315, 1994) at chapter 6 – Public Works Legislation: Kawanatanga: The Powers of the Crown to Take Land

¹⁷ GW Hinde, DW McMorland, NR Campbell and DP Grinlinton *Land Law in New Zealand* (1st ed, Butterworths, Wellington, 1997) at 29

¹⁸ Waitangi Tribunal *Te Maunga Railways Land Report* (Wai 315, 1994) at chapter 6 – Public Works Legislation: Kawanatanga: The Powers of the Crown to Take Land

With the passing of time, the ultimate privilege of the Crown has been further refined by statute. Parliament responds, sometimes slowly and reluctantly, to pressures brought upon it by the public conscience of the day. One such example was the introduction in 1981 provisions to limit the Crown's power to acquire land from its citizens. Broad public works land acquisition powers were restricted to only enable land acquisitions deemed to be essential. Soon after enactment of the Public Works Act 1981, Peter Salmon observed:

The most significant departure from tradition contained in this legislation is a restriction on the circumstances under which land can be acquired compulsorily. Land may now be acquired compulsorily only if it is for an essential work. ...[T]here is no doubt that in the process of balancing the public against the private interest the change has resulted in a strong swing of the pendulum in the direction of the private property owner.¹⁹

Although this new 'essential work' restriction was repealed several years later,²⁰ the legislative refinement process was at work. Parliament arrested a culture rampant within government and local authorities which placed excessive reliance upon compulsory land acquisition powers. Advancement of public works for the greater good was balanced against the cost of compromising private interests in land.²¹

Limiting compulsory acquisition powers to 'essential works' restrained both central and local governments. Acquiring authorities had to negotiate on a willing buyer willing seller basis if they wished to acquire land for a public purpose that fell outside the narrow 'essential work' category.

The 'essential work' restriction was repealed by Parliament in 1987 in favour of broader compulsory acquisition powers. A message had been sent and it was time for Parliament to loosen the restraint. The practical interests of the public are sometimes a priority.

¹⁹ Peter Salmon *The Compulsory Acquisition of Land in New Zealand* (Butterworths, Wellington 1982) at 8

²⁰ "Essential Work" definition was repealed on 31 March 1987 by the Public Works Amendment Act 1987 (No 2), s 2(1)

²¹ See (24 March 1987) 479 NZPD pp 8023-8024 - speech by the Minister of Works and Development, Hon Fraser Colman referring to opposition by local authorities to restrictive statutory powers - As cited in Waitangi Tribunal *Te Maunga Railways Land Report* (Wai 315, 1994) at chapter 6 – Public Works Legislation: Kawanatanga: The Powers of the Crown to Take Land

The Public Works Act of 1981 was passed at a time in New Zealand's history when there were growing sentiments to restrain excessive use of government powers over private property rights. In 1975, a land march from the far north of New Zealand to Parliament was led by respected Maori leader, Whina Cooper, protesting the significant and ongoing loss of Maori land from its Maori owners. Protests were later held at Bastion Point in Auckland during 1977 and 1978. The Bastion Point protests concerned the almost total loss of tribal land which had belonged to Auckland iwi, Ngati Whatua. The Government announced that 60 acres (24 hectares) of then uncommitted Crown owned land would be sold for upmarket housing rather than be offered back to its former Ngati Whatua owners from whom it had been acquired.²² There was also protests at Te Kopua, Raglan, led by Maori activist, Eva Rickard. Land had been compulsorily taken during World War II as a temporary emergency airfield. Despite assurances at the time of acquisition, the land was not returned to its former owners after the war. When the land was no longer required for the purpose it had been taken, it was instead leased to a local golf club and converted into a golf course.

The statutory offer back scheme illustrates a significant shift in policy. Parliament now formally recognises the Crown's prevailing responsibility to former owners. The scheme is described by Harrison J in the Court of Appeal judgment of *Williams v Auckland Council*²³ in a series of questions to ascertain whether or not an offer back duty will arise. The summary is edited here for general reference. It is necessary to consider:

- (a) Whether the [acquiring authority] acquired or held the land for a public work;
- (b) If so, whether the [acquiring authority or its successor to the land] still held and required the land for a public work on 1 February 1982 [being the date the Public Works Act 1981 with offer-back provisions came into force];
- (c) If so, whether the owners must prove the [acquiring authority] compulsorily acquired the land;
- (d) If not, or if the owners are required to prove compulsion and are able to do so, whether the [acquiring authority or its successor to the land] lawfully

²² Waitangi Tribunal "The Loss of the Orakei Block" <www.justice.govt.nz/tribunals/waitangi-tribunal/resources/teaching-aids/resource-kits/orakei/the-loss-of-the-orakei-block>

²³ *Williams v Auckland Council* [2015] NZCA 479

exercised a discretionary power [when the land was no longer required for a public work] in resolving not to offer ...the land back to [its former] owners;

- (e) If not, whether all owners fell within the statutory definition of a “successor”.²⁴

The statutory offer back scheme does not guarantee the return of land to former owners or their successors. However, it is an improvement from the historic system of land disposal where surplus public works land could be sold without any regard to former owners or their successors who hold prevailing ties to subject land taken from them.

Era of Land Disposal

The era of extravagant land acquisition for public works is now history. The context today is set in an era of surplus public works land disposal. The Government’s attention is now predominantly focussed upon reducing its land holding rather than increasing it.²⁵ To think of the Public Works Act 1981 exclusively as a legislative instrument to take land for public works would be to miss an important function of the Act. The land disposal provisions of the Act are now just as important, if not more important, to Maori than the acquisition provisions. The statutory mechanism under which the Crown disposes of surplus public works land should now be the leading public works issue for Maori, if not all New Zealanders.

Where land is no longer required for a public work or land exchange, the Chief Executive of Land Information New Zealand for and on behalf of the Crown is charged with the responsibility for its disposal.²⁶ It was not until the Public Works Act 1981 that the Crown had to consider its responsibility to previous

²⁴ *Williams v Auckland Council* [2015] NZCA 479 at [9]

²⁵ Land Information New Zealand “LINZ Hosts Inaugural Crown Property Forum” (7 April 2016) www.linz.govt.nz/news/2016-04/linz-hosts-inaugural-crown-property-forum - The Crown’s policy to “*unlock the value of Crown land*” appears to be predominantly focussed upon efficiencies in Crown land disposal processes.

²⁶ Public Works Act 1981, s 40(1) – Note: Where land is held by a local authority, the chief executive of that local authority holds the disposal responsibility. For the offer-back of surplus railway land see New Zealand Railways Corporation Restructuring Act 1993, ss 23 and 26.

owners. It now must consider whether or not surplus public works land should be first offered back to them or their successors prior to its sale on the open market to third party interests.²⁷

The Crown's offer back obligations to former owners of surplus public works land, other than railway land, is prescribed under s40 of the Public Works Act 1981. Surplus public works land that was previously owned by Maori may, if the land meets the specified criteria under s41, be returned to Maori without any need to comply with s40 offer back requirements. The Crown's statutory offer back responsibilities are administered by the Chief Executive Officer of Land Information New Zealand, the leading government department in New Zealand for land matters.²⁸ The scheme also confers responsibilities upon local authorities that hold surplus public works land. The disposal of surplus railway land is governed under ss23 and 26 of the New Zealand Railways Corporation Restructuring Act 1990. The disposal provisions for surplus railway land are similar to those under the Public Works Act, but the public works offer back scheme is more detailed. For economy, this paper considers the Public Works Act offer back scheme as applicable to the Crown.

The statutory offer back scheme is remedial. It was enacted following a period of raised public awareness regarding the Crown's relationship with Maori and public works land. The land-march protest of 1975 together with protests at Bastion Point and Raglan raised sufficient public concern for Parliament to take action. An offer back scheme was introduced under the 1981 Public Works Act. The rationale behind the offer back provisions is described by Smellie J at the High Court in *Rowan v Attorney-General*:

On the face of it the plain meaning and intent of the section appears to be remedial, bringing to an end a perceived injustice where land could be compulsorily taken by the Crown for one purpose and arbitrarily used for another without giving the original owner the opportunity to buy it back.²⁹

The disposal regime for surplus public works land is particularly important for Maori and more relevant today than the public works land acquisition

²⁷ Public Works Act 1981, s42

²⁸ *Ibid*, s 40(1) - The chief executive of a local authority is responsible where that local authority holds surplus land not required for a public work.

²⁹ *Rowan v Attorney-General* [1997] 2 NZLR 559 at 568

scheme.³⁰ The offer back scheme presents an opportunity for former owners to be restored to their land. Public works land often is acquired under compulsion or an element of compulsion. This is where a perceived injustice arises, regardless of whether or not the surrender is for the greater good. The opportunity to buy the land back will vary in significance for each former land owner. For Maori, that opportunity is more than a chance to realise an economic opportunity. There is the prospect of being reunited with prevailing cultural ties to the land. Cultural ties in land are significant for people that hold them.

The Courts observe that a former owner or their successor must hold a ‘personal or familial connection’ with surplus public works land in order to qualify for an offer back. The Court of Appeal in *Williams v Auckland Council*, upheld by the Supreme Court on appeal, describes the offer back scheme as intended to restore land to a person that still holds a ‘personal or familial connection’ with it, such connection being more than mere economic interest.³¹ It was observed:

In undertaking this balancing exercise we repeat that the purpose of s 40 is remedial, designed to confer a personal, not an economic, benefit on those with an attachment to the land.³²

If a former owner or their successor of surplus public works land has lost their attachment to the land they will then lose their statutory offer back entitlement. The remedial aspect of the scheme does not extend to an opportunity for former owners to exercise rights if they are motivated exclusively by the prospect of financial profit at the expense of the public. The economic interests of former owners are considered to be compensated when land is taken for a public work, not when land is offered back. The Courts in *Williams v Auckland Council* were prepared to balance the interests of former land owners against the adverse consequences for Auckland Council and its ratepayers where the

³⁰ Richard Fletcher (ed) *Review of the Public Works Act: Issues and Options* (Land Information New Zealand, Public Discussion Paper, December 2000) at 62

³¹ *Williams v Auckland Council* [2015] NZCA 479 at [118] – [125], upheld on appeal cited at *Williams v Auckland Council* [2016] NZSC 20 at [9]

³² *Ibid* at [121]

interests of the former land owners was largely, if not exclusively, based upon economic grounds.³³

Maori cultural, social and spiritual ties to land are enduring. Such people are intrinsically connected to geographic locations through tribal affiliations. It would be difficult to assert that a Maori former land owner could ever lose their 'personal or familial connection' to land if they remain connected to their hapu or iwi. If a hapu or iwi is recognised as belonging to a particular area, their connection to the land is likely to be preserved by their status as tangata whenua which infers a special bond and connection to their traditional land. How the Courts will view this for the purpose of s40 offer back is yet to be seen.

Mandatory Offer Back – s40(1)

The Crown is obliged to offer surplus public works land back to its former owners or their successors in the event the land is no longer required for a public work and is not required for exchange. Such surplus public works land must be offered for sale to its former owner or their successor.³⁴ This is a statutory duty imposed upon the Crown.³⁵ There are exceptions to the otherwise mandatory offer back. Circumstances that will give rise to these exceptions are prescribed under s40(2) of the Act.³⁶ Ascertaining whether such circumstances are enough to release the Crown from its duty to offer land back is a discretion that rests with the chief executive of Land Information New Zealand.³⁷

Ultimate responsibility for surplus public works land held by central government agencies rests with the Crown. The chief executive of Land

³³ *Williams v Auckland Council* [2015] NZCA 479 at [120]

³⁴ Public Works Act 1981, s40(1) - For the offer-back of surplus railway land see New Zealand Railways Corporation Restructuring Act 1993, ss 23 and 26.

³⁵ *Hull v Attorney-General* (1998) 12 PRNZ 523 (HC) (at page 3 of online report)

³⁶ Public Works Act 1981, s 40(2)

³⁷ *Hull v Attorney-General* (1998) 12 PRNZ 523 (HC) (at page 3 of online report)

Information New Zealand is the responsible statutory officer. However, that officer will not always be the person involved in important administrative decisions that give rise to the triggering of s40 offer back obligations. There are many branches of government that administer public works land and many individual decision makers. The Crown's ultimate responsibility is described by Randerson J in *Hull v Attorney-General*:

Where the Crown has been found to be in breach of its obligations, it cannot hide behind a change in the relevant officer whose task it is to perform the statutory obligations at issue. The relevant statutory officer exercises its functions on behalf of the Crown and as its agent. Accordingly, it is for the Crown to ensure that by one means or another, it carries out its statutory obligations. The Crown clearly has the capacity to ensure that the land is offered back, as nearly as may be in accordance with its statutory obligations.³⁸

Cross agency roles and responsibilities can be complex, particularly as relevant events roll out over several years while government agencies are reorganised or restructured. The Courts look beyond all this. Offer back obligations rest with the Crown.

A simple summary of the Crown's duty under s40 is observed by Keith J in the Court of Appeal judgment of *Attorney-General v Hull*:

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. Individual cases may present particular difficulties but the foregoing approach should be of assistance in resolving the usual issues which arise [when dealing with central government land] under s 40.³⁹

If qualifying requirements are satisfied, public works land will be deemed surplus to the Crown's requirements. Offer back obligations will be triggered at that time, unless the statutory exceptions apply.

Randerson J at the High Court in *Hull v Attorney-General* describes s40 as imposing an obligation upon the Crown where the three factual circumstances in subsections (1)(a), (b) and (c) are established.⁴⁰ Section 40(1) reads:

³⁸ *Hull v Attorney-General* (1998) 12 PRNZ 523 (HC) (at page 4 of online report)

³⁹ *Attorney-General v Hull* [2000] 3 NZLR 63 (CA) at [44] to [45]

⁴⁰ *Hull v Attorney-General* (1998) 12 PRNZ 523 (HC) (at page 3 of online report)

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 under section 105 of this Act –

The chief executive [of Land Information New Zealand] or local authority, 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.⁴¹

Land may cease to be required for a public work either by express decision or because of contingent circumstances.⁴² In either event, the Crown's duty to offer the land back is triggered.

The Courts have consistently maintained the 'plain meaning and intent' approach when interpreting s40.⁴³ There is no bending of words to avoid inconvenience. What Parliament has passed are the words the Courts apply. The plain meaning is adopted by Smellie J in *Rowan v Attorney-General*.⁴⁴ The Court of Appeal also favoured this approach in *Attorney-General v Hull*:

Our final comment relating to s 40 concerns the various descriptions or characterisations given by Courts of the former owner's right under that provision. We do not consider that it is useful to try to compare the position under s 40 with conventional property law concepts. It might be better simply to allow the provisions of s 40 to speak for themselves in their historical and legislative context.⁴⁵

The plain meaning of the Act has at times proved to be inconvenient. Where that inconvenience is at the expense of the Crown, there is no option but to grant entitled former owners their right to an offer back. Any failure by the Crown to offer surplus public works land back within reasonable after offer back obligations are triggered will amount to a breach of its statutory duty. The Crown has no choice.

⁴¹ Public Works Act 1981, s 40(1)

⁴² *Attorney-General v Hull* [2000] 3 NZLR 63 (CA) at [36] to [43]

⁴³ See discussion at Part II of this paper regarding the Court of Appeal decision of *Port Gisborne Ltd v Smiler & Ors* CA 182-98, 26 April 1999, [1999] 2 NZLR 695

⁴⁴ *Rowan v Attorney-General* 2 NZLR 559 at 568

⁴⁵ *Attorney-General v Hull* [2000] 3 NZLR 63 (CA) at 78

When Land Becomes Surplus

The point in time which public works land ‘is no longer required’ is not always obvious. It is at times an involved process to ascertain precisely when a property has ceased to be required for a public work. Such question is not answered by a single recorded decision. It is necessary to consider the actual use of the land and whether or not its use is in keeping with the public work purpose for which it had initially been acquired and is officially held.

In qualifying circumstances, surplus public works land must be offered for sale to the person from whom it was acquired or to the successor of that person. The land is to be offered at either the current market value of the land or at any lesser price if the chief executive considers it reasonable to do so.⁴⁶ The Court of Appeal in *Horton & Anor v Attorney-General* expressed this requirement of the statutory scheme in strict terms.⁴⁷ Once the factual matters prescribed under subsection (1)(a) to (c) are satisfied, the land is at that point in time surplus to the Crown’s requirements. Responsibility under the offer back statute then passes from the land holding agency to the chief executive of Land Information New Zealand who “*shall endeavour to sell the land*” and “*shall offer to sell the land*” to the former owner or their successor.⁴⁸ There is no going back. Once the offer back obligation is triggered, the land holding agency cannot change its mind and decide to keep the land even if it does genuinely require it for further public works.⁴⁹ This principle proved to be a problem for Coal Corporation in Horton. The State Owned Enterprise was not entitled to reconsider its previous position that certain mining land it held was no longer required for a public work. Coal Corporation appears to have been coming to terms with its land portfolio and commercial priorities as a relatively recently formed State Owned Enterprise. The Court of Appeal and the Privy Council strictly applied the statutory scheme. There was no allowance for administrative dilemmas on Coal Corporation’s behalf.

⁴⁶ Public Works Act 1981, s40(2)

⁴⁷ *Horton & Anor v Attorney-General* CA43/97, 3 December 1997 at 17 decision upheld by Privy Council *Attorney-General v Horton & Anor* [1999] 2 NZLR 257 (PC)

⁴⁸ Public Works Act 1981, s40(1) and (2) - *Horton & Anor v Attorney-General* CA43/97, 3 December 1997 at 17

⁴⁹ *Attorney-General v Horton & Anor* [1999] 2 NZLR 257 (PC) at 262 line 5

There are no express time limits for the Crown under the offer back legislation. However, the Crown is obliged to attend to the offer within a reasonable time of the obligation arising and to do so with due expedition.⁵⁰ There have been occasions when the Crown has not realised that statutory offer back requirements have triggered and surplus public works land has been held longer than can be justified without being offered to former owners or their successors.⁵¹ In such cases the Crown will be in breach of its obligation to those former owners and their successors. A typical problem for the Crown in such situation is that the market value of land for the purpose of offer back will be fixed to the value as at the time the Crown should have made the offer. This can result in significant windfalls for former owners where property prices increase over time.

Mandatory Offer Back: Grounds for Exemption – s40(2)

The presumption regarding public works land is that the Crown will owe a duty to former owners or their successors to offer the land back to them when subject land is no longer required. However, there are occasions when the Crown will be exempt from this duty.

The chief executive of Land Information New Zealand is entitled to exclude land from offer back if there are qualifying circumstances. Those circumstances are prescribed under s40(2) and (4). Under s40(2) the chief executive may determine that land will not be offered back where:

- (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—⁵²

⁵⁰ *Horton & Anor v Attorney-General* CA43/97, 3 December 1997 at 17

⁵¹ *Attorney-General v Morrison* [2002] 3 NZLR 373 (CA)

⁵² Public Works Act 1981, s40(2)

Section 40(4) confers discretion upon the chief executive to exclude land from offer back to former owners of their successors and instead direct the offer to an owner of adjacent land:

Where the chief executive ...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.⁵³

These are practical provisions to exclude mandatory offer back of land that will not serve the remedial objective of the offer back scheme. The exceptions are available to avoid unnecessary burden upon the Crown. For example, it would be unreasonable to require the Crown to offer land back if the former owner had advertised the property for sale on the open market where the Crown merely won the property by way of the best offer. Circumstances that will give rise to land being offered to an owner of adjacent land will for example include severance areas of impractical size or location.

Impracticable to Offer Land

Land Information New Zealand guidelines prescribe examples of when it may be impracticable for the Crown to offer surplus public works land back to its former owners or successors. Scenarios prescribed are:

1. Where the former owner is now a defunct company;
2. The former owner and their successors have died;
3. Where original land parcels cannot be offered back due to the later amalgamation of various land parcels from different owners into one, now surplus, computer register title. If substantial improvements have been built on the amalgamated land it may well be impractical to then subdivide the surplus

⁵³ Public Works Act 1981, s40(4)

amalgamated parcel to reinstate the original parcel for offer back to its former owner,⁵⁴ and

4. Due to local authority planning restrictions, the Crown may sometimes be prevented from subdividing land to reinstate former parcels.⁵⁵

In *Rowan v Attorney-General*, the High Court awarded damages to the plaintiff where an officer for the former Ministry of Works incorrectly decided that it would be impracticable to offer back a surplus public works property to its former owners because it was landlocked.⁵⁶ The officer mistakenly thought it was not possible to obtain a certificate of title for the land unless it was amalgamated with an adjoining property that had road frontage. He also mistakenly thought that s40 gave the department a choice whether to offer the land to its former owner or their successor in title. The successor in title was the person who later owned the parent land from which the public works land had originally been taken.⁵⁷ The Court held that the department was supposed to offer the land to its former owners, and by failing to do so it had breached its duty of care owed to those former owners.⁵⁸

Significant Change to Land

The chief executive may determine that an exemption to offer back applies where there has been significant change in the character of the land because of the public work or works for which the land was held. Examples of significant

⁵⁴ Where land is partly required and partly surplus, and where the relevant statutory officer considers that subdivision would be “impracticable, unreasonable and unfair” under s 40(2)(a), then there is no obligation to sell. – per Randerson J in *The Sisters of Mercy (Roman Catholic Diocese of Auckland Trust Board) v Attorney-General* HC Auckland CP.219/99, 6 June 2001 cited in *Ngahina Trust & Ors v Kapiti Coast District Council* HC Wellington CIV-2008-485-001657, 31 May 2010 at [95]

⁵⁵ Guideline for disposal of land held for a public work (Land Information New Zealand, LINZG15700, 13 November 2009) at 16-17

⁵⁶ *Rowan v Attorney-General* 2 NZLR 559 (HC) at 573

⁵⁷ *Ibid*

⁵⁸ *Ibid* at 574

change recorded in Land Information New Zealand guidelines include significant change arising from:

1. Change to the land itself, such as change caused by land reclamation or major landscaping work;
2. Change in local authority district plan zoning or use;
3. Significant building improvements on the land likely to remain in use in keeping with the ‘highest and best use’ of the subject property; and
4. Demolition of improvements on the land following acquisition for a public work.⁵⁹

For a significant change in the character of the land to give rise to an exemption to offer land back, that change of character must have occurred while the land was held and still required for a public work.⁶⁰

Timing of the Exemption Decision

The discretionary power under s40(2) to exempt land from offer back must be exercised within a reasonable period from the triggering of the offer back obligation. If the discretion is not exercised in a timely manner, the ability to exclude land from offer back on grounds it would be “*impracticable, unreasonable or unfair to do so*”⁶¹ will be lost.⁶² The Court of Appeal in *Williams v Auckland Council* refers a period of 18 months which was agreed in that case as a reasonable period of time.⁶³

Holders of surplus public works land have on occasions improperly sought to rely on their discretionary powers to avoid responsibility to former owners.

⁵⁹ Guideline for disposal of land held for a public work (Land Information New Zealand, LINZG15700, 13 November 2009) at 20

⁶⁰ *Williams v Auckland Council* [2015] NZCA 479 at [60]

⁶¹ Public Works Act 1981, s 40(2)(a)

⁶² *Williams v Auckland Council* [2015] NZCA 479 at [58]

⁶³ *Ibid* at [57] - [58]

Miller J observed in *Edmonds v Attorney-General*, later cited by the Court of Appeal in *Williams v Auckland Council*:

If the agency did not invoke the relevant subsection to justify a decision to retain the land at the time, it is difficult to see why the Court ought to reach a decision on its behalf, in litigation brought after any reasonable time needed to reach a decision has long passed.⁶⁴

The discretionary power for exemption under s40(2) cannot be exercised retrospectively as a defence for failing to observe mandatory offer back provisions. Harrison J observes this construction both conforms to the plain wording of s 40 and is “...consistent with the policy underlying that provision.”⁶⁵

Former Owner and Successor – To Whom is the Duty Owed?

Section 40 offer back rights are conferred upon former owners of surplus public works land and their successors. An important step in the offer back process is the identification of those people to whom the Crown owes the statutory duty of offer back. Section 40(2) reads:

“...[the Crown] shall offer to sell the land by private contract to the person from whom it was acquired or the successor of that person –“⁶⁶

The task of identifying former owners involves a search of public land records. The Registrar-General of Land holds a register of land interests.⁶⁷ However, the Registrar of the Maori Land Court is responsible to record ownership of Maori freehold land.⁶⁸ The two registers may duplicate ownership information for Maori freehold land, however, the Maori Land Court register is the primary

⁶⁴ *Edmonds v Attorney-General* HC Wellington CIV-2000-485-695, 3 May 2005 as cited in in *Williams v Auckland Council* [2015] NZCA 479 at [59] which notes an appeal against the decision in *Edmonds v Attorney-General* was allowed in part but not on this finding: See *Attorney-General v Edmonds* CA97/05, 28 June 2006 at [55] and [60]

⁶⁵ *Williams v Auckland Council* [2015] NZCA 479 at [60]. Note: At [61] these factors may be relevant when a Court exercises its discretion to grant declaratory relief.

⁶⁶ Public Works Act 1981, s 40(2)

⁶⁷ Land Transfer Act 1952, ss 4(1) and 33(1)

⁶⁸ Te Ture Whenua Maori Act 1993, s127(1)

record for Maori freehold land.⁶⁹ Former owner details are held under either, or both, registers. The more difficult identification task arises where a former owner has died. In such situations the successor of the former owner becomes the entitled person. Probate and intestacy records will be required to help identify successors of former owners.

The meaning of the term ‘successor’ is recorded under s40(5) which reads:

(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.⁷⁰

The first part of the definition refers to succession of the natural person by way of will or intestacy. The application of this part of the statute is aided by laws relating to wills and intestacy. In *Williams v Auckland Council*, Harrison J rejected any suggestion of broadening the definition to cater for successors beyond the immediate successor of the former owner:

There is an assumption that ownership of the land has not changed between the dates of acquisition and the owner’s death, meaning ...that Parliament intended only one level of succession.⁷¹

Succession for the purposes of the offer back scheme is a one-step exercise, and no more. The person next in line from the former owner is their successor. Descendants beyond this first level of succession miss out. The narrow interpretation follows the obiter of *Port Gisborne Limited v Smiler*⁷² at the Court of Appeal and is not helpful for Maori.

⁶⁹ Te Ture Whenua Maori Act 1993, s123

⁷⁰ Public Works Act 1981, s 40(5)

⁷¹ *Williams v Auckland Council* [2015] NZCA 479 at [65] citing *Mark v Attorney-General* HC Wellington CIV-2002-485-799, 27 October 2009.

⁷² *Port Gisborne Ltd v Smiler & Ors* [1999] NZLR 695 (CA) at [43] – [45]

Successors of Maori Land

Public works land will often remain in the hands of its administrating public body for many decades. Public works activity is therefore likely to endure beyond the lifetime of former owners. Strong ties to such land will typically be retained by descendants of former Maori owners. Maori cultural ties to land endure for multiple generations, not just one level of succession. This gives rise to a problem where former owners and their immediate successors fail to live long enough to qualify for an opportunity to buy their land back. The remedial purpose of the offer back scheme falls short at this stage. Tikanga Maori is the basis upon which Maori recognise enduring connection and relationship with land. The meaning of the term ‘successor’ under s40(5) of the Public Works Act falls short of land succession norms under Tikanga Maori. It fails those descendants of former owners who retain their traditional connection with land once owned by their ancestors but fall beyond the one-step succession limit from those people that happen to be named on the public land record.

Maori freehold land succession is based upon a hybrid of Maori custom together with common succession laws of probate and intestacy. Part 4 of Te Ture Whenua Maori Act 1993 is dedicated to this customary and common succession of Maori land interests.⁷³ The statutory scheme for Maori land succession is broader than succession prescribed under the Public Works Act. To this extent, s40(5) is inconsistent with Te Ture Whenua Maori Act 1993.

Parliament recognises that Maori interests are not always adequately catered for under the general offer back provisions of s40. Section 41 of the Public Works Act caters for a limited class of former Maori owners. The chief executive of Land Information New Zealand has discretion to either comply with the requirements of s40 or alternatively apply to the Maori Land Court for the land to simply be vested as Maori freehold land in Maori ownership. This option is not available for all land previously owned by Maori. Surplus public

⁷³ Te Ture Whenua Maori Act 1993, s 101 – General law relating to the administration of estates, and bringing and settling claims against estates, to apply subject to Part 4 of Te Ture Whenua Maori Act 1993.

works land will only qualify if it was: Maori freehold land or General land owned by Maori immediately prior to acquisition for a public work; beneficially owned by over four people; and not vested in any trustee or trustees.⁷⁴

The disposal of former Maori land provision under the Public Works Act reads:

41 Disposal of former Maori land when no longer required

Notwithstanding anything in sections 40 and 42 of this Act, where any land to which section 40(2) of this Act applies was, immediately before its taking or acquisition,-

- (a) Maori freehold land or General land owned by Maori (as those terms are defined in section 4 of Te Ture Whenua Maori Act 1993); and
- (b) Beneficially owned by more than 4 persons; and
- (c) Not vested in any trustee or trustees-

The chief executive ... shall-

- (d) Comply with the requirements of section 40 of this Act; or
- (e) Apply to the Maori Land Court for the district in which the land is situated for an order under section 134 of Te Ture Whenua Maori Act 1993.⁷⁵

The advantage of the s41 disposal provision is that it offers an alternative to the formalities under the s40 procedure that are unsuitable for Maori land dealings. One such unsuitable aspect is the discrepancy between the meaning of ‘successor’ under s40(5) and Maori land succession practise. This discrepancy can be avoided if the chief executive exercises discretion to dispose of subject land under s41(e) by applying to the Maori Land Court for a vesting order.

