BEFORE THE AUCKLAND
LAND VALUATION TRIBUNAL **LVP 051/03**

IN THE MATTER	of a claim for compensation under the Public works Act 1981
BETWEEN	**PENELOPE JEAN GRAY** Claimant
AND	**MINISTER OF LANDS** Respondent

Before the Auckland Land Valuation Tribunal

Chair:	His Honour Judge J D Hole
Members:	P J Mahoney, Esq J C Charters, Esq
Date of hearing:	15 - 18 March 2004
Counsel:	Mr Bill Korver for Claimant Mr M T Parker for Respondent
Date of Decision:	23 April 2004

DECISION OF TRIBUNAL

Introduction

1. This decision relates to an application for compensation in respect of land belonging to the claimant acquired by the respondent for a motorway. It is part of the land in CT 66C/327 (North Auckland Registry) and has an area of 19.7833 hectares. It was taken by proclamation signed on

16 November 2000 and published in the Gazette on 30 November 2000. The land was vested in the Crown on 14 December 2000, which is the specified date under s 62(2) Public Works Act 1981.

2. The effect of the motorway designation was to sever the claimant's land into two blocks. The Crown agreed to acquire the western severance as, because of the motorway, it had no legal access and the cost of providing access to it was prohibitive. The claimant has retained the eastern severance ("the residual land") containing 6.1000 hectares. It accommodates her house and curtilage and has road access.

The Claim

3. The amended claim dated 2 October 2003 claims that the residual land will be injuriously affected by the work "because the land taken has environmental/conservation qualities". The sum of $1,461,000 is claimed, being the total claim for compensation amounting to $1,981,000 less advance compensation of $520,000 paid by the respondent.

4. In his opening submissions, counsel for the claimant presented the claim somewhat differently. He said it was calculated as follows:

Land value including its special value:	$1,661,000 (including GST)
Claim for damage done by goats:	$ 100,000
Pine trees on taken land:	$ 20,000
Potential loss of spring on residual land:	$ 100,000
Temporary occupation:	$ 100,000
Total:	$1,981,000

5. Subsequently, the Tribunal was told that the claim for temporary occupation was not being pursued; thus reducing the total claim to $1,881,000.

6. The respondent, at the hearing, increased its land value figure from $585,000 (including GST) to $635,000 (including GST). It offered $1,400 for the pine trees and nothing in respect of the balance of the claims.

7. The Tribunal, with the concurrence of the respondent, has considered the claim in the manner presented at the hearing by the claimant's counsel.

Goat Damage

8. The Tribunal agrees with counsel for the respondent that the basis for this claim is unclear. There is no doubt that, over the last ten or so years, the entire property has sustained extensive damage from wild goats. The claimant says the goats originally arrived over her southern boundary, her northern boundary and through the nine wire fence around the pine trees. She complains that they came from land which had been acquired by the respondent, and that the respondent had a duty to prevent the goats from escaping from its land. Further, she says that the respondent, contrary to the advance compensation agreement dated November 2002, until three weeks ago, had failed to put a goat fence along the new boundary between the land being acquired by the respondent and the residual land. As a result, goats came through that area, causing devastation to the residual land.

9. To succeed under this head, the claimant has to prove that the damage was caused as a result of some default by the respondent. If the claimant can succeed in establishing liability, then she must prove loss.

10. She fails under both heads. If the claim is one for injurious affection, then the claim needed to be brought within two years (s 78 of the Act). If it is for a breach of contract, then this Tribunal has no jurisdiction.

11. In respect of the claim concerning the failure to fence, as required by the November 2002 agreement, there is no evidence that goat damage was the result of such failure: in any event this, too, is a breach of contract claim outside the jurisdiction of the Tribunal.

12. In terms of liability, quite apart from the legal issues, factually this was always going to be a difficult head of claim. The evidence was extremely nebulous and, in particular, lacking specificity in terms of time and consequential damage. For example, in respect of allegations that goats entered as a result of the respondent's contractors leaving gates open, there was no evidence as to when this occurred or what damage resulted.

