IN THE COURT OF APPEAL OF NEW ZEALAND

CA35/03

	BETWEEN	TERRENCE JOHN MUSSON AND MARGARET ALLISON MUSSON Appellants
	AND	CANTERBURY REGIONAL COUNCIL Respondent

Hearing: 5 May 2004

Coram: McGrath J
Chambers J
O'Regan J

Appearances: P L Mortlock for Appellants
P F Whiteside for Respondent

Judgment: 2 August 2004

JUDGMENT OF THE COURT DELIVERED BY O'REGAN J

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[1] This is an appeal against a decision of Panckhurst J to grant a declaration under the Declaratory Judgments Act 1908 to the respondent, the Canterbury Regional Council, to the effect that hard fill in gravel pits on land leased by the Council to the appellants is not an improvement for the purposes of the calculation of rent under the lease.

Facts

[2] The appellants lease an area of land adjacent to the Waimakariri River on the outskirts of Christchurch from the Council. We will call this land the "leased area". The land had passed to the Council from the North Canterbury Catchment Board.

[3] The leased area was acquired by the Board in 1948, as part of a much larger area. At that time there were not adequate stop banks so the land was subject to flooding.

[4] In 1963 the Board leased land including the leased area to a company called Scotts Engineering Limited. Scotts had a subsidiary company which undertook sandblasting, and this company undertook sandblasting activities on the site. In the period up to 1981, the gravel pits on the land were filled, much of it because of the activities of the sandblasting operation, which dumped sand in the gravel pits.

[5] In 1973 the Board granted Scotts a lease of the land for a period of 21 years with rights of renewal. When advertising for applications to lease the land the Board specified the value of improvements on the land at $30,900, which was the value of the three buildings on the land. Scotts sought a rent reduction because of the reclaiming of the gravel pits on the land, but this was declined by the Board in 1974.

[6] A formal lease between the Board and Scotts was signed in 1982. In the late 1980s Scott assigned its leasehold interest in parts of the land and surrendered other parts of the land. A new lease was then entered into in 1989 with the subsidiary of Scotts which used the land incorporating the leased area, Sandblasters and Metal Sprayers Limited. Later in 1989, a company associated with the appellants, Roydvale Transport Limited, subleased part of the area leased by Sandblasters. Roydvale paid Sandblasters $65,000 to purchase buildings and other improvements on the subleased land.

[7] In 1994, Sandblasters assigned its 1989 lease to the appellants. The appellants paid $53,000 as consideration for the assignment.

[8] In 1996, the appellants and the Council agreed to execute a new lease. The lease was signed on 6 May 1996 and provided for a lease for a term of 18 years six months from 1 April 1996, with perpetual rights of renewal. The lease was registered at the Land Transfer Office on 5 August 1996.

[9] The lease says that the Council leases to the appellants the land described in Schedule A of the document, which in turn refers to C/T 41A/145 and C/T 41A/147, Canterbury Registry, which together amount to 3.7285 hectares. Part VI of Schedule B to the lease says:

> VI **AND IT IS HEREBY AGREED** by and between the parties hereto as follows that is to say that this lease is granted under Section 7(1)(e) of the Public Bodies Leases Act 1969 with a perpetual right of renewal for the same term as the original lease at a rent to be determined in accordance with the First Schedule to that Act (as the same is amplified in the First Schedule hereunder) **AND** the provisions of the said First Schedule to the said Act (amplified as aforesaid) shall be implied herein and form part hereof as if the same had been set forth herein at length.

[10] Accordingly, the calculation of rent must be made in accordance with the First Schedule to the Public Bodies Leases Act 1969 (the Act), which sets out standard provisions for inclusion in renewable leases granted under s7(1)(e), as modified in the lease itself. The First Schedule to the lease (which, rather enigmatically, has a Schedule A, a Schedule B and a First Schedule) provides for rent reviews to occur on a five yearly basis. The First Schedule to the Act provides a process for determining rents at each rent review. Of particular relevance in this case is cl 3 of the First Schedule to the Act which says:

> 3. In making the said valuation no account shall be taken of the value of the following improvements on the said land: [*Specifying, as the lessor thinks fit, the kinds of improvements, whether made during the term or at any other time, which are not to be taken into account in the valuation of the rent.*]

