

IN THE MATTER of Section 79 of the Public Works Act 1981

BETWEEN **THE MINISTER OF LANDS**

Applicant

AND **MURIEL KATHLEEN KETT**

First Respondent

AND **GLENN SHANNON-KETT**

Second Respondent

Date of Ruling: 1 September 2005

RULING AS TO COSTS

1. In its decision dated 17 June 2005 the Tribunal awarded the first and second respondents compensation in the sum of \$600,000 including GST plus interest. In addition, minor amounts were awarded in respect of specific items. Costs were reserved.
2. The applicant acknowledges that the costs claimed on behalf of the experts, Sheldon's (Mr Stafford-Bush), Riley Consultants, and Telfer Young (Mr Walker), are properly payable – the only issue is legal costs.
3. The claims for legal costs are very high when related to the amount of compensation awarded. The claims excluding GST are:
 - In respect of the first respondent \$63,712.00

- In respect of the second respondent \$56,761.45.
- These total \$120,473.45.

These figures may be contrasted with the legal costs incurred by the applicant which total \$19,787.00. The applicant thought that an award of \$30,000.00 would be adequate.

4. It will be noted that these are the GST exclusive costs. GST is not a relevant factor in determining a contribution towards costs. Maybe it would have relevance if indemnity costs were appropriate; although even this must be questionable.
5. The starting point in assessing costs is s 90 Public Works Act 1981. This requires that the costs must be reasonable. In considering whether or not costs are reasonable, s 90(4) permits the Court to take into account the amount of compensation awarded and such evidence as was adduced before the Tribunal.
6. When considering the issue of reasonableness, McMullin J's judgment in ***Ministry of Works and Development v Cromwell Farm Machinery Limited*** [1986] 2 NZLR 29, 36, sets out the principle as follows:

"The legislature has chosen not to limit the award of costs under the Public Works Act by reference to any scale except that of reasonableness ... We think that the proper balancing of ss 60 and 90 of the Public Works Act 1981 should result in awards of costs which, while not providing a full indemnity to the claimant on a solicitor and client basis, represent a more generous approach than is adopted or allowed in ordinary civil litigation".
7. In reaching that conclusion, the Court noted that claims for compensation under the Public Works Act are different from other kinds of civil litigation. This is because claimants become litigants as a result of the exercise by the Crown of a statutory power of expropriation over which they have no control. This virtually forces the citizen to become a litigant.

8. After a careful perusal of the various memoranda submitted to the Tribunal, in this case the following factors affecting "reasonableness" are taken into account:
- (a) The compensation award itself.
 - (b) The fact that there were two claimants. In cases such as this the applicant must take the claimants as it finds them. The fact that they were tenants in common in equal shares rather than joint tenants is of marginal importance. In this case, it was quite apparent that the claimants' diverse agendas did not permit single representation. Notwithstanding this comment, however, claimants cannot expect the applicant to pay for unnecessary or unreasonable individual frolics. Thus, where claimants do have separate representation as a result of their own particular propensities, this is a factor which will probably increase a costs award. However, it is unlikely that where there are two claimants, each separately represented, the total costs will be double that which would otherwise have been awarded. The additional representation occasioned by having two claimants (with individual agendas) is simply one factor to be taken into account.
 - (c) The claimants' success or otherwise. In this case both claimants were successful in respect of the compensation to be paid for the taking of the land. That figure was agreed to just before the hearing commenced. Thus no hearing was necessary to fix the compensation payable for the land taken: however the Tribunal recognises the significant costs incurred by each party in reaching the "Tribunal door settlement". The second respondent required a hearing to determine two additional issues. Neither was found to be meritorious and, in these circumstances, he cannot expect to receive costs in respect of arguing them.

The effect of this, therefore, is that both the first and second respondents should receive an equal award of costs as they have each received almost the same amount of compensation.

- (d) The applicant cannot be expected to reimburse parties who continually change counsel. The Tribunal recognises that that is their right, of course. However, the ultimate criterion is "reasonableness" and the Tribunal takes judicial notice of the fact that most claimants normally engage one counsel for the duration of the proceeding. The same comment applies where a party goes overseas and instructs overseas solicitors to assist him. All the overseas solicitors are doing is to translate the advice which is being given to that party by the New Zealand counsel. Normally, this would not be regarded as compensatory in terms of costs.

Conclusion

9. Recognising the need for separate representation (which has had the effect of inflating the costs award) and the requirement for a generous award, but also taking into account the other factors set out in this ruling, the total award of legal costs is in the sum of \$75,000. As previously indicated, this will amount to \$32,500 each. In addition, the amounts claimed on behalf of Telfer Young, Sheldon's and Riley Consultants are allowed in full and these figures are contained in counsels' memoranda.

J D Hole
District Court Judge