13. Finally, quantum was not proved. The only attempt at this was the production, through the claimant, of a copy letter from a nurseryman who did not give evidence. The claimant's valuer attempted to translate that letter so that it meant that each plant therein mentioned was worth the sum alongside it: it could equally have meant that the total number of plants cost that figure.

14. The claim for goat damage is disallowed.

Loss of spring

15. The claimant fears that, when the motorway is constructed, the works will cut through the water table and destroy the spring on the residual land which is used for plant irrigation. Her valuer has calculated the loss to her over a twelve month period by determining that the spring is able to fill two or three 2,500 gallon tankers in a 24 hour period. Each tanker of water costs $140. If one multiplies two tanker loads of water by 365 days, the result is $102,200 – say, $100,000.

16. There is no evidence that the claimant uses two to three tanker loads of water per day for plant irrigation. There is no evidence as to the cost of establishing an alternative water supply, such as a new bore. Obviously, this "back of the envelope" type calculation undertaken by the valuer is just as specious as his attempt at calculating the alleged goat damage loss.

17. Fortunately for the claimant, this head of claim can be dealt with by the undertaking given at the hearing by Mr Brown of the respondent. That undertaking has been incorporated in a memorandum from counsel for the respondent reading:

> "Transit New Zealand, through the Minister, undertakes that if as a consequence of the construction of the works the spring ceases to flow it will forthwith investigate and if appropriate, drill a well on the property to provide Mrs Gray with a water supply for irrigation purposes".

(Counsel for the claimant, by memorandum, attempted to persuade the Tribunal that a different form of undertaking should have been given. He did not seek this from the witness at the hearing and no undertaking in the form requested by him was given).

Pine Trees

18. The claimant relied upon the valuer, Mr Stafford Bush, to assess the value of the pine trees on the land being taken. His evidence was about as unscientific as that which he gave in respect of the preceding two heads of claim. The value of the trees to the claimant is not an appropriate way of assessing their market value. Strictly, their value forms part and parcel of the land value claim. If treated separately, then the willing seller/willing purchaser approach is the only valid one. If that approach is adopted, then the only evidence is that of Mr Webster, a duly qualified forestry valuer, who reached an assessment of $1,400.

19. In evidence Mr Webster acknowledged that, as part of a lifestyle block, trees such as these might give an added market value to the land beyond their actual value. He was not qualified to undertake that sort of valuation. The claimant presented no evidence in this regard.

20. $1,400 is allowed in respect of the pine trees.

Land Value: Special Value

21. The major difference between the parties in respect of land value is the claimant's claim for "special value" or "habitat value". The claim for special value is in the sum of $1,110,000. As mentioned earlier, originally this claim was described as being one for injurious affection. Notwithstanding that this claim comprised the main difference between the parties, the legal basis for it was not mentioned in counsel for the claimant's opening address. When asked, the claimant's valuer rather disarmingly indicated that he was unaware of the statutory authority for the claim and suggested it was something to be addressed by the claimant's counsel in closing. This he did in his closing address. Notwithstanding his very lengthy submissions, his argument may be summarised as follows:

> "When assessing market value in accordance with s 66(1)(b) (without the exceptions) where land has a special value to the claimant which can be quantified, this is a factor which should be added to the assessed market value. Because of its special value to the claimant, the claimant is not anxious to sell and, thus, to get her to sell, an extra inducement is required".