[11] This provision is, in turn, modified by cl 3 of the First Schedule to the lease. That clause says:

> 3. Under Clause 3 of the said First Schedule no account shall be taken of the values of the following improvements on the said land:
>
> a. Improvements as defined in Section 14(9) of the Public Bodies Leases Act 1969 made after 1 April 1994 by the lessee with the consent in writing of the lessor to or on the demised premises except such as shall have been purchased acquired or paid for by the lessor;
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> b. The following improvements made prior to 1 April 1994 – all improvements existing on the demised premises at that date.

[12] Clause 3.a of the First Schedule to the lease cross-refers to the definition of improvements in s14(9) of the Act. That provision says:

> (9) In this section the term "improvements" means substantial improvements of a permanent nature; and includes reclamation from swamps; clearing of bush, gorse, broom, sweetbrier, or scrub; cultivation (including the clearing of land for cropping, and the clearing and ploughing of land for, and the laying down of the land for or with, grasses); planting with trees or live hedges; the laying out and cultivating of gardens; fencing; draining; roading; bridging; sinking water wells or bores, or constructing water tanks, water supplies, water races, irrigation works, head races, border dykes, or sheep dips; making embankments or protective works of any kind; in any way improving the character or fertility of the soil; the erection of any buildings; and the installation of any telephone or of any electric-lighting or electric-power plant.

[13] Notably, however, cl 3.b of the First Schedule to the lease refers only to "improvements", so, on the face of it, the term "improvements" as used in cl 3.b does not cross refer to s14(9) of the Act.

High Court Judgment

[14] Panckhurst J observed that the issue had to be determined from first principles, as there was no relevant New Zealand authority. He referred to the decision of Archer J in *MacDermott and Anor v Valuer-General* [1956] NZLR 240 in which the Land Valuation Court confronted the issue as to whether filling on a section could be an improvement for the purposes of the Valuation of Land Act 1951. Archer J expressed the view that the answer could depend on the facts of the case, on the character of the filling, and on the circumstances of the subdivision, but in the end did not find it necessary to answer the question. Archer J noted that the bulk of the filling had been put on the sections fortuitously and at little cost. He said it could lead to an inequitable result if the Court were to hold that the filling should be regarded as an improvement and valued as if it had been put there at higher cost, or, on the other hand, that it should be ignored entirely and treated as merged in the unimproved value.

[15] Panckhurst J considered the definition of improvements in s14(9) of the Act and accepted that there were three elements to this definition, namely:

(a) The work must be substantial;

(b) The nature of the work must improve the land;

(c) The improvement must be of a permanent nature.

[16] The Judge noted that s14(9) applied only to farmland, but did not consider that to be a concern in this case, since the parties had incorporated the definition in the lease even though the leased area was not being used as a farm. However he noted that cl 3.b of the First Schedule to the lease referred to "improvements" without cross-reference to s14(9), in contrast to cl 3.a. The Judge determined that the definition of improvements in s14(9) was not imported into cl 3.b. The issue which had to be determined was whether the fill was an improvement in the more generic context of cl 3.b.

[17] The Judge then considered other provisions in the lease to assist with the interpretation of cl 3.b of the First Schedule. In particular he referred to the provisions in Part IV of Schedule B to the lease which dealt with improvements. He referred to:

(a) Clause 2, which says that the lessor is not liable to pay compensation for improvements or buildings, but that the lessee was entitled to remove them at the end of the term;

(b) Clause 3, which says that if improvements are not removed the lessor may acquire them at valuation or use reasonable endeavours to have an incoming tenant do so;

(c) Clause 4, which obliges the lessor to account to the lessee for any sum received from an incoming tenant in consideration for the value of improvements; and

(d) Clause 5, which entitles the lessor to require the lessee to remove improvements erected or effected by the lessee in some circumstances.