It will be of particular concern for Maori that not all former Maori land is captured under the s41 Maori land disposal provision. Land that falls outside the relatively narrow class includes:

1. Maori freehold land with between one and four beneficial owners;
2. Maori freehold land that was vested in a responsible trustee or trustees, such as the Maori Trustee or a Maori land trust recognised by order of the Maori Land Court; and

⁷⁴ Public Works Act 1981, s41(a) – (c)

⁷⁵ Ibid, s 41

3. General land owned by Maori. In keeping with Government policy during the 1960s, Maori freehold land was routinely converted to General land where such land was beneficially owned by no more than four people. Such conversion was typically a matter of procedure without beneficial owners being consulted.

The problem of the s41 provision for Maori successors is twofold. First, such vesting is at the discretion of the statutory officer. It is not a right in favour of former land owners or their descendants to determine whether or not the s40 provisions are unsuitable and they would be better served by s41. Second, the qualifying class of land that falls under s41 is narrow leaving non-qualifying land to the formal requirements of the potentially unsuitable s40 offer back scheme. Some former owners and their descendants will be lucky, while others will miss out. There is no obvious reason for there to be such a narrow approach under s41 which disqualifies some Maori land due to land ownership recording rather than taking into account the remedial purpose of the statutory offer back scheme as it applies to all land formerly owned by Maori.

Return of Land by Maori Land Court Order

The Maori Land Court has jurisdiction to grant an order vesting land into Maori ownership and to declare that such land shall become Maori freehold land.⁷⁶ The chief executive may seek an order as an alternative to the standard offer back procedure under s40 of the Public Works Act.⁷⁷ In such cases, the vesting procedure under s134 of Te Ture Whenua Maori Act 1993 replaces the procedure under s40.

The statutory vesting scheme under s134 of Te Ture Whenua Maori Act 1993 prevails. The Maori Land Court by way of a s41(e) offer back is responsible to consider the chief executive's application and the terms of any vesting order

⁷⁶ Te Ture Whenua Maori Act 1993, s 134(2)

⁷⁷ Public Works Act 1981, s41(e)

sought. The Court is not constrained by the terms proposed by the chief executive, including terms proposing names of people whom the chief executive considers should take the land back.⁷⁸ Offer back provisions under ss40 and 41 of the Public Works Act do not limit the powers of the Court to exercise its own discretion.⁷⁹

The relevant provisions of section 134 of the 1993 Act read:

134 Change to Maori freehold land by vesting order on change of ownership

(1) This section applies to—

(a) Any land (other than Maori freehold land) that the beneficial owner wishes to have vested in or held in trust for any Maori or any group or class of Maori, or any Maori incorporation; and

...

(e) Any Crown land (other than Crown land reserved for Maori).

(2) The Maori Land Court shall have jurisdiction in accordance with the succeeding provisions of this section to make a vesting order in respect of any land to which this section applies and to declare in that order that the land shall become Maori freehold land.

...

(3) An application to the Court for the exercise of its jurisdiction under this section shall be made,—

...

(e) In any case to which subsection (1)(e) of this section applies, any Minister of the Crown.

(4) Notwithstanding anything in subsections (1) to (3) of this section, any Minister of the Crown having responsibility in regard to the matter may apply to the Court for the exercise of its jurisdiction, and on such an application the Court may exercise its jurisdiction, under this section in respect of any Crown land that has not been formally set aside for the benefit of Maori.

(5) An application may be made to the Court, and the Court may exercise its jurisdiction, under this section notwithstanding the provisions of any Act to which the land is subject, and notwithstanding any terms and conditions imposed by the Act on the sale or other disposition of the land.

(6) In any application under this section, the applicant may specify—(a)

The person or persons in whom it is proposed the land shall be vested; and

(b) The price to be paid for the land, and the terms and conditions of payment; and

(c) Any other conditions to which it is proposed the order shall be subject.

⁷⁸ Te Ture Whenua Maori Act 1993, s 134(7)(a)

⁷⁹ Ibid, s 134(5)

(7) On an application under this section, the Court may make an order vesting the land in—

(a) Such person or persons as the Court may find to be entitled to the land or otherwise in accordance with the terms of the application, in such shares as may be specified in the order; or

(b) A Maori incorporation or a Maori Trust Board or trustees for or on behalf of such person or persons, and on such terms of trust, as the Court may specify in the order.⁸⁰

The s41(e) offer back option assigns jurisdiction over to the Maori Land Court to exercise its own discretion under s134. Several unsuitable aspects of the s40 offer back scheme are addressed by a specialist Court which is expert in Maori land matters. The Court holds the final say as to '*[s]uch person or persons as the Court may find to be entitled...*'.⁸¹ The Court's powers, unlike those powers of the Public Works Act 1981, are designed expressly to cater for the needs of Maori people in relation to land.⁸²

The s41(e) offer back option does not remove the influence of the chief executive who is responsible to propose terms of any vesting order sought from the Court.⁸³ Negotiations between the chief executive and former owners or their successors will be concluded before a vesting application is lodged with the Court. Terms of the agreement reached between the parties will be conditional upon the Court's approval. Such approval will ultimately be in the form of a vesting order on terms determined by the Court.

If the parties are unable to reach agreement, for example upon the price to be paid or upon any restrictions the Crown may wish to impose over the land, the chief executive is entitled to withdraw from negotiations. Offer back obligations will be satisfied if subject land has been offered to former owners or the successors and those people have had a reasonable opportunity to consider the offer regardless of whether or not the offer is accepted. In such circumstances, there is no need for the chief executive to apply to the Court for a vesting order. The deal is over. The subject land can be sold on the open market.⁸⁴

⁸⁰ Te Ture Whenua Maori Act 1993, s134

⁸¹ Ibid, s134(7)(a)

⁸² Ibid, ss2 and 17

⁸³ Ibid, s134(6)

⁸⁴ Public Works Act 1981, s42(1)(d)

The strict offer back provisions of s40 are not entirely suitable for dealing with land interests held by Maori. ‘Tikanga Maori’ is the deeply embedded customary values and practices of Maori⁸⁵ and is the foundation of Maori culture. The values and principles it embodies are essential to Maori understanding of what may be appropriate, particularly regarding rights and interests over land. Tikanga greatly influences, if not determines, what Maori consider to be right, correct or appropriate.⁸⁶

The succession of land interests is particularly important to Maori. Maori interests extend beyond the notion of ownership. Land is not simply an asset measurable in financial terms. Maori hold a special connection to land over many generations of association and activity. The land itself confers identity while ancestry is associated with occupation. These values extend well beyond monetary terms.⁸⁷ When dealing with the succession of Maori interests in land for the purpose of offer back, the method of succession is critical. Eligibility for succession of offer back rights is more appropriately addressed under the jurisdiction of the Maori Land Court by s134 Te Ture Whenua Act 1993 than by the chief executive under terms prescribed under s40(5) of the Public Works Act 1981. Te Ture Whenua Maori Act 1993 caters for tikanga Maori while the Public Works Act does not.

The suitability of various methods for determining succession is measureable by the end result. Succession by way of laws aligned to Maori custom may deliver a different end result compared to succession determined exclusively under standard laws for probate and intestacy.

An illustration of differing end results is recorded in a 1958 High Court case involving a Maori land owner who died intestate without children. In *Re Wiremu Ngawhare (Deceased), Hopkins v Raupatu Te Kaponga*,⁸⁸ the Court was asked to determine whether the persons entitled to succeed an interest in

⁸⁵ Te Ture Whenua Maori Act 1993, s4 – meaning of ‘tikanga Maori’

⁸⁶ Dr Robert Joseph “Contemporary Maori Governance: New Error” update of “Contemporary Maori Governance: New Era or New Error?” *New Zealand University Law Review* (Vol. 22, No. 4, 2007) at 682 – 70 at 24

⁸⁷ Waitangi Tribunal *Te Maunga Railways Land Report* (Wai 315, 1994) at Part 6 – Public Works Legislation, Section: Compensation and the Value of Land

⁸⁸ *Re Wiremu Ngawhare (Deceased), Hopkins v Raupatu Te Kaponga* [1958] NZLR 464

land would do so by Maori custom under s116 of the Maori Affairs Act 1953, or by succession determined exclusively by standard laws of intestacy. There were two distinct classes of entitled persons. On one side was the non-Maori half-brother of the deceased. On the other side were the nearest blood relations to the deceased who were Maori. The Court held that the persons entitled to succeed should do so as if the land was ‘European land’. Maori custom did not apply. The land went to the deceased’s non-Maori half-brother.

The municipal law of New Zealand recognises succession both under Maori custom⁸⁹ and under the laws of probate or intestacy.⁹⁰ Succession by Maori custom has no less legal standing if qualifying criteria are met. For the purpose of s41 offer back of surplus public works land, it is the chief executive of Land Information New Zealand, for and on behalf of the Crown, who gets to decide the method of succession. As *Re Wiremu Ngawhare (Deceased), Hopkins v Raupatu Te Kaponga* illustrates, it is possible that eligible successors under Maori custom will not necessarily be eligible under an alternative method of succession.

The return of surplus public works land by Maori Land Court order faces difficulties due to four significant barriers that limit the operation of s41 offer back. First, prerequisites determine that not all Maori land qualifies under the s41 offer back criteria. The prerequisites are based upon formal historic ownership records which have no bearing to the remedial objective of the offer back scheme. Second, if land does meet the prerequisites of s41, the opportunity under s41(e) for land to be returned by Maori land Court order is entirely at the discretion of the chief executive of Land Information New Zealand.⁹¹ Maori who hold strong connections to subject land as either former owners or the descendants of former owners have no say in determining the suitability or appropriateness of options conferred under s41 to either follow the scheme of the Maori Land Court or the scheme under s40 of the public Works Act. Third, the parties to offer back must reach agreement as to terms of any proposed vesting. Maori’s disadvantage is that if agreement is not

⁸⁹ Te Ture Whenua Act 1993, Part 4 – Administration of Estates

⁹⁰ Administration Act 1969, s 77

⁹¹ Public Works Act 1981, s41(d) and (e)

reached within a reasonable time, the Crown's offer back responsibilities may be satisfied regardless. Fourth, the 'one-level succession from the former owner' principle of s40(5) and *Port Gisborne Limited v Smiler*⁹² cannot necessarily be avoided given such approach is still available to the chief executive under s41(d). Whether or not the Maori Land Court would follow this reasoning is another question given it has its own jurisdiction to determine such matters.⁹³ However, an offer back will not even get before the Court if the chief executive has already decided to comply with the requirements of s40⁹⁴ and adopt the Public Works Act meaning of successor where there is no eligible successor under those criteria.

Unsuitable Statutory Approach

It is a near impossible task to create a statutory scheme that will work well in all situations. Circumstances leading up to the disposal of surplus public works land will vary greatly. However, a good scheme should seek to meet the reasonable requirements of the people for whom the scheme is intended to serve. The statutory offer back scheme is not designed to serve the Crown.⁹⁵ It is designed to serve former owners of surplus public works land and the successors of those former owners. The offer back scheme is for those people and it is intended to be remedial.⁹⁶

The Crown, in its Treaty settlement with Ngati Turangitukua, acknowledges that the ss40 and 41 land disposal mechanisms "...do not always work well."⁹⁷ The acknowledgement itself refers to matters of timeliness. A protocol agreement was reached between the Crown and Ngati Turangitukua under their settlement to better support the offer back process. It addresses the need

⁹² *Port Gisborne Ltd v Smiler & Ors* [1999] 2 NZLR 695 (CA) at [43 – [45]]

⁹³ *Te Ture Whenua Maori Act 1993*, s134(5)

⁹⁴ *Public Works Act 1981*, s41(d)

⁹⁵ *Hull v Attorney-General* (1998) 12 PRNZ 523 (HC) (at page 3 of online report)

⁹⁶ *Rowan v Attorney-General* [1997] 2 NZLR 559 at 568

⁹⁷ *Deed of Settlement O Ngati Turangitukua* (Office of Treaty Settlements, 26 September 1998) Attachment 6: Land Information New Zealand Protocol at [1]

for the Crown to improve its consultation with former Maori owners. It also enables Ngati Turangitukua to notify the Crown if there are any other persons that may be entitled former owners or successors other than those persons identified by the Crown from formal land records.⁹⁸

The offer back protocol addresses some shortfalls of ss40 and 41 regarding consultation and identification of entitled persons. However, it has limited legal reach. The Treaty settlement with Ngati Turangitukua is recorded by deed between the parties. The full provisions of the Deed and offer back policy have not been elevated to legislation, other than a relatively brief apology and several essential operative provisions.⁹⁹ The offer back protocol is an arrangement between parties, the Crown and Ngati Turangitukua, which has no broader application to the statutory offer back scheme as a whole. Advantages for Ngati Turangitukua are not enjoyed by all Maori former owners or their successors.

The offer back protocol endorsed by the Crown for Ngati Turangitukua has merit in a wider sense. The offer back scheme is designed for former owners and their successors, but the scheme tends to fail those people if they are Maori. There is particular difficulty with the link between recognising eligible persons under the scheme and those people who genuinely have a cultural connection to subject land by way of their cultural and ancestral ties. The Court of Appeal's decision in *Port Gisborne Ltd v Smiler*¹⁰⁰ is an example. An unusual outcome followed the Court's reasoning as to how the term 'successor' under s40(5) should be applied. The background to the Smiler case is that 40,000 acres of ancestral land belonging to the hapu of Tauwhareparae was sold to the Crown in 1879 following several years of negotiation and formal steps by the Crown to secure an exclusive negotiating position. The purchase was given effect under the consolidated public works legislation of the day, s34 of the Immigration and Public Works Act 1870.¹⁰¹ The Court of Appeal observed a difference between land 'acquired and held for public or

⁹⁸ Deed of Settlement O Ngati Turangitukua (Office of Treaty Settlements, 26 September 1998) Attachment 6: Land Information New Zealand Protocol at [6]

⁹⁹ Ngati Turangitukua Claims Settlement Act 1999

¹⁰⁰ *Port Gisborne Ltd v Smiler & Ors* [1999] 2 NZLR 695 (CA) at [43 – [45]]

¹⁰¹ *Ibid* at [3].

government works' and land merely acquired and held "...by the Crown for the general purposes of settlement."¹⁰² It was found that the Tauwhareparae land was not initially brought into public ownership for a public work, notwithstanding its use and designation in later years.¹⁰³ The public works status occurred four years after the land was acquired from its former owners. In 1884 the land was endowed on the Gisborne Harbour Board and the public works purpose was triggered.¹⁰⁴ The Court of Appeal found that the former owner for the purpose of the offer back scheme was the Crown, not the hapu of Tauwhareparae. The Gisborne Harbour Board was deemed to have acquired the land from the Crown because the land was owned by the Gisborne Harbour Board when it was first held for a public work.¹⁰⁵ The hapu of Tauwhareparae with genuine cultural and ancestral ties to the subject land they had surrendered to the Crown were not recognised under the statutory offer back scheme.

Laws in Aotearoa New Zealand recognise a system of land unique to Maori. The system is administered under Te Ture Whenua Maori Act 1993 and overseen by the Maori Land Court. The preamble of the Act refers to the special relationship between Maori and the Crown by way of the Treaty of Waitangi. It also proclaims how land is deeply significant to Maori. Mechanisms are in place under the land system to promote the retention and protection of such land in the hands of its owners for their benefit. The protection also extends to whanau and hapu in recognition of wider cultural ties between people and land.¹⁰⁶

The Maori land system has unique arrangements for land ownership, succession, governance, administration and judicial oversight. The Public Works Act offer back provisions are not designed to cope with this unique system of land. Offer back of surplus public works land in Aotearoa New Zealand functions on a 'one scheme fits all' basis. Maori interests in land are treated the same as all other interests in land generally. Some former Maori

¹⁰² Port Gisborne Ltd v Smiler & Ors [1999] NZLR 695 (CA) at [23]

¹⁰³ Ibid at [31]

¹⁰⁴ Ibid at [6]

¹⁰⁵ Ibid at [33]

¹⁰⁶ Te Ture Whenua Maori Act 1993, Preamble

land will at the discretion of the chief executive of Land Information New Zealand be passed to the Maori Land Court under s 41(e) if offer back terms are first accepted by former owners. However, strict qualifying criteria means that unique treatment in terms of s41(e) is not guaranteed.

Successor in Probate and Successor in Title

There are two aspects to the term ‘successor’ as it is defined under s40(5) of the Public Works Act. The first relates to the person entitled to the subject land under the will or intestacy of the former owner. This person is the successor in probate.¹⁰⁷ The second relates to the subsequent owner of land from which the surplus public works land was originally taken. This person is the successor in title to the original owner.

The purpose of recognising the successor in title is to restore a land parcel to its original position rather than restoring the original owner’s connection to the land. The successor in title provision is included for practical reasons to give land administrators options in relevant circumstances.

Schemes for disposal of surplus public works land before the 1981 Public Works Act came into force ignored any remedial notion toward former owners or their successors in probate. The attitude of the day appears to be that former owners received compensation for the loss of their interest in subject land, and that compensation supposedly reflected both the land value and full settlement for any perceived injustice.

The objective of disposal schemes which pre-date ss40 and 41 offer back provisions is utilitarian. Surplus public works land could be consolidated with adjacent land for best utilisation. Section 29 of the Public Works Act 1876 (repealed)¹⁰⁸ and s35 of the Public Works Act 1928 (repealed)¹⁰⁹ provided that

¹⁰⁷ Administration Act 1969, s5 – The High Court has jurisdiction and authority to make a grant of probate or letters of administration in respect of a deceased person.

¹⁰⁸ Public Works Act 1876 (repealed), s29

surplus public works land originally taken under those Acts could be sold by offering it first to the owner of the balance land from which it had been severed, being the successor in title. If that person did not accept the offer, the land could then be sold to the adjoining owner of the surplus land.¹¹⁰ This mechanism is perhaps better described as a ‘utilitarian offer’ rather than a ‘remedial offer back’.

The composition of s40(5) is such that both ‘successor in probate’ and ‘successor in title’ are qualifying persons where only part of a person’s property was originally taken. In such circumstances the ‘successor in title’ is included. There is nothing under the statutory definition to suggest that a ‘successor in probate’ should be excluded where circumstances give rise for a ‘successor in title’ to be included. If Parliament intended the successor in probate to be excluded, subsection (5) would have been worded differently, for example: “...in any case where part of a person’s land was acquired or taken, [shall instead be] the successor in title of that person.”¹¹¹

The Court of Appeal in *Port Gisborne Ltd v Smiler & Ors* expressed an obiter view which implies a successor in title should be entitled over a successor in probate.¹¹² This view is not supported from a plain reading of the words in s40(5) so it would be difficult to argue that such view was ever the intention of Parliament for the remedial offer back scheme. It seems as if the Court in *Smiler* missed the significance of Parliament’s new objective under the 1981 Public Works Act which is remedial rather than utilitarian as it was under previous Acts.¹¹³

¹⁰⁹ Public Works Act 1928, s35 - Which is a carry-over from the provisions of the Public Works Act 1894, s29 except for the final paragraph of the 1928 Act which is additional.

¹¹⁰ Public Works Act 1876 cited at *Port Gisborne Ltd v Smiler & Ors* [1999] 2 NZLR 695 (CA) at [30]

¹¹¹ Public Works Act 1981, s 40(5) with the words ‘shall instead be’ inserted for illustration.

¹¹² *Port Gisborne Ltd v Smiler & Ors* [1999] NZLR 695 (CA) at [45]

¹¹³ See *Rowan v Attorney-General* 2 NZLR 559 (HC) at 574 for interests of former owner where there was also another person as successor in title.

Offer Back and the Treaty of Waitangi

The Treaty of Waitangi stands as a foundational document in the constitution of Aotearoa New Zealand. The system of land tenure operative in the nation since 1840 is underpinned by the Crown's right of eminent domain. The Crown holds ultimate title in land. The Crown's subjects can only hold privileges in land under the ultimate title and authority of the Crown. These privileges are conferred by way of estates in land which are inferior to the Crown's title.

The Treaty of Waitangi has no direct application to the Public Works Act 1981 other than by way of its constitutional significance. There is no specific Treaty provision within the Act, unlike Treaty of Waitangi provisions in other statutes such as s9 of the State Owned Enterprises Act 1986.¹¹⁴ The Treaty provision under the State Owned Enterprises Act gave rise to the 1987 landmark Court of Appeal decision of *New Zealand Maori Council v Attorney-General* concerning the disposal of land from the Crown to State owned enterprises and ensured protection of Maori interests.¹¹⁵

The Waitangi Tribunal has called for the Public Works Act 1981 and other relevant legislation to be amended to require:

“That all persons exercising functions and powers under the Public Works Act should act in a manner that is consistent with the Treaty of Waitangi.”¹¹⁶

The Tribunal's fourteen recommendations concerning Public Works legislation from its Ngai Tahu, Te Maunga and Turangi reports were tabled in December 2000 under a review of the Public Works Act. Amendments to the 1981 Act were recommended to avoid situations, either in the Act itself or derived by powers conferred under the Act, which breach or potentially breach the principles of the Treaty.¹¹⁷ There was a strong preference among Maori

¹¹⁴ State Owned Enterprises Act 1986, s9

¹¹⁵ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641

¹¹⁶ Waitangi Tribunal *Te Maunga Railways Land Report* (Wai 315, 1994) at Recommendations 3(a) (no page or paragraph references on report)

¹¹⁷ Richard Fletcher (ed) *Review of the Public Works Act: Issues and Options* (Land Information New Zealand, Public Discussion Paper, December 2000) at 59-61

submitters to the review for there to be a Treaty reference in the body of the Act.¹¹⁸

In absence of statutory recognition or adoption, the Crown's obligations under the Treaty of Waitangi are not directly enforceable in the Courts.¹¹⁹ With no express Treaty provision in the Public Works Act 1981, the exercise of Treaty principles by the Crown is limited to good faith and best intentions of responsible Ministers and officials. Obligations arising from the relationship between the Crown and Maori are prescribed by analogy rather than direct application, as is the relationship itself.¹²⁰ O'Regan J delivered the Court of Appeal judgment in the 2008 forestry case *New Zealand Maori Council v Attorney-General*. He observes:

The decisions of this Court contain clear statements to the effect that the Crown's duty to Maori is analogous with a fiduciary duty and we see no proper basis for us to revisit them. The law of fiduciaries informs the analysis of the key characteristics of the duty arising from the relationship between Maori and the Crown under the Treaty: good faith, reasonableness, trust, openness and consultation. But it does so by analogy, not by direct application. In particular, we see difficulties in applying the duty of a fiduciary not to place itself in a position of conflict of interest to the Crown, which, in addition to its duty to Maori under the Treaty, has a duty to the population as a whole. ...[T]he Crown may find itself in a position where its duty to one Maori claimant group conflicts with its duty to another.¹²¹

A Treaty of Waitangi provision in the Public Works Act will serve to secure the principles of good faith, reasonableness, trust openness and consultation as derived from the Treaty. Powers to facilitate public works activities for the good of the general population would be maintained and continue. However, the manner by which these powers are exercised would be open to the scrutiny of the Courts if the exercise of power is contrary to principles of good faith, reasonableness, trust, openness and consultation.

The Crown's right of eminent domain and powers of the Crown to compulsorily take land for public works is at odds with perceived rights of Maori land owners under the Treaty of Waitangi. The Second Article of the Treaty of Waitangi guarantees Maori a right to retain possession of their

¹¹⁸ *Review of the Public Works Act: Summary of Submissions* (Land Information New Zealand, August 2001) at 77

¹¹⁹ *New Zealand Maori Council v Attorney-General* [2008] 1 NZLR 318 at [65], [66], [72] and [81]

¹²⁰ *Ibid* at [81]

¹²¹ *Ibid* at [81]

lands.¹²² The Second Part of the Public Works Act 1981 authorises the Crown to take land, if need be by compulsion.¹²³ A Treaty of Waitangi clause in public works legislation will not resolve this contradiction. A carefully worded clause will, however, enable those difficult provisions which are necessary for the public good as a whole to continue but with requisite transparency. Such transparency will be promoted when the Courts are able to review the actions of the executive in light of their responsibilities arising under the Treaty of Waitangi.

A Treaty of Waitangi provision in the Public Works Act will inevitably be subservient to the right of the Crown to take private land in the interests of the greater public. A Treaty clause could be as simple as modifying the Treaty provisions from existing legislation such as s9 of the State Owned Enterprises Act 1986.¹²⁴ Modification must ensure that powers conferred by the Public Works Act can still be exercised without undue limitation. A Public Works Act Treaty of Waitangi provision could read:

[Without limiting the powers conferred by this Act,] [n]othing in this Act shall permit the Crown or a Local Authority to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.¹²⁵

There is natural tension between the Crown's Treaty obligations and the Crown's right to govern in the interests of the greater public. However, an express Treaty of Waitangi provision in the Public Works Act would serve as a protector of the good faith relationship between the Crown and Maori. If carefully worded, the provision would not unreasonably limit those powers necessary for governments to carry out public works.

¹²² Treaty of Waitangi, United Kingdom – New Zealand (opened for signature and entered into force 6 February 1840), art 2

¹²³ Public Works Act 1981, Part 2 Acquisition of land for public works

¹²⁴ State Owned Enterprises Act 1986, s9

¹²⁵ *Ibid* – with introduction inserted for illustration.

Practical Considerations for Offer Back to Maori

The offer back scheme under ss40 and 41 of the Public Works Act 1981 requires the Crown to identify those people eligible to have surplus public works land offered to them. The Crown's offer back obligations will only be satisfied where those eligible people have had a reasonable opportunity to consider an offer put before them.

Accuracy of former owner information is important for the proper discharge of offer back responsibilities. Details of former owners are sourced from historic land records. The record of legal and beneficial owners of all Maori freehold land is the responsibility of the Registrar of the Maori Land Court.¹²⁶ The Registrar-General of Land holds a register of land interests which includes General land, Maori freehold land and some land of public bodies.¹²⁷ However, the record of the Maori Land Court Registrar is the primary source for information about ownership of Maori freehold land, whether that be current or historic.

Land ownership information for a specific parcel can vary from one source to another. Where Maori freehold land is registered under the General land system of the Registrar-General of Land, it is relatively common for ownership details on computer freehold register titles to differ from those ownership records at the Maori Land Court. An example of this is where trustees have been appointed to manage land interests for and on behalf of beneficial Maori owners. Maori Land Court ownership lists record the names of all beneficial owners as well as the appointment of trustees. The Registrar-General of Land in this situation will only recognise the trustees as legal owners of the land. The statutory offer back scheme requires that surplus public works land be offered to the former owners or their successors, not to the former trustee or trustees.

Public works land has on many occasions been acquired from District Maori Land Boards, the Maori Trustee and other trustees or agents who at the time of

¹²⁶ Te Ture Whenua Maori Act 1993, s 127(1) and (4)

¹²⁷ Land Transfer Act 1952, ss 4(1) and 33(1)

acquisition were named as registered proprietor on the Registrar-General of Land's register. However, in each of these situations Maori Land Court records will evidence details of all beneficial owners represented by those trustees or agents. Maori freehold land belongs to its beneficial owners, not trustees or agents. Care must be taken to properly identify former owners. The Crown's statutory duty to offer surplus public works land back will only be discharged if the former owners '*from whom the land was acquired*',¹²⁸ or their successors are properly identified and have had reasonable opportunity to consider the offer.

Barriers for Maori to Accept Offer Back

The offer back scheme under ss40 and 41 of the Public Works Act is an opportunity for Maori to return to land previously taken from them. The opportunity is not an easy one for them to realise. There are barriers specific to Maori under the offer back scheme.

The offer back scheme does not recognise any intrinsic value of land other than its current market value determined by a suitably qualified valuer.¹²⁹ Value from a Maori perspective concerns identity, many generations of occupation, and the link to ancestry which cannot be translated into monetary terms.¹³⁰ The offer back of surplus public works land is conducted strictly on financial terms. Payment of money will get land returned. Any inability to pay will result in land being sold to somebody else.¹³¹

Maori freehold land is commonly held by multiple owners, to such an extent that governing structures must be implemented to cope with large numbers of beneficial owners. When such land has been taken for a public work, the

¹²⁸ Public Works Act 1981, s 40(2)

¹²⁹ Ibid, s 40(2)(c) and (d) – A lesser price may be acceptable if the chief executive considers it reasonable to do so.

¹³⁰ Waitangi Tribunal *Te Maunga Railways Land Report* (Wai 315, 1994) at Part 6 – Public Works Legislation, Section: Compensation and the Value of Land

¹³¹ Public Works Act 1981, s42

cohesion of the land owning group is detrimentally affected, if not lost altogether. The statutory offer back of land, many years after it has been taken from its former owners, is to a weakened group of people. Their ability to regroup and reach consensus over formalities associated with the buying back of surplus public works land will be put to the test. To make matters worse, if an offer is not accepted within 40 working days it may then be withdrawn by the Crown and the subject property sold on the open market.¹³² Time is essential.

Offer back contemplates the possibility of land being sold to former owners or their successors on financial terms. The ability to take up such opportunity is dependent upon purchasers either having sufficient cash reserves to pay an agreed purchase price or having access to credit on reasonable terms. These two requirements are problematic for Maori.

The purchase price of surplus public works land is the current market value or a lesser price if the chief executive of Land Information New Zealand considers it reasonable to do so.¹³³ Discretion to accept a lesser price is an allowance for genuine negotiation between parties. Depending upon circumstances, it may be reasonable to accept a lesser price. However, the discretion is not about extending generosity to Maori merely because they may struggle to raise the purchase price.

Maori have 40 working days from receiving an offer to secure funding for any contemplated purchase.¹³⁴ This time limit may be extended at the discretion of the chief executive officer, but even so the prospective purchasers will be required to move quickly to have any chance of accepting the terms of an offer before it is withdrawn. The amount of money required to satisfy the purchase of land will be a relatively significant sum. If entitled purchasers do not have sufficient funds themselves, their only option will be to raise finance from a willing lender. The task of coordinating and mobilising multiple former owners and successors will be difficult enough when it is time to receive and

¹³² Public Works Act 1981, s42(1)

¹³³ Ibid, s40(2)(c) and (d)

¹³⁴ Ibid, s42(1)(a)

consider an offer back proposal. The logistics involved with raising finance amongst a large group of people will pose even more difficulty.

