IN THE COURT OF APPEAL OF NEW ZEALAND CA240/01

	BETWEEN	ATTORNEY-GENERAL OF NEW ZEALAND AND CHIEF EXECUTIVE, LAND INFORMATION NEW ZEALAND
		Appellants
	AND	ALEXANDER ROSS MORRISON
		First Respondent
	AND	DONALD STANLEY BLAMPIED
		Second Respondent

Hearing:	11 July 2002
Coram:	Keith J Anderson J Glazebrook J
Appearances:	M T Parker for Appellants D E Wackrow for Respondents
Judgment:	13 August 2002

JUDGMENT OF THE COURT DELIVERED BY GLAZEBROOK J

Introduction

[1] Mr Morrison and Mr Blampied have agreed to purchase land at Castor Bay in Auckland from the Crown, which is described in the agreements as acting by and through the Chief Executive of Land Information New Zealand (the Chief Executive). The land was offered to Mr Morrison and Mr Blampied in accordance with the offer back provisions of the Public Works Act 1981 as two of the successors in title to the original owner. The purchase price in

each case is "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". An inability to agree on that date led to proceedings being filed in the High Court by Mr Morrison and Mr Blampied.

[2] By judgment dated 31 July 2001 Fisher J held that the relevant date was 5 February 1988, being the date of a memorandum of the relevant Branch Manager of the Housing Corporation, directing that the land be sold.

[3] Mr Morrison and Mr Blampied support the decision of Fisher J. They had, however, before the High Court, submitted that 1 July 1988 was the appropriate date, being the date that, in accordance with the Branch Manager's memorandum, an offer was made to sell the land to the Takapuna City Council (the Council). While not conceding the point, they recognise that some intermediate organisation may have been needed after the decision to sell had been taken but before an offer back was made.

[4] The Crown, both before the High Court and this Court, contended for 21 April 1999, the date the relevant Minister consented to declare the land surplus.

[5] The only issue in this appeal is the date that the offer back should have been made. The first question is whether the Branch Manager's memorandum triggered the offer back provisions. If that question is answered in the affirmative the next question is whether the memorandum immediately triggered the offer back provisions or whether a period of intermediate organisation was allowable. In order to answer those questions we first set out the factual background and the arguments of the parties in more detail. We then discuss the process under the Public Works Act.

Factual background

[6] The land at issue was used for temporary housing for military personnel during World War II and formed part of a larger block that had originally

been taken under the Public Works Act 1928 for defence purposes. In 1947, by proclamation, the use was changed and the land set aside for "housing purposes". The houses were tenanted and the land administered first by the State Advances Corporation and, after 1974, by the Housing Corporation. A further proclamation in 1957 adjusted the boundary adding further land for "State housing purposes".

[7] By 1986 the houses were in a state of disrepair with repairs uneconomic. In 1987 Housing Corporation staff began to consider selling the land and they obtained an opinion from the Ministry of Works that they interpreted as meaning that the offer-back provisions of s40 of the Public Works Act did not apply. Finally, on 5 February 1988, the Branch Manager concerned sent a memorandum to the Auckland Manager of Property Development directing that the land be sold. The plan was to relocate the tenants and sell the existing dwellings for removal if they were worth it. The Council was to have first refusal before the land was put on the market. There is no dispute that the Branch Manager had the authority to make this decision.

[8] A project manager was appointed for disposal of the land and an offer was made to sell the land to the Council by letter of 1 July 1988, it being considered that the Council might be interested in adding the land to an adjacent beach reserve. It appears common ground that, if the Council had been interested, this would have been another public work in terms of s40(1)(b) of the Public Works Act. Discussions with the Council about a possible purchase continued for some years. Although the Council did not see the purchase as a high priority, a local pressure group thought differently. The Council finally, however, confirmed in 1997 that it would not purchase the land.

[9] The plan to relocate the tenants and sell the land also ran into opposition from tenants' groups. As a result various options for repair or reinstatement of the properties appear to have been considered from May to August 1988. A renewed decision to demolish the units as they became vacant was, however, made in the latter half of 1990. While some of the tenants vacated and were

relocated after this, the remaining tenants issued judicial review proceedings to challenge the notices to quit that had been issued. These proceedings were decided by Barker J – see *Calvert and Others v Housing Corporation of NZ* (M759/91, High Court Auckland, 10 October 1991). While, by consent, the notices to quit were set aside for reconsideration by the Housing Corporation, by the end of 1991 all but one of the tenants had vacated and the houses had been demolished. That last tenant left some time in 1992 and her house had been demolished by the end of 1992. For completeness we note that a possible Treaty of Waitangi claim was notified in 1988 but nothing came of it.