[18] Panckhurst J considered that hard fill was not capable of removal, and had no recovered value, so that the right of the lessee to remove it would be illusory. He thought that it followed that the associated right of the lessee to seek compensation for the value of the hard fill either from a lessor or an incoming lessee would be equally illusory. He saw the work of filling gravel pits as of a nature which was incompatible with the scheme of the removal and compensation clauses in Part IV of the lease. Thus he was inclined to the view that the hard fill merged with the land as it was dumped, and became part of its unimproved value.

[19] Panckhurst J referred to the observation by Archer J *in Commissioner of Crown Lands v Kinney Brothers* (1966) New Zealand Valuer 273 that it was not the function of a valuer to value land in its natural state, but rather in the state it would have been in at the relevant date of the valuation, if, at that date, it had no improvements on it. He noted that, in the present case, the land had experienced the destruction wrought by gravel extraction and the restoration brought about by the deposit of hard fill waste. He said that it was filled at the time of the commencement of the present lease and that the valuer's function was to value the land as he found it at the date of the valuation.

[20] Panckhurst J noted that the notion that hard fill could merge and become part of the unimproved value of the land was at odds with the definition of improvements in s14(9) of the Act. He noted that, for example, the s14(9) definition included "reclamation from swamps" yet work of that nature would be, like hard fill, incapable of removal. He said this exemplified the significance of the distinction between cl 3.a of the First Schedule to the lease, which cross-referred to the s14(9) definition, and cl 3.b of the same schedule, which did not.

Appellants' arguments

[21] On behalf of the appellants, Mr Mortlock argued that the term "improvement" as it appeared in cl 3.b of the First Schedule to the lease had to be given its natural meaning. He accepted that the definition in s14(9) of the Act did not apply to cl 3.b.

[22] Mr Mortlock said that Panckhurst J was wrong to derive assistance in the interpretation of cl 3.b of the First Schedule from other provisions in the lease. He said the provisions in Part IV of Schedule B were provisions intended to protect a lessee on termination of a lease, but were not relevant to determining which improvements were to be taken into account in the event of a rent review.

[23] Mr Mortlock said that "improvement" is a word in everyday use in lease documents, and simply means something which is so related or fixed to the land as to be part of the land and which makes use of the land more beneficial. He said that an improvement must be intended to be on the land indefinitely or permanently, and as a matter of practicality needed to be a work of substance or significance. He said that plain literal meaning should be applied, and no restriction should be read in by reference to provisions in the lease which have no application in the case of a rent review.

[24] Mr Mortlock said the form of the lease was imposed on the appellants by the Council, so that the Council should not be heard to claim a restricted meaning for the term "improvements" in cl 3.b. He said that cls 2-5 of Part IV of Schedule B do not apply to the hard fill in this case because those clauses apply only to improvements or buildings effected or erected by the lessee, and the hard fill was placed on the land by prior lessees in this case. Thus he said these provisions could not assist with the interpretation of cl 3.b. Mr Mortlock said the Judge was wrong to attach any significance to the fact that it would not be practical to remove the fill at the termination of the lease – he pointed out that there was no right of removal in this case because the fill had not been placed there by the appellants, so the issue was academic in the present circumstances.

[25] Mr Mortlock said the lease as drafted required a valuer calculating rental to exclude from the calculation of the value on which rental would be based all improvements on the land that were made prior to 1 April 1994. There is no reason to limit that in any way. Improvements, no matter who made them, were to be excluded as long as they occurred prior to 1 April 1994. He said the Judge's finding that the hard fill effectively restored the land to its natural state was not in keeping with that requirement. He said it was not appropriate to assess improvements by

reference to the natural state of the land – in most cases the lessees will take the land well after it has ceased to be in its natural state.

Arguments for the Council

[26] On behalf of the Council, Mr Whiteside argued that the Judge was right to differentiate between cl 3.a and cl 3.b, and to determine that the definition in s14(9) of the Act applied to the former but not to the latter. However he also noted another distinction between cl 3.a and cl 3.b. In cl 3.a, reference is made to improvements to or on the demised premises. On the other hand, cl 3.b refers to "all improvements existing on the demised premises". Mr Whiteside said that hard fill in gravel pits may be an improvement to the demised premises but not an improvement on the demised premises. Mr Whiteside argued that, if the parties had intended that the hard fill in the gravel pits was to be excluded from the calculation of rents during the term of the lease then they would have used the words "improvements existing to or on the demised premises" in cl 3.b.