Lenders typically require security as a condition before finance will be advanced to a borrower. The terms of that security will be determined by the lender. The form of security in such circumstances is likely at the very least to be a registered mortgage over the subject land.

Mortgage security over Maori freehold land does not offer the same level of security as a mortgage over General land. Mortgage security is intended to enable the mortgagee to realise its interest in subject land if a borrower is in default. The alienation provisions under Te Ture Whenua Maori Act 1993 impose restrictions upon mortgagees, indeed every person, wishing to sell Maori freehold land.¹³⁵ If Maori require mortgage finance to satisfy purchase conditions, the lender is likely to prefer or require that the surplus public works land be returned to Maori as General land rather than Maori freehold land. This may pose a problem for the purchasers if the Maori land system is more suitable for their needs as land owners having regard to tikanga Maori. It may be a bigger problem for Maori in these circumstances if the chief executive imposes offer back terms which include the surplus public works land being vested as Maori freehold land.¹³⁶

If Maori are willing to purchase surplus public works land under an offer back arrangement but they are simply unable to raise funds to satisfy the sale terms, the entire offer back exercise at that point is reduced to a futile exercise. The reality of the offer back scheme is that property is offered strictly on financial terms. There are very real barriers for Maori to raise sufficient funds to enable land to be returned to them as Maori freehold land. If the original acquisition of land from Maori was a breach of the special relationship between the Crown and Maori, the offer back of land without any reasonable chance of acceptance is likely to give rise to another breach.

¹³⁵ Te Ture Whenua Maori Act 1993, Part 7 Alienation of Maori land, s146

¹³⁶ Public Works Act 1981, s41(e)

Conclusion

The offer back provisions of the Public Works Act require the Crown to offer surplus public works land back to former owners or their successors unless statutory exemptions apply. The enactment of offer back provisions in 1981 was a significant advancement to address perceived injustice arising from losing land compulsorily taken. It is now time to improve the Act to better align the offer back scheme with well-established Maori land laws and to better reflect the constitutional relationship between the Crown and Maori.

The special constitutional relationship between the Crown and Maori, together with laws and a land system unique to Maori interests in land, call for an offer back scheme that recognises the Crown's special duty to Maori being different than obligations owed to others. The relationship between Maori and the Crown is a constitutional arrangement in place since 1840 and more recently affirmed under Treaty of Waitangi settlements. Laws of Aotearoa New Zealand recognise a land system unique to Maori land. Those laws take into account tikanga Maori in matters including customary succession of Maori land interests. The offer back scheme should be better aligned to this system and the unique needs of Maori.

The statutory offer back scheme can only be revised by Parliament. It is not possible to read more into the offer back provisions in their existing form. Government officials responsible to administer the Crown's obligations and the judiciary in its role of applying the law are bound to a statute which has remained without significant change or reform for well over three decades. A lot has happened in Aotearoa New Zealand regarding advancement of Maori issues since the early 1980s. Much needed improvement can only be brought about by revising the legislation to a modern form. Parliament already acknowledges the nature of the Crown's relationship with Maori in other legislation. The principles of the Treaty of Waitangi have long since existed under other legislation. It is now time to import those principles into a revised Public Works Act.

PART II

THE JUDICIAL NARRIATIVE

SIGNIFICANCE OF THE JUDICIAL NARRIATIVE

The Crown's special duty to Maori regarding the offer back of surplus public works land is broader than the strict confines prescribed by statute. However, unless obligations are imposed by a statutory scheme, there will be no legal justification to prioritise the interests of former owners over competing concerns held by the government of the day. Such competing concerns are typically driven by economic factors rather than a desire to address past injustices over historic public work land acquisition methods. Bastion Point and Te Kopua controversies of the 1970s are but two prominent examples. The unfettered opportunity to realise economic potential of surplus public works land will naturally take priority over legally unrecognised, but principally justified, interests of former Maori owners. In both Bastion Point and Te Kopua, the Crown had an opportunity under legislation of the day to offer the surplus lands back to former owners if it wished to do so. Such provision existed under s436 of the Maori Affairs Act 1953, the non-binding predecessor to the binding offer back provisions of ss40 and 41 of the Public Works Act 1981. However, a golf course and the prospect of financial return from upmarket housing took priority over redress to former land owners from whom the lands were compulsorily taken.

The offer back of surplus public works land involves all three constitutional powers, Parliament, the Judiciary and the Executive. Parliament has imposed obligations upon the executive to consider former owners before disposing of surplus public works land. The judiciary is tasked with the responsibility of upholding Parliament's intention where offer back cases are brought before the Courts. A judicial narrative has now woven around the words of the statutory

offer back scheme. Parliament set the overall purpose of the scheme, but the judiciary has revealed the implications of the scheme for the Crown and former owners as real life situations have been decided one way or another.

It is commonplace and proper for the judiciary to enquire on the intent of Parliament before arriving at a decision concerning the interpretation of statute. However, Parliament in 1981 could never have foreseen just how the offer back scheme would play out. It even took time for the Executive to come to terms with its obligations. Some Government agencies thought they were exempt from the requirement to offer surplus public works land to former owners.¹³⁷ In the words of Fogerty J:

“The only reliable way to find the meaning of a statute is to apply it to a set of facts.”¹³⁸

A common theme throughout offer back cases is the complexity of facts. Applying the plain meaning of statute is not a simple task when complex background facts are introduced. Appeal Courts overturning decisions by learned judges of lower Courts speaks of the difficulty in understanding the statutory offer back scheme. It may in some respects be understandable that Government officials have taken time to come to terms with their offer back obligations. The judicial narrative is the application of black letter statute to background facts.

By enacting the offer back provisions under Public Works Act 1981, Parliament has forced the hand of the Executive branch of government to consider former owners before disposing surplus public works land. Discretionary offer back powers, such as those under s436 of the Maori Affairs Act 1953, were not enough to avoid controversies with former owners at Bastion Point and Te Kopua, Raglan. The interests of former owners were not at the top of Government’s agenda. Obligations must be enshrined in statute if they are to take priority over competing interests. In absence of a statutory scheme for protection, the judiciary has limited powers to intervene and hold

¹³⁷ *Attorney-General v Hull* [2000] 3 NZLR 63 (CA)

¹³⁸ *Robertson v Auckland City Council* [2014] NZHC 765 at [212]

the Executive accountable.¹³⁹ The statutory offer back scheme enables the Executive to understand and manage its priorities against the interests of former owners.

Parliament is the supreme lawmaker of New Zealand.¹⁴⁰ The judiciary's role in the relationship is well explained by McGrath J at the Supreme Court in *Paki v Attorney-General*:

“It is Parliament ...that has full power to make laws under our constitutional arrangements. The Supreme Court itself recognises New Zealand's commitment to the sovereignty of Parliament, as well as to the rule of law. An act of Parliament is the superior law that prevails over any inconsistent laws made by the executive or judicial branches of government. ...

It follows that the courts should not develop the common law in a manner inconsistent with legislation [or] that frustrates applicable statutory schemes.”¹⁴¹

It is not the role of the judiciary to reform statute law. Acts of Parliament are the means by which modern law reform is carried out in New Zealand.¹⁴²

Understanding the purpose of Parliament is fundamental to proper statutory interpretation. The meaning of statute law is derived “...*from its text and in light of its purpose.*”¹⁴³ The ‘intention of Parliament’ is perhaps better described as the ‘purpose of Parliament’. It would be absurd to analyse the collective mind of Parliamentarians to ascertain their intention at the passing of each statute. Furthermore, it was impossible for Parliament in 1981 to contemplate the full implications of the law it passed. Public sector reforms, corporatisation of government agencies reorganisation of port authorities are but some examples of events which unfolded years later to face both Parliament and the statutory offer back regime.

¹³⁹ Judicial intervention is available under the judicial review process to protect against illegal or unreasonable administrative action, but its application and effectiveness is constrained as illustrated under *Ngati Whatua O Orakei Maori Trust Board v Attorney-General & Ors* HC Auckland M.1501/92, 18 November 1992 at 14 - 29

¹⁴⁰ JF Burrows and RI Carter *Statute Law in New Zealand* (5th ed, Lexis Nexis, Wellington, 2009) at 19

¹⁴¹ *Paki v Attorney-General* [2015] 1 NZLR 67 (SCNZ) at [190] – [191]

¹⁴² JF Burrows and RI Carter *Statute Law in New Zealand* (5th ed, Lexis Nexis, Wellington, 2009) at 23

¹⁴³ Interpretation Act 1999, s5(1) Ascertaining meaning of interpretation

The purpose of offer back legislation is remedial. It is that surplus public works land must be offered to those people from whom it was taken, subject to several express exceptions.¹⁴⁴ The Privy Council in *Horton* observes:

“[The offer back scheme] 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.”¹⁴⁵

The statute means what it says. A common theme from offer back cases has the judiciary applying the law as it is written. The policy of the scheme is clear from the words of the statute.

The policy underpinning statutory offer back scheme has not always proven convenient. Despite inconvenience, offer back cases are typically determined in terms of the literal rule of statutory interpretation.¹⁴⁶ The words in s40 of the Act are given their ordinary meaning when applied to relevant facts. Government agencies and enterprises coming to terms with their offer back obligations through the 1980s and 1990s occasionally found themselves in difficulty. Classic examples appear in *Attorney-General v Hull*¹⁴⁷ and *Attorney-General v Horton*.¹⁴⁸ Other canons of interpretation are not relevant given the plain drafting of offer back legislation. The ‘golden rule’ of interpretation, where extraordinary meanings are applied to words to avoid contradiction or absurdity, is not an issue.¹⁴⁹ Likewise, the ‘mischief rule’, where statutes are interpreted to remedy a mischief for which they were enacted is not applicable to the offer back legislation.¹⁵⁰

It would not be possible to properly consider implications of the offer back regime for Maori without reviewing some important cases. The only reliable way to ascertain the meaning of offer back legislation is to apply the ordinary

¹⁴⁴ Public Works Act 1981, s40

¹⁴⁵ *Attorney-General v Horton* [1999] 2 NZLR 257 at 261 (PC)

¹⁴⁶ An exception being the Supreme Court decision in *Williams v Auckland Council* [2016] NZSC 20 (SC) where plaintiffs proved the technical requirements of the offer back scheme had been satisfied in their favour but the Supreme Court found they did not meet the remedial purpose of the offer back legislation.

¹⁴⁷ *Attorney-General v Hull* [2000] 3 NZLR 63 (CA)

¹⁴⁸ *Attorney-General v Horton* [1999] 2 NZLR 257 (PC)

¹⁴⁹ JF Burrows and RI Carter *Statute Law in New Zealand* (5th ed, Lexis Nexis, Wellington, 2009) at200

¹⁵⁰ *Ibid*

words to a set of facts.¹⁵¹ Statute law is paramount. The role of the judiciary is to apply the ordinary meaning of black letter law to the facts as presented by litigants. Those facts are often complex and, often, better understood with the benefit of hindsight.

Offer back legislation passed by Parliament in 1981 is a significant recognition of the rights of former owners of surplus public works land. Maori are placed in a position stronger than they were before the offer back scheme came into force. However, any improvement in the offer back regime to better address the Crown's special duty to Maori, where this is not adequately provided under existing legislation, must now be driven by Parliament.

The judicial narrative highlights advantages and shortfalls of the statutory offer back scheme. The real life stories of people affected by the legislation are brought out in cases before the Courts. It is only from these real life stories that it is possible to judge the appropriateness and relevance of the statute law. The following analysis and commentary regarding a selection of offer back cases seeks to highlight implications of the offer back scheme upon Maori.

HULL: Events that Trigger Obligations

Cases

Attorney-General v Hull [2000] 3 NZLR 63 (CA)

Hull v Attorney-General HC Auckland M 1900-SD00, 25 October 2001

Hull v Attorney-General (1998) 12 PRNZ 523 (HC)

Hull v Attorney-General HC Auckland M 1181-89, 27 November 1998

¹⁵¹ *Robertson v Auckland City Council* [2014] NZHC 765 at [212]

Introduction

As cities expand, demand increases for surrounding rural land to be converted from traditional use. Farmland, natural beauty areas, traditional food gathering sites and sacred areas are consumed into expanding cityscapes. More often than not, urban expansion takes place well beyond the control of landowners. Mass transition of land use will also result in economic, social and cultural change for people, particularly so for multi-generational land owning families whom are likely to have a strong connection to their property and its surrounds. For Maori, an extreme example of this phenomenon is illustrated by the urban expansion of Auckland city at the expense of Ngati Whatua whom by 1978 had lost ownership of practically all of their traditional lands. For individual landowners, whether Maori or non-Maori, the power behind an overwhelming push for urbanisation of land is much the same. The urban expansion phenomenon places landowners in a position whereby they have no option other than to have their lands consumed.

The offer-back scheme of s40 does not discriminate between the preferences of the land holding agency or the former land owner. The policy of the legislation is that surplus public works land should be offered to former owners or their successors unless exemptions apply. The wording of the legislation can at times be inconvenient to the interests of either party. If public works land is surplus to requirements, is not required for another public work or exchange, then it must be offered back to its former owners unless the exemptions to offer-back apply.¹⁵² The offer is to be at current market value, unless the chief executive of Land Information New Zealand considers it reasonable to off the land back for a lesser price.¹⁵³

¹⁵² Public Works Act 1981, s 40

¹⁵³ *Ibid*, s 40(2)(d)

Issues

The Hull cases are important to the understanding of offer back obligations. Land originally taken for housing purposes was no longer required for a public work. The responsible agency had offered the surplus land back to the Hulls following requests from the Hulls' solicitor to do so. The question before the Courts was ultimately to determine the date that the surplus land should have been offered back to the former owners.¹⁵⁴ If the responsible agency was statute bound to offer the land back at an earlier date, the sale price would be significantly less.¹⁵⁵ The ensuing litigation proves that the increase in land value over the years was worth the effort for each of the parties to pursue their preferred position.

The background facts are complex and they unfolded over several years. The Court of Appeal overturned the High Court decision that was in favour of the Hulls.¹⁵⁶ The reason for the Court of Appeal reaching a different end result to the High Court ultimately rests in its approach to interpreting s40 provisions. Given the series of detailed and complicated facts, the final decision could otherwise have gone either way. But the prevailing approach adopted by the Court of Appeal was to resist comparing conventional property law concepts with the offer back regime. The provisions of s40 are, in the words of Keith J who delivered the judgment¹⁵⁷, '*to speak for themselves in their historical and legislative context*'.¹⁵⁸ The legislative context is that the statute means what it says. The words of s40 are not to have meaning imported from other arenas, such as conventional property law. The Court's reference to the 'historical context' of s40 is a subtle reminder that the purpose of s40 is in its origin. Bastion Point, Te Kopua Raglan and the 1975 land march although not mentioned in the judgment are very much part of the historical context behind

¹⁵⁴ Public Works Act 1981, s40(2)

¹⁵⁵ *Ibid*, s 40(2)(d)

¹⁵⁶ *Attorney-General v Hull* [2000] 3 NZLR 63 at [53] (CA)

¹⁵⁷ The judgment of the Court of Appeal was delivered by Keith J. The same 'plain meaning' approach to the interpretation of s40 was adopted in the Court of Appeal judgment of *Port Gisborne Ltd v Smiler & Ors* CA 182-98, 26 April 1999, [1999] 2 NZLR 695 which was also delivered by Keith J

¹⁵⁸ *Attorney-General v Hull* [2000] 3 NZLR 63 at [49] (CA)

Parliament enacting the offer back regime. Keith J reminds us that this context is relevant.

Perhaps the most important observation of the Court of Appeal in Hull is that offer back obligations under s40 may be triggered by events.¹⁵⁹ A ‘formal recorded decision’ may not be required.¹⁶⁰ The Court of Appeal determined that the date the land was no longer required for a public work and should have been offered to the Hulls was later than the date determined by Randerson J at the High Court.¹⁶¹ The practical result was that the Hulls had to pay more to buy the land back given the increase in value between the two dates. The approach adopted by Keith J at the Court of Appeal reads:

“[I]f 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.”¹⁶²

The abandonment of a public work is one such example of circumstances likely to trigger offer back obligations under s40. A formal written decision to this effect is not a pre-requisite.¹⁶³ Section 40(1) refers to land ‘*no longer required*’ for a public work.¹⁶⁴ Circumstances are enough. The legislation does not stipulate a requirement for a formal recorded decision.

Whether or not public works land is no longer required for a public work will not always be an easy question to answer. The Hull case is testimony to that. However, Keith J at least presents a test that can be applied to background facts. The test is the easy part. It is the application of the test to facts, often complex, where matters become difficult.

¹⁵⁹ *Attorney-General v Hull* [2000] 3 NZLR 63 at [41] (CA)

¹⁶⁰ *Ibid* at [48] (CA)

¹⁶¹ *Hull v Attorney-General* HC Auckland M 1181-89, 27 November 1998

¹⁶² *Attorney-General v Hull* [2000] 3 NZLR 63 at [41] (CA)

¹⁶³ *Ibid* at [48] (CA)

¹⁶⁴ Public Works Act 1981, s40(1)(a)

Background Facts

Following construction of Auckland's harbour bridge in 1959, urban growth accelerated north of the city toward Albany where the Hull family owned rural property. As part of the urban planning development for Albany, the Crown in 1976 acquired from the Hull family two parcels of land for State housing purposes. The acquisition of land was invoked under the Public Works Act 1928.¹⁶⁵

The Hulls owned their land for a relatively short while. It was purchased by them in 1963 and utilised as a dairy farm. Even after the Crown acquired ownership, the Hulls continued to farm the property under a lease from the Crown. The two subject land parcels comprised an area of 47 hectares or 124 acres.¹⁶⁶

In the same year that the Hulls purchased their land, the Crown began purchasing land in the Albany Basin for its future urban development. The basin comprised the small village of Albany with the balance being substantially a rural landscape. In total there was approximately 5,500 acres or 2,200 hectares of land within the basin. It was intended that the basin be developed into a new urban community with reserves, schools, commerce and light industry, but the initial intention was predominantly for a State Housing area similar to Otara and Mangere.¹⁶⁷

A steering committee was established by the Government to promote planning for a new university at Albany and to steer development of the whole urban community. In 1973, the steering committee prepared a technical report for the Minister of Works and Development and the Minister of Housing which included a long term outline development plan for the direction of development and urban growth within the entire Albany Basin. The report recommended that 200 acres of land, within the vicinity of the Hull's property, be set aside for a sub-regional centre. The steering committee noted that initial

¹⁶⁵ *Hull v Attorney-General* HC Auckland M 1181-89, 27 November 1998 at 2

¹⁶⁶ *Ibid* at 3

¹⁶⁷ *Ibid* at 3 - 4

steps had been taken by the Housing Division of the Ministry of Works to exercise its powers under the Public Works Act 1928 to acquire all privately owned land within this zone.¹⁶⁸

The Hull's property largely fell under a proposal in the technical report for land to be set aside for industrial purposes such as general manufacturing, assembly plants, distribution warehouses and extensive yard type industries.¹⁶⁹ The Waitemata County district scheme which came into effect during 1973 zoned the Hull property as 'rural residential deferred', a designation for lands likely to be developed in future as part of urban expansion. The designation did not allow for urban development. Industrial activities were excluded and so were other uses incompatible with residential use.¹⁷⁰ The proposal anticipated that Waitemata County Council would introduce changes to its district scheme to enable the incremental roll out of long term urban development.¹⁷¹

The technical report recommended that the bulk of the land area, approximately 3,200 acres of the Albany Basin from an approximate total area of 5,500 acres, be utilised for housing purposes. The Hull's property was largely designated for future industrial purposes. Except for two small areas, there was no evidence to indicate that the Hull land was ever intended to be used for housing.¹⁷²

The reason the Crown assumed responsibility for orchestrating development of the Albany Basin was to ensure comprehensive development of the whole community. The steering committee expressed that public ownership of the industrial land would enable more effective land use controls to deliver broader economic and employment benefits.¹⁷³

¹⁶⁸ *Hull v Attorney-General* HC Auckland M 1181-89, 27 November 1998 at 4

¹⁶⁹ *Ibid* at 5

¹⁷⁰ *Ibid* at 4

¹⁷¹ *Ibid* at 6

¹⁷² *Ibid* at 6

¹⁷³ *Ibid* at 5 - as quoted from the technical report p 44

On 31 July 1974, the Associate Minister of Works and Development wrote to the Hulls notifying them of the Crown's intention to take their land. Extracts from the letter read:

You may be aware that Government, with the active cooperation of the Waitemata County Council and Auckland Regional Authority, has been engaged on the planning of the Albany Basin as a major extension to the Auckland metropolitan area. ...

To ensure the orderly development of the Basin as a new urban community with shopping, commercial and recreational facilities as well as places of work for future residents, in step with population and growth, Government now intends to acquire a further 423 acres of land which includes property owned by you ...

In order to implement this decision I have signed a Notice of Intention to take, under the provisions of the Public Works Act 1928, this additional land and you will receive formal notification of this as soon as practicable ...

You will be approached by a Property Officer of the Ministry of Works and Development in the near future and I am hopeful that in due course it will be possible to purchase from you, by negotiation, the land required on terms which will be mutually satisfactory. I would add that only if agreement cannot be reached by negotiation will consideration be given to the use of the compulsory powers of acquisition under the Public Works Act.¹⁷⁴

The overwhelming inevitability of land ownership deprivation is apparent from correspondence to the Hulls. Whether the landowners agree or not, the Crown's intention to take was signed off by the Associate Minister. The invitation to negotiate was on terms with a predetermined outcome. The Hulls were going to lose their land and no amount of negotiation would change that. This illustrates the power imbalance in favour of the Crown. This is the imbalance deemed necessary to carry out public works for the greater public good.

The Hulls and the Ministry of Works and Development did not agree within the prescribed 12 month statutory period so legalisation action was carried out regardless. On 12 February 1976 the Hull land was taken for State Housing

¹⁷⁴ Letter from the Associate Minister of Works and Development to Peter Abe Hull and John William Hull regarding the acquisition of land at Albany (31 July 1974) as cited from *Hull v Attorney-General* HC Auckland M 1181-89, 27 November 1998 at 7

Purposes under s32 of the Public Works Act 1928.¹⁷⁵ The designation of land for State Housing Purposes, although it was intended for industrial use, became a material point in litigation that followed.¹⁷⁶

Following the taking, the land was administered by Housing Corporation for and on behalf of the Crown. A lease was granted to the Hulls who continued to utilise the property as a dairy farm. Development of the Albany Basin continued but there were changes from the original plan. Various factors came into play such as a decline in the national economy and a change of local authority planning designation from rural residential deferred to rural industrial deferred. This affected the timing of the development and the proposed location for industrial areas was moved to where the former Hull land was situated.¹⁷⁷

The Public Works Act 1981 came into force on 1 February 1982 and with it the offer-back provisions of s40. Housing Corporation took time to appreciate the implications of s40. It initially questioned whether the offer back provisions even applied to the land it held.¹⁷⁸ A significant reason for this position appears to rest in the sheer inconvenience of offer-back obligations to Housing Corporation. The State housing provider had assumed the role of a commercial property developer endeavouring to achieve a return from its investment by way of property sales. Offer-back obligations are an impediment to the freedom required by a property developer wishing to take advantage of market opportunity to maximise financial return on investment. A report of October 1985 by the Assistant Director-General of Housing evidences the Housing Corporation's concern:

“5.2 The Housing Corporation purchased the land and has held it since the mid-60s for purposes now proposed. This, together with an outlay of approximately

¹⁷⁵ *Hull v Attorney-General* HC Auckland M 1181-89, 27 November 1998 at 8

¹⁷⁶ *Ibid* at 11 – Court concluded it was intended by Housing Corporation and the Ministry of Works and Development “...that the land was intended for future industrial purposes and not for housing.”

¹⁷⁷ *Ibid* at 9, 10 and 11.

¹⁷⁸ *Ibid* at 12

\$1,000,000 on engineering preparatory work suggests that we have a commitment to proceed to ensure a return of our investment to date.”¹⁷⁹

Development of housing within the Albany Basin depended upon market demand for developed land and Housing Corporation’s ability to meet the costs of infrastructure services for its new urban area.¹⁸⁰

Decisions dating to 1972 or 1973 indicated that earlier intentions of building a vast State housing complex had been set aside in favour of a mixed housing development with industrial areas. By the mid-1980s, the land acquired from the Hulls was under a cloud of uncertainty. Urban development of the Albany Basin progressively unfolded and Housing Corporation considered the former Hull property was still required for urban development likely to occur in the foreseeable future. There was no formal decision by Housing Corporation on the land being declared surplus to public works requirements.¹⁸¹ The Corporation thought it could hold onto the land on its belief that the meaning of ‘State housing purposes’ was sufficiently broad to include general urban purposes, such as the industrial development it intended. The Corporation thought that its offer-back obligations under s40 would not apply provided that it still intended to develop the Hull land for industrial purposes.¹⁸²

The Hulls decided in late 1986 they would try to recover their land. Their solicitor met with a senior planning officer of the Housing Corporation and was informed that State housing was no longer the intended purpose for the land, and that had been the case since at least 1979. A letter from the Hulls’ solicitor was sent to Housing Corporation on 17 December 1986 informing that the Hulls wished to purchase their former land in keeping with the provisions of s40 of the Public Works Act.¹⁸³ There still remained a significant level of uncertainty within Housing Corporation whether it could hold land for State Housing Purposes if the land was in fact intended for industrial and commercial development. It was not until 15 May 1989 that the Department of

¹⁷⁹ Report by the Assistant Director-General of Housing (Housing Corporation, October 1985) as cited in *Hull v Attorney-General* HC Auckland M 1181-89, 27 November 1998 at 16

¹⁸⁰ *Hull v Attorney-General* HC Auckland M 1181-89, 27 November 1998 at 16

¹⁸¹ *Ibid* at 16

¹⁸² *Ibid* at 26

¹⁸³ *Ibid* at 17

Lands finally presented formal offers to the Hulls. The offers were based upon a market value assessment of the land at that time. \$6.7 million plus GST was sought for the larger block and \$3.5 million plus GST for the smaller. The Hulls were given 40 working days to respond.¹⁸⁴

The Hulls' response to the Crown's offer confirmed their intention to purchase the properties, but at prices prescribed by s40. The Hulls then lodged legal proceedings with the Courts seeking a determination that the land had become surplus to requirements much earlier, as far back as 1981. As such they considered the Crown's offer to them should have been based upon the value of the land as at that date.¹⁸⁵

What the Courts said

The High Court ruled that by 1979 the fact scenario evidenced that the former Hull land was no longer required for State Housing Purposes, the public work for which it had been acquired.¹⁸⁶ The High Court reasoned that Housing Corporation was not entitled to hold land for industrial development; therefore, statutory obligations under s40 could not be avoided when the offer back provisions of the Act came into force.¹⁸⁷ On any uncertainty over the new offer back regime that conferred obligations upon Housing Corporation, Randerson J was unsympathetic:

“In my view, it is irrelevant that the Corporation may have mistaken the extent and nature of its legal powers and obligations. Plainly, it had access to legal advice and, if it acted under mistake as to its legal position, this is not something which it may reasonably pray in aid to avoid its statutory obligations.”¹⁸⁸

¹⁸⁴ *Hull v Attorney-General* HC Auckland M 1181-89, 27 November 1998 at 23

¹⁸⁵ *Ibid* at 23

¹⁸⁶ *Ibid* at 40

¹⁸⁷ *Ibid*

¹⁸⁸ *Ibid*

The onus rests upon responsible agencies to properly observe and carry out their statutory duties.

The Court of Appeal preferred a far broader approach to the legitimacy of public work activity. It rejected the significance Randerson J had placed upon the distinction between ‘industrial purposes’ versus ‘state housing purposes’. Instead, it was the overall objective of the public work that was relevant, the urban development of the Albany Basin. Keith J at the Court of Appeal reasoned that ‘state housing purposes’ included industrial and commercial components which would comprise part of the intended new urban community. It was proper for land intended for industrial and commercial development to be held for state housing purposes. The broader purpose of urban development was legitimately contemplated under the ‘state housing purposes’ designation of the subject land.¹⁸⁹ The appeal was allowed.

The Hull litigation provides useful insight into operation of the surplus public works land offer back regime. Stepping back from the unique and complex facts, several themes appear in the narrative which relate to the offer back scheme as a whole. Rather than getting lost in detail, such as in the significance of district plan changes to the final outcome or in the relevance of ‘state housing purposes’ versus ‘industrial purposes’, there are some more broader lessons to be learned.

The Hulls faced the overwhelming inevitability that their farm land would be lost to urbanisation. The public works purpose for which their land was taken was driven by economic factors supported by the government of the day. The tone of correspondence from the Associate Minister of Works notifying the Hulls of the Crown’s intention to take their land will be familiar to Maori who have lost traditional lands to public works. An invitation to enter negotiations to sell is underscored with notice that land will be compulsorily taken if

¹⁸⁹ *Attorney-General v Hull* [2000] 3 NZLR 63 at [30] (CA)

negotiations are unsuccessful.¹⁹⁰ If land is required for a public work, it is not the ‘taking’ which is negotiable. Negotiation is only relevant to the terms upon which the land owner releases its property to the acquiring authority. Even then, the balance of power whether or not such terms are acceptable rests with an acquiring authority fully equipped to exercise compulsory powers of acquisition should negotiations fail.