22. The concept recognises that compensation should not be assessed in *"a niggardly way but in a way which was calculated to fully recompense the claimant for the loss which it had proved to an acceptable standard that it had incurred as a result of the land being taken."* ***David Reid Electronics Ltd v Minister of Works and Development*** (1989) DCR 251. Significantly, in that case, at page 256, the Tribunal said:

> *"If compensation is to be a reality the Court must take into consideration all of the circumstances and see what sum of money will place the dispossessed man in a position as nearly as similar as possible to that he was in before. This will not include what may be called sentimental losses such as personal attachment to a particular spot; or compensation for money which had been expended on the land but which could bring no return..."*

23. This is not a new concept. The leading recent New Zealand authority is ***McNulty v Minister of Survey and Land Information*** (High Court, Dunedin, M 61/92, Hansen J and I W Lyall). At page 43 of the report in the New Zealand Valuers' Journal, the Court made the same point by citing with approval ***Russell v Minister of Lands*** 17 NZLR 241, Pennefather J, from where the above quotation was taken. Thus in order to place a dispossessed owner in the same position as he was previously in but for the taking:

- The land value as assessed in accordance with s 62(1)(b) is determined;

- Where the land has some special value to the claimant, the quantum of that special value is added to the market value;

- That special value is assessed in accordance with the general principles governing the assessment of compensatory damages for financial loss.
  (See ***Wellington City Corporation v Berger Paints NZ Ltd*** [1975] 1 NZLR 184 at 205 per Richmond J in the New Zealand Court of Appeal)

- BUT, special value does not include sentimental losses such as a claimant's attachment to the land or money spent on the land which could bring in no return. (***Russell***) (supra)

Special Value to Claimant

24. In her evidence the claimant explained the land's special value to her. She bought it in 1986 to establish on it a residential healing centre. It contained four permanent springs; a very beautiful part of the Nukumea Stream; rare native plants; old native trees; native medicinal plants; and native bush. Most important it was always "chemical free". Over the years a house was built; pine trees were thinned; a dam created; chickens were grown for their eggs and manure; an adventure trail for exercising horses was created; an orchard established; and native plants planted amongst the bush to enhance it; and so forth. The residential healing centre lasted for about two or three years but was discontinued in the late 1980s or early 1990s due to the prospect of the motorway happening. Since then the property has been used as a lifestyle block with some income coming from its nursery. Incidentally, there is no claim for business losses.

25. The property is included in that area described in the Rodney District Scheme as RAP21. This signifies that it is worthy of protection partly as a result of its earlier use as kauri gum diggings. Initially, then, it would have comprised a kauri forest; and today most of the land is bush and fern in the process of regeneration. The land and wetlands including the Nukumea Stream are home for native fauna of various kinds.

26. Whilst the land does have a very real special value to the claimant, it is clear that this is not compensatable in terms of the Public Works Act 1981. The special value to the claimant is a sentimental one recognising her attachment to the property and the enormous efforts she has made in effecting various improvements to it as detailed in paragraph 24. This is the very type of special value which is specifically excluded from being the

subject of compensation by virtue of such authorities as ***Russell*** and ***McNulty***.

Valuation of Special Value

27. One of the reasons for this is that such emotional factors are not capable of valuation in monetary terms. If one were to ask a claimant how much extra over and above the market value would the claimant pay for the land because of its special characteristics, the answer inevitably would be "as little as possible – say $1." One dollar then comprises the monetary value which the market place would ascribe to the special value.

28. If the market place is larger than merely the claimant, then any special value would normally be incorporated in the market value as assessed in accordance with s 62(1)(b). The starting point is to ascertain what extra did the claimant pay over and above market value to acquire the land with such desirous qualities to her. Rather surprisingly, the claimant's valuer made no such inquiry. The respondent's valuer did investigate if there was sales evidence which indicated that bush clad blocks of land such as the claimant's attracted a premium over and above similar blocks in pasture. The answer was in the negative.