[27] Mr Whiteside said that Panckhurst J was right to interpret cl 3.b in the context of the lease document as a whole. He relied not only on cls 2-5 of Part IV, as Panckhurst J did, but also on a number of other provisions in the lease.

[28] The first of these was Part I of Schedule B, which provides certain exceptions and reservations from the lease. That provision says:

> **THAT** there are hereby excepted and reserved from this lease all mines metals minerals milling timber and timber like trees flax coal lignite stone gravel clay kauri-gum and other metals or minerals whatsoever in under or upon the demised premises and (subject to the right of the Crown) all antiquities and valuables found during any excavation of the demised premises with full power and liberty to the lessor its agents servants and grantees or licensees to enter upon the demised premises for the purpose of searching for working winning getting and carrying away all such metals minerals milling timber and other things so reserved as aforesaid and for such purpose to make such roads erect such buildings sink such shafts and do all such acts and things as may be necessary **PROVIDED ALWAYS** that the lessor will allow to the lessee an abatement of the rent payable hereunder in fair and just proportion to the interference to the lessee occasioned by the exercise of any such powers by the lessor or any agent servant grantee or licensee of the lessor and the amount of any such

> abatement shall in default of agreement be determined by arbitration in manner hereinafter set forth.

[29] Mr Whiteside said that the fill in the gravel pits consisted of sand concrete soil and the like, and that each of these consisted of minerals stone gravel clay or water, all of which were excluded from the lease. He noted that stone gravel clay metal and minerals were excluded if they were "in under or upon the demised premises", and contrasted this with cl 3.b which refers to improvements existing "on" the demised premises.

[30] Mr Whiteside relied on a number of provisions in Part II of Schedule B to the lease, including:

(a) Clause 2, which requires the lessee to pay rates on the demised premises or any improvements on the demised premises;

(b) Clause 3, which requires the lessee to keep the buildings erections and other improvements in good repair;

(c) Clause 12, which prohibits the lessee from removing from the demised premises any "soil shingle gravel sand or minerals";

(d) Clause 13, which requires the lessee to notify the lessor if there is soil blowing away from the land, and the lessee to prevent the blowing of soil if required;

(e) Clause 15, which says the lessee is not to erect any workshop storeroom office or other building or any fence or any other improvement whatsoever without the lessor's consent;

(f) Clause 16, which obliges the lessee to insure all buildings and improvements of an insurable nature;

(g) Clause 18, which prohibits the lessee from carrying on any dangerous noxious or offensive occupation trade or calling on the demised premises or any improvements;

(h) Clause 28, which requires the lessee to comply with statutory requirements relating to the demised premises or any improvements;

(i) Clause 32, which says the lessee must not remove or cause to be removed from the demised premises any buildings or erections or other improvements whether affixed to the land or not, without the consent of the lessor;

(j) Clause 33, which says that the lessee must not excavate on the demised premises (except for the purpose of foundations for buildings or digging of wells) without the lessor's consent.

[31] Mr Whiteside argued that all of these provisions suggested that filling in of gravel or shingle pits would not be an improvement. He placed particular reliance on cl 12, which prohibits the removal of soil shingle gravel sand or minerals, because he said that under the Act, improvements belong to the lessee and, if the fill in the gravel pits belong to the lessee, then a prohibition on removal of the fill (soil shingle gravel sand or minerals) would be inconsistent with the lessee's ownership of the fill in the former gravel pits.

[32] Mr Whiteside argued that the interpretation contended for by the Council was consistent with the commercial purpose of the lease. He said that leases under the Act contemplate that improvements are effectively owned by the lessee, which is why they are ignored when the rent is fixed. He said this also explained the right to remove improvements at the end of the lease. Since the removal of the fill was "illusory" as Panckhurst J had found, the implication was that the fill was not an improvement. He said it was obvious that, as a matter of practicality, the fill could not be removed. However, Mr Mortlock specifically accepted that the fill could not be removed under Part IV of Schedule B because the provisions of that Part apply only to improvements made by the lessee itself, not by prior tenants.