Public works are not always perfectly planned and executed. They are subject to factors unforeseen and at times beyond the control of acquiring authorities. It can take years, if not decades, for public works to unfold and reach an end. The selection of the Hulls’ land for a public work was carried out when the Albany urban development was only a concept. Detail of the development was to follow, contingent upon town planning approvals and unforeseen economic and political factors. The end result of the public work over the Hull property was that Housing Corporation’s participation in the urban development was abandoned. The land was no longer required for a public work and it was offered back to the former owners following their persistent petitioning.

It is more than likely that the Hulls could not afford to buy their land back. It had been taken from them as farmland, but offered back as a prospective industrial development. The market value of the land had significantly increased in value since the land was taken for State housing purposes. There was a significant gap between the original compensation sum paid to the former owners when the land was taken and the market value purchase price in the Crown’s offer back some 14 years later. Compensation awarded to the Hulls in 1975 was ‘in the vicinity of \$1 million’.¹⁹¹ In 1989 two parcels of land were offered back to the Hulls for \$6.7 million plus GST and \$3.5 million plus GST respectively.¹⁹²

Housing Corporation was ill prepared and wrongly advised following the enactment of offer back legislation. It took years before it came to grips with its statutory offer back obligations. The Hulls were placed in a position

¹⁹⁰ Letter from the Associate Minister of Works and Development to Peter Abe Hull and John William Hull regarding the acquisition of land at Albany (31 July 1974) as cited from *Hull v Attorney-General* HC Auckland M 1181-89, 27 November 1998 at 7

¹⁹¹ *Hull v Attorney-General* HC Auckland M 1181-89, 27 November 1998 at 8

¹⁹² *Ibid* at 23

whereby they, through their solicitor, had to demand the land holding agency to follow through with its statutory obligations to them.

Conclusion

Perhaps the most dominant message to Maori from the Hull litigation is that the offer back provisions of the Public Works Act mean what they say. Keith J's 'plain meaning' approach to the application of s40 provisions cannot be faulted. The Court of Appeal decision merely applies the ordinary words of s40, 'in their legislative and historical context', to the facts as presented before the Court.¹⁹³ Parliament is the supreme lawmaker in New Zealand.¹⁹⁴ It is not for the judiciary to import meaning into a statute beyond that which can reasonably be sustained by those words passed by Parliament.

If the judicial narrative deviates from the values or interests of former Maori owners, fault does not rest with the judiciary. Instead, the problem rests with the statutory provisions and their suitability for purpose. Any required change, adaptation or amendment to the statutory offer back regime cannot be promulgated by the judiciary. That responsibility rests solely with Parliament.

The Crown's special duty to Maori regarding surplus public works land must be more than a well-established principle. If the duty is to hold any true significance it must be recorded in statute. Only Parliament can confer proper measures of accountability which can be recognised and upheld under the judicial process. The Courts will not import meaning and purpose into the statutory offer back scheme beyond that which is already there.

¹⁹³ *Attorney-General v Hull* [2000] 3 NZLR 63 at [49] (CA)

¹⁹⁴ JF Burrows and RI Carter *Statute Law in New Zealand* (5th ed, Lexis Nexis, Wellington, 2009) at 19

THE OHINEWAI COAL LANDS CASES (HORTON): Statutory Schemes are Enforceable

Cases

Attorney-General v Horton [1999] 2 NZLR 257 (PC)

Horton & Anor v Attorney-General CA43/97, 3 December 1997

Deane v Attorney-General [1997] 2 NZLR 180 (HC)

Introduction

The Ohinewai Coal Lands Cases relate to the offer-back of land at Ohinewai compulsorily acquired by the Crown for a proposed large scale coal mine. The acquisition was part of government ‘think big’ policy of national public works to stimulate economic growth. The policy was abandoned not long after the land was taken.

The High Court heard two cases together which had been filed by Mr Deane on one hand and trustees of E.G. Levin Farm Settlement Trust on the other. The commentary as follows begins with the High Court decision of *Deane v Attorney-General*¹⁹⁵ then continues with the Levin Trust cases, the trustees being Mr Horton and Mr Campbell. The Levin Trust or Horton case was appealed to the Court of Appeal¹⁹⁶ and the Privy Council¹⁹⁷.

¹⁹⁵ *Deane v Attorney-General* [1997] 2 NZLR 180

¹⁹⁶ *Horton & Anor v Attorney-General* CA43/97, 3 December 1997

¹⁹⁷ *Attorney-General v Horton* [1999] 2 NZLR 257

Issues

Statutory schemes are enforceable. With *Horton*¹⁹⁸, offer back obligations were an inconvenience to the government's privatisation agenda of the day. If the Crown is in breach of its obligations, it must be reminded of them by the New Zealand Courts.¹⁹⁹

The land requirements of newly incorporated state owned enterprises were not entirely known from day one. It took time for officials to understand and come to terms with the practical needs of these new business organisations and their statutory obligations. They learned from the Courts that as soon as conditions are satisfied under s40, statutory rights are conferred upon former owners and their successors. There is no going back once an offer back obligation is triggered. Surplus land must be offered back even if it is realised at a later stage it is again needed for a public work.

Background Facts

Mr Deane's farm at Ohinewai was compulsorily taken by the Crown in 1986. It was intended that the property would in future be developed into an opencast coal mine. Mr Deane was granted a lease and he continued to occupy the property after it was acquired by the Crown.²⁰⁰ The Levin Trust property was also taken in 1986 for the same purpose.²⁰¹

Not long after the Deane and Levin Trust properties were taken, a significant change in government policy was introduced. The 'think big' policy was abandoned and Government no longer wished to be directly involved in coal mining. Its coal mining function was corporatised and in 1988 state coal assets were transferred to the State Owned Enterprise, Coal Corporation of New

¹⁹⁸ *Attorney-General v Horton* [1999] 2 NZLR 257

¹⁹⁹ *Deane v Attorney-General* [1997] 2 NZLR 180 at 198 line 34

²⁰⁰ *Ibid* at 180 line 29

²⁰¹ *Attorney-General v Horton* [1999] 2 NZLR 257 at 258 line 38

Zealand Limited. In keeping with the policy change, plans for a large open cast coal mine over the Ohinewai properties were cancelled.

Corporatisation of state owned assets required the allocation of corporatised assets to newly formed enterprises. Government agencies and newly created state owned enterprises were not always certain about whether some land assets were still required for a public work. This uncertainty was not helped by apparent confusion over how the offer-back provisions of s40 should, or should not, be observed by responsible land holding agencies. The confusion extended to how those provisions should apply to their surplus public works land.²⁰²

On 1 April 1987 the business of State Coal Mines passed to Coal Corporation.²⁰³ The newly established State Owned Enterprise and its shareholding Ministers on behalf of the Crown entered into an agreement on 31 March 1988 setting out the detail of arrangements between them. There were three significant aspects of this agreement particularly relevant to the Ohinewai properties. First, the Ohinewai properties were expressly excluded from those State Coal Mines assets deemed to have transferred to Coal Corporation. The properties appeared on a schedule described as ‘*Surplus Properties*’ and referred to under the agreement as “...*owned by the Crown, surplus to the requirements of [Coal Corporation].*”²⁰⁴ Second, Coal Corporation was appointed as the Crown’s exclusive selling agent to dispose of the Surplus Properties. Coal Corporation was entitled to a commission amounting to 10% of the net sale price and commission on rents and income pending any sale. The agreement further provided that:

²⁰² Apparent confusion is discussed at *Deane v Attorney-General* [1997] 2 NZLR 180 at 196 line 6 and also at *Hull v Attorney-General* HC Auckland M 1181-89, 27 November 1998 at 12

²⁰³ *Horton & Anor v Attorney-General* CA43/97, 3 December 1997 at 2

²⁰⁴ Agreement between the Ministers of State Owned Enterprises and Finance and Coal Corporation of New Zealand Limited 31 March 1988, clause 2 as cited in *Horton & Anor v Attorney-General* CA43/97, 3 December 1997 at 2

“...the company shall have a discretion is determining how, when, and on what terms and conditions the properties should be sold or otherwise disposed of.”²⁰⁵

Third, Coal Corporation was granted a first option to purchase at market value any of the Surplus Properties which according to the agreement could be exercised by the company giving notice to the Crown.²⁰⁶

The arrangement between Coal Corporation and its shareholding Ministers regarding Surplus Properties was a misguided attempt at pragmatism. Properties transferred to State Owned Enterprises would be subject to clawback provisions if such land sold to a third party was later subject to a recommendation of the Waitangi Tribunal for it be returned to Maori ownership.²⁰⁷ The arrangement sought to avoid the clawback mechanism altogether, and instead authorise a State Owned Enterprise to administer the lands. Also, the first option to purchase in favour of Coal Corporation was at odds with the statutory rights of former owners to purchase surplus public works land under s40 of the Public Works Act 1981.

Not long after the agreement between the shareholding Ministers and Coal Corporation, on 28 April 1988 Coal Corporation notified Mr Deane that he would soon be presented with an offer to purchase the land he previously owned.²⁰⁸ A formal offer was presented to Mr Deane in 1989. A proposed purchase price of \$550,000 was derived by a valuer for Coal Corporation as the market value.²⁰⁹ Mr Deane’s solicitor confirmed his client’s willingness to purchase the property but at a price to be determined after Mr Deane obtained his own valuation. A counter proposal of \$430,000 in keeping with his valuation was later put to Coal Corporation. This figure was subsequently increased by Mr Deane to \$460,000 to reflect a Coal Corporation valuation as at 1 June 1988, one month after its initial notification to Mr Deane.²¹⁰

²⁰⁵ Agreement between the Ministers of State Owned Enterprises and Finance and Coal Corporation of New Zealand Limited 31 March 1988, clause 23 as cited in *Horton & Anor v Attorney-General* CA43/97, 3 December 1997 at 2

²⁰⁶ *Ibid*

²⁰⁷ State Owned Enterprises Act 1986, s27B

²⁰⁸ *Deane v Attorney-General* [1997] 2 NZLR 180 at 185

²⁰⁹ *Ibid* at 186 line 14

²¹⁰ *Ibid* at 186 line 4

The Coal Corporation administered Ohinewai land disposals were immediately suspended following a decision of the Court of Appeal which concerned the land disposal scheme.²¹¹ The decision was in favour of the Tainui Maori Trust Board. Following corporatisation of State coal assets, Tainui Maori Trust Board became concerned that the Crown's intention to dispose of the Ohinewai lands would be carried out in a manner likely to defeat the Trust Board's claim over them. Waikato-Tainui Maori had lost the majority of their tribal land, including the subject district of Ohinewai, when it was confiscated by the Crown during land wars of 1865.²¹² In 1989 the Court of Appeal upheld an application by the Trust Board regarding the Ohinewai public works lands and its then unsettled claim before the Waitangi Tribunal.

The Tainui Maori Trust Board was concerned that the agreement between the Crown and Coal Corporation jeopardised its position to negotiate with the Crown a treaty settlement which may include Ohinewai land sold by Coal Corporation as an agent for the Crown. Proceedings were heard by the Court of Appeal. The Court determined that the Crown must not act in a manner inconsistent with the principles of the Treaty of Waitangi given that the Crown had authorised a State Owned Enterprise to manage disposal of the Ohinewai assets or liabilities on its behalf.²¹³ The Treaty obligation was conferred upon the Crown under s9 of the State Owned Enterprises Act 1986. The mechanism for disposal of surplus Ohinewai lands designed by agreement between the Crown and Coal Corporation technically avoided triggering the treaty settlement clawback provision of the State Owned Enterprises Act.²¹⁴ The clawback provision was to safeguard Maori claims to the Waitangi Tribunal²¹⁵ and would enable subject land to be utilised if called upon in future for settlement of any successful Treaty claim. The Court did not accept that the Crown's intention to sidestep the statutory clawback provision was in keeping with its statutory Treaty of Waitangi obligations to Waikato-Tainui. The

²¹¹ *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 at 546 (CA)

²¹² The Waikato Raupatu or land confiscation was introduced by Proclamation published in the New Zealand Gazette in 1865 under authority of the New Zealand Settlements Act 1863.

²¹³ *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA) (see p 526 line 46, p 537 line 52, p 540 line 33, p 545 line 28 and p 546 line 4). Authority of the Crown appointing Coal Corporation under s 23(1)(b) of the State-Owned Enterprises Act 1986.

²¹⁴ State Owned Enterprises Act 1986, s 27A(1)

²¹⁵ *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 at 520 line 39 (CA)

Crown and Coal Corporation were prevented from “*selling, disposing or otherwise alienating*” the Ohinewai lands until a suitable “*scheme of protection*” was in place to protect the Tainui Maori Trust Board including the Tainui claim lodged with the Waitangi Tribunal and, at that time, unresolved.²¹⁶

Mr Deane and the trustees of Levin Trust took exception to not being given the opportunity to purchase their respective farms back from the Crown compulsorily taken from them some years earlier. They considered the properties were no longer required for coal mining purposes and that the Crown had to offer the lands back to them. Mr Deane on one hand and trustees of the E.G. Levin Farm Settlement Trust on the other filed separate proceedings seeking, amongst other things, determinations they shall each have their former lands offered back to them. The High Court heard the two cases together.

Coal Corporation had engaged with Mr Deane regarding the offer-back of the former Deane property. The offer-back was withdrawn by Coal Corporation following the Court of Appeal’s decision in favour of the Tainui Trust Board.²¹⁷ However, trustees of the Levin Trust had no contact from Coal Corporation about the possible buy-back of the farm previously owned by the Trust. Instead, the Trustees were informed from a Coal Corporation representative that the former Levin Trust land may be used as part of a Treaty of Waitangi settlement with Waikato-Tainui. This information motivated the Trustees to assert a claim to take priority over Waikato-Tainui.²¹⁸

Although Coal Corporation had abandoned its plans for a large scale open cast coal mine at Ohinewai, there was a possibility that the former Levin Trust property could be required to support a smaller scale mine. Other former owners of Ohinewai lands, including Mr Deane, had been approached by Coal Corporation regarding the offer-back of surplus land. The Levin Trustees were never approached notwithstanding their former property appearing on the

²¹⁶ *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA) (see p 526 line 46, p 537 line 52, p 540 line 33, p 545 line 28 and p 546 line 4).

²¹⁷ *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA)

²¹⁸ *Attorney-General v Horton* [1999] 2 NZLR 257 at 260 line 35 (PC)

schedule of Surplus Properties in the agreement between Coal Corporation and its shareholding Ministers.²¹⁹

What the Courts said

The first aspect of the Horton litigation deals with the timing of when land is no longer required for a public work. Public sector reforms were brought about by a shift in government policy toward corporatisation and privatisation of commercial state assets. Whether or not coal mining land was surplus to requirements was not a simple question to answer at that time. To compound the problem, Coal Corporation initially did not understand its obligations under s40.²²⁰

The litigation ultimately did not go well for Coal Corporation despite Hammond J at the High Court finding in favour of the Attorney-General. Hammond J accepted that uncertainty resulting from the Government's exit from the coal business and passing the role to a state owned enterprise would understandably result in some confusion. He resisted a strict approach to s40. The difficulty for Coal Corporation was that it appeared for a short period it had resolved that it no longer required the land. The state owned enterprise some months later changed its position and decided it required the land. Hammond J considered that it would be "*unduly legalistic to overlook the reality of what was unfolding.*"²²¹ He ruled that the land was still required for a public work notwithstanding the position briefly held by Coal Corporation that it was not. Hammond J concluded that the public work prevailed and the offer back provisions of s40 therefore did not apply.²²² The Court of Appeal did not agree. It held that as soon as public works land is surplus to requirements, the

²¹⁹ *Attorney-General v Horton* [1999] 2 NZLR 257 at 260 line 19 (PC) - Agreement between the Ministers of State Owned Enterprises and Finance and Coal Corporation of New Zealand Limited 31 March 1988, Eighth Schedule as cited in *Horton & Anor v Attorney-General* CA43/97, 3 December 1997 at 2

²²⁰ *Horton & Anor v Attorney-General* CA43/97, 3 December 1997 at 11

²²¹ *Ibid*

²²² *Ibid*

statutory scheme under s40 is triggered giving rise to obligations which cannot be reversed with a change of mind.²²³ The Privy Council agreed with the Court of Appeal's reasoning and dismissed an appeal sought by the Attorney-General.²²⁴

The test to determine whether land is 'no longer required' for a public work is found in the Privy Council judgment. It is described as an "*objective assessment in accordance with expert evidence.*"²²⁵ This approach led their Lordships to a relatively simple conclusion. The answer rested in Coal Corporation's intentions. If Coal Corporation intended to mine in the area, then it could require the land for that purpose or ancillary works. If Coal Corporation did not intend to mine the area, the land 'would not be required'.²²⁶ The end result, an objective assessment supported by relevant evidence, was delivered by Lord Hoffman:

"There was no existing enterprise to which Coal Corp's needs could be objectively related."²²⁷

The subject land was no longer required for a public work at that described point in time. The Privy Council's reasoning supports the broader approach taken by the Court of Appeal when it refused to accept that inclusion of the former Levin Trust land in a schedule of 'surplus properties' was enough in itself to establish that the land was no longer required.²²⁸ It is necessary to consider the broader context and circumstances of the matter to draw the correct conclusion.

²²³ *Horton & Anor v Attorney-General* CA43/97, 3 December 1997 at 18

²²⁴ *Attorney-General v Horton* [1999] 2 NZLR 257 (PC) at 262

²²⁵ *Ibid*

²²⁶ *Ibid*

²²⁷ *Ibid*

²²⁸ *Horton & Anor v Attorney-General* CA43/97, 3 December 1997 at 14

Conclusion

The Privy Council's decision in *Attorney-General v Horton*²²⁹ is significant. There is no avoiding of statutory obligations when public works land is no longer required. There is now a clearer understanding what will constitute land being deemed surplus to public work requirements. Once obligations are triggered, there is no going back.

Government objectives of the day can give rise to temptation to avoid proper process and responsibility. The statutory offer back scheme was at odds with Government pragmatism and convenience when it sought to exit the coal business and transfer assets to Coal Corporation. Judicial intervention was only made possible for three reasons. First, the former owners knew of the situation. Second, the former owners took action to ensure their rights were upheld. Third, the former owners could exercise rights conferred by statute. Parliament is the supreme lawmaker and the offer back scheme it prescribes must be observed, whether or not to do so is inconvenient and against other policy objectives.

A parallel statutory protection was observed leading up to the Horton litigation. Proceedings by Tainui Maori Trust Board succeeded based upon s9 of the State Owned Enterprises Act 1986.²³⁰ In keeping with the Crown's Treaty of Waitangi obligations enshrined in statute, the Crown and Coal Corporation could not avoid the scheme under the State Owned Enterprises Act 1986 to safeguard Maori claims to the Waitangi Tribunal.²³¹

Maori are often not far from their former lands. Being dispossessed from public works land does not remove tangata whenua status from former Maori owners. Maori remain connected to land, even when it has been taken from them. It is in the interests of former owners to keep informed about land lost to public works if they seek an opportunity to buy it back when it is no longer required.

²²⁹ *Attorney-General v Horton* [1999] 2 NZLR 257 (PC)

²³⁰ *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 at 546 (CA)

²³¹ State Owned Enterprises Act 1986, s27A(1)

The purpose of s40 offer back is remedial. It is to address perceived injustice where land is compulsorily taken from its owners.²³² Those people have an opportunity to buy it back when it is no longer required. Once a statutory scheme is in place, its purpose cannot be swayed by Government's desire for pragmatism and convenience. The offer back scheme is purpose driven, arising from a historical context where perceived injustice of compulsory land acquisition justified a remedy. Bastion Point and Te Kopua, Raglan, are leading historical examples. In the words of Richardson J at the Court of Appeal in *Horton*:

“While [s40] does not impose express time limits, it requires the chief executive to follow the statutory process and by necessary implication to do so with due expedition.”²³³

Statutory schemes are enforceable. This is an important message for Maori who may well benefit from an improved offer back regime. A revised Act could consider Maori succession practices, and ensure that successors of former owners are not limited to one generation for entitlement under offer back provisions. Perhaps the decades long call of the Waitangi Tribunal for a Treaty provision to be included in the Public Works Act could finally be realised.²³⁴ Well intended Government policy statements and schemes do not carry the same weight.²³⁵

²³² *Rowan v Attorney-General* [1997] 2 NZLR 559 at 568

²³³ *Horton & Anor v Attorney-General* CA43/97, 3 December 1997 at 17

²³⁴ Waitangi Tribunal *Te Maunga Railways Land Report* (Wai 315, 1994) at Recommendations 3(a) (no page or paragraph references on report) – Also see Waitangi Tribunal considerations in Richard Fletcher (ed) *Review of Public Works Act: Issues and Options* (Land Information New Zealand, Public Discussion Paper, December 2000) at [7.2]

²³⁵ See - Richard Fletcher (ed) *Review of Public Works Act: Issues and Options* (Land Information New Zealand, Public Discussion Paper, December 2000) at [2.1] – where a key driver for the review of the Public Works Act 1981 is to “ensure that exercise of the 1981 Act powers, functions and duties is within a statutory framework that accords with Treaty of Waitangi principles.”

MORRISON: Competing Factors

Cases

Attorney-General v Morrison [2002] 3 NZLR 373 (CA)

Morrison v Anor v Attorney-General & Anor HC Auckland CP 297-SD00, 31 July 2001, (2001) 4 NZ ConvC 193, 428

Introduction

The Morrison case gives useful insight into how internal and external factors can adversely influence administration of the statutory offer back scheme. The full bureaucratic chain of control and decision making, from Corporation officials through to the responsible Minister, can become involved in the administration and disposal of surplus public works land.²³⁶ Public interest groups, political influence and the priorities of third party local body institutions can distract officials from the core purpose of s40.

Whether or not land is no longer required for a public work is not always easy to determine. The complexity of unfolding events such as public policy changes, Treaty of Waitangi issues and town planning scheme changes, are but some examples of factors which add to the context within which the statutory offer-back provisions of s40 must be applied. The Hull²³⁷ and Horton²³⁸ cases illustrate how over time numerous factors can unfold to complicate what at first may seem to be a relatively straight forward offer back scheme. Both *Hull* and *Horton* are leading case authorities in this area of law.

²³⁶ Housing Corporation Act 1974, s20(1) "The Minister may require the Corporation to give effect to the policy of the Government ..."

²³⁷ *Attorney-General v Hull* [2000] 3 NZLR 63 (CA)

²³⁸ *Attorney-General v Horton* [1999] 2 NZLR 257 (PC)

The Morrison case²³⁹ is yet another example of the complex nature of events which can shroud the core purpose of s40 offer back. Similar to *Hull* and *Horton*, there were various notable events leading up to the matter being brought before the Courts. Fisher J presides over Morrison at the High Court. He has difficulty with the legal reasoning between the Privy Council in *Hull* and the Court of Appeal in *Horton*:

“There are real difficulties in reconciling some of the Court of Appeal’s reasoning in *Attorney-General v Hull* [2000] 3 NZLR 63 at 77 with the Privy Council decision in *Attorney-General v Horton* [1999] 2 NZLR 257. In this decision I have attempted to identify the principles intended to govern a case like this one.”²⁴⁰

What Fisher J means by the term ‘*a case like this one*’ is a case where the date the land should have been offered to its former owner must be determined by the Court, the fundamental issues of both *Hull* and *Horton*. However, the Court of Appeal did not agree with Fisher J.²⁴¹ It reasoned that observing the offer back scheme is a simple matter of following the procedure prescribed under the statute, notwithstanding the complexity of surrounding events. The first step is to ascertain whether s40(1)(a) is satisfied, that is to determine if the land is no longer required for the public work. When s40(1)(a) is satisfied, the Chief Executive must in a timely manner establish whether under s40(1)(b) and (c) the land is required for either another public work or for the purpose of exchange. If the land is required under s40(1)(b) or (c), then the offer back provisions are not triggered.²⁴² The Court of Appeal reasoning brings the offer back process back to its fundamental purpose by following the prescribed statutory procedure without getting distracted by the complexity of surrounding events. In fairness to Fisher J, this is easier said than done.

²³⁹ *Morrison v Anor v Attorney-General & Anor* HC Auckland CP 297-SD00, 31 July 2001, (2001) 4 NZ ConvC 193, 428 and *Attorney-General v Morrison* [2002] 3 NZLR 373 (CA)

²⁴⁰ *Morrison v Anor v Attorney-General & Anor* HC Auckland CP 297-SD00, 31 July 2001 at [2]

²⁴¹ *Attorney-General v Morrison* [2002] 3 NZLR 373 (CA) at [20]

²⁴² *Ibid*

Issue

An unusual aspect of Morrison is that the plaintiffs, Morrison and Blampied, and the vendor of the surplus land, Housing Corporation, had already reached substantial agreement regarding the offer-back to the plaintiffs. The substantial agreement was only reached following years of exchange between the parties as to whether or not an obligation to offer the land back even existed. However, once it was accepted that the statutory offer back scheme applied, the parties then could not agree on the price that should be paid. Their inability to agree was based upon a difference of opinion as to the date that offer back obligations were triggered. The parties agreed that the price should be market value as prescribed under s40, such value determined as at the date it should have been offered to the former owner or his successors. The plaintiffs therefore contracted with Housing Corporation to purchase the surplus land for the price being:

“...the market value of the land as at the date when the land should have been offered back to the offeree and family pursuant to the provisions of the Public Works Act 1981.”²⁴³

The purpose of the Morrison proceedings was for the Court to determine the purchase price. With appreciating land values, the date when s40 offer back obligations are triggered had a financial consequence for both vendor and purchaser. That financial consequence was significant enough for Morrison to be brought before the High Court and then the Court of Appeal.

Background Facts

The Morrison case concerns surplus housing land initially taken under the Public Works Act 1928 from Mr A Morrison. Acquisition of the greater

²⁴³ Agreement for Sale and Purchase between Housing Corporation as vendor and A.R Morrison and D.S. Blampied as purchasers as cited in *Morrison v Anor v Attorney-General & Anor* HC Auckland CP 297-SD00, 31 July 2001 at [1]

Morrison landholding was concluded in two parts, the first by proclamation of 1934 and the second by proclamation of 1941. The land was set apart for defence purposes. The land was strategically located adjacent to the beach at Castor Bay in Auckland and therefore suitable for the defence of Auckland. Gun battery emplacements were constructed over part of the former Morrison holding, with another part being divided into 13 sections and used for housing military personnel during World War II. After the war these sections were set apart for housing purposes and used for general state housing.²⁴⁴ It was these housing areas that would later become the subject of proceedings.

In 1987 the housing land was administered by the Government owned and controlled housing provider, Housing Corporation. Decision making authority regarding the future of Corporation held land was conferred upon numerous people.²⁴⁵ A decision that property was surplus to Corporation requirements could come from many levels within the bureaucratic chain of control. In addition, the responsible Minister could direct the Corporation to follow specific Government policy involving land disposal.²⁴⁶ Members of the Corporation's governance could pass resolutions which would bind the Corporation.²⁴⁷ The Chief Executive and designated Corporation staff held delegated authority to determine the future of Corporation properties, such as whether or not a property was required for housing purposes. The Corporation could even appoint committees comprising Corporation people, or other people, for advice, research or for any purposes specified under the Housing Corporation Act 1974.²⁴⁸

Housing on the former Morrison land was in disrepair. The dwellings were originally constructed for temporary accommodation from materials below standard. From an economic standpoint, repairs were not worthwhile. Coastal bare sections at this location were valuable, so Corporation staff considered selling the land so money could be better spent elsewhere.²⁴⁹

²⁴⁴ *Morrison v Anor v Attorney-General & Anor* HC Auckland CP 297-SD00, 31 July 2001 at [3]

²⁴⁵ *Ibid* at [5]

²⁴⁶ Housing Corporation Act 1974, s20

²⁴⁷ *Ibid*, s10 (Repealed)

²⁴⁸ *Ibid*, s16 (Repealed)

²⁴⁹ *Morrison v Anor v Attorney-General & Anor* HC Auckland CP 297-SD00, 31 July 2001 at [6]-[7]

In 1988 a Branch Manager at Housing Corporation followed through on a recommendation that the former Morrison land should be sold with the proceeds of sale reinvested into other housing. An opinion had been obtained from the Ministry of Works which incorrectly stated the offer back provisions of s40 were not relevant in this situation.²⁵⁰ The Corporation's initial understanding was that it would have a clear run to sell the properties and achieve its desired objective. The reality of the situation was quite different. It was not until some 11 years later that agreement was reached to sell the land.²⁵¹

Various influences contributed to the surplus land disposal losing momentum. Auckland City Council had expressed an interest in the land for it to be added to an adjoining beach reserve.²⁵² Maori claimants notified the Corporation that the property may be subject to its claim lodged with the Waitangi Tribunal.²⁵³ Although the Corporation tried to explore the interests of both Council and the claimants, there were no material developments. These unresolved issues did nothing to quiet public interest in the land.

In 1990 the Corporation adopted a policy to demolish each house on the site as they became vacant. A memorandum recording the Corporation's approach is an example of how the disposal became clouded in wider considerations, well beyond the statutory considerations prescribed under the surplus land provisions of s40. The memorandum reads:

The project team, considering a PR strategy to implement this recommendation, suggests the following:

1. None of the dwellings should be demolished prior to the election – October 27.
2. No publicity at all concerning the demolition of the dwellings.
3. In the meantime any enquirers should be advised we are currently completing a cost analysis exercise in terms of reviewing the condition and use of the dwellings.
4. A copy of Mr Williams' report and Harrison Grierson Consultants' report should be forwarded to Merrill Coke Communications Manager so that Head Office is briefed should this issue blow up.²⁵⁴

²⁵⁰ *Morrison v Anor v Attorney-General & Anor* HC Auckland CP 297-SD00, 31 July 2001 at [7]

²⁵¹ *Ibid* at [9]

²⁵² *Ibid* at [10]

²⁵³ *Ibid* at [11]

²⁵⁴ Memorandum of 15 August 1990 from a Housing Corporation Committee following a recommendation of 2 August 1990 by the Portfolio Manager that houses at the former Morrison site be demolished as they fell vacant – as cited in *Morrison v Anor v Attorney-General & Anor* HC Auckland CP 297-SD00, 31 July 2001 at [12]

Public relations strategy took priority over the Corporation's core offer back obligations to former owners of the land. By the end of 1992, and following judicial review proceedings brought by three occupying tenants, the final dwelling on site was demolished.²⁵⁵ However, yet another wave of resistance was about to be presented.

