

IN THE LAND VALUATION TRIBUNAL
HELD AT AUCKLAND

LVP 25/01

IN THE MATTER **of the Public Works Act 198 and the
Resource Management Act 1991**

AND IN THE MATTER **of an application under Section 84 of the
Public Works Act 1981**

BETWEEN **ANTHONY JOHN GAVIGAN**

Claimant

AND **AUCKLAND CITY COUNCIL**

Respondent

Before the Auckland Land Valuation Tribunal:

Chair: His Honour Judge J D Hole

Members: R M McGough, Esq
 K G Stevenson, Esq

Date of Ruling: 11 March 2003

Counsel: Claimant in person
 S T Woodfield for respondent

RULING AS TO COSTS

Introduction

[1] In its decision dated 17 October 2002 the Tribunal awarded Mr Gavigan compensation of \$27,685.00 plus interest thereon from 26 February 2001 to 17 October 2002 at 7.5%. Costs were reserved.

[2] The parties have been unable to agree as to costs. The Council says it has incurred the following costs:

Witness and experts expenses	\$ 29,106.80
Solicitor/client costs	\$158,586.05
GST	\$ <u>23,461.61</u>
TOTAL	\$211,154.46

[3] Pursuant to s 90(2) Public Works Act 1981 the Council seeks costs of \$175,000.00 (including GST). In addition, it claims \$13,500.00 (including GST) which is about 50% of the costs incurred by it before its offer to Mr Gavigan of 26 September 2001 was made.

Principles

[4] Costs in claims for compensation are provided for in s 90 Public Works Act 1981. Subject to the provisions of s 90, the costs of the hearing are at the discretion of the Tribunal. In this case s 90(2) is relevant and provides:

“Where the respondent has made an offer of any amount for compensation and the compensation awarded is less than the amount so offered, the Tribunal may order the claimant to bear his own costs and to pay the costs of the respondent insofar as the costs of either party are incurred after the making of the offer”.

[5] In its letter of 26 September 2001 the Council offered to settle Mr Gavigan’s claim in the sum of \$36,200.00 plus GST or such higher figure as the valuers might agree upon. This offer was higher than the compensation award.

[6] Mr Gavigan has submitted that the letter of 26 September 2001 did not contain an offer capable of acceptance. His reasoning seems to be that the Council’s valuer refused to make himself available to negotiate a higher sum. Of course, until the offer had been accepted there was no obligation on the Council’s valuer to do so.

Then, in his notice of 19 October 2001 Mr Gavigan expressly declined the Council's offer. (Mr Gavigan's assertion of his acceptance on 27 September 2001 cannot be correct given the 19 October 2001 notice (exhibit I 86)). The Tribunal concludes that the 26 September 2001 letter did contain an offer as envisaged by s 90(2).

[7] In *Carr v The Minister of Works and Land Development* (Dunedin Registry) LVP 110/86, 16 February 1990) the High Court stated at page 6 –

“The reasonable costs contemplated in the section must be the costs of the complainant which it is reasonable to require the respondent in the circumstances to pay.”

The learned Judge appreciated that the reasonableness of costs must generally be affected substantially by the result of the proceedings. The Council accepts that “the costs of the respondent” (s 90(2)) can be interpreted as “the reasonable costs of the respondent”. It does not accept that s 90(2) authorises the Tribunal to order “a sum towards the reasonable costs of the respondent”. With respect, if *Carr* is to be followed, then the order must provide for payment of the costs of the Council which it is reasonable to require Mr Gavigan to pay. In practice this would amount to a sum towards the costs of the Council.

[8] In *Minister of Works v Cromwell Farm Machinery Limited* [1986] 2 NZLR 29 the Court of Appeal pointed out that the Public Works Act treats compensation and costs as separate matters. Only “reasonable” costs are sanctioned by the Act. The Court noted that it was not the practice in compensation cases to award a claimant the full amount of his solicitor and client costs. However, costs were generally awarded on a basis more generous than that adopted in ordinary civil litigation. At page 36 McMullin J pointed out that compensation claimants are litigants of a special kind. They become litigants, not because of any contracts or arrangements into which they have entered, or relationships which they have formed giving rise to an action in tort, but “... because of the exercise by the Crown (or local authority) of a statutory power of expropriation over which they have no control”.

[9] In the Tribunal's opinion, simply because s 90(2) applies does not mean that Mr Gavigan loses his status as a “litigant of a special kind”. He has become a litigant because of the exercise by the Council of a power over which he had no control. In these circumstances, while pursuant to s 90(2) costs must be awarded

against Mr Gavigan, their reasonableness is substantially affected in his favour by virtue of his status.