[10] Despite all the tenants having left by the end of 1992, it was not until 1999 that the Minister's approval was sought for the land to be declared surplus and offered back in accordance with s40 of the Public Works Act 1981. Approval was given on 21 April 1999. The successors of the former owner were located and Mr Morrison and Mr Blampied indicated that they wished to buy part of the land. They then entered into the purchase agreements described above.

[11] The main reason for the delay in selling the land after the tenants had vacated appears to have been the continued negotiation with the Council over the sale. We note, however, that there had been a Cabinet Directive on 16 June 1993 that land of this type (small developed sections ready for sale) should be sold under the Housing Act 1955 as distinct from being sold as surplus land. Only surplus land would be offered back under the provisions of the Public Works Act. The powers under the Housing Act 1955 are discussed below.

Summary of the submissions of the parties

[12] On behalf of the Crown, Mr Parker submitted that the date the Minister decided to declare the land surplus is the date the land should have been offered back and thus is the appropriate date for the contracts. This is because, until then, the land was held for housing purposes, these being the purposes set out in the 1947 proclamation. The housing purposes were

either the rental of houses to tenants (who did not all finally vacate the properties until the end of 1992) or the holding of developed sections for sale or possible sale in accordance with the Cabinet Directive of 16 June 1993 referred to above.

[13] As a 'fall back' position he argued, on the authority of *McLennan v Attorney-General* [1999] 2 NZLR 469, that the land should be valued for sale purposes at the date a timeous offer should have been made to the former owner. In this case, leaving aside the question of the tenants, a reasonable time should have been allowed before the offer back to allow the necessary investigations to take place, both to decide whether any of the exemptions in s40 applied and to locate the former owner or his descendants.

[14] Mr Morrison and Mr Blampied support the decision of Fisher J. On their behalf Mr Wackrow submits that the decision to dispose of the land was made on 5 February 1988 and, once that decision was made, it could not be reconsidered – see *Attorney-General v Horton* [1999] 2 NZLR 257, 262. In any event, even though the land was *used* for State housing purposes for a period (that is rented to tenants up until the tenants vacated), it was not, because of the decision to dispose of it, *required* for those purposes. In addition, even if the definition of State housing purposes in the Housing Act 1955 is the applicable one, the sale of bare land does not come within that definition.

[15] As indicated above, however, Mr Wackrow accepts that there may be some force in the Crown's submission that time should have been allowed for organising the sale. If that is this Court's view, he submits that the date of the offer to the Council is the appropriate date.

Process under s40 of the Public Works Act

[16] Under s40 of the Public Works Act land taken for a public work must be offered back to the original owner or his or her successor if it is no longer required for that public work, not required for any other public work, and not

required for exchange under s105 of the Act – see s40(1)(a)-(c). There are certain exceptions to the offer back requirement set out in s40(2)(a) and (b) and s40(4). The relevant parts of s40 read as follows:

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—

…

(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.

[17] In the *Attorney-General v Hull* [2000] 3 NZLR 63 this Court set out the processes to be followed when s40 of the Public Works Act applies. As indicated at para [41] of that decision the first, and usually determinative,

criterion in s40 is satisfied when, in terms of subs(1)(a), the land is no longer required for the purpose for which it was taken. Whether that is so is a question of fact involving an assessment of intention in the light of objective circumstances. Proof that the land is no longer required for the relevant public work may be achieved by demonstrating an affirmative decision to that effect. The point can also be established by examining the conduct of the body holding the land and, if appropriate, drawing an inference that the body has concluded that it no longer requires the land for that work.

[18] In this case it is accepted by all parties that the memorandum of 5 February 1988 shows an affirmative decision to sell. The decision was taken by a staff member with the requisite authority. Mr Morrison and Mr Blampied submit that the memorandum records an affirmative decision that the land was no longer required for housing purposes, the public work set out in the 1947 proclamation. This is because the manner of sale, being the sale of bare land, does not come within that purpose. The Crown says, by contrast, that the sale of bare land does come within the 1947 proclamation. In particular it comes within the powers in the Housing Act 1955 which is the successor to the statute in force at the time of the 1947 proclamation.

[19] The next step, as set out in para [43] of *Hull*, is for the landholding agency (in this case the Housing Corporation) or the Chief Executive to take reasonable (and, we add, expeditious) steps to ascertain whether the land is or is not required in terms of s40(1)(b) or (c). Fisher J, in his judgment in this case, expressed the view that this passage was difficult to reconcile with the decision of both this Court and the Privy Council in *Horton*.