Although Auckland City Council did not consider it a priority to acquire the surplus land to include into its adjoining beach reserve, several motivated local residents thought otherwise. They lobbied their local Member of Parliament, the Hon Murray McCully, who gave his support to their views. The situation took on a whole new level of significance in 1995 when Mr McCully was appointed Minister of Housing. In his ministerial capacity, he requested that the Corporation defer their efforts to sell the land so he could hold further discussions with Auckland City Council.²⁵⁶

A sale to Auckland City Council never eventuated. The Corporation therefore proceeded with its objective to sell the surplus land on the open market. It consulted Land Information New Zealand ("LINZ"), the government agency responsible for administration of the Public Works Act, about the disposal. It informed LINZ about a Cabinet directive of 16 June 1993 that land of this kind should be sold under the Housing Act 1955 rather than as surplus state housing land. The response from LINZ by letter of 25 March 1999 lifted the veil of confusion regarding the Corporation's offer back obligations to the former land owners. A Cabinet directive could not override the Corporation's obligations under s40 of the Public Works Act.²⁵⁷

On 23 April 1999 the Corporation instructed a consultant to attend to the statutory offer back on its behalf. Seven grandchildren of the original owner were entitled under their grandfather's will to have the land offered to them. Two from those seven grandchildren accepted the offer to purchase the land

²⁵⁵ *Morrison v Anor v Attorney-General & Anor* HC Auckland CP 297-SD00, 31 July 2001 at [13]

²⁵⁶ *Ibid* at [15]

²⁵⁷ *Ibid* at [16]

previously taken from their grandfather. Those two purchasers are the plaintiffs in *Morrison*.²⁵⁸

What the Courts said

The parties each had a view regarding the date they considered the subject land should have been offered back. Successors of Mr Morrison contended that the relevant date was 1 July 1988 when the Branch Manager of Housing Corporation offered to sell the land to Takapuna City Council.²⁵⁹ The Crown's position was that the relevant date was 21 April 1999 when the Minister approved the disposal.²⁶⁰ There is a gap of almost eleven years between these dates.

Fisher J at the High Court concluded that the land should have been offered back on 5 February 1988.²⁶¹ This was the date of a memorandum by the Branch Manager at Housing Corporation which directed that the land should be sold. However, it was the Court of Appeal judgment that settled the matter once and for all. All sections except one were vacated with the houses demolished by 31 December 1991. The final section was vacated and the house demolished by 9 December 1992. The Court of Appeal held these dates were the dates upon which the values in the sale contracts would be set.²⁶²

Neither the successors of Mr Morrison, the Crown, Fisher J at the High Court or the presiding Court of Appeal judges could agree upon a date. They all had their own well-reasoned positions. However, by constitutional prerogative, the Court of Appeal had the final say. The Court of Appeal's reasoning is in keeping with the fundamental offer back scheme prescribed by Parliament. Its decision is sound.

²⁵⁸ *Morrison v Anor v Attorney-General & Anor* HC Auckland CP 297-SD00, 31 July 2001 at [17]

²⁵⁹ *Ibid* at [20]

²⁶⁰ *Attorney-General v Morrison* [2002] 3 NZLR 373 (CA) at [4]

²⁶¹ *Morrison v Anor v Attorney-General & Anor* HC Auckland CP 297-SD00, 31 July 2001 at [74]

²⁶² *Attorney-General v Morrison* [2002] 3 NZLR 373 (CA) at [37]

The difference between the High Court and Court of Appeal dates rests upon the question of required timing for the offer back. The High Court adopted a strict approach. The immediate date of the Branch manager's decision was Fisher J's choice. The Court of Appeal was prepared to be more practical. It made allowance for time needed to identify descendants of the former owner, saying that a delay of 12 months could be appropriate.²⁶³ It also distinguished between the facts of *Horton*²⁶⁴ and the facts before them. Unlike *Horton*, the former Morrison land was still being used for housing purposes, the public work for which it was held, until the tenants vacated the properties and the houses were demolished. The Court of Appeal decision reads:

Where land is still being used for the authorised public work, even if the decision has been taken that it is no longer required for that purpose, it will normally necessarily take longer to ready for disposal than vacant land. How long depends on the particular circumstances of each case.²⁶⁵

The fundamental purpose and provisions of the statutory offer back scheme may be understood and acknowledged by all stakeholders. However, it is the circumstances of each case that will give rise to differing opinions.

Conclusion

The offer back cases contribute to the law in a manner which the statute cannot. It is the application of statute law to a set of facts which brings true meaning to the offer back scheme. This is ultimately the role of the judiciary. Government agencies may interpret their own obligations, but Morrison illustrates this is not always reliable. Housing Corporation incorrectly believed for some time it was not subject to statutory offer back obligations.²⁶⁶ When it realised that it owed a duty to offer the land back to successors of the former

²⁶³ *Attorney-General v Morrison* [2002] 3 NZLR 373 (CA) at [32]

²⁶⁴ *Attorney-General v Horton* [1999] 2 NZLR 257 (PC)

²⁶⁵ *Attorney-General v Morrison* [2002] 3 NZLR 373 (CA) at [36]

²⁶⁶ *Morrison v Anor v Attorney-General & Anor* HC Auckland CP 297-SD00, 31 July 2001 at [7]

owner, the date it believed its obligation was triggered was over six years different from the date finally determined by the Court of Appeal.²⁶⁷ The experience of Mr Morrison's successors is not an unfamiliar one for Maori. Sometimes it is necessary to engage in legal proceedings to ensure statutory schemes are upheld and the duties conferred upon responsible Government agencies are properly exercised.

The Court of Appeal decision in Morrison²⁶⁸ illustrates that actual use of land for the designated public work, and the cessation of such use, is a more significant indicator regarding the trigger of s40 obligations than any recorded decision alone may indicate. This approach makes sense as it looks beyond the paperwork into the substance of circumstances.

It is the broader Morrison story that serves an important reminder to former Maori owners of public works land. The Crown's special duty to Maori is not the only responsibility that faces the Crown when it wishes to dispose of its surplus public works land. The offer back scheme, notwithstanding its legislative status, is challenged by competing interests. Responsible land holding agencies must get the best return from their assets for the taxpayer. In the interests of economic efficiency, Government agencies should not be burdened by land which no longer serves a purpose. Then there are the interests of other public bodies, Treaty considerations and demands from public interest groups. Morrison appears to have them all, including political influence. Morrison is a reminder of the importance of a statutory scheme to protect the interests of former owners of surplus public works land. Law of Parliament is supreme over other demands, obligations and pressures of the day. Statute law is enforceable through the Courts when competing circumstances unjustifiably seek to take priority.

For Maori, loss of considerable tracts of land to public works is deeply felt.²⁶⁹ The offer back of surplus public works land to those former owners is a fundamental acknowledgement of that loss. It is an opportunity to address a

²⁶⁷ *Attorney-General v Morrison* [2002] 3 NZLR 373 (CA) at [4] and [37]

²⁶⁸ *Ibid* at [37] – [38]

²⁶⁹ Richard Fletcher (ed) *Review of Public Works Act: Issues and Options* (Land Information New Zealand, Public Discussion Paper, December 2000) at [7.1]

perceived injustice where land compulsorily taken would otherwise be sold without giving the former owner an opportunity to buy it back.²⁷⁰ The interests of former owners will only take priority over competing interests if an overriding statutory scheme recognises and protects their rights. A statutory scheme ensures there is requisite priority and accountability. Former owners must be recognised when public works land is no longer required. They should be afforded an opportunity to be reunited with land taken from them. These are the sentiments of Morrison which echo the protest voice at Te Kopua, Raglan and Bastion Point in the late 1970s.

SMILER: Statute versus Interpretation

Cases

Smiler & Ors v Port Gisborne Ltd HC Gisborne CP 1-98, 12 June 1998

Port Gisborne Ltd v Smiler & Ors CA 182-98, 26 April 1999, [1999] 2 NZLR 695

Introduction

*Port Gisborne Ltd v Smiler*²⁷¹ at the Court of Appeal is an offer back case that should raise significant concern for Maori. The judgment imposes limitations to the offer back scheme which arguably do not exist in the statute and are prejudicial to Maori interests. Laurenson J at the High Court delivered a well-reasoned decision in favour of the Maori plaintiffs. However, his decision was

²⁷⁰ *Rowan v Attorney-General* [1997] 2 NZLR 559 at 568

²⁷¹ *Port Gisborne Ltd v Smiler & Ors* CA 182-98, 26 April 1999, [1999] 2 NZLR 695

overturned on appeal. The Court of Appeal decision is now a leading case authority.

Issues

Two key questions are brought before the Courts in *Smiler*²⁷².

The first question is: From whom was the land acquired? Under s40(2), the offer back is to be directed to that person or their successor.²⁷³ The distinction here is in the difference between land acquired by the Crown from former Maori owners and held in the general land bank of the Crown, versus the unallocated Crown land which some years after it was acquired from Maori, was set apart for a public work.

The second question is the meaning of the term ‘successors’ as defined under s40(5) of the offer back scheme.²⁷⁴ It was 119 years from when the land was lost from Maori ownership until offer back proceedings were heard at the High Court. Generations later, the hapu of Tauwhareparae had not lost their connection to the land despite their estrangement from its fee simple title.

Background Facts

Port Gisborne Limited owned and operated the shipping port at Gisborne. The company was the successor of the Gisborne Harbour Board which had held the subject harbour land since 1884. The land was set apart as an endowment for purposes of the Gisborne Harbour Board Empowering Act 1884.²⁷⁵ Revenue from the lease of endowment lands supported the cost of harbour works.²⁷⁶

²⁷² *Smiler & Ors v Port Gisborne Ltd* HC Gisborne CP 1-98, 12 June 1998 and *Port Gisborne Ltd v Smiler & Ors* CA 182-98, 26 April 1999, [1999] 2 NZLR 695

²⁷³ Public Works Act 1981, s40(2)

²⁷⁴ *Ibid*, s40(5)

²⁷⁵ Gisborne Harbour Board Empowering Act 1884 (Repealed), s13

²⁷⁶ *Port Gisborne Ltd v Smiler & Ors* CA 182-98, 26 April 1999, [1999] 2 NZLR 695 at [6]

Over 100 years later, the subject land was vested in Port Gisborne Limited under provisions of the Port Companies Act 1988.²⁷⁷ The endowment status was brought to an end under the 1988 Act, which as a result lifted restrictions over the land regarding its sale.²⁷⁸ The transfer of land from the Harbour Board into the company was exempted from the Public Works Act offer back provisions under the 1988 Act. However, the new port companies became subject to statutory offer back obligations as if they were a Harbour Board.²⁷⁹

The land was used by both the Harbour Board and latterly the port company for the Port facility.²⁸⁰ By 1998 the land was surplus to requirements. The Crown did not wish to resume ownership from Port Gisborne Limited so the company sought to sell the land by tender on the open market.²⁸¹

Proceedings were brought before the High Court by descendants of the original Maori owners of the land. They claimed that Port Gisborne Limited had to offer the land back to them in accordance with the company's obligations under s40 of the Public Works Act. The Crown had purchased the land as part of the 40,000 acre (16,000 hectare) purchase of land known as Tauwhareparae Block from its Maori owners, the Tauwhareparae hapu, in 1879.

The Crown purchase was carried out under authority of the Immigration and Public Works Act 1870.²⁸² There was no public work purpose designated at the time, the land was merely held by the Crown.²⁸³ The Crown had placed a prohibition on the land prior to the sale, which prevented any person other than the Crown from acquiring an interest in the Block.²⁸⁴ Purchase of 40,000 acres (16,000 hectares) amounts to a considerable land holding. The reason behind

²⁷⁷ *Port Gisborne Ltd v Smiler & Ors* CA 182-98, 26 April 1999, [1999] 2 NZLR 695 at [7] – The land was transferred in 1993.

²⁷⁸ Port Companies Act 1988, s27(1)(b)

²⁷⁹ *Ibid*, s26

²⁸⁰ *Smiler & Ors v Port Gisborne Ltd* HC Gisborne CP 1-98, 12 June 1998 at 6

²⁸¹ *Port Gisborne Ltd v Smiler & Ors* CA 182-98, 26 April 1999, [1999] 2 NZLR 695 at [7]

²⁸² Immigration and Public Works Act 1870, s34 – see *Port Gisborne Ltd v Smiler & Ors* CA 182-98, 26 April 1999, [1999] 2 NZLR 695 at [3]

²⁸³ *Port Gisborne Ltd v Smiler & Ors* CA 182-98, 26 April 1999, [1999] 2 NZLR 695 at [5] – On 24 August 1881 a proclamation published in the New Zealand Gazette declared Tauwhareparae Block as “Waste lands of the Crown” meaning land held by the Crown for no defined purpose.

²⁸⁴ Government Native Land Purchases Act 1877 ss2 and 3 as cited in *Port Gisborne Ltd v Smiler & Ors* CA 182-98, 26 April 1999, [1999] 2 NZLR 695 at [4]

the Crown's action appears ultimately to provide land and infrastructure for settlers.²⁸⁵

Within the Tauwhareparae Block there were areas given to activities for public use. Some of the land had been a port for well over 200 years. Captain Cook anchored his ship the Endeavour and made his first landing in Aotearoa New Zealand near the site in 1769.²⁸⁶ Flax trading was established in the area by 1831 with trade conducted from ships.²⁸⁷ Although 40,000 acres of Tauwhareparae Block can be described generally as settlement lands, within that greater Crown land holding would have been specific areas used but not designated for public works at the time of the Crown's purchase. The obvious use is port activities. Although this aspect of history is not mentioned in either the High Court or Court of Appeal judgments, Laurenson J at the High Court acknowledges that a port facility was being operated at Gisborne as early as 1873.²⁸⁸

What the Courts said

Two key issues arise. The first is a question: 'From whom was the land acquired?' The original land owners were Maori. Their land, a considerably large holding, was purchased by the Crown for settlement although it was not designated as such. Soon after the acquisition, arrangements were put in place for various areas to be set apart for public purposes. The public work over the relevant part of the block was formalised in 1884, three years after it was purchased from its former Maori owners. The land was endowed on the Gisborne Harbour Board and set apart as an endowment.²⁸⁹ On the question 'from whom was the land acquired?' Laurenson J said it was acquired from the

²⁸⁵ *Port Gisborne Ltd v Smiler & Ors* CA 182-98, 26 April 1999, [1999] 2 NZLR 695 at [18]

²⁸⁶ Steven Oliver "Gisborne Harbour Board and the Development of Port Gisborne" (September 2000) www.rongowhakaata.iwi.nz at 9

²⁸⁷ *Ibid* at 10

²⁸⁸ *Smiler & Ors v Port Gisborne Ltd* HC Gisborne CP 1-98, 12 June 1998 at 16

²⁸⁹ Gisborne Harbour Board Empowering Act 1884 (Repealed), s13

former Maori owners. The Court of Appeal, with the final say, said the land was acquired from the Crown. The land was therefore not offered back. The Court of Appeal concluded the port authority was obliged under s40 to offer the land back to the Crown, not the former Maori owners.²⁹⁰

Equally troubling for Maori is the Court of Appeal's obiter views of the second key issue: The meaning of the term 'successors',²⁹¹ to whom s40 offer back rights extend. Maori land succession is unique because it takes into account Tikanga Maori or Maori customary values and practices.²⁹² Parliament has recognised this in the offer back scheme under s41 of the Act which relates to the disposal of former Maori land.²⁹³ Where pre-requisite criteria are met, s41 enables the chief executive to avoid complying with the requirements of s40 altogether. The chief executive may instead apply to the Maori Land Court to vest the land into Maori ownership.²⁹⁴ This is a remarkable and entirely relevant statutory provision of which the Court of Appeal obiter is silent. It is, however, a mechanism that Laurenson J observes in his decision as the means under which Parliament intends for the more complex Maori ownership question to be resolved.²⁹⁵

The approach by Laurenson J at the High Court to whether or not the statutory offer back provisions extend to the former Maori owners of Tauwhareparae Block is based upon the underlying purpose of the Crown when it acquired the land.²⁹⁶ He concluded:

“...from a date which almost certainly preceded the vesting of the land in the Crown, the land was contemplated as being required for a public work, namely the endowment of a harbour. The exigencies of the time meant that a firm decision was not made until 1884.”²⁹⁷

²⁹⁰ *Port Gisborne Ltd v Smiler & Ors* CA 182-98, 26 April 1999, [1999] 2 NZLR 695 at [37] and [41]

²⁹¹ Public Works Act 1981, s40(5) – Definition of the term 'successor' for the purposes of s40.

²⁹² Te Ture Whenua Maori Act 1993, s4 meaning of 'tikanga Maori' – s114(1) Succession to Maori land on intestacy in accordance with Tikanga Maori

²⁹³ Public Works Act 1981, s41

²⁹⁴ *Ibid*, s41(d) and (e)

²⁹⁵ *Smiler & Ors v Port Gisborne Ltd* HC Gisborne CP 1-98, 12 June 1998 at 20 -21

²⁹⁶ *Ibid* at 16

²⁹⁷ *Ibid* at 19

Laurenson J considered as ‘a neutral factor’ that the land was held generally as unallocated Crown land for three years after it was acquired before being allocated for a public work purpose.²⁹⁸ The land was first secured by the Crown to protect it from acquisition by private interests. That involved a two-step process. The first step was that the Crown prohibited alienation to private buyers.²⁹⁹ The threat or contemplation of compulsion is inferred from such action. It is a step akin to negotiations with an acquiring authority which holds powers to compulsorily acquire land under public works legislation. The prohibition on the sale of land was imposed by the Crown as prospective purchaser for its exclusive and unfair advantage. Although Tauwhareparae Block was sold by its former owners to the Crown, the prohibition of alienation to private buyers confirms an element of compulsion in the sale. This principle is recognised in the 2015 decision of the Court of Appeal in *Williams & ors v Auckland Council*.³⁰⁰ The second step was that the Crown purchased the land and held it in its general land bank pending allocation of various parts for the intended purpose.³⁰¹ Laurenson J concluded that the land was held for a public work by the Crown before it was formally designated as such upon vesting as endowment.³⁰²

The High Court decision was overturned on appeal in favour of the port authority. The reasoning of the Court of Appeal is difficult to reconcile with the plain meaning approaches to the interpretation of s40 as observed in *Hull*³⁰³ and *Horton*.³⁰⁴ A critique of the decision is perhaps best supported by a quote from leading text about statutory interpretation in New Zealand:

In the enthusiasm engendered by the purposive and contextual approaches it must never be forgotten that the task of the interpreter is to *interpret* the text of the statute: to say what the text *means*.³⁰⁵

²⁹⁸ *Smiler & Ors v Port Gisborne Ltd* HC Gisborne CP 1-98, 12 June 1998 at 18

²⁹⁹ *Port Gisborne Ltd v Smiler & Ors* CA 182-98, 26 April 1999, [1999] 2 NZLR 695 at [4] - Government Native Land Purchases Act 1877, ss2 and 3

³⁰⁰ *Williams & ors v Auckland Council* [2015] NZCA 479 at [49] – [53]

³⁰¹ *Port Gisborne Ltd v Smiler & Ors* CA 182-98, 26 April 1999, [1999] 2 NZLR 695 at [4] and [5]

³⁰² *Smiler & Ors v Port Gisborne Ltd* HC Gisborne CP 1-98, 12 June 1998 at 19

³⁰³ *Attorney-General v Hull* [2000] 3 NZLR 63 (CA)

³⁰⁴ *Horton & Anor v Attorney-General* CA43/97, 3 December 1997 and *Attorney-General v Horton* [1999] 2 NZLR 257 (PC)

³⁰⁵ JF Burrows and RI Carter *Statute Law in New Zealand* (5th ed, Lexis Nexis, Wellington, 2009) at307

The Court of Appeal in *Port Gisborne Ltd v Smiler* deviated from this fundamental principle of statutory interpretation.³⁰⁶ With Parliament as the supreme lawmaker in New Zealand, it is essential that statute law is observed ‘from its text and in light of its purpose’.³⁰⁷ It would not be justifiable to level criticism at a judgment if only because the outcome is not suitable to a particular position or view. The adversarial court system in New Zealand means there are winners and losers in most civil cases. Disappointment is inevitable for at least some people. However, criticism rests where a Court deviates from well-established canons of interpretation.

Laurenson J at the High Court makes an important observation regarding the triggering requirement of s40.³⁰⁸ Section 40(1) refers to land that is ‘held’ under the Act or in any manner for a public work. The scheme does not require subject land to have been ‘acquired’ from the former owners, merely ‘held’. The Court of Appeal judgment in *Horton*,³⁰⁹ upheld by the Privy Council,³¹⁰ identifies two features of the statutory offer back scheme that must each be observed separately. The first feature is whether s40(1) is satisfied, where land ‘held’ for a public work and is no longer required for a public work or exchange. The Court in *Horton* observes this subsection is expressed in the present tense.³¹¹ The Court of Appeal in *Port Gisborne Ltd v Smiler* approaches s40(1) from both the present tense and past tense, therefore extending to the time to when the subject land was acquired.³¹² However, from the words of the statute itself, there is no linking of this first feature to the circumstances of the acquisition itself. The Courts have been clear on this point.³¹³ Once the first feature or s40(1) is satisfied, then the second feature of the scheme under s40(2) which refers to ‘acquisition’ is to be addressed. The second feature under s40(2) expresses this mandatory language:

³⁰⁶ Interpretation Act 1999, s 5(1) - Ascertaining the meaning of an enactment.

³⁰⁷ *Ibid*

³⁰⁸ *Smiler & Ors v Port Gisborne Ltd* HC Gisborne CP 1-98, 12 June 1998 at 14

³⁰⁹ *Horton & Anor v Attorney-General* CA43/97, 3 December 1997 at 17

³¹⁰ *Attorney-General v Horton* [1999] 2 NZLR 257 (PC) at 262

³¹¹ *Horton & Anor v Attorney-General* CA43/97, 3 December 1997 at 16

³¹² *Port Gisborne Ltd v Smiler & Ors* CA 182-98, 26 April 1999, [1999] 2 NZLR 695 at []

³¹³ *Attorney-General v Hull* [2000] 3 NZLR 63 at [43] (CA) and *Horton & Anor v Attorney-General* CA43/97, 3 December 1997 at 16

“...[T]he chief executive ... shall offer to sell the land ...to the person *from whom it was acquired* or to the successor of that person ...” (emphasis added)³¹⁴

The statute simply refers: ‘from whom it was acquired’. As observed positively by the Privy Council, the legislative policy is to preserve the rights of the former owner subject only to the continuing needs of the state.³¹⁵ Because of the statute wording and the Privy Council observation, it is difficult to justify the reasoning of the Court of Appeal where it concludes an offer back of surplus public works land should be made to the Crown.³¹⁶

It is notable that in its written judgment the Court refers to submissions by counsel for the appellant which are not in keeping with the words of s40. These submissions appear to have swayed the Court. The commentary reads:

[Counsel for the appellant] submitted that the Crown did not acquire the land for a public work; it cannot therefore be said that the respondents are the successors of persons from whom the land was acquired for a public work as required by subs (2).³¹⁷

There is no rebuttal in the judgment of the inaccuracy of this statement. The words quoted from s40(2) ‘from whom it was acquired’ are blended with additional foreign words: ‘for a public work’. Subsection (2) does not include these latter words, nor can they be imported from subsection (1) if, as the Courts in other cases contend, the first feature under subsection (1) is to be satisfied independently from the second feature under subsection (2).

The Court of Appeal judgment continues with the prerequisite ‘public work acquisition’ theme:

“In light of that background it would be contrary to the statutory intention to apply s40 to land which has been acquired for other than public work purposes. What justification could there be for requiring an offer back to be made where land has been acquired for a commercial purpose on an arm’s length transaction, but years later used for a short term for some form of public work but is no longer required for

³¹⁴ Public Works Act 1981, s40(2)

³¹⁵ *Attorney-General v Horton* [1999] 2 NZLR 257 (PC) at 261

³¹⁶ *Port Gisborne Ltd v Smiler & Ors* CA 182-98, 26 April 1999, [1999] 2 NZLR 695 at [41]

³¹⁷ *Port Gisborne Ltd v Smiler & Ors* CA 182-98, 26 April 1999, [1999] 2 NZLR 695 at [15]

that work? At the time of acquisition, the vendor has no existing right which needs preservation.”³¹⁸

The Court became lost ‘in the enthusiasm engendered by the purposive and contextual approaches’.³¹⁹ Parliament expressly provides a solution for the situation observed by the Court, should that ever arise. Section 40(2) of the offer back scheme confers power upon the chief executive to grant an exception to offer back where a requirement to offer land back would be *impracticable, unreasonable, or unfair to do so*.³²⁰ The statutory intention is to preserve the rights of the former owner subject only to the continuing needs of the state.³²¹ The chief executive has discretion to exempt land from offer back. The Court of Appeal assumed responsibility for a mischief that Parliament expressly places under the care of the chief executive.

Section 40(2)(b) provides an exception to offer back where there has been significant change in the character of the land due to the public work.³²² This subsection refers to such change that occurred:

‘...for the purposes of, or in connection with, the public work for which it was *acquired or is held*.’ [emphasis added]³²³

The provision was included to the offer back scheme as an amendment in November 1982.³²⁴ Williams J at the High Court in *Bennett & Ors v Waitakere City Council & Anor* observes that the terms ‘acquired or held’ merely reflects there is a possibility of significant change on public work sites and this may be a factor to exempt offer back.³²⁵ It is not an opportunity to import the term ‘acquired’ into other parts of the statute which trigger s40 offer back

³¹⁸ *Port Gisborne Ltd v Smiler & Ors* CA 182-98, 26 April 1999, [1999] 2 NZLR 695 at [36]

³¹⁹ JF Burrows and RI Carter *Statute Law in New Zealand* (5th ed, Lexis Nexis, Wellington, 2009) at 307

³²⁰ Public Works Act 1081, s40(2)(a) – see *Hood v Attorney-General* CA16/04, 2 March 2005 at [97]

³²¹ *Attorney-General v Horton* [1999] 2 NZLR 257 (PC) at 261

³²² Public Works Act 1981, s40(2)(b)

³²³ *Ibid*

³²⁴ Public Works Amendment Act 1982, s2 – deemed to have come into force on 1 November 1982

³²⁵ *Bennett & Ors v Waitakere City Council & Anor* HC Auckland CIV-2005-404-007348, 14 May 2007 at [85] – Confirmed on appeal see *Waitakere City Council & Anor v Bennett & Ors* [2008] NZCA 428, [2009] NZRMA 76 at 48]

consideration where the qualifying requirement is merely that subject land is ‘held’ for a public work.³²⁶

The Court of Appeal explored repealed public works legislation of 1876 and 1928 together with amendments of 1878 and 1935 to compare the disposal mechanisms under those statutes with the offer back scheme of the 1981 Act.³²⁷ It intended to assist ‘*in ascertaining the true intent and meaning of s40*’.³²⁸ It was a mistake for the Court to refer to the mechanism under those repealed statutes as offer back schemes.³²⁹ These mechanisms were little more than provisions to facilitate the disposal of surplus public works land.³³⁰ Their purpose was for rationalisation of land tenure and repatriation of surplus public works land with adjoining land parcels. The Court of Appeal was in error to treat the land disposal mechanism under the repealed statutes as a scheme in the nature of s40 offer back. The statutory purpose of s40 offer back is remedial. It is to address perceived injustice where land is compulsorily taken from its owners.³³¹ Parliament passed the offer back legislation in 1981 following an awakening about the rights of former land owners. It was not the continuation of the tenure rationalisation mechanism under former public works legislation. If the statutory offer back scheme is to be compared with any other legislation, the comparison should more appropriately be made with the discretionary offer back provisions of the now repealed s436 of the Maori Affairs Act 1953.³³² The Court of Appeal did not mention this legislation in its quest to understand the ‘true intent and meaning’ of s40 despite the strikingly similar objectives and wording between the two schemes. The conclusion reached by the Court of Appeal following its perusal of surplus public works land disposal provisions since 1876 is:

³²⁶ Public Works Act 1981, s40(1)

³²⁷ *Port Gisborne Ltd v Smiler & Ors* CA 182-98, 26 April 1999, [1999] 2 NZLR 695 at [31]

³²⁸ *Ibid* at [29]

³²⁹ *Ibid* at [30] and [31]

³³⁰ Public Works Act 1928, s35 (Repealed)

³³¹ *Rowan v Attorney-General* [1997] 2 NZLR 559 at 568

³³² Maori Affairs Act 1953, s436 (Repealed)

“The consistent intention which comes through is that the offer back concept is referable to land which has been brought into public ownership for public work purposes.”³³³

The Court fails in its reasoning to recognise two things. First, Parliament had a change of focus following events in 1978 at Te Kopua, Raglan and Bastion Point. A new scheme was introduced under the 1981 Act. Section 40 offer back is not a repeal and re-enactment of a previous statutory provision. The new scheme extends well beyond a mere amendment of the former statutory land disposal mechanism. The nature and purpose of the new scheme is different, being remedial as opposed to a mere land disposal and tenure rationalisation mechanism. Any obligations or rights of either public work land holders or former owners are to be assessed under the 1981 Act, not its repealed predecessors.³³⁴ Second, the literal words of the statute passed by Parliament in 1981 do not support the Court’s interpretation. There is no need to explore repealed statutes dating back over 100 years before the 1981 Act to understand the true intent and meaning of s40. The repeal of previous public works legislation should not revive any former land disposal scheme³³⁵ or carry repealed provisions over on grounds of broadening Parliament’s intent. To do so is implied statutory amendment.³³⁶ The Court would have done better to apply conventional rules of statutory interpretation and apply s40 from its own text and in light of its own purpose.³³⁷ If it did so, the end decision is likely to have been the same as that of the lower Court even if the path to get there was different.