[10] Other factors to be taken into account in determining reasonableness of costs includes whether the amount claimed was unreasonably high, the result, and conduct of the case. In this latter regard, actions which had the effect of increasing the costs of the Council are relevant.

The Amount of the Claim and Result

[11] The claim was for \$400,715.00 plus interest and GST. The Council's offer was for \$36,200.00 or such higher amount as the valuers might agree upon plus interest and GST. The award was for \$27,685.00 plus interest and GST; this works out at \$35,038.83. The grossly excessive claim meant that the Council's possible exposure was much greater than it would have been than if the claim had been closer to the award. Much greater resources were required. This is reflected in the Council's claim for costs and in this award of costs.

[12] Before the proceedings were instituted before this Tribunal, Mr Gavigan successfully brought proceedings against the Council in the Environment Court pursuant to s 185 Resource Management Act 1991. The solicitors acting for the Council in respect of those proceedings were different from those sitting in respect of these. It is claimed that this has resulted in a duplication of effort. This is not accepted by the Tribunal. The two proceedings were quite discrete; different issues were involved. In any event, s 90(2) applies only to the period subsequent to the offer and this award of costs is confined to that period.

[13] The reason for this is the restrictive wording of s 90(2). Whilst the Tribunal accepts that there is a general discretion over and above s 90(2) in s 90(1), it declines to make an award of costs for the period preceding the offer. This is because, whilst it appreciates that the negotiations prior to the offer were exceedingly difficult, these costs are those normally expected by a Council to bear by virtue of the special litigant status of Mr Gavigan. Indeed the Council has agreed to pay Mr Gavigan pre-offer costs estimated at \$8,500 (including GST). Mr Gavigan has not sought an alternative sum.

[14] Mr Gavigan contends that the costs claimed by the Council are excessive. The "double-handling" allegation has already been dealt with. At paragraph 14 of

his memorandum dated 18 November 2002, Mr Gavigan refers to a letter dated 4 February 2002 to him from the Council. He says the letter assured him that the further costs required to be incurred would be met by the Council. The relevant paragraphs read:

“Referring to your email dated 23 January 2002 and your request for confirmation that Council will accept liability for costs incurred in any additional work. The extent of costs that you may be awarded will depend on the determination of the Land Valuation Tribunal.

Conversely, should there be a settlement of this matter outside of the Tribunal process, and the parties are able to reach an agreement on compensation, Council will agree to meet reasonable legal and valuation costs as per normal practice.

Regrettably, we do not appear to have been able to make any progress in resolving this dispute. At this stage, the most appropriate course of action is to proceed to the Tribunal hearing, so that an independent decision can be made on your claims.”

The significance of the submission is that it is one example of many instances where Mr Gavigan has interpreted the written word as an “assurance” or agreement where patently there was no such assurance or agreement. Consequently the Tribunal is hesitant about accepting his submissions as to the alleged defaults on the part of the Council with respect to preparatory matters. Indeed, this duplicitous approach both as to negotiations with the Council and to preparatory matters preceding the hearing undoubtedly caused the Council to incur additional costs. This matter is relevant both to the discretion exercised pursuant to s.90(2) and quantum.

[15] In a s. 90(2) situation, (unlike *Carr*), the actual costs incurred by the Council are of little importance when determining the costs which it is reasonable to require the respondent in the circumstances to pay. More important considerations are the special litigant status, the amount of the claim vis-à-vis the award, and the conduct of the parties.

Application for extension of time

[16] Having received submissions as to costs from both parties in accordance with paragraph 51 of the Tribunal's decision, the Tribunal issued a memorandum seeking clarification of the meaning of s 90(2). Mr Gavigan used this invitation as an opportunity to make an application for an extension of time to file submissions and make oral submissions on costs. This was because he had instructed a new solicitor and new counsel. The application is declined. The costs submissions have been received. There is no necessity to grant an extension of time. Mr Gavigan has had his opportunity to address the costs issue and has taken advantage of it. He is not entitled to a further opportunity. Further, he has appealed the Tribunal's decision on compensation and if that appeal is to proceed it is appropriate that any matters arising out of this decision be dealt with at the same time.

Conclusion

[17] The Tribunal considers that those costs of the Council (including witness expenses) which it is reasonable for Mr Gavigan to pay amount to \$60,000 (including GST).

[18] The compensation payable by the Council to Mr Gavigan (as calculated on page 8 of the Council's memorandum) including costs agreed to by the Council amounts to \$43,538.83. Accordingly Mr Gavigan is ordered to pay the Council \$16,461.17 being the amount by which the costs ordered in this ruling exceed the total compensation award.

Judge JD Hole (Chairman)