[20] We have no such difficulty. If the land is required for the purposes set out in s40(1)(b) or (c) then the offer back provisions are not triggered. If, once s40(1)(a) was satisfied, no inquiry could be made of other agencies then land could conceivably be offered back despite it being required for the purposes set out in s40(1)(b) or (c). This cannot have been the statutory intention as it would render those paragraphs nugatory in such a case. Nor can it be the case, however, that an agency or the Chief Executive can delay indefinitely,

ostensibly ascertaining whether paragraphs (b) and (c) are satisfied, on the basis for instance that some other agency may possibly require the land. That would defeat the purpose of s40.

[21] If, after inquiry, the land is not required for the purposes set out in s40(1)(b) or (c) the Chief Executive must, as set out in para [44] of *Hull,* 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.

[22] The timing of that offer back will depend on the facts in each case but a reasonable time in the circumstances to ready the land for sale and to locate the original owner or successors in title of the land is allowed - see *McLennan* (supra).

Was the land still required for housing purposes?

[23] As indicated above, the first question is whether the 5 February 1988 memorandum triggered the offer back provisions. The Crown submits that, until the Minister's directive, the land in question was required for the public work set out in the 1947 proclamation and that therefore s40(1)(a) was not satisfied. It submits that the definition of State housing purposes in s2 of the Housing Act 1955, combined with s15 of that Act, means that any sale of the land, in accordance with the Branch Manager's memorandum of 5 February, would have been for State housing purposes and this was the public work for which the land was held. It was only when the decision was made to declare the land surplus that it was no longer required for State housing purposes.

[24] Fisher J held, on the basis of *Hull,* that the meaning and scope of the relevant public work are to be ascertained from the 1947 proclamation as interpreted in its contemporary legal and factual context. He stated that subsequent statutes cannot affect the scope of the designated public work, although they

may affect the detailed uses to which the land may be put without going outside the designated public work. We agree with this as a general proposition.

[25] He went on to hold that the public work for which the land was held in this case was the provision of housing for members of the public, by letting or selling it for residential occupation on the land. He held that the decision to dispose of the land on the basis that it was not required for tenants or purchasers to occupy was the antithesis of requiring it for housing purposes. From the time the decision to sell was made, the land was no more than a marketable asset to be realised at the earliest opportunity. To hold otherwise, he said, would mean that s40 of the Public Works Act could never apply to land held for State housing purposes. He indicated that he would have come to the same view even if he had considered that the Housing Act 1955 was the applicable legislation.

[26] We agree with the reasoning of Fisher J in relation to the purpose for which the land was taken and his conclusion that any sale in accordance with the 5 February memorandum would not have been within that purpose. We also agree that the same outcome would have arisen under the Housing Act 1955. We provide our reasons for that latter conclusion in more detail as that Act was the focus of the Crown's argument before us.

[27] In terms of the Housing Act 1955, under s2 "State housing purposes" are defined as follows:

> **State housing purposes** means the erection, acquisition, or holding of dwellings and ancillary commercial buildings by the Crown under this act for disposal by way of sale, lease, or tenancy; and includes the acquisition of land by the Crown—
>
> (a) As sites for dwellings and ancillary commercial buildings:
>
> (b) For schemes of development and subdivision into sites for dwellings:
>
> (c) For motorways, roads, streets, access ways, service lanes, reserves, pumping stations, drainage and water works, river

> and flood protection works, and other works upon or for the benefit of the land so acquired or the occupiers thereof:

[28] Section 15 of that Act provides for the disposal of State housing land (being land held or set apart for State housing purposes) by sale, lease or tenancy as follows:

> **Disposal of State housing land by sale or lease**
>
> Subject as hereafter provided in this Act, any State housing land and any buildings or chattels held for State housing purposes may be disposed of by way of sale, lease, or tenancy by the Corporation.

[29] Assuming for these purposes that the Housing Act 1955 is the relevant Act, the Crown's argument suffers from both legal and factual difficulties. It was clear from the 5 February memorandum that the intent was to have the tenants vacate and the houses demolished and then to sell the bare land. The definition of State housing purposes in s2 contemplates the purchase of bare land but it allows the sale only of dwellings, which in turn are defined as not including the land appurtenant to such dwellings. This might be seen as somewhat curious as it would be difficult to dispose of the dwellings without the land. Be that as it may, s15 does give the power to dispose of land held or set apart for State housing purposes, whether there is a dwelling on it or not. It does not, however, deem that disposal to be for State housing purposes. It is a bare power to sell. While the nature of the land and its zoning made multi-unit residential development the most likely use for any purchaser it does not appear from the evidence that the provision of housing on the land was the Housing Corporation's purpose in selling it. As held by Fisher J the Housing Corporation's purpose was to dispose of bare land as a marketable asset. Section 15 therefore does not help the Crown.