³³³ *Port Gisborne Ltd v Smiler & Ors* CA 182-98, 26 April 1999, [1999] 2 NZLR 695 at [31]

³³⁴ *Waitakere City Council & Anor v Bennett & Ors* [2008] NZCA 428, [2009] NZRMA 76 at [63] – Also see JF Burrows and RI Carter *Statute Law in New Zealand* (5th ed, Lexis Nexis, Wellington, 2009) at 648: “There is also some authority [*Beaumont v Yeomans* (1934) 34 SR (NSW) 562 (CCA) at 570 per Jordan CJ] for the view that if a provision is repealed and re-enacted in a form that enlarges its scope, this is amendment rather than true repeal.” “In so far as the new provision is merely repetition it may operate retrospectively: *R v Worsley* (1994) 77 A Crim R 241 (Tas SC) at 246 per Zeeman J”

³³⁵ Interpretation Act 1999, s17(2)

³³⁶ JF Burrows and RI Carter *Statute Law in New Zealand* (5th ed, Lexis Nexis, Wellington, 2009) at 648

³³⁷ Interpretation Act 1999, s5(1)

Conclusion

If the dominant message to Maori from the *Hull*³³⁸ and *Horton*³³⁹ litigation is that the offer back provisions of the Public Works Act mean what they say, *Port Gisborne Ltd v Smiler*³⁴⁰ is an exception to that message. It is not for the judiciary to import meaning into a statute beyond that which can reasonably be sustained by those words passed by Parliament. Legislative reform in New Zealand is in the exclusive domain of Parliament.

The Court of Appeal had the final say on the matter and its reasoning sets a precedent. However, the Court of Appeal's approach should not be immune from constructive and qualified criticism which should enquire whether Parliament's objective regarding its offer back scheme has been correctly applied. The judgment of the Court of Appeal was delivered in 1999. Since that time, the case has become recognised as a leading authority in offer back law. The *Port Gisborne Ltd v Smiler*³⁴¹ deviation is at the expense of Maori. It will take an intervention by Parliament to restore the true intent of the offer back scheme. That will only happen if there is the political will to do so.

TE ATATU LANDS LITIGATION (WILLIAMS): Real Personal Interest in Land

Cases

Williams v Auckland Council [2016] NZSC 20 (SC) – Leave to appeal Court of Appeal decision denied.

³³⁸ *Attorney-General v Hull* [2000] 3 NZLR 63 at [49] (CA)

³³⁹ *Attorney-General v Horton* [1999] 2 NZLR 257 (PC)

³⁴⁰ *Port Gisborne Ltd v Smiler & Ors* CA 182-98, 26 April 1999, [1999] 2 NZLR 695

³⁴¹ *Port Gisborne Ltd v Smiler & Ors* CA 182-98, 26 April 1999, [1999] 2 NZLR 695

Williams v Auckland Council [2015] NZCA 479 (CA) – Unsuccessful appeal of High Court decision.

Robertson & Ors v Auckland Council [2014] NZHC 765 (HC) – Unsuccessful application for declaration

Robertson & Ors v Auckland Council [2014] NZHC 422 (HC) – Question of law regarding legal privilege

Bennett & Ors v Waitakere City Council & Anor [2013] NZHC 1357 (HC) – Application for order directing plaintiffs to provide further and better discovery and to answer interrogatories.

Waitakere City Council & Anor v Bennett & Ors [2008] NZCA 428 (CA) – Confirming decision of High Court not to strike out.

Bennett & Ors v Waitakere City Council & Anor HC Auckland CIV-2005-404-007348, 12 December 2007 – Reasons for granting leave to appeal High Court's refusal to strike out claim.

Bennett & Ors v Waitakere City Council & Anor HC Auckland CIV-2005-404-007348, 14 May 2007 – Unsuccessful application for review of High Court dismissal of strike out proceedings.

Bennett & Ors v Waitakere City Council & Anor HC Auckland CIV-2005-404-007348, 19 October 2006 – Unsuccessful application to strike out proceedings.

Introduction

The Te Atatu Lands litigation is a legal battle initiated by litigation funders. They struck a deal with the successors of former owners of seven separate properties in Te Atatu at the upper Waitemata Harbour. The successors were funded to take up the case. If successful, the funders stood to reap the benefit

of a substantial increase in land value. The successors themselves would receive a proportionately small pay-out as part of the deal they struck with the funders.

Issue

The successors claimed that the local Council owed a duty to them under s40 of the Public Works Act 1981 to offer the surplus public works land back. They contended the subject land was no longer required for a public work when the 1981 Act came into force on 1 February 1982. If this was the case the market value of the land at 1 February 1982 would be the price Council must offer the land for sale to them. Proceedings were first lodged in 2005, so the significant increase in land value since 1982 was a problem for the Council.³⁴² The case was hard fought with the Council denying liability throughout.

The concept of a ‘real personal interest in the land’ is something familiar to Maori. The connectivity principle was brought up by the Court of Appeal in the Te Atatu lands case when the successors had satisfied all the express technical requirements of s40. The Court had to come up with a good reason why it would not require the Council to offer the land back in circumstances it deemed inappropriate and outside of the remedial nature of the offer back scheme. In the Te Atatu lands litigation, the successors were motivated by prospective financial rewards rather than being restored to their land.

Background Facts

In 1949 rural land in the upper Waitemata Harbour at Te Atatu was required for construction and development of port facilities. The Auckland Harbour

³⁴² *Williams v Auckland Council* [2015] NZCA 479 (CA) at [58]

Board notified land owners of seven separate properties of the proposed public work. Acting under statutory powers, it then over several years acquired 75 hectares of land from those owners.³⁴³

The port facilities were never constructed. It became evident by the late 1970s that the port development would not go ahead.³⁴⁴ The land was instead used for other purposes including residential housing. However, most of the land was a public park and therefore valuable should this park be developed into residential housing.³⁴⁵

The land passed through a succession of public owners over the years. Under the Auckland Harbour Board and Waitemata City Council (Te Atatu) Empowering Act 1983, Waitemata City Council had powers to promote the subdivision and development while the land was still held by the Auckland Harbour Board.³⁴⁶ Importantly, this subdivision and development contradicts the fact that Auckland Harbour Board held the land for a public work.³⁴⁷

Subdivision and development of the Te Atatu lands, promoted by Council to provide for the needs of a growing city, did not fall under a public work. In 1988 when the Auckland Harbour board was to be disestablished in favour of a new Port Company,³⁴⁸ a dispute developed as to whether the land should transfer to a Port Company or instead be transferred to a newly established Waitakere City Council.³⁴⁹ The land was in 1989 vested in Waitakere City Council with no regard to a public work purpose, other than acknowledging the public work ‘port purposes’ designation had long since ceased to be applicable.³⁵⁰ The land was eventually held by Auckland Council following the amalgamation of Auckland councils in 2010.³⁵¹

³⁴³ *Williams v Auckland Council* [2015] NZCA 479 (CA) at [1]

³⁴⁴ *Robertson & Ors v Auckland Council* [2014] NZHC 765 at [154]

³⁴⁵ *Williams v Auckland Council* [2015] NZCA 479 at [1]

³⁴⁶ Auckland Harbour Board and Waitemata City Council (Te Atatu) Empowering Act 1983 (Repealed), s5 – See *Robertson & Ors v Auckland Council* [2014] NZHC 765 at [181]

³⁴⁷ *Robertson & Ors v Auckland Council* [2014] NZHC 765 at [184]

³⁴⁸ Port Companies Act 1988, s21 – see *Robertson & Ors v Auckland Council* [2014] NZHC 765 at [187]

³⁴⁹ *Robertson & Ors v Auckland Council* [2014] NZHC 765 at [189]

³⁵⁰ Local Government (Auckland region) Re-organisation Order 1989 – see *Robertson & Ors v Auckland Council* [2014] NZHC 765 at [190] – [192]

³⁵¹ Local Government (Auckland Council) Act 2009, s6

Statutory offer back provisions under the Public Works Act 1981 introduced a new direction in public policy regarding surplus public works land. Public bodies were subject to greater accountability for their lands which no longer qualified for the public work for which they had been taken and held. The former owners of the Te Atatu lands commenced proceedings in 2005 for declaratory relief. They sought to require the then holder of the lands to follow through on the offer back provisions of s40, with market values to be derived as at 1982 when the lands became surplus to requirements.³⁵²

What the Courts said

The litigation covers a range of issues under s40 and provides useful insight into interpretation and application of the statutory offer back provisions. The claim by the successors of former owners was not motivated by their desire to be restored to their lands. The litigation was conducted and financed by a third party litigation funder who would take the majority of proceeds from the benefit of a win against the Council.³⁵³

The successors of the former owners said that due to the significant costs of litigation the only way they could pursue their claim was through a litigation funder. Such a move was not prohibitive in the eyes of the Courts; however, it didn't win them any favour. Counsel for the successors of the former owners sought to address difficulties Council would inevitably face if it had to transfer the subject lands to private interests. The Court of Appeal observed:

“... this submission serves to highlight an inequity which undermines the [successors of the former] owners' claims. S 40 Ltd, the [successors of the former] owners' litigation funder, would be the principal beneficiary of success. The company would acquire the Te Atatu land at 1983 prices, without any adjustment for the time value of money in the intervening 22 years. Inflation over this period, and the rapidly increased demand for land for residential purposes, means its 1983 value is a fraction

³⁵² *Robertson & Ors v Auckland Council* [2014] NZHC 765 at [8]

³⁵³ *Williams v Auckland Council* [2015] NZCA 479 (CA) at [8]

of its current market worth. On one estimate, the value of the Te Atatu land as a whole is about \$50 million to \$70 million. To allow the [successors of the former] owners, or more particularly S 40 Ltd, to take at the Council's expense the benefit of windfall profits attributable solely to extraneous factors would be contrary to the policy underlying s40.”³⁵⁴

The proposition was simply untenable to the Court. The successors of four out of seven former owners had established that the Council breached its duty to offer the land back. The Council was in trouble at this point. However, the Court of Appeal took the matter further by drawing upon the purpose of the statutory offer back scheme:

“We accept, of course, that the owners have established the Council's breaches of their rights; and that in the normal course they should be vindicated by declaratory relief. But, where the owners' delay has been prolonged and where the effect of allowing them to assert their rights now would be adverse to the Council and its ratepayers, the interests must be balanced.

In undertaking this balancing exercise we repeat that the purpose of s40 is remedial, designed to confer a personal, not an economic, benefit on those with an attachment to the land.”³⁵⁵

For a person to be eligible under s40, they need more than to just meet the technical criteria prescribed. Their cause must satisfy the remedial purpose of s40.

The unsuccessful parties sought leave of the Supreme Court to appeal the Court of Appeal decision.³⁵⁶ The application was refused:

“We do not read the Court of Appeal's judgment as being critical of the use of a litigation funder, but rather as emphasising that the purpose of the Public Works Act is to restore to someone whose land has been compulsorily taken land with which that person has a personal or familial connection. That is in keeping with the fact that the offer back right applies only to the original owner and the original owner's successor, as that term is restrictively defined in s40(5). In the present case the land

³⁵⁴ *Williams v Auckland Council* [2015] NZCA 479 (CA) at [118]

³⁵⁵ *Ibid* at [120] – [121]

³⁵⁶ *Williams v Auckland Council* [2016] NZSC 20 (SC)

was taken in the 1950s and the present named applicants did not have any real personal interest in the land.”³⁵⁷

The Supreme Court agreed with the Court of Appeal’s purposive approach. It also noted that the Court of Appeal’s restrictive interpretation of the term ‘successor’ supported the lack of ‘personal or familial connection’ the claimants had with the land.

Conclusion

The concept of a ‘real personal interest in the land’ is something that Maori retain through Tikanga Maori, or Maori customary values and practices.³⁵⁸ Whether the land was taken for a public work in 1950 or before, former Maori owners and their descendants retain strong ties with land as part of their cultural identity as tangata whenua or people of the land. Unlike the Te Atatu lands litigants, the connection with formerly held land will not be reduced to merely an economic interest. However, if a proposition of a litigant is deemed untenable to a Court, even a litigant with an interest in former Maori freehold land, the chance of their success will be greatly reduced. The Te Atatu Lands litigation illustrates that the Courts are not only concerned about meeting the technical requirements of the statutory offer back scheme, they are also concerned about meeting its purpose.

The Supreme Court touched on the Court of Appeal’s narrow approach to interpretation of the term ‘successor’³⁵⁹ compared with the wider interpretation of Fogarty J at the High Court.³⁶⁰ The Court of Appeal observes:

“ – it is whether a person would have been entitled to the land under the will or intestacy of the person who owned the land at the time of acquisition had that person owned it at the date of his or her death. There is an assumption that ownership of the

³⁵⁷ *Williams v Auckland Council* [2016] NZSC 20 (SC) at [9]

³⁵⁸ Te Ture Whenua Maori Act 1993, s4 Interpretation – Tikanga Maori

³⁵⁹ *Williams v Auckland Council* [2015] NZCA 479 at [65]

³⁶⁰ *Robertson & Ors v Auckland Council* [2014] NZHC 765 (HC) at [209]

land has not changed between the dates of acquisition and the owner's death, meaning ...that Parliament intended only one level of succession."³⁶¹

Maori should be alarmed at this interpretation which fails to account for the traditional succession of Maori freehold land interests by lines of natural descent. However, between the drafting of the s40(5)³⁶² 'succession' definition and the Court of Appeal interpretation in *Port Gisborne Ltd v Smiler*³⁶³, there is difficulty with the offer back scheme. The Supreme Court conceded there is an arguable point on the interpretation of s40(5).³⁶⁴ Statutory reform is likely to be the only way to adequately accommodate Maori land succession practices under the offer back scheme.

KANE: Offer Back Obligations versus Treaty Settlement Obligations

Case

Kane v Attorney-General [2014] NZHC 251, [2014] NZAR 404

Introduction

The Crown's role is not simple when multiple parties hold legitimate rights in public works land. Rights held by one party confer duties upon another. Difficulties arise where rights compete with one another. *Kane v Attorney-General*³⁶⁵ is a case that deals with such an issue. The Crown's intention to

³⁶¹ *Williams v Auckland Council* [2015] NZCA 479 at [65]

³⁶² Public Works Act 1981, s40(5)

³⁶³ *Port Gisborne Ltd v Smiler & Ors* CA 182-98, 26 April 1999, [1999] 2 NZLR 695

³⁶⁴ *Williams v Auckland Council* [2016] NZSC 20 (SC) at [16]

³⁶⁵ *Kane v Attorney-General* [2014] NZHC 251, [2014] NZAR 404

enter a settlement with Kurahaupo and other iwi was in keeping with a duty it owed as part of its Treaty of Waitangi partnership responsibilities. However, there was a question as to the Crown's duty to former owners and their successors regarding the offer back of some of the land that happened to be tagged for the Treaty settlement. The broader interests of Treaty of Waitangi claimants competed with those interests conferred upon former owners or their successors under the statutory offer back scheme.³⁶⁶

Issues

The public works land was about to be transferred from Crown ownership as part of a Treaty of Waitangi settlement with iwi.³⁶⁷ The applicants were not party to the pending Treaty settlement. They alleged that the Crown failed to observe their rights under s40 and unjustifiably denied them from an opportunity to buy back public works land. The Crown contended that it had considered its s40 offer back obligations, but there were no eligible living successors of the deceased former owner.³⁶⁸ It further contended that the public works land was not surplus to requirements because it would continue to use the land for the public work purpose under a lease back arrangement; therefore, the offer back provisions of s40 had not been triggered.³⁶⁹

³⁶⁶ See other examples of competing interests between Treaty of Waitangi claimants and holders of offer back rights in *Attorney-General v Horton* [1999] 2 NZLR 257 (PC) and *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA)

³⁶⁷ *Kane v Attorney-General* [2014] NZHC 251 at [50]

³⁶⁸ *Ibid* at [21]

³⁶⁹ *Ibid* at [36]

Background Facts

George Fairhall lived at Woodbourne in Marlborough until he died intestate and without issue in 1941.³⁷⁰ His farm had been in family ownership since 1885. He was the descendant of settlers who had arrived in Nelson in 1842.³⁷¹

Mr Fairhall held an early interest in aviation. His Woodbourne farm was used as a private airfield in the 1920s.³⁷² In 1939, a major part of the farm was taken for defence purposes under the Public Works Act 1928.³⁷³ Following Mr Fairhall's death, the Crown in 1947 compulsorily acquired a further 111 acres (45 hectares) from the administrators of his estate.³⁷⁴ It was this land that later became the subject of proceedings.

Letters of administration were granted by the Supreme Court in Nelson in 1941 to the late Mr Fairhall's four surviving siblings, as his next of kin.³⁷⁵ By the time proceedings were lodged in 2013, those four siblings and all their children had died. The applicants in the proceedings are grandchildren of two of the deceased siblings and great grandchildren of one of those siblings of the late Mr Fairhall.³⁷⁶

In 2010 land at the Woodbourne air force base was offered to Kurahaupo and other iwi as part settlement of their Treaty of Waitangi claims. The Crown's offer by way of Deeds of Settlement comprised land which fell under three categories. First, 'current surplus land' which was defence land declared surplus to requirements on 1 March 2010. Statutory obligations, such as s40 offer backs, were being addressed. Second, 'non-operational land' which was land that the New Zealand Defence Force would notify iwi by a specified date was no longer required for operational purposes or any other public work. The availability of this land was also subject to the Crown's statutory clearance obligations. Third, 'leaseback land' which was land at Woodbourne still

³⁷⁰ *Kane v Attorney-General* [2014] NZHC 251 at [13]

³⁷¹ *Ibid* at [11]

³⁷² *Kane v Attorney-General* [2014] NZHC 251 at [11]

³⁷³ *Ibid* at [12]

³⁷⁴ Proclamation 678 Marlborough Registry as cited in *Kane v Attorney-General* [2014] NZHC 251 at [16]

³⁷⁵ *Kane v Attorney-General* [2014] NZHC 251 at [14]

³⁷⁶ *Ibid* at [19]

required for either defence purposes or another public work. This land would be leased back by the Crown for operational purposes.³⁷⁷ Transfer of land to iwi was conditional on Treaty of Waitangi settlement legislation being passed to give effect to contemplated arrangements.³⁷⁸

The former 1947 Fairhall land fell under the leaseback category. The applicants sought a declaration from the Court. They wanted the Court to declare that before the land was provided for Treaty settlement purposes the Crown should have first obtained their consent, or procured their acknowledgement, for their contended surrender of statutory offer back rights.³⁷⁹ The applicants claimed a legitimate expectation that the Crown would first address its offer back obligations to them.³⁸⁰ They further claimed that the Crown was under an obligation while negotiating the Treaty of Waitangi settlement to not knowingly put their statutory offer back rights at risk.³⁸¹

A small part of the former 1947 Fairhall land had become surplus to requirements some years beforehand. In 2011 it was offered back to the applicants as part of the Crown's statutory clearance procedure. The offer occurred because the applicants were the immediate surviving descendants to eligible beneficiaries of the late Mr Fairhall's estate.³⁸² The applicants declined the Crown's offer. However, the Crown's offer apparently gave rise to their expectation that the balance land taken from the estate in 1947 would in future be offered to them.

The Minister for Treaty of Waitangi Negotiations and officials from the Office of Treaty Settlements had set out in correspondence the Crown's position regarding offer back obligations to former owners of the former 1947 Fairhall land.³⁸³ Surplus public works land would be processed subject to standard offer back obligations where such obligations exist. However, land still

³⁷⁷ *Kane v Attorney-General* [2014] NZHC 251 at [40]

³⁷⁸ *Ibid* at [41]

³⁷⁹ *Kane v Attorney-General* [2014] NZHC 251 at [9]

³⁸⁰ *Ibid* at [6]

³⁸¹ *Ibid* at [8]

³⁸² *Ibid* at [24]

³⁸³ *Ibid* at [29] – [36]

required for a public work and subject to transfer to iwi with a lease back to the Crown was not surplus to requirements. The Crown considered that it did not have to observe the statutory offer back scheme in these circumstances.³⁸⁴

What the Courts said

There were three aspects to the applicants' claim. First, do the applicants themselves qualify within the meaning of 'successors' as referred in s40(5) of the Public Works Act 1981? Second, is the applicants' claim justiciable? Would it be possible to bind the Crown to an unknown future contingency if the land was not surplus to requirements?³⁸⁵ Third, does the Court have jurisdiction to review parliamentary driven and sanctioned Treaty of Waitangi settlement arrangements?³⁸⁶

Are the Applicants Eligible "Successors"?

Government officials had in 2011 offered 2.66 hectares of surplus land to the applicants. That land was part of the former 1947 Fairhall property. However, three years later the Crown held a different view concerning its offer back obligations. Its revised position was that the estate of Mr Fairhall was the owner from whom the land was taken for a public work. The beneficiaries of his estate were therefore the 'successors' for s40 offer back. Given that all these beneficiaries had died before the Crown's offer back duty had materialised, and it still had not materialised by the date of proceedings, there was no living person to whom the statutory offer back obligation applied.³⁸⁷ The applicants were one and two generations too far removed from eligibility.

³⁸⁴ *Kane v Attorney-General* [2014] NZHC 251 at [35]

³⁸⁵ *Ibid* at [26]

³⁸⁶ *Ibid* at [20]

³⁸⁷ *Ibid* at [22]

The Court applied the obiter observation of the Court of Appeal in *Port of Gisborne v Smiler*³⁸⁸ and held that Mr Fairhall and his siblings as his successors in intestacy were the only people to fall into the eligible class of offerees under s40 of the Act. The Crown's submissions were accepted. The applicants failed to qualify as successors so at this point their cause was lost.³⁸⁹

Although *Kane v Attorney-General*³⁹⁰ does not serve as a leading s40 precedent case in the same way as *Hull*³⁹¹, *Horton*³⁹² and *Smiler*³⁹³, it is a relatively clean illustration of Smiler obiter cutting short succession at one step removed from the original owner. If the Crown holds a property for a public work long enough, it will inevitably outlive former owners and their successors. Over time statutory offer back obligations will be defeated.

Is the applicants' claim justiciable?

Despite the claimants failing to qualify under the *Smiler*³⁹⁴ observation of 'successor', the Court continued to consider other aspects of their claim. The next problem for the applicants was that the land was still required for the public work purpose for which it was taken. Inclusion of the land as part of a Treaty of Waitangi settlement with iwi did not change the defence purpose for which it would continue be utilised under the terms of the leaseback arrangement.

The Court rejected the applicants' claim that the Crown should have considered the rights of eligible s40 offerees before such time as the actual obligation to offer land back to them had arisen. The applicants could have no legitimate expectation of the Crown within this context.³⁹⁵ The Crown may enter into arrangements to vest or transfer the land into a third party if the

³⁸⁸ *Port Gisborne Ltd v Smiler & Ors* CA 182-98, 26 April 1999, [1999] 2 NZLR 695 at [44] – [45]

³⁸⁹ *Kane v Attorney-General* [2014] NZHC 251 at [23]

³⁹⁰ *Ibid* 251

³⁹¹ *Attorney-General v Hull* [2000] 3 NZLR 63 (CA)

³⁹² *Attorney-General v Horton* [1999] 2 NZLR 257 (PC)

³⁹³ *Port Gisborne Ltd v Smiler & Ors* CA 182-98, 26 April 1999, [1999] 2 NZLR 695 (CA)

³⁹⁴ *Ibid* at [44] – [45]

³⁹⁵ *Kane v Attorney-General* [2014] NZHC 251 at [37]

public work purpose for which the land is utilised prevails. Under these circumstances the s40 offer back provisions are not be triggered.

Does the Court have Jurisdiction to Review Parliamentary Driven and Sanctioned Arrangements?

The Te Tau Ihu Claims Settlement Bill was before Parliament during the *Kane v Attorney-General*³⁹⁶ proceedings. The Bill, if passed, would authorise the Crown to give effect to its settlement with iwi which included the transfer or vesting of the former 1947 Fairhall land into an iwi settlement trust.³⁹⁷ Evidence was presented to the Court showing that the responsible Minister and officials had not overlooked s40 offer back considerations during negotiations with iwi and during the parliamentary process.³⁹⁸ The Crown had taken care to point out that any contemplated transfer of surplus public works land under the Treaty of Waitangi settlement would be conditional upon clearance through the statutory offer back procedure. It also clarified that land still utilised for a public work would not trigger statutory offer back obligations and therefore would not be offered back to former owners or their successors.³⁹⁹ Regarding the contemplated transfers of land to iwi, clause 148 of the Bill provided:

“...the Crown is not required to comply with any other enactment that would otherwise regulate or apply to the transfer of a commercial property, a deferred selection property, or any Woodbourne land.”⁴⁰⁰

The wide sweeping provision removed any doubt that s40 offer back obligations could not be triggered by transferring operational defence land into third party iwi hands. The parliamentary process was underway to address this point.

The Court would not intervene in the parliamentary process nor would it review the Treaty of Waitangi settlement process.⁴⁰¹ The facts were not

³⁹⁶ *Kane v Attorney-General* [2014] NZHC 251

³⁹⁷ Te Tau Ihu Claims Settlement Bill 2013 (123-2), cl 146(1)

³⁹⁸ *Kane v Attorney-General* [2014] NZHC 251 at [48]

³⁹⁹ *Ibid* at [29] – [36]

⁴⁰⁰ Te Tau Ihu Claims Settlement Bill 2013 (123-2), cl 148 as cited in *Kane v Attorney-General* [2014] NZHC 251 at [46]

complicated and the constitutional separation of powers between Parliament and the judiciary ultimately prevailed. The High Court decision was not appealed.

Conclusion

The applicants' claim was directed at the Crown's failure to observe the statutory offer back scheme before committing itself to a Treaty of Waitangi settlement. The settlement had been presented as a Bill before Parliament.⁴⁰² The Crown had taken steps to deal with matters arising under s40 as part of its Treaty settlement procedure. Its position was that since the land was still required for a public work, notwithstanding a contemplated transfer of the subject land from Crown ownership as part of a Treaty of Waitangi settlement, the offer back provisions of s40 were not triggered. Had the Crown failed to consider its obligations under s40 the Court may have taken a different approach, perhaps similar to that of Hammond J at the High Court in *Deane v Attorney-General* when an issue of the Crown owing dual obligations to multiple parties arose:

“In my view, if the Crown was in breach of its Treaty of Waitangi obligations and had to be reminded of them by New Zealand Courts, then the consequences for transactions caught midstream should fall on the Crown, and not on the innocent [third party] plaintiffs. Hence, in my view the fact that the Crown had to reconsider its overall position as a result of a decision of our Court of Appeal in no way affects the underlying substantive liability [under the s40 offer back scheme] between the plaintiff and the Crown.”⁴⁰³

The Crown had sufficiently covered off this issue in *Kane* which made the Court's task easier. But Hammond J's observation in contrast serves as an

⁴⁰¹ *Kane v Attorney-General* [2014] NZHC 251 at [54]

⁴⁰² *Kane v Attorney-General* [2014] NZHC 251 at [50]

⁴⁰³ *Deane v Attorney-General* [1997] 2 NZLR 180 at 198 line 33

example that the Crown cannot avoid a statutory obligation under s40 merely because it owes a conflicting obligation to another party.

Another feature of *Kane v Attorney-General* is the use of the *Smiler*⁴⁰⁴ ‘successor’ interpretation which limits eligibility regarding offer back rights. The plaintiffs’ claim was knocked out on this point. The message to Maori is that if the Crown utilises public work land for long enough, s40 offer back rights will eventually be lost, even if a ‘real personal interest’⁴⁰⁵ in the land is retained by descendants of former owners.

Where a former owner or their successors would otherwise be entitled to an offer back except for the land being required for Treaty of Waitangi settlement purposes, a solatium payment may be made by the Crown to that otherwise eligible person.⁴⁰⁶ The solatium payment scheme is set out under s42A and was introduced by way of an amendment to the Public Works Act in 1995 under the Waikato Raupatu Claims Settlement Act 1995.⁴⁰⁷ However, the scheme is little more than a token. Solatium payments cannot exceed the relatively small sum of \$20,000.⁴⁰⁸ A token solatium payment is unlikely to adequately compensate former owners or their successors for the lost opportunity to be reunited with land in which they hold a ‘real personal interest’.

NGAHINA TRUST: Acquired and Held for a Public Work?

Case

Ngahina Trust & Ors v Kapiti Coast District Council HC Wellington CIV-2008-485-1657, 31 May 2010

⁴⁰⁴ *Port Gisborne Ltd v Smiler & Ors* CA 182-98, 26 April 1999, [1999] 2 NZLR 695 at [44] – [45]

⁴⁰⁵ *Williams v Auckland Council* [2016] NZSC 20 (SC) at [9]

⁴⁰⁶ Public Works Act 1981, s42A

⁴⁰⁷ Waikato Raupatu Claims Settlement Act 1995, s 37

⁴⁰⁸ Public Works Act 1981, s42A(4)

Introduction

The acquisition, holding and disposal of public works land will inevitably involve a story. Circumstances of former land owners will vary as too will reasons for land being required for the public good. The story of Ngahina Trust's dealings with the local Council at Kapiti Coast is a good example, from acquisition through to disposal, of interactions between a Maori land owner and a public works acquiring authority. As is often the case in s40 litigation, the plaintiffs were forced to take legal action to remind the public body of its obligations to them under the statutory offer back scheme. Council resisted all the way.