[33] Finally Mr Whiteside said that there would be no unfairness to the appellants in adopting the approach suggested by the Council. He said that there was nothing in the evidence to show that the appellants had paid anything to previous tenants for

the fill, and indeed the evidence suggested that the payment made to the previous tenant for the assignment of the lease and for the purchase of improvements did not involve any payment for the hard fill in the gravel pits.

Discussion

Section 14(9)

[34] We proceed on the basis that the reference to improvements in cl 3.b is a reference to that term as commonly used, not as it is defined in s14(9) of the Act. We agree with Panckhurst J that there is a difference between cl 3.a and cl 3.b in that respect. For that reason the broad definition of "improvements" which appears in s14(9) does not assist with the interpretation of cl 3.b, which is at the heart of this case. It is, however, notable that where a lessee has made improvements of the kind described in s14(9), then the provisions elsewhere in the lease dealing with improvements could be expected to apply. Yet many of the improvements described in the definition in s14(9) (for example clearing gorse, clearing land for cropping or improving the fertility of the soil) are not improvements of the kind to which the provisions relating to removal of improvements and compensation for improvements can readily be made. That tends to support the appellants' argument that only limited support can be gained from other provisions in the lease when interpreting cl 3 of the First Schedule.

Part I of Schedule B

[35] We do not accept the Council's contention that Part I of Schedule B can be interpreted as stating that the lessee has no interest whatsoever in minerals stone gravel clay and the like. Under the terms of the lease, the lessee leases "the land described in Schedule A", which in turn refers to land described by reference to deposited plans and certificates of title issued under the Land Transfer Act 1952. In the absence of any indication to the contrary in the lease, what is leased is the lessor's full interest in "land" as that term is broadly defined in the Land Transfer Act 1952. That definition is:

> **land** includes messuages, tenements, and hereditaments, corporeal and incorporeal, of every kind and description, and every estate or interest therein, together with all paths, passages, ways, waters, watercourses, liberties, easements, and privileges thereunto appertaining, plantations, gardens, mines, minerals, and quarries, and all trees and timber thereon or thereunder lying or being, unless specially excepted:

[36] In our view, the effect of Part I is to limit the activities which the lessee may undertake on the land in the course of the exercise of the lessee's rights of occupation of the land so that the lessor's interest in the things specified in Part I is preserved. But it does not, as Mr Whiteside appeared to suggest, restrict the lessee's interest to some limited right of occupation of the surface of the land, and deprive the lessee of any interest in anything below the surface. We think there is force in Mr Mortlock's argument that such an interpretation would lead to an absurd outcome in relation to foundations for buildings erected on the land and underground services such as water pipes, gas pipes, electricity cables, telephone cables and the like.

[37] Mr Whiteside sought to argue that the exception for stone, gravel, clay and minerals in Part I of the lease was irreconcilable with hard fill, which was largely comprised of such substances, being an improvement. That argument was based on the premise that an improvement belonged to a lessee and was therefore excluded from the lessor's interest in the land. In our view, that premise is incorrect. An improvement is part of the land, and in the absence of any agreement to the contrary is the property of the lessor. In this case the lease gives contractual rights to the lessee in relation to improvements, such as a right to compensation for some (but not all) improvements at the expiration of the lease, a right to remove improvements at the expiration of the lease in some circumstances and the right for the value of improvements to be excluded from the value of the land used for the purpose of the calculation of rent. Those contractual protections for a lessee do not, however, alter the fact that, as a matter of property law, the improvements are part of the land which is owned by the lessor and leased by the lessee. That means that there is no significant support derived from Part I of the lease when interpreting the scope of cl 3.b of the First Schedule to the lease in this case.

Interpreting "improvements" in the context of the lease

[38] Mr Whiteside placed considerable weight on the apparent limitation of the concept of "improvements" in Part II and Part IV of the lease to improvements of a kind which were in the nature of buildings or structures which were capable of being removed and for which compensation could be readily calculated in the event that they were not removed. In effect his argument was that the term "improvements" has precisely the same meaning wherever it is used in the lease, and given its apparently limited meaning in Parts II and IV, the same limited meaning should be given to the term in cl 3.b.