29. The assessment of the special value of $1,110,000 by the claimant's valuer was done in a rather curious manner. When the motorway project was undergoing the resource consent procedure, the Hearings Commissioner, in his decision, set out conditions to be fulfilled by the respondent. These related to the undertaking of mitigation works downstream from the claimant's land. If the works were not carried out, then the respondent was required to pay costs in lieu. These conditions were amended by consent in the Environment Court: no costings were mentioned in the final conditions approved by the Court. The valuer has

treated the original costings as values to be ascribed to special value. There are some very obvious fallacies in this approach:

- The cost of doing something and its value are not synonymous;
- There is no record of where the costings came from: their author was not called to give evidence about them.
- The costings were not agreed to by the parties: the Environment Court decision in this regard was by agreement between the respondent and the Auckland Regional Council. That decision removed any element of financial contribution by the respondent. As the Court stated at paragraph 12:

> *"The proposed amendment to those conditions would remove the element of Transit making financial contributions to the regional Council, and would define with greater specificity the type of works that are to be undertaken".*

- The costings have nothing to do with a calculation under s 62(1)(b). In this regard counsel for the claimant declared that the "special value" assessment was to be calculated in accordance with s 62(1)(b). That section imports into the calculation the amount which would be received if the land were sold on the open market by a willing seller to a willing buyer. Given the basis for his calculation, which had nothing to do with market value as defined in s 62(1)(b), it is not surprising the claimant's valuer confessed he did not know of the statutory authority for his extraordinary special value figure of $1,110,000.

30. The environmental and conservation qualities of the land were no doubt of relevance to the recourse management hearings. However, once that process became exhausted and a final decision for the taking of the land was made, then the sole remaining issue between the parties was

compensation. Before this Tribunal that comes down to a calculation in monetary terms as to the market value to be assessed for the land taken. Environmental and conservation matters are not usually relevant to that calculation unless there is clear market evidence to support it. Obviously, this was not an issue in this case.

31. In this case, the claim for special value is untenable and is rejected.

Failure to Negotiate

32. In the course of the hearing, both the claimant's counsel and valuer complained of the failure of the respondent's valuer to enter into negotiations with them. Normally, this would have occurred and this Tribunal encourages this type of negotiation. For a body in the position of the respondent to refuse to negotiate is not only regarded as heavy handed but also frustrates any goodwill and possible compromise. However, in this case, while the Tribunal does not agree with the respondent's decision in this regard, it considers that its response was understandable: given the absurd nature of the claim and its size, it was thought by the respondent that negotiations would be pointless. Effectively, the claim for special value attaching to market value for land taken was contrary to well established authority and factually hopeless. Notwithstanding this, however, the Tribunal considers that there should have been negotiations.

Section 62(1)(b) Land Valuation

33. All three valuers based their calculations on the premise that the property had its "highest and best use" as a lifestyle property, with limited subdivisional potential. This was reflected by all three valuers in their "before value" assessments.

34. A summary of the respective valuations (including appropriate adjustments conceded at the hearing) is as follows:

	Claimant (B S-Bush)	Respondent (A D Roberts)	Respondent (I W Gribble)
'Before' values – 25.8833 ha			
Gross realisation	$1,212,500 (exc. house/site	$1,585,000 (inc house + site)	$1,460,000 (inc house + site)
Special value – habitat	$1,110,000	Nil	Nil
Profit and risk- percentage	15%	15-20%	10%
Profit and risk – dollar amount	$ 234,129	$ 208,251	$ 112,670
Development costs	$ 268,026	$ 256,870	$ 279,700
Net block value	$1,605,000	$1,082,700	$ 952,875
House + curtilage	$ 433,000	($ 480,000) (inc gross real)	($ 460,000) (inc gross real)
Value of 'before' land (inc GST)	**$2,038,000**	**$ 995,000**	**$ 952,875**
'After' value – 6.100 ha			
Land (lifestyle site)	$ 300,000	$ 180,000	$ 365,000*
Improvements	$ 239,000	$ 180,000	$ 200,000
Allowance for inj. aff.	30% ($162,000)	(inc 30%)	approx. 23.75%
Value of 'after' land inc. dwelling	**$ 377,000**	**$ 360,000**	**$ 430,890 (inc GST)**
Assessed compensation	$1,661,000	$ 635,000	$ 521,985

35. The Tribunal considers that the valuation undertaken by Mr A D Roberts, with one significant adjustment for profit and risk on the dwelling, most accurately reflects the appropriate market value of this property on both a "before and after" basis.