Issues

Ngahina Trust land was acquired by the Council in two stages. The first stage was a sale transacted under provisions of the Public Works Act. The second stage was also a sale but the land transaction was instead implemented by way of conventional transfer. Council did not exercise its public works powers of acquisition for the second stage.⁴⁰⁹

Prior to enactment in 1993 of restrictions upon the alienation of Maori freehold land,⁴¹⁰ it was common place for Maori freehold land to be sold on a willing seller basis.⁴¹¹ The Ngahina trustees were proactive in land development of which land sales were part. Although there appears to be a willing buyer willing seller basis to the Trust's land transactions with the Council, district planning rules restricted the prospective purchasers to one party, the Council. Those planning rules had been created by the purchaser.

⁴⁰⁹ *Ngahina Trust & Ors v Kapiti Coast District Council* HC Wellington CIV-2008-485-1657, 31 May 2010 at [24]

⁴¹⁰ Te Ture Whenua Maori Act 1993, Part 7 Alienation of Maori Land

⁴¹¹ Maori Affairs Act 1953 (Repealed), Part 19 Alienation of Land by Maoris -General Provisions

An issue before the Court was whether or not the statutory offer back scheme was relevant in light of the circumstances. If the scheme was relevant, exceptions to offer back could apply. A similar problem was raised in *Smiler*.⁴¹² Was land held for a public work or was it held generally by the acquiring authority? Representatives of the former Maori owners showed a willingness to sell to the Council. The sale of the majority area was initiated by the trustees. The second stage transaction wasn't even transacted under Public Works Act provisions or powers.

Background Facts

Ngahina Trust was created by order of the Maori Land Court in 1981. Its purpose was to administer several consolidated Maori land blocks in the Paraparaumu area on behalf of beneficial Maori owners. Trust lands were within an area the local Council intended for development of Paraparaumu town centre.⁴¹³

District Plan restrictions over subject Ngahina Trust lands restricted sale to any party other than the local Council. The Trust was actively subdividing other lands in its holding for commercial development. However, Council was the only prospective purchaser of lands they had designated themselves for road, park, recreation reserve and civic purposes.⁴¹⁴

During 1981 in an attempt to address their financial problems, previous administrators of the trust land had agreed with Kapiti Borough Council to sell an area comprising 3.755 hectares. The agreement recorded a term whereby the land would be designated for road extension and civic centre. A compensation figure of \$108,900 was agreed upon and the land was accordingly taken under s32 of the Public Works Act 1928 which was the Act

⁴¹² *Port Gisborne Ltd v Smiler & Ors* CA 182-98, 26 April 1999, [1999] 2 NZLR 695

⁴¹³ *Ngahina Trust & Ors v Kapiti Coast District Council* HC Wellington CIV-2008-485-1657, 31 May 2010 at [4] –

[5]

⁴¹⁴ *Ibid* at [18]

in force at that time. All of the trust's debts were paid from the compensation received, and a balance of \$60,000 was retained.⁴¹⁵

Following the 1981 sale of land to the Council, the Trustees approached Council with a proposal to sell more land. The trustees intended to utilise sale proceeds for the further development of the Trust's commercial land development.⁴¹⁶ The land offered to Council was designated under the operative District Plan for public purposes. It could not be developed by anyone other than Council.⁴¹⁷ Following interaction between the parties which stretched over several years, 12.8 hectares of Trust land was sold to the Council in 1989 for \$84,800.⁴¹⁸

The Council's intended development of Paraparaumu town centre never went ahead. Council had entered into an arrangement with Kapiti Coast Enterprise Trust, a charitable trust charged with the responsibility of managing the development at arm's length from Council.⁴¹⁹ Under the arrangement, Kapiti Coast Enterprise Trust was granted an option to purchase the town centre land to carry out the contemplated comprehensive development.⁴²⁰ However, the agreement expired in 1997 following a change in planning direction from the Council and a lack of consensus between the parties.⁴²¹ Despite several attempts, Council could not revive the development and, except for constructing three buildings, the land remained undeveloped.⁴²²

In 2008, Ngahina Trust and other plaintiffs filed proceedings seeking a High Court declaration requiring Council to offer the 1981 and 1987 land back under obligations arising under s40 of the Public Works Act 1981.⁴²³ The plaintiffs contended that both the 1981 and 1987 land were held for public works and were no longer required for public works. The Council disputed that it had an obligation to offer the land back. It contended that the 1987 land,

⁴¹⁵ *Ngahina Trust & Ors v Kapiti Coast District Council* HC Wellington CIV-2008-485-1657, 31 May 2010 at [6]

⁴¹⁶ *Ibid* at [20]

⁴¹⁷ *Ibid* at [27]

⁴¹⁸ *Ibid* at [23] – [24]

⁴¹⁹ *Ibid* at [35]

⁴²⁰ *Ibid* at [41]]

⁴²¹ *Ibid* at [53]

⁴²² *Ibid* at [61]

⁴²³ *Ibid* at [1]

having been purchased following a sale offer initiated by the Trust, was not held for a public work.⁴²⁴

What the Courts said

The Ngahina Trust case illustrates the ‘purpose of acquisition’ test laid down by the Court of Appeal in *Port Gisborne Ltd v Smiler*.⁴²⁵ The test enquires whether the subject land was held for a public work immediately after it was acquired from former owners. MacKenzie J adopted a similar approach although the end result for Ngahina Trust was different to the result delivered to the hapu of Tauwhareparae in *Smiler*.⁴²⁶ MacKenzie J’s approach reads:

The question whether land is held for a public work must in this case be determined by a consideration of the purpose for which the land was acquired. That requires a separate examination of the circumstances of acquisition of the 1981 and 1987 land.⁴²⁷

The conclusion to be reached following application of the ‘purpose of acquisition’ test will swing entirely upon the facts of each case and the Court’s interpretation of those facts.

We see in *Port Gisborne Ltd v Smiler* the Court of Appeal concluding that land was acquired for the general land bank of the Crown, not for a public work. The ‘purpose of acquisition’ test in that case led to a finding that the former Maori owners were not entitled to a statutory offer to purchase surplus land although the land had been designated for a public work several years after it was acquired.

Kapiti Coast District Council eventually conceded that public work purposes were behind its acquisition of the 1981 land. These purposes included

⁴²⁴ *Ngahina Trust & Ors v Kapiti Coast District Council* HC Wellington CIV-2008-485-1657, 31 May 2010 at [1] – [3]

⁴²⁵ *Port Gisborne Ltd v Smiler & Ors* CA 182-98, 26 April 1999, [1999] 2 NZLR 695

⁴²⁶ *Ibid*

⁴²⁷ *Ngahina Trust & Ors v Kapiti Coast District Council* HC Wellington CIV-2008-485-1657, 31 May 2010 at [67]

extension of a public road, setting apart a segregation strip preventing access to a specific portion of public road, and plans for a civic centre. MacKenzie J reiterated the public work intention was further evidenced by the acquisition having been concluded by way of powers prescribed under public works legislation:

Compensation was paid under the [Public Works Act] and a compensation certificate registered. The procedure was appropriate only for land being acquired for a public work.⁴²⁸

Land acquired for a public work purpose, and by way of public work powers, will give rise to s40 offer back provisions.

The 1987 land had a different acquisition history. It was willingly sold by Ngahina Trust. Unlike the 1981 land, the 1987 land was conveyed to Council under a conventional sale agreement and the land title was accordingly transferred. The Council did not exercise statutory public work powers or utilise public work provisions. However, there was more to the circumstances of this acquisition. The apparent willingness of the seller was offset by Council's requirement for the land in its district plan. MacKenzie J recognised the predicament of the landowners leading up to their sale. District Plan designations confined the land use to such degree that only Council could utilise it for its designated purpose. MacKenzie J cites *Bowler Investments v Attorney-General*⁴²⁹ in comparing the inevitability of the Trust's sale to the Council:

"...where an owner sells to the Crown because the prospect of a public work has denied him a market he is, in a sense, compelled to sell to the Crown.

While I do not overlook the fact there was no formal [public work] designation, it seems to me that in substance, if the market is anticipating the designation and the property is thus unsaleable, no material distinction should be drawn on the basis that a formal designation has not yet been imposed.

[It was] emphasised that at the time the Crown did not have to buy, but even if such were strictly the case, the simple fact is that the Crown did buy and the obvious

⁴²⁸ *Ngahina Trust & Ors v Kapiti Coast District Council* HC Wellington CIV-2008-485-1657, 31 May 2010 at [68]

⁴²⁹ *Bowler Investments v Attorney-General* (1987) 7 NZAR 73 at 80

reason why it bought was that it must have been satisfied that Bowler Investments could not sell elsewhere because of the plans for the northern motorway.”⁴³⁰

Circumstances surrounding the sale of Maori freehold land by Ngahina Trust to the Council were relevant. Kapiti Coast District Council was found to have acquired the 1987 land for a public work.⁴³¹ The ‘purpose of acquisition’ test revealed the true nature of the acquisition. Designations under the local authority’s District Plan forced the hand of Ngahina Trust. The mechanism under which the land was transferred was deemed irrelevant.

The absence of compulsion in an acquisition of land for a public work may qualify an exemption to offer land back if such circumstances amount to an offer being unreasonable.⁴³² If it wasn’t for the District Plan designation limiting the practical utilisation of the 1987 Ngahina Trust land, Council may have been justified to exempt the land from offer back.⁴³³

A relatively small area of the former Ngahina Trust land, comprising 7400m², was in 1987 vested in Kapiti Coast District Council as reserve contribution upon subdivision.⁴³⁴ The plaintiffs did not seek a declaration for this area to be offered back to them. It had already been ruled in *Dunbar v Hurinui District Council* that land taken for reserve contribution upon subdivision is not subject to s40 offer back provisions.⁴³⁵

The Court considered whether or not the 1981 land and 1987 land were no longer required for a public work. Kapiti Coast District Council contended that the 1981 land and the 1987 land was not surplus to requirements. MacKenzie J applied tests from the leading decisions of *Attorney-General v Hull*⁴³⁶ and *Attorney-General v Horton*⁴³⁷ and found otherwise. *Hull* emphasises the critical role of the facts when determining whether public works land is surplus to

⁴³⁰ *Bowler Investments v Attorney-General* (1987) 7 NZAR 73 at 80

⁴³¹ *Ngahina Trust & Ors v Kapiti Coast District Council* HC Wellington CIV-2008-485-1657, 31 May 2010 at [73]

⁴³² Public Works Act 1981, s40(2), *Bowler Investments v Attorney-General* (1987) 7 NZAR 73 at 79 as cited in *Ngahina Trust & Ors v Kapiti Coast District Council* HC Wellington CIV-2008-485-1657, 31 May 2010 at [71]

⁴³³ Public Works Act 1981, ss40(1) and 40(2)

⁴³⁴ *Ngahina Trust & Ors v Kapiti Coast District Council* HC Wellington CIV-2008-485-1657, 31 May 2010 at [24]

⁴³⁵ *Dunbar v Hurinui District Council* HC Christchurch CIV-2004-409-000171, 5 August 2004 as cited in *Ngahina Trust & Ors v Kapiti Coast District Council* HC Wellington CIV-2008-485-1657, 31 May 2010 at [69]

⁴³⁶ *Attorney-General v Hull* [2000] 3 NZLR 63 at [41]

⁴³⁷ *Attorney-General v Horton* [1999] 2 NZLR 257 at 262(PC)

requirements.⁴³⁸ An affirmative decision by the land holding agency or conduct to the same effect can lead to an inference that public works land is no longer required.⁴³⁹ If the land holding agency is in a genuine state of indecision over whether it still requires a public work property, it is likely to have difficulty to justify its indecision:

“... if any reasonable person would undoubtedly have concluded that in all the circumstances the land was no longer required for the relevant public work ...”⁴⁴⁰

The *Horton* principle is that once land is no longer required for a public work, or any other public work or exchange, the land holding agency cannot retract its decision or reinstate a defunct public work status. When a public work purpose or exchange is no longer valid, the right to an offer back immediately vests in the former owners or their successors subject only to those exceptions prescribed under s40(2) of the Act.⁴⁴¹

Kapiti Coast District Council’s attempt to distance itself from developing Paraparaumu town centre by passing responsibility to Kapiti Coast Enterprise Trust introduced a possibility that the public work nature of the development was no longer applicable. If this was the case the land would be deemed surplus to requirements and Council’s offer back obligations would be triggered. In relinquishing its control, the project would not qualify as a local work authorised under public works legislation. The term ‘local work’ under the Public Works Act 1981 means:

“... a work constructed or intended to be constructed by or under the control of a local authority, or for the time being under the control of a local authority.”⁴⁴²

The Council could not maintain enough control of the project under the terms of its arrangement with Kapiti Coast Enterprise Trust. The multiple purpose nature of the contemplated development into public and commercial facilities was enough to conclude that none of the subject land was required for public

⁴³⁸ *Ngahina Trust & Ors v Kapiti Coast District Council* HC Wellington CIV-2008-485-1657, 31 May 2010 at [76]

⁴³⁹ *Attorney-General v Hull* [2000] 3 NZLR 63 at [41]

⁴⁴⁰ *Ibid*

⁴⁴¹ *Attorney-General v Horton* [1999] 2 NZLR 257 at 262(PC)

⁴⁴² Public Works Act 1981, s2 Interpretation

purposes.⁴⁴³ Council acquired the land for designated public purposes, but its plans proceeded beyond those purposes and beyond what could be justified as public or local works.⁴⁴⁴

The Court referred to a leading Court of Appeal decision which addressed mixed public work and commercial uses over land designated for public works. *McElroy v Auckland International Airport*⁴⁴⁵ concerns land taken for aerodrome and utilised for Auckland International Airport. Not only does the airport serve its core function, there is also significant retail and commercial activity on site which extends well beyond core airport operations. The Court of Appeal held that a modern international airport would be unworkable without a mixed commercial purpose. It would be unworkable and unrealistic in such case to fragment airport land ownership solely to cater for a purest application and strict enforcement of public work purpose.⁴⁴⁶

MacKenzie J decided that the contemplated mixed public work and commercial purpose for Paraparaumu town centre was not justified in the same manner as a modern international airport. Commercial and civic purposes for the town centre were not so intertwined that Council must retain ownership and control of the land.⁴⁴⁷ It could divest itself of ownership and control of commercial land without undue interruption to civic activity on civic land.

It was concluded that not all of the 1981 land and 1987 land was still required for a public work.⁴⁴⁸ The Court directed Council to ascertain which part of the subject land was no longer required for a public work, in practical terms meaning Council needed to clearly distinguish between its commercial purpose and civic purpose. Once this was done, Council would then be in a position to determine whether it would be impractical, unreasonable or unfair to offer the land back to Ngahina Trust, or whether significant change in the

⁴⁴³ *Ngahina Trust & Ors v Kapiti Coast District Council* HC Wellington CIV-2008-485-1657, 31 May 2010 at [84]

⁴⁴⁴ *Ibid* at [87]

⁴⁴⁵ *McElroy v Auckland International Airport* [2009] NZCA 621

⁴⁴⁶ *Ibid* at [75] and [76]

⁴⁴⁷ *Ngahina Trust & Ors v Kapiti Coast District Council* HC Wellington CIV-2008-485-1657, 31 May 2010 at [93]

⁴⁴⁸ *Ibid* at [97]

character of the land would exempt Council from its offer back obligations.⁴⁴⁹ If subdivision of land was required to effect an offer back to former owners or their successors, this could be reason under s40(2)(a) of the Act to justify an exemption from offer back on grounds it would be impractical to do so.⁴⁵⁰ The judgment of MacKenzie J was not appealed.

Conclusion

Maori are not unfamiliar with taking Court action against public bodies. More often than not this will concern exercise of statutory powers. The words of a statute are merely one part of the equation, albeit a fundamental part. The blurring of statutory rights, powers and obligations happens when background facts are applied and each party seeks to preserve their own position.

There was more to the nature of the Ngahina Trust land transactions than the method of conveyance. The district plan was construed in such a way that the Ngahina Trust land would inevitably be acquired and held for various public purposes. The story behind the relationship and dealings between Ngahina Trust and the Council was essential to understanding the true nature of the land and its status as a public work. Clarity regarding statutory offer back rights and obligations could be ascertained from that point on.

The statutory offer back scheme under s40 is not limited to circumstances where land was compulsorily taken.⁴⁵¹ Trustees of Ngahina Trust initiated land sales to the Council. However, Council had shut down any possibility of the land being sold to any other party or developed other than according to Council's plan. This may not have amounted to a compulsory acquisition, but it removed all possibility that the sales were conducted openly.

⁴⁴⁹ Public Works Act 1981,s40(2); *Ngahina Trust & Ors v Kapiti Coast District Council* HC Wellington CIV-2008-485-1657, 31 May 2010 at [98]

⁴⁵⁰ *The Sisters of Mercy (Roman Catholic Diocese of Auckland Trust Board) v Attorney-General* HC Auckland CP.219/99, 6 June 2001 – Where land is partly required and partly surplus. See *Ngahina Trust & Ors v Kapiti Coast District Council* HC Wellington CIV-2008-485-1657, 31 May 2010 at [95]

⁴⁵¹ *Ngahina Trust & Ors v Kapiti Coast District Council* HC Wellington CIV-2008-485-1657, 31 May 2010 at [71]

NGATI WHATUA O ORAKEI MAORI TRUST BOARD: Justified in Principle but not in Law

Case

Ngati Whatua O Orakei Maori Trust Board v Attorney-General & Ors HC Auckland M.1501/92, 18 November 1992

Introduction

*Ngati Whatua O Orakei Maori Trust Board v Attorney-General*⁴⁵² concerns an application for judicial review of a decision by the Department of Survey and Land Information⁴⁵³ to sell land without the plaintiff having an opportunity to tender its purchase offer. It does not concern the land clearance provisions of ss40 and 41 of the Act which presumably had been addressed before the subject land was offered for tender on the open market. The case is an example of Maori engaging in the Crown's land disposal process and raising concerns essentially at odds with that process. A problem for Maori arises when genuine concerns have no legal standing.

Events in *Ngati Whatua O Orakei Maori Trust Board v Attorney-General* took place during an era which predated Treaty of Waitangi settlements and the formal protection mechanism to hold surplus Crown land for Treaty settlement purposes. A protection mechanism process was later sanctioned by Cabinet for Government agencies to consult with Maori before selling surplus land. If Maori express an interest in such land, the Office of Treaty Settlements will now purchase it from the vendor Government agency and hold the land in a

⁴⁵² *Ngati Whatua O Orakei Maori Trust Board v Attorney-General & Ors* HC Auckland M.1501/92, 18 November 1992

⁴⁵³ The Department of Survey and Land Information is the predecessor of Land Information New Zealand.

regional landbank pending claim settlement. If called upon by a successful claimant, the land-banked property can be used as part settlement of their claim with the market value of the property being deducted from the overall settlement figure.⁴⁵⁴

Issues

Although the Crown's protection mechanism is now in place to protect claimants' interests in surplus Crown land from sale to third party purchasers, such a mechanism is unlikely to exist without pressure brought upon the Crown by litigants such as Ngati Whatua O Orakei Maori Trust Board. The Trust Board's claim before the High Court was unsuccessful with the right of the Crown to sell to a third party purchaser upheld. Regardless of the outcome under black letter law, the decision by Cabinet to introduce the Crown land protection mechanism shows that the Trust Board's cause was valid and well placed, if not before its time. The wheels of Government move slowly and, unfortunately for Ngati Whatua, too slow to prevent the subject surplus land at Auckland from being lost into private hands. Ministerial responses to questions raised by the Trust Board prior to the Crown's sale were too slow, vague or non-existent for a change of policy to help in the situation.⁴⁵⁵ Valid and well placed principles may not be recognised under black letter law. However, claims on these grounds will sometimes indicate a need for law change or policy change. The practical requirements of Maori seeking to engage with the Crown as their Treaty partner are not always supported in law.

⁴⁵⁴ Office of Treaty Settlements *Protection of Maori Interests in Surplus Crown-Owned Land: Information for Crown Agencies* (June 2006) at 2 – see www.linz.govt.nz/.../cp_protection-mechanism-information-for-crown-agencies.pdf

⁴⁵⁵ *Ngati Whatua O Orakei Maori Trust Board v Attorney-General & Ors* HC Auckland M.1501/92, 18 November 1992 at 5 – 8 and 14 – The Court refers to correspondence from Mr Te Aho, solicitor for the Trust Board to the Prime Minister, Minister of Lands, Minister of State Owned Enterprises, Minister of Education and Minister of Maori Affairs with replies from private secretaries to the Minister of Lands and Minister of Maori Affairs and a reply from the Minister of Lands on 9 June 1992 after the subject land was sold.

Background Facts

The Tamaki Girls College some years beforehand was located in a suburb of Auckland on 4.7150 hectares of Crown owned land administered by the Ministry of Education. The college was amalgamated with Tamaki Boys College and relocated to another site. The Tamaki Girls College land was therefore no longer required by the Ministry of Education. Buildings on the land were leased and utilised for some years by community groups with an emphasis upon Maori education. Activities on site included pre-school and primary school Maori language education under Kohanga Reo and Kura Kaupapa Maori schemes. Skills and technical training to young Maori were also taught under a Maccess scheme.⁴⁵⁶

The Ministry of Education decided in 1991 that the land should be sold. Early in 1992 it was decided that the sale process would be promoted by public tender. Terms of tender included a tender closing time and date of 4.00pm 10 June 1992. The sale process was facilitated by Mr MacLean who was then the Auckland office manager at Landcorp Reality Limited.⁴⁵⁷

Mr MacLean met with representatives of Ngati Whatua O Orakei Maori Trust Board. The Trust Board representatives expressed their concern for the land. They considered that the land was Maori land and should be dealt with in a manner which recognises their Treaty of Waitangi claim.⁴⁵⁸ Only a matter of days after the meeting, the Waitangi Tribunal on 22 April 1992 delivered an interim decision about other land in Auckland, known as Sylvia Park, which had been sold by the Crown but was the subject of claims by Ngati Whatua and other iwi.⁴⁵⁹ The Waitangi Tribunal recommended that the proceeds of sale should be held on trust in an interest bearing account until the claims are settled. It also recommended that the Crown should negotiate with Ngati

⁴⁵⁶ *Ngati Whatua O Orakei Maori Trust Board v Attorney-General & Ors* HC Auckland M.1501/92, 18 November 1992 at 2

⁴⁵⁷ *Ibid* at 3

⁴⁵⁸ *Ibid*

⁴⁵⁹ *Ngati Whatua, Ngati Paoa and Ngaitai* WAI 276, 72 and 121

Whatua and the other iwi claimants for a suitable land disposal mechanism regarding the disposal of Crown and State Owned Enterprise assets in Auckland.⁴⁶⁰

The Trust Board instructed its solicitor, Mr Te Aho, to act. On 28 April 1992, Mr Te Aho wrote to the Prime Minister asking if the government would be adopting the Waitangi Tribunal's recommendation regarding Crown land in Auckland. His letter was copied to the Minister of Lands and Landcorp. Other than a written acknowledgement from the Prime Minister's private secretary promising a reply "*as soon as possible*", there was no reply.⁴⁶¹ Mr Te Aho wrote several more letters on behalf of the Trust Board in light of the Waitangi Tribunal's recommendation seeking to progress an arrangement to purchase or acquire the former Tamaki Girl's College land. These letters were addressed to the Minister of Lands, the Minister of State Owned Enterprises, the Minister of Education and the Minister of Maori Affairs. The letters were acknowledged again with promises to reply "*as soon as possible*". The correspondence all took place within a six week time frame. The only response beyond a basic acknowledgement was from the Minister of Lands, dated almost two weeks after the subject property was unconditionally sold to a third party purchaser. The Minister explained that the property was sold and that negotiations with the Trust Board had "*fallen through*". Mr Te Aho replied to the Minister's letter disputing that negotiations had ceased.⁴⁶²

The Trust Board relied upon the advertised tender closing date of 10 June 1992 as the date upon which they had to lodge their own tender to have any chance of acquiring the surplus Crown property. The tender conditions recorded that the property could be sold beforehand by private treaty, outside from the tender process, should an early offer be acceptable to the vendor.⁴⁶³ On 29 May 1992 a third party purchaser presented an unconditional offer on the basis that such offer was only open for that day. The proposed purchase price was

⁴⁶⁰ Waitangi Tribunal *Interim Report on Sylvia Park and Auckland Crown Asset Disposals* (Wai 276, 72 and 121, 1992) at 3 – as quoted in *Ngati Whatua O Orakei Maori Trust Board v Attorney-General & Ors* HC Auckland M.1501/92, 18 November 1992 at 5

⁴⁶¹ *Ngati Whatua O Orakei Maori Trust Board v Attorney-General & Ors* HC Auckland M.1501/92, 18 November 1992 at 5

⁴⁶² *Ibid* at 14

⁴⁶³ *Ibid* at 16

within the Crown's expectations. Mr MacLean phoned Mr Te Aho and explained that the offer had been received although Mr MacLean had not yet seen it. Mr Te Aho told Mr MacLean that the Trust Board was due to meet before the tender closing date to discuss its offer if there was a quorum.⁴⁶⁴ Following consultation between officials, the Crown accepted the third party offer and the property was unconditionally sold that afternoon.⁴⁶⁵

What the Courts said

The Trust Board presented three arguments in its proceedings:

The first argument was based upon the statutory provision for general disposal of land not required for a public work, s42 of the Public Works Act 1981. Where surplus public works land has been cleared from ss40 and 41 offer back obligations, s42(1)(d) provides that the chief executive of Land Information New Zealand⁴⁶⁶ may:

“Cause the land to be offered for sale by public auction, public tender, private treaty, or by public application at a specified price...”⁴⁶⁷

Section 42(2) then requires the chief executive to give public notice of public tenders to certain people, including former owners and owners of adjoining land, no later than 20 working days before the tender closing date.⁴⁶⁸

The Trust Board argued that the Crown was statute bound to the tender process and unlawfully withdrew from that process by unconditionally selling the property before the tender closing date. The Court rejected this argument. The ability of a vendor to accept, before a tender closing date, an offer lodged outside of the tender process is “...*just a matter of commercial decision-*

⁴⁶⁴ *Ngati Whatua O Orakei Maori Trust Board v Attorney-General & Ors* HC Auckland M.1501/92, 18 November 1992 at 12

⁴⁶⁵ *Ibid* at 13

⁴⁶⁶ The Department of Survey and Land Information is the predecessor of Land Information New Zealand.

⁴⁶⁷ Public Works Act 1981, s42(1)(d)

⁴⁶⁸ *Ibid*, s42(2)

making in the market place.”⁴⁶⁹The Court’s interpretation of the sale methods prescribed under s42(1)(d) did not lock the chief executive into a mandatory tender process once sale by tender was decided.⁴⁷⁰

The Trust Board failed in its argument alleging the Crown behaved unlawfully. There was no improper or underhanded behaviour exercised by the third party purchaser, nor was there any improper or unscrupulous behaviour or dealings by the officials when attending to the surplus land disposal. The sale transaction was conducted within the law and in keeping with typical commercial practice regarding sale and purchase of land.⁴⁷¹ The needs and interests of Ngati Whatua fell outside of black letter law and those commercial norms.

Fairness

The Court also considered the Trust Board’s two arguments based on fairness. The first fairness argument was the Crown deprived the Trust Board the opportunity of buying the land when it accepted the third party offer notwithstanding expressions of interest and communications regarding the Trust Board’s intention to present an offer to buy the land. The second fairness argument was based upon the principles of the Treaty of Waitangi. The Trust Board contended that it was entitled to a reasonable opportunity to present its offer and negotiate in good faith and there was no proper reason for the Crown to withdraw the tender deadline to accommodate the third party purchaser.⁴⁷²

Both fairness arguments were rejected by the Court. The judgment records:

“It is not unfair to observe that it is really a case of “first come first served” ...”⁴⁷³

Market place principles prevailed in absence of express statutory policy or Crown policy to the contrary. Treaty of Waitangi obligations were irrelevant in the judicial context. There was no legislative authority to justify such

⁴⁶⁹ *Ngati Whatua O Orakei Maori Trust Board v Attorney-General & Ors* HC Auckland M.1501/92, 18 November 1992 at 17

⁴⁷⁰ *Ibid* at 18

⁴⁷¹ *Ibid* at 19

⁴⁷² *Ibid*

⁴⁷³ *Ibid*

considerations.⁴⁷⁴ If there was an abuse of process or ““trickery” when dealing with Maori rights”⁴⁷⁵, the Court would intervene. But neither the Crown nor its servants exercised any such behaviour in their dealings with the Trust Board or in the sale to the third party purchaser.

Legitimate Expectation

There were no evidential grounds to support the Trust Board’s contention it held a legitimate expectation that its offer would be received and considered. The property was offered for sale on an open market basis. The Crown’s consultation and communications with the Trust Board did not amount to a promise for special consideration, or any consideration, of an offer from the Trust Board should it be forthcoming.⁴⁷⁶ The Trust Board held no special status in the open market environment. A reasonable expectation was acknowledged by the Court, but the standard for legitimate expectation which would give rise to judicial intervention was not reached.⁴⁷⁷

Unreasonableness

The Court rejected a further claim by the Trust Board that the Crown had acted unreasonably by abandoning the tender process to consider and accept a third party offer. The third party offer was within the price range the Crown expected for the property. In light of the open market nature of the surplus land sale, the Court held that the Crown’s early acceptance of the third party offer was not unreasonable in the administrative meaning of that term.⁴⁷⁸

⁴⁷⁴ *New Zealand Maori Council v Attorney-General* [2008] 1 NZLR 318 at [65], [66], [72] and [81] (CA) with *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) applied

⁴⁷⁵ *Ngati Whatua O Orakei Maori Trust Board v Attorney-General & Ors* HC Auckland M.1501/92, 18 November 1992 at 21

⁴⁷⁶ *Ibid* at 26

⁴⁷⁷ *Ibid*

⁴⁷⁸ *Ibid* at 27

Conclusion

Ngati Whatua O Orakei Maori Trust Board v Attorney-General is an example that well principled arguments will not be upheld by the Courts unless those arguments are supported by law.