[39] We do not accept that argument. Some of the references to improvements in other provisions are limited by their own context. For example cl 15 of Part II talks about erection of improvements, which limits the class of improvements to which it relates to those which can be "erected". Clause 16 deals only with improvements which are of an insurable nature.

[40] The provisions of Part IV dealing with compensation for improvements and removal of improvements relate only to improvements effected by the lessee itself, while cl 3.b addresses itself to the different situation – namely improvements already on the land prior to the commencement of the lessee's lease. Thus, in the context of the current lease, some inconsistency between those provisions and cl 3.b would not necessarily be of great moment.

[41] Mr Whiteside placed particular weight on the fact that cl 12 in Part II prohibits the removal of shingle soil gravel sand and minerals by the lessee, which he said was inconsistent with the appellants' argument that the fill amounted to an improvement. He said if the appellants were correct that the hard fill was an improvement, then they would effectively own the fill, and, if that were the case, would be entitled to remove it, which meant that it would not be possible to reconcile the lessee's right of removal of an improvement under cl 2 of Part IV and cl 12. Again we do not accept that this argument is correct in the context of the current lease, though it may have had some weight in interpreting earlier lease documents relating to this land. In the present context, there is no right on the part of

the appellants to remove the hard fill, because the right of removal applies only to improvements effected by the appellants themselves. And, as we have already said, there is no basis on which we should interpret the lease as giving the lessee ownership of the hard fill. Thus we do not agree that the prohibition on removal of soil shingle gravel sand and minerals is necessarily inconsistent with the interpretation of cl 3.b contended for by the appellants.

[42] For similar reasons we do not think there is any weight in Mr Whiteside's argument that cl 32 of Part II, which prohibits removal of improvements without the consent of the lessor, and cl 33, which prohibits excavation without the consent of the lessor, are of particular assistance in the interpretation of cl 3.b of the First Schedule. In our view, there is no irreconcilable conflict between the interpretation of cl 3.b contended for by the appellants and those provisions.

[43] We accept that, while previous lessees would have been entitled, as a matter of law, to remove the hard fill if it were an improvement, that would have been almost certainly of no practical value to them. Similarly any claim by a prior lessee for compensation for fill which has been dumped in holes would have been unlikely to amount to much, if anything. But the fact that a right has no practical worth does not mean that it does not exist. There will be many occasions when improvements on land are of negligible value to a departing tenant – for example electricity lines which have no inherent value unless they are connected to the power supply at one end and providing electricity to a profitable operation at the other. No one would seriously suggest that the electricity lines did not constitute an improvement to the land, but it may be that at the end of the lease they would not be removed and that any right of compensation would be of negligible value.

[44] We conclude that, although context may assist with the interpretation of provisions in a contract, the other provisions of the lease referring to improvements in this case provide only limited assistance in the interpretation of cl 3.b.

Plain meaning

[45] Panckhurst J accepted (at para [31]) that the filling of the gravel pits did improve the land in a substantial way and permanently. He accepted that there was a betterment of the land to which the lease related, and that this betterment was both substantial and permanent. Thus the filling of the gravel pits amounted to an improvement as that term is commonly understood. However he found that the contextual arguments, which have not found the same favour with us, led to the conclusion that the fill did not amount to an improvement for the purposes of the present lease.

[46] Having taken a different view on the contextual arguments, we fall back on the plain meaning of the word. It is broad in its scope. In *Aithau-Wanganui v Malpas* [1979] 2 NZLR 545 at 552, Cooke and McMullin JJ said that all work done or material used at any time on or for the benefit of land by the expenditure of capital or labour by any owner or lessee will be an improvement if its effect is to increase the value of the land at the relevant valuation date. In the same case at 557, Richardson J concurred in that formulation, and added, "The underlying concept is of the expenditure of effort and money which increases the value of the land." Panckhurst J was right to find that the gravel pits were an improvement in the normally understood sense of the term. In our view, that leads to the conclusion that the fill can amount to an improvement for the purposes of the present lease.