[30] This means that we do not accept the Crown's submission that the decision to sell, and any subsequent sale conducted in accordance with the memorandum of 5 February 1988, would have been for State housing purposes in terms of the Housing Act 1955 (and even less that a sale would have been for housing purposes in terms of the 1947 proclamation). The decision in the memorandum of 5 February was a decision that the land was no longer

required for the public work for which it was held. In accordance with *Horton* (supra), that decision could not be revisited.

[31] In this case the land was not required for another public work – see para [69] of Fisher J's decision (which is not under appeal) – or for the purposes set out in s40(1)(c). The provisions of s40(2) were therefore triggered, including of course the limits on the obligation to make the offer back in s40(2)(a) and (b) and s40(4) but there is no suggestion they were applicable in this case.

What was the required timing for the offer back?

[32] The second question is whether, as Fisher J held, the Crown was obliged to offer back the land immediately on making the decision that it was no longer required. In our view there would be obvious practical difficulties in that course. As submitted by the Crown, in the first place it was necessary to identify and find the descendants of the original owner. In many cases (and this was no exception) that could take some time and, submits the Crown, a delay of up to 12 months could be appropriate.

[33] In this case the Housing Corporation was also exploring whether the land was required for another public work, namely by the Council for the extension of the reserve. As indicated above, a reasonable time to explore such a possibility must be contemplated by s40(1)(b) of the Public Works Act. This is not to suggest, as Fisher J does, that Housing Corporation staff would have been "authorised to hawk it [the land] around the countryside until they can find another department or local authority interested in using it for something else". They were not doing this in the initial stages. They were merely making inquiries as to whether it was required for another public work and a public work that appeared an obvious use, at least to the residents who campaigned for the Council to purchase the land.

[34] That the Council did not require the land is clear from the fact that it did not respond positively to the letter of offer of 1 July 1988 within a reasonable time. Because of this the Corporation was not able to continue negotiations

without first offering the land back to the original owner or his successors. In this case, therefore, the inquiries of the Council should not have delayed the process of offering back beyond say the beginning of September 1988.

[35] There is, however, a further important matter in this case that justified delay in the offer back process. The decision had been taken to relocate the tenants and demolish the houses. Fisher J characterised the delays in achieving the vacant possession of the dwellings as being due to the "twin influences of politics and inertia". In our view, as a public agency, the Housing Corporation was entitled to take the view that it could not require the tenants to vacate at the first legally available opportunity without finding acceptable alternative accommodation. It could also take into account and try and meet the concerns of the tenants and the tenants' organisations in relation to the process, even if some of the internal communications suggest that the Corporation may rather have had the aim of merely avoiding adverse publicity. One suspects, however, that a high level of publicity would have delayed the process of ensuring vacant possession even further. Some of the tenants at least were prepared to go to the lengths of judicial review and with some success. Against this background it is not for a Court to try and second-guess the Housing Corporation's actions in this regard. It must be assumed that the process of having the houses vacated and demolished was accomplished in a timely manner, taking into account the issues with the tenants and the fact that the Housing Corporation was a public agency.

[36] We note too that, unlike in *Horton* (supra), the land while it was tenanted was clearly being used for housing purposes, the purpose set out in the 1947 proclamation. 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 circumstance of each case.

[37] We consider in this case that, until the tenants vacated, there was no obligation to offer the land back. After the tenants vacated the dwellings needed to be demolished and sufficient time has to be allowed for that to take

place. It is not clear when the tenants vacated each section that is subject to the sale agreements. The evidence is, however, that all of the sections but one were vacated and the houses demolished by the 31 December 1991 and that the final section was vacated and the house demolished by 9 December 1992. In the absence of further evidence we hold that the Crown was not obliged to offer back any of the sections until 31 December 1991 and the final section was not required to be offered back until 9 December 1992. This means that these are the relevant dates for the sale contracts.

Result and Costs

[38] The appeal is allowed to the extent that the date set by Fisher J of 5 February 1988 (as being the date the land should have been offered back) is adjusted. The date of 31 December 1991 is substituted for all but one of the sections. In respect of that last section the date of 9 December 1992 is substituted.

[39] The appeal has been disallowed in respect of appellants' main ground of appeal. It has been allowed in respect of the other ground but Mr Morrison and Mr Blampied conceded before this Court that some modification to the date set by Fisher J may have been justified. As this is the case costs of $3000, plus disbursements (including reasonable travel and accommodation costs) to be set by the Registrar if necessary, are awarded to Mr Morrison and Mr Blampied.

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