Statutory schemes are important because the rights conferred are binding and enforceable through the Courts. With disposal of surplus public works land, the s40 offer back scheme offers some protection. It recognises circumstances under which land has been taken from private owners for the public good. The remedial nature of s40 can be at odds with the government policy agenda and priorities of the day. For this reason, Government cannot always be relied upon to voluntarily protect the interests of former owners. The protection must be sanctioned by Parliament and available for the Courts to uphold.

Well principled claims on grounds not supported in law will sometimes indicate a need for law change or policy change. It may be just as important for law makers and policy makers to note the legal cases lost by Maori as well as those where Maori have succeeded. The practical requirements of Maori are not always recognised in law. If the Crown is genuine with its engagement of Maori as its Treaty partner, gaps in the law must be reviewed and addressed. To its credit, the Crown implemented the Crown land protection mechanism to avoid a repeat of circumstances that gave rise to the *Ngati Whatua O Orakei Maori Trust Board* case. The gaps in the offer back scheme now must be addressed.

PART III

REPATRIATION: ‘OFFER BACK AND RETURN’

Introduction

The objective of statutory offer back must be revised. The existing scheme is essentially a first option in favour of former owners or their successors to purchase surplus public works land at market value. The objective under revised legislation should more appropriately be for the Crown to offer back and also return to Maori surplus public works land where that is at all possible.

The offer back scheme was at its introduction in 1981 the realisation of a significant shift in policy regarding surplus public works land. Instead of a mechanism purely to assist the Crown and local authorities dispose of unwanted public works land, the interests of former owners and their successors is now recognised.

For Maori, the offer back of surplus public works land to them will only be meaningful if there is a reasonable chance of the land being returned to their hands. The ability to overcome barriers to follow through on land purchases at market value is a very real problem.

Need for Reform

Several decades have now passed since statutory offer back obligations were introduced. The offer back provisions under the Public Works Act 1981 have remained substantially unchanged since the law was first enacted. A lot has happened since that time in the arena of Crown land and Maori issues. Corporatisation and privatisation of government owned assets, modification of

surplus Crown land disposal mechanisms, express statutory acknowledgement of the Treaty of Waitangi, Maori land legislative reform, Treaty of Waitangi settlements and greater public awareness and empathy for Maori land related issues are some legal, political and social developments which have taken place in Aotearoa New Zealand since 1981. These factors together with the judicial narrative from decades of offer back cases serve as a firm basis upon which to review the statutory offer back regime and assess how it could more appropriately reflect the Crown's special duty to Maori in a modern context.

The existing requirement for the Crown to offer surplus public works land back to former owners or their successors is futile unless there is a real possibility that the surplus land may in fact be returned to those entitled people should they wish to exercise their right. Maori in particular will face significant difficulty to follow through on land purchase arrangements under the existing offer back regime.

Maori interests in land typically involve multiple parties, in keeping with the notion of communal ownership and compounded by traditional land succession arrangements enshrined in legislation.⁴⁷⁹ The ability of Maori to accept an offer within the prescribed 40 working day time period⁴⁸⁰ is encumbered with several logistical constraints. These include the need for all prospective purchasers to understand the full implications of the offer and reach a consensus amongst their own group as to whether or not the terms prescribed by the Crown can be met.

The task for multiple people to raise funds to purchase land at market valuation is complex. Where it is intended for surplus public works land to be vested in the purchasers as Maori freehold land,⁴⁸¹ Maori are likely to struggle to raise finance from mainstream lenders who are reluctant to accept mortgage security over Maori freehold land.

⁴⁷⁹ See Te Ture Whenua Maori Act 1993, Part 4 Administration of Estates

⁴⁸⁰ Public Works Act 1981, s42(1) – The chief executive may sell the land to any third party where an offer back to former owners or their successors has not been accepted within 40 working days or such further period as the chief executive considers reasonable.

⁴⁸¹ Ibid, s41 Disposal of former Maori land when no longer required

2009 - Public Works (Offer Back of and Compensation for Acquired Land) Amendment Bill

During 2007, the Public Works (Offer Back of and Compensation for Acquired Land) Amendment Bill was introduced to Parliament. The Bill sought to ensure former owners of surplus public works land are given the first right of refusal to purchase land no longer required for the original public work for which it was taken.⁴⁸² A proposal was made for solatium payments, being payments compensatory or consolatory in nature, to former owners where land taken was not actually used.⁴⁸³ Another purpose of the Bill was to:

“...provide for the *descendants* of the former owners to exercise [offer back rights], where the former owners are deceased.” [emphasis added]⁴⁸⁴

It is not clear whether use of the term ‘descendants’ was intentional. There is no express provision proposing to replace the term ‘successor’ as it appears in s40(2) and defined in s40(5) of the Act. However, the term ‘descendants’ does imply an intention for the offer back right to extend beyond the ‘one step’ obiter succession limit observed by the Court of Appeal in *Port of Gisborne v Smiler*⁴⁸⁵ and adopted by the High Court in *Kane v Attorney-General*.⁴⁸⁶

The Bill was not passed. A Select Committee report noted:

“...the intent of the bill is addressed by current mechanisms for redress for compensation and offer back, available through the Court system and Treaty of Waitangi Settlement processes. ...Nevertheless, it is apparent to us in the bill’s motivation, and comments made in submissions to the bill, that significant concern remains about the effects of activities conducted under the various forms of the [Public Works] Act in New Zealand’s history.”⁴⁸⁷

⁴⁸² Public Works (Offer Back and Compensation for Acquired Land) Amendment Bill 2007 (139-1)

⁴⁸³ *Ibid* cl 6

⁴⁸⁴ *Ibid* cl 4 Purposes

⁴⁸⁵ *Port Gisborne Ltd v Smiler & Ors* CA 182-98, 26 April 1999, [1999] 2 NZLR 695 at [44] – [45]

⁴⁸⁶ *Kane v Attorney-General* [2014] NZHC 251 at [23]

⁴⁸⁷ Local Government and Environment Committee *Recommendation on Public Works (Offer Back of and Compensation for Acquired Land) Amendment Bill* (21 June 2010) at 4

Instead of the compensatory nature reflected under the Bill, the attempt for reform may have been better placed with a scheme or mechanism to enable former Maori owners or their descendants to overcome barriers that would otherwise prevent surplus public works land from being returned to them under the existing statutory offer back scheme. Land owners are eligible for compensation when their land is taken for a public work.⁴⁸⁸ The adequacy or fairness of compensation is an issue better considered under provisions of the Act which address compensation. If taking land for a public work purpose, with or without compensation, has in the past given rise to a breach of the principles of the Treaty of Waitangi, this issue is best considered in the Treaty settlement forum. The offer back of surplus public works land to former owners or their successors is a different issue.

The select committee report records that the Member of Parliament who sponsored the Bill, Te Ururoa Flavell, acknowledged the difficulty of amending the Act as proposed in his bill. However, it also noted Mr Flavell's submission that a comprehensive review of the offer back provisions should be conducted by Land Information New Zealand as the government agency responsible for administration of the Act. The report records his view that a review of the Act should include a Treaty of Waitangi clause and amendments to s40 that acknowledge and address historical injustices committed under the Act.⁴⁸⁹ Any advancement of these ideals appears to have been lost in the compensatory or consolatory proposals under the Bill.

Parliament is the supreme law maker in New Zealand. Change to the existing statutory offer back regime must be carefully designed as any such change will have significant implications for Maori and all New Zealand. On one hand, reform ought to meet desired objectives for change. On the other hand, reform must be workable alongside other statutory regimes and administrative systems.

⁴⁸⁸ Public Works Act 1981, s60(1)(a) Basic Entitlement to Compensation

⁴⁸⁹ Local Government and Environment Committee *Recommendation on Public Works (Offer Back of and Compensation for Acquired Land) Amendment Bill* (21 June 2010) at 4

Early 2000s - Legislative Review of the Public Works Act

The Government carried out an extensive review of the entire Public Works Act during the early 2000s. The review included strong themes articulating the Crown's obligations under the Treaty of Waitangi. Excerpts from a public discussion paper of December 2000 released by Land Information New Zealand records:

“The Government has decided to undertake a review of the 1981 Act to:

...

- ensure that exercise of the 1981 Act powers, functions and duties is within a statutory framework that accords with Treaty of Waitangi principles;

...

The Government has decided that certain principles will apply to the new Act. These include:

...

- That the Act's acquisition and disposal procedures are just and transparent for all parties; and
- Crown obligations under the Treaty of Waitangi

...

The review objective is to provide legislation that is clear, workable, sufficiently flexible to be able to meet current and future requirements for public works, and gives effect to Crown obligations under the Treaty of Waitangi.

...

The approach taken is a rigorous consultative process that identifies and addresses broad key issues, including:

...

- Disposal of land no longer required for a public work;
- Matters raised by the Waitangi Tribunal;

...

- Whether Treaty of Waitangi provisions should be included in any new legislation.⁴⁹⁰

‘The new Act’ never eventuated. It was not even presented as a bill before Parliament. Striking the perfect balance between the Crown serving the greater

⁴⁹⁰ Richard Fletcher (ed) *Review of Public Works Act: Issues and Options* (Land Information New Zealand, Public Discussion Paper, December 2000) at 17

public interest and observing its obligations under the principles of the Treaty of Waitangi is perhaps an impossible task regarding public works legislation. As the Waitangi Tribunal observed, Crown powers of compulsory acquisition of land cuts right across the guarantee of Maori rangatiratanga it promised under Article 2 of the Treaty of Waitangi.⁴⁹¹ Rather than seeking the perfect unattainable balance, new public works legislation should instead seek to capture the intent of the Government articulated in the Discussion Paper regarding its Treaty obligations and resulting special relationship it considers to hold with Maori. Until such arrangement is enshrined in law as a standard which would give rise to accountability, these words are vulnerable to being described as aspirational at best or contradictory at worst.

The Discussion Paper asks whether or not an offer back scheme is needed in new public works legislation.⁴⁹² The argument for repealing offer back rights is based upon land owners having already received monetary compensation for losing their land. From a Maori viewpoint, monetary compensation for losing fee simple title and possession is unlikely to adequately compensate for the land loss. Customary ties to land will remain. Wahi tapu sacred sites are not erased when fee simple title passes from Maori. The status of those sites remains significant to Maori in a cultural sense. There may even be a valid question whether or not a form of customary title may exist over such land, a title which recognises customary status not severed by exercise of compulsory powers of acquisition under the Act.

The review of the Act was an opportunity to consider how well the existing offer back regime works in practice and whether it is appropriate to introduce changes to cater for the requirements, objectives and values of the current day. The only reliable way to test the suitability of offer back legislation is to apply it to a set of facts.⁴⁹³ Despite the offer back regime being in place for almost 20 years at the time of the review, and the Government expressing the

⁴⁹¹ Waitangi Tribunal Te Maunga Railways Land Report (Wai 315, 1994) at chapter 6 Public Works Legislation

⁴⁹² Richard Fletcher (ed) *Review of Public Works Act: Issues and Options* (Land Information New Zealand, Public Discussion Paper, December 2000) at 38

⁴⁹³ *Robertson v Auckland City Council* [2014] NZHC 765 at [212] In the words of Fogerty J: "The only reliable way to find the meaning of a statute is to apply it to a set of facts."

importance of the principles of the Treaty of Waitangi in its public works role, it is surprising that modifications to the law were never advanced.

Submissions to the review of the Act were summarised by Land Information New Zealand and released in a report of August 2001. On the disposal of surplus public works land, offer back of surplus land to former owners generated the most responses. Approximately two thirds of submitters were either users of the Act, such as government agencies and local authorities, or Maori. The number of submissions from these two groups was more or less equal at approximately 65 each.⁴⁹⁴ The users of the Act supported streamlining the offer back process as much as possible. They considered the existing regime was too costly and time consuming to implement so therefore needed to be revised. On the other hand, Maori submitters had strong views that surplus public works land should be offered back in all cases, and such offers should be conducted at either no cost or less than market value.⁴⁹⁵

Some Maori submitted that additional compensation should be paid to former owners in recognition of the benefit received from the land while it was held for a public work. This view was later captured in the defeated Public Works (Offer Back and Compensation for Acquired Land) Amendment Bill 2007.⁴⁹⁶ It illustrates that Maori remain connected to land notwithstanding the loss of ownership of fee simple title. A cultural or customary connection prevails.

The connection former Maori owners hold to public works land could be easily overlooked if the context of discussion is limited to legal ownership of the fee simple. An argument that connection to land will be severed upon transfer of the fee simple is foreign under Maori custom.

Maori custom regarding natural and physical resources is supported under legislation as a 'matter of national importance'. Section 6 of the Resource Management Act 1991 reads:

⁴⁹⁴ Review of the Public Works Act: Summary of Submissions (Land Information New Zealand, August 2001) at [7.1]

⁴⁹⁵ Ibid

⁴⁹⁶ Public Works (Offer Back and Compensation for Acquired Land) Amendment Bill 2007 (139-1)

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

...

(e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, and other taonga.

(g) the protection of protected customary rights.⁴⁹⁷

Section 7 of the Resource Management Act continues with this theme:

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to –

(a) Kaitiakitanga [which means the exercise of guardianship by the tangata whenua of an area in accordance with Tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship].⁴⁹⁸

The role and status of Maori as prevailing ‘kaitiaki’ or guardian over natural and physical resources is not lost over public works land. The role and status of Maori former owners will in fact be strengthened regarding public works land if the Crown’s acknowledgement of its Treaty of Waitangi obligations and its aspirations to include these under any new public works Act are to be taken seriously.⁴⁹⁹

Submissions regarding to whom the offer back should be made were received during the review of the Act. Section 40(2) requires that the offer be presented to the person from whom the land was acquired or the successor of that person.⁵⁰⁰ According to the summary of submissions, users of the legislation preferred measures which would reduce the administrative burden on them. Discussion whether the offer back obligation should be limited to only the former owner, not the successor of that former owner, was “...seen to balance

⁴⁹⁷ Resource Management Act 1991, s6

⁴⁹⁸ Ibid, s7 with s2 meaning of ‘kaitiakitanga’.

⁴⁹⁹ Richard Fletcher (ed) *Review of Public Works Act: Issues and Options* (Land Information New Zealand, Public Discussion Paper, December 2000) at 17

⁵⁰⁰ Public Works Act 1981, s40(2)

the interests of both the former owner and the acquirer.”⁵⁰¹ Some submitters proposed a time limit after which the obligation to offer land back would lapse. It must be accepted that the offer back regime, whether the existing regime or a regime under revised legislation, must not be disproportionately burdensome to administer. However, any perceived difficulty with the unique Maori land system and succession arrangements under relevant legislation should not be grounds to promote a ‘simplified’ offer back process to merely avoid such system and arrangements. To do so would be prejudicial against Maori. Extending an opportunity to a person to buy back land previously taken from them for a public work is not an exercise of convenience. It is a remedial exercise designed to confer a personal benefit on those with an attachment to the land.⁵⁰² It is for that reason a ‘simplification’ of the existing offer back regime should be treated with caution. Reform should not erode the rights of the class of person entitled to offer back under the existing Act.

Enduring Connection between Maori and Public Works Land

The compulsory loss of land to a public work will for Maori typically result in consequences which cannot be addressed by fiscal compensation at market land value. Ngati Turangitukua was deeply affected by the loss of its land and subsequent development when in 1964 the Ministry of Works moved under public works powers to establish a township at Turangi.⁵⁰³ The Waitangi Tribunal observed the far reaching consequences of the public work:

The Tribunal found that as a result of inadequate consultation with the Ngati Turangitukua people, the Crown failed to mitigate the trauma and adverse social repercussions from their activities at Turangi. As the Tribunal noted, this has resulted in the dislocation of households, the loss of lifestyle and livelihood, and the loss of

⁵⁰¹ Richard Fletcher (ed) *Review of Public Works Act: Issues and Options* (Land Information New Zealand, Public Discussion Paper, December 2000) at 49

⁵⁰² *Williams v Auckland Council* [2015] NZCA 479 at [118] – [125], upheld on appeal cited at *Williams v Auckland Council* [2016] NZSC 20 at [9]

⁵⁰³ Waitangi Tribunal *The Turangi Township Remedies Report* (Wai 84, 1998) at [5.3]

the guarantee of a place on ancestral lands for their children. The pain of this loss is long term and is being passed on to the next generation.⁵⁰⁴

These implications for all former Maori owners should be considered against the offer back scheme under existing public works legislation. The purpose of offer back legislation is remedial in nature. Restoration of former owners to their traditional land is an important part of their social, cultural and economic wellbeing.

Ngati Turangitukua's experience shows that aspects of customary authority over public works land will prevail over physical and natural resources. However, this prevailing interest is not recognised under the Public Works Act. Absence of any such statutory provision may have been a factor why the acquiring authority behaved in such an authoritative manner in complete disregard to the values and concerns of former Maori owners.

Customary authority exercised by an iwi or hapu in relation to a particular area is the basis for holding 'mana whenua' status.⁵⁰⁵ That customary authority is not revoked when land is taken for a public work. Parliament recognises the relevance of 'tangata whenua' for purposes under the Resource Management Act 1991.⁵⁰⁶ The iwi or hapu holding mana whenua over a particular area have rights conferred under that statutory scheme. This recognition is based upon customary authority over a particular area. It is not based upon the formal notion of land ownership from which an owner will be alienated upon sale or confiscation.

Ngati Turangitukua's affiliation with its land continued after the public work taking by the Ministry of Works. Several wahi tapu sacred sites remained in the area. Crown officials gave undertakings to Ngati Turangitukua that wahi tapu would not be interfered with. A senior Ministry of Works official gave assurances that wahi tapu would be respected and protected.⁵⁰⁷ Unfortunately, several sites were not respected or protected. One such site was an old urupa

⁵⁰⁴ Waitangi Tribunal *The Turangi Township Remedies Report* (Wai 84, 1998) at [5.2.8]

⁵⁰⁵ Resource Management Act 1991, s2 meaning of 'mana whenua'.

⁵⁰⁶ *Ibid*, s2 meaning of 'tangata whenua', Part 1 and ss 14, 30-36AA, 56-58A, 58M, 58N, 58O-58Q, 63-70, 151AA-165, 187-198

⁵⁰⁷ Waitangi Tribunal *Turangi Township Report 1995* (Wai 84, 1995) at [4.7.3] and [8.9.3]

called Te Puke a Ria. It was a small hill within an area that the Ministry of Works designated for industrial purposes. At the summit lay the remains of Ria. For years, she mourned the loss of her husband from the summit which looked out to Motiti where he had died. The Tribunal heard evidence that Te Puke a Ria was sacred and had been cared for by Ngati Turangitukua.⁵⁰⁸ The site was desecrated when the public works were carried out. The Tribunal report reads:

We were told by Ranginui Biddle of Ngati Hine, a hapu of Ngati Tuwharetoa, what happened. He was employed by a contractor who specialised in moving land with heavy machinery. He was working in the areas close to the hill known as Te Puke a Ria. He approached the hill in his big D8 bulldozer. He then realised this was the place where our 'old kuia was buried'. Ranginui knew this place was 'very special'. He stopped his bulldozer and told his boss they should not be digging there because the hill was an urupa. His boss told him the work had to go on. Everything had to be done quickly and on time. Ranginui refused to carry on with the destruction of the hill. He was instantly dismissed. Te Puke a Ria was flattened and the bones left somewhere on the industrial block. They have never been recovered.⁵⁰⁹

This evidence is a compelling example of former Maori owners retaining strong ties to land notwithstanding its acquisition for a public work. In 1998 Ngati Turangitukua agreed with the Crown to settle its grievances regarding the Turangi township development.⁵¹⁰ The settlement includes a consultation protocol for the offer back of surplus public works land.⁵¹¹

The Crown's failure to protect Ngati Turangitukua wahi tapu was considered by the Waitangi Tribunal as one of the most serious of the Crown's omissions to fulfil its Treaty of Waitangi obligations.⁵¹² Acquisition of the fee simple estate in land for a public work did not sever the connection retained by the former Maori owners. This prevailing connection gave rise to an obligation upon the Crown to act reasonably and in good faith towards Ngati

⁵⁰⁸ Waitangi Tribunal *Turangi Township Report 1995* (Wai 84, 1995) at [4.7.3] and [8.9.3]

⁵⁰⁹ Waitangi Tribunal *The Turangi Township Remedies Report* (Wai 84, 1998) at [3.3.3]. Also see Waitangi Tribunal *Turangi Township Report 1995* (Wai 84, 1995) at [4.7.3] and [8.9.3]

⁵¹⁰ Deed of Settlement O Ngati Turangitukua (Office of Treaty Settlements, 26 September 1998)

⁵¹¹ *Ibid*, Section 6: Offer Back Protocol

⁵¹² Waitangi Tribunal *The Turangi Township Remedies Report* (Wai 84, 1998) at [5.2.4]

Turangitukua and to protect their rights under Article 2 of the Treaty of Waitangi.⁵¹³

Adequacy of compensation for land compulsorily taken from Maori for a public work cannot be measured merely by the sum of money paid to former owners. Value from a Maori perspective is derived over many generations of association and activity with land. Land confers identity while ancestry is associated with occupation. These values cannot be translated into monetary terms.⁵¹⁴ This is a position supported in the landmark 1987 Court of Appeal case *New Zealand Maori Council v Attorney-General* where Richardson J observes:

“As expressed in the English text [of the Treaty of Waitangi], the guarantee to the Maori collectively and individually was of "the full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties" as long as they wished to retain them. In the Maori text it is the rangatiratanga, the chieftainship of those lands, which is protected. ...

There are difficulties in ascribing either perspective as having the full understanding of the Treaty partners at the time. However, read in conjunction with article 2, two points at least are clear. One is that the protection accorded to land rights is a positive "guarantee" on the part of the Crown. This means that, where grievances are established, the State for its part is required to take positive steps in reparation. The other is that possession of land and the rights to land are not measured simply in terms of economic utility and immediately realisable commercial values.”⁵¹⁵

Fee simple title to land confers upon the holder various rights and privileges. One of the most significant of these is the right of exclusive possession. Taking land from Maori owners not only alienates them physically from the land, it also interrupts the ancestral association which is part of their cultural identity. Return of surplus public works land to former Maori owners is a means by which the inadequacy of monetary compensation at the time of taking could be addressed. The return of land is remedial in its full sense.

⁵¹³ Waitangi Tribunal *The Turangi Township Remedies Report* (Wai 84, 1998) at [5.2.6]

⁵¹⁴ Waitangi Tribunal *Te Maunga Railways Land Report* (Wai 315, 1994) at Part 6 – Public Works Legislation, Section: Compensation and the Value of Land

⁵¹⁵ *New Zealand Maori Council v Attorney-General* (1987) 1 NZLR 641 at 674

The Waitangi Tribunal in its Turangi observations recognises the prevailing connection Ngati Turangitukua has with its traditional lands. The connection prevails notwithstanding confiscation of the fee simple estate and the denial of land possession in favour of the Crown for public works. The basis of this traditional connection is Ngati Turangitukua's affinity to specific significant sites together with their responsibility for such land which has been exercised and passed down for generations.

Former Maori owners do not lay claim to responsibility for carrying out public works over such lands. That responsibility rests with the Crown in its domain. Responsibility for the bones of ancestors and other culturally significant issues which lay upon public works land rests with former Maori owners as tangata whenua. The Crown, in its role as facilitator of public works, has an overriding duty to respect and protect the enduring role and responsibilities of former Maori owners. Former Maori owners remain as tangata whenua over public works land.

Alienation of the fee simple estate from Maori does not equate to the alienation of Maori from their role and responsibility as tangata whenua of public works land. The Treaty partnership between the Crown and Maori is further justification for the Crown to preserve and protect the role and responsibility of tangata whenua over public works land. To do so would be an example of the Crown as protector of Maori, an express guarantee under the Treaty of Waitangi.⁵¹⁶

Uncontested evidence was presented before the Court of Appeal in the 1987 *New Zealand Maori Council v Attorney-General* lands case to support the significance of land in Maori culture. Richardson J quoted with approval from a New Zealand Maori Council paper Kaupapa – Te Wahanga Tuatahi which reads:

“It [Maori Land] provides us with a sense of identity, belonging and continuity. It is proof of our continued existence not only as a people, but as the tangata whenua of

⁵¹⁶ Treaty of Waitangi, United Kingdom – New Zealand (opened for signature and entered into force 6 February 1840), art 3

this country. It is proof of our tribal and kin group ties, Maori land represents turangawaewae [a place to stand].

It is proof of our link with the ancestors of our past, and with the generations yet to come. It is an assurance that we shall forever exist as people, for as long as the land shall last.”⁵¹⁷

The return of surplus public works land to former Maori owners will restore continuity between past and future generations. In keeping with the observation of Richardson J, *where grievances are established*, such as where the connection to land is lost to a public work, *the State for its part is required to take positive steps in reparation*.⁵¹⁸ Reparation solely in monetary terms will not restore to Maori *a sense of identity, belonging and continuity*.⁵¹⁹ Reparation for the loss of these values can only be satisfied when subject land is returned to the people from whom it was taken. The State is therefore obliged to take all reasonable steps to ensure, wherever possible, that surplus public works land is not only offered to former Maori owners but also that such land is actually returned to those people.

Conclusion

Reform of Public Works Act offer back provisions is well overdue. The suitability of the offer back scheme as an effective remedial instrument for Maori must be seriously reconsidered by Parliament.

Maori have strong ties to land, including land for which they no longer hold fee simple title. Public works land taken for the greater public good should be offered back to the former owners and their successors when it is no longer required. However, the offer back should be more than a token procedure with

⁵¹⁷ *New Zealand Maori Council v Attorney-General* (1987) 1 NZLR 641 at 674 quoting as evidence the New Zealand Maori Council paper Kaupapa – Te Wahanga Tuatahi. Also see discussion of this aspect of the Richardson J judgment at Waitangi Tribunal *Te Maunga Railways Land Report* (Wai 315, 1994) at Part 6 – Public Works Legislation, Section: Compensation and the Value of Land.

⁵¹⁸ *Ibid* at 674

⁵¹⁹ *Ibid* at 674 quoting as evidence the New Zealand Maori Council paper Kaupapa – Te Wahanga Tuatahi.

little chance of land return. Surplus public works land should be returned to former Maori owners and their descendants where that is at all possible. The return of land is remedial in its full sense.

There has been no material change in the Public Works Act following the extensive review carried out in the early 2000s. The offer back scheme is essentially the same as when it was first passed into law in 1981, well over three decades ago. A revised offer back scheme is now required to better address the remedial purpose of the scheme when public works land formerly owned by Maori is no longer required for a public work.

Maori hold an ancestral connection to land. This is interrupted when land is taken away from them for the greater public good. The blanket policy for succession of Maori and non-Maori interests under the existing offer back scheme fails to adequately cater for the ancestral association specific to Maori. Their connection extends well beyond the one step succession limit imposed in existing offer back law. This is compelling reason alone for Parliament to update the law.

SURPLUS PUBLIC WORKS LAND: THE CROWN'S SPECIAL DUTY TO MAORI

Conclusion

The Crown owes a special duty to Maori regarding the offer back of surplus public works land. The Crown's responsibility to Maori as its Treaty partner is inherent to constitutional arrangements in place since 1840 and which endures to the present day. The duty not only extends to responsibility for the statutory offer back scheme itself, but also to ongoing issues arising between the Crown and Maori which indicate the need for statutory revision and reform. There is little point in having a remedial offer back scheme unless it is effective in achieving the purpose for which it was enacted.

The statutory offer back scheme has been in operation for well over three decades. The judicial narrative illustrates the importance of a statutory scheme for offer back. Statutory schemes are enforceable. History shows that the triggering of offer back obligations has not always been understood or observed by responsible land holding agencies. Government institutions face pressures which compete for attention and priority. Good policy in principle is not as powerful as good policy in law. Remedial policy directed toward former owners of public works land will not be granted priority by public administrative authorities if it was not for Parliament sanctioned offer back provisions.

A reform of the offer back legislation would be an opportunity to consider improving the scheme for Maori and keep pace with developments since 1981. Such improvement could include a statutory mandate for the principles of the Treaty of Waitangi to be observed, similar to Treaty provisions under other legislation.⁵²⁰ The remedial nature and purpose of the offer back scheme is likely to be better served with measures that would ensure surplus public

⁵²⁰ Treaty of Waitangi observance provisions, see: Resource Management Act 1991, s8; Conservation Act 1987, s4; State Owned Enterprises Act 1986, s9

works land is returned to former Maori owners and their descendants where that is at all possible.

Maori continue to hold a real personal interest in land notwithstanding the loss of such sites for public works and notwithstanding the passing of time and generations. Customary authority known as ‘mana whenua’ is still relevant and exercised by an iwi or hapu over public works land.⁵²¹ Just as the ‘mana whenua’ status of Maori endures and is recognised under statute, so too must offer back rights endure for all descendants of original Maori owners who have lost or surrendered lands for public works. The one step succession limit imposed upon Maori under existing offer back law is entirely inappropriate and is in need of reform.

Long overdue reform of the offer back scheme will only be realised if Parliament makes it a priority to do so. The Crown’s special duty to Maori regarding the offer back of surplus public works land is governed by statute law which has not kept pace with developments since 1981. The Crown’s special Treaty relationship with Maori has come a long way since then.

⁵²¹ Resource Management Act 1991, s 2 meaning of ‘mana whenua’

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