36. Mr Roberts provided a relevant and compelling analysis of market sales to support his assessment of the land value in a "before" situation, at

approximately $21,535 per hectare. The value assessed relates to the 24.8833 hectares of land excluding the existing house site and curtilage, which he separately assessed at $480,000. The value ascribed to the bulk of the land reflected the acknowledged subdivisional potential with the ability to create at least a further three smaller bush allotments as well as a larger bush holding of 21.5 hectares.

37. Accordingly the Tribunal adopts the figures as applied by Mr Roberts in his assessment of the house lot and curtilage. However his deduction for profit and risk and selling costs associated with this component of the property is excluded as when the property is valued as a lifestyle holding there is no deduction required for profit and risk and selling costs for the main house and site. Similarly, the Tribunal adopts his assessed land values pertaining to the balance of the land, including his deductions for profit and risk, selling and development costs. His assessed profit and risk at 20% relating to the subdivisional potential of the residual land can be compared with the suggested rate of 15.0% adopted by the claimant's valuer Mr Stafford-Bush. The latter figure was based on his gross realisation in excess of $2.322 million, for land grossly inflated by the inclusion of the unsubstantiated but claimed special value.

38. Mr Roberts' assessment of the dwelling and associated house site (approximately 1 hectare) at $480,000, can be compared with the figures assessed by Mr Gribble at $460,000 and Mr Stafford-Bush at $433,000.

39. In the "after" situation i.e. in assessing the 6.10 hectares residual land, again the assessment undertaken by Mr Roberts at $360,000 has been adopted. His assessment of value includes a generous adjustment of 30.0% for the likely impact and effect of the adjoining motorway, which is coincidentally a deduction similar to that adopted by Mr Stafford-Bush and

compares with a lower deduction of approximately 20-25% as applied by Mr Gribble.

40. Applying the above adjustments to the values as assessed by Mr Roberts results in a compensation assessment to the claimant for the loss sustained in respect of the Transit acquisition of 19.7833 hectares as follows:

"Before" value – 25.8833 hectares	
House site - 1.0 hectares inc. dwelling and site improvements	$ 480,000 (including GST)
Balance of land – 24.8833 hectares	
Value reflecting subdivisional potential	$1,105,000
Adjusted for GST =	$ 982,222
Less selling costs 4.5%	$ 49,725
Profit and risk 20%	$ 155,416
Costs of subdivision	$ 241,351
Value of balance land ($21,530 per hectare)	$ 535,730
Plus GST 12.5% =	$ 602,696 say $ 602,700
Value of "before" property	**$1,082,700 (including GST)**
"After" value – 6.100 hectares House site of 6.100 hectares plus dwelling and associated site improvements	
Assessed value after allowance for injurious affection/motorway impact	$ 360,000 (including GST)
Compensation payable:	$ 722,700 (including GST)

The award

41. As at the specified date:

Assessed value of "before" property	$1,082,700 (including GST)
Assessed value of "after" property after allowance for injurious affection	$ 360,000
Compensation payable in respect of land is:	$ 722,700 (including GST)
The value of the pine trees is:	$ 1,400 (including GST)
Total compensation:	$ 724,100 (including GST)
Less advance compensation paid:	$ 520,000
Balance owing:	$ 204,100

Plus interest at 7.5% on $724,100 from specified date to 29 November 2002 and on $204,100 from 30 November 2002 to date of payment.

Plus costs which are reserved. Counsel are to submit a memorandum in respect thereof within 14 days.

Judge J D Hole
(Chairman)