"To or on"

[47] That leaves the last point, which is the argument that cl 3.b of the First Schedule is limited to improvements "on" the land, in contrast to cl 3.a which refers to improvements as defined in s14(9) of the Act "to or on" the land. Mr Whiteside argued that the limitation in cl 3.b to improvements on the land excluded improvements which were under the land or improvements which enhanced the land (such as clearance of gorse or improvement of soil quality) which were not physically on top of the land.

[48] We accept there is some force in this argument, but ultimately we are not convinced by it because:

(a) Clause 3 of the First Schedule to the Act deals with "improvements on the said land", and this wording has been faithfully reproduced in the introduction to cl 3 of the First Schedule to the lease. Thus, the only improvements which can be excluded from the valuation for the purposes of the calculation of rent are improvements "on the said land", whether they are under cls 3.a or 3.b. The fact that improvements to or on the land under cl 3.a are included within the general concept of "improvements on the said land" in the introductory wording of cl 3 of the First Schedule to the lease would support the contention that there is no particular significance in the addition of the words "to or" in cl 3.a. That suggests that improvements to or on the land and improvements on the land should be seen as essentially synonymous;

(b) A limitation of cl 3.b to improvements which are physically sitting on top of the surface of the land would exclude improvements of the kind which one would normally expect to be taken into account. Examples of these have already been given – underground services and the foundations of buildings. Similarly cables suspended above the ground could in some cases be seen as improvements, though they are not "on the land" in the physical sense.

[49] In our view, the term "improvements on the land" should be interpreted as applying to anything which is of a nature that it constitutes a betterment of the land concerned which is substantial and permanent. In our view, so long as those improvements have been made on the land, and not on adjoining land, for example, then they should come within cl 3.b for the purposes of the calculation of rent.

Commercial considerations

[50] Mr Whiteside argued that the appellants' case had no commercial justification because the appellants had not paid for the fill in the gravel pits and they should not therefore be entitled to get the advantage of a reduction in rent which

results from the fill being treated as an improvement. Mr Whiteside said there was no evidence that the appellants had ever paid anything to the previous lessee for the fill in the gravel pits. He said there was not therefore any unfairness to them in the fill not being treated as an improvement.

[51] As pointed out in paras [6] and [7] above, the Mussons (or their associated company) paid $65,000 for improvements to the previous lessee, Sandblasters, and $53,000 as consideration for the assignment of the lease. There is nothing in the contemporary documents which indicated that the improvements for which payment was made included the fill in the pits, and the appellants did not contend that there was ever any explicit acknowledgement to that effect. Nevertheless the appellants argued that they had purchased all the improvements on the land and that, to the extent that the gravel pits constituted an improvement for Sandblasters, then they would continue to constitute an improvement for the appellants.

[52] We accept that there is no strong argument founded on equity or fairness in favour of the appellants, but in our view, the absence of any such argument is of no significance. This case is about the interpretation of the lease, and that is essentially a matter of contractual construction.

[53] In any event, the fairness arguments cut both ways. There was no evidence that the Council or the Board had ever paid anything for the fill in the pits. Yet the Council's position is that it is entitled to a higher rental for the leased area because the fill has enhanced the utility of that land. That position is no more meritorious than that of the appellants.

[54] We observe that the standard form of lease contemplated by the Act provides for the parties to specify in cl 3.b the improvements which existed at the time the lease was signed and which were to be excluded from the value of the land for the purposes of the calculation of rent. It seems to be contemplated that the parties will list specific improvements so there is no dispute in the future as to what should be excluded. If that approach had been followed here, this dispute would never have arisen. Having adopted the open-ended and general wording in cl 3.b in this case,

we do not think the Council should be aggrieved when that yields a result which the Council did not anticipate.

Result

[55] We are satisfied that the hard fill in the gravel pits on the leased area is an improvement for the purposes of cl 3.b. We therefore allow the appeal. The appellants are entitled to costs which we set at $6,000 and disbursements (including reasonable travel and accommodation costs for Mr Mortlock) as agreed by counsel or, if agreement cannot be reached, as determined by the Registrar. Costs in the High Court should be determined in that Court in the light of this judgment.

Solicitors:
Mortlocks, Christchurch for Appellants
Wynn Williams & Co, Christchurch for Respondent