IN THE COURT OF APPEAL OF NEW ZEALAND CA93/99

BETWEEN JUKEN NISSHO LIMITED

Appellant

AND THE ATTORNEY-GENERAL

Respondent

CA96/99

BETWEEN CARTER HOLT HARVEY FORESTS LIMITED

Appellant

AND THE ATTORNEY-GENERAL

Respondent

Hearing:	13 and 14 March 2000
Coram:	Richardson P Henry J Thomas J Blanchard J Tipping J
Appearances:	D A R Williams QC and A D Banbrook for Appellant in CA93/99 G P Curry and R C Turkington for Appellant in CA96/99 J J McGrath QC, M T Parker and E F FitzGerald for Respondent in CA93/99 and CA96/99
Judgment:	22 March 2000

JUDGMENT OF THE COURT DELIVERED BY HENRY J

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[1] These two appeals raise common issues concerning the construction of provisions in Crown forestry licences relating to the periodic review of licence fees.

The issues come to this Court by way of appeal on questions of law arising from arbitral awards made by the appointed umpire, Mr J P Larmer. The purpose of the arbitrations was to resolve a dispute as to the amount of the yearly licence fees payable following a review of the then existing fee. In each case the dispute included competing claims as to the basis upon which the umpire was to embark upon his determination.

General background

[2] In 1998 the Government announced its intention to sell the Crown's commercial forestry assets. That led to litigation challenging the disposal as being inconsistent with the judgment of this Court in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641. The litigation, also reaching this Court (*New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142), resulted in a settlement which was given effect by the Crown Forest Assets Act 1989. The long title, which it is legitimate to use for the purpose of interpreting the Act as a whole and ascertaining its scope (*Vacher & Sons Limited v London Society of Compositors* [1913] AC 107,128), reads:

> An Act to provide for-
> (a) The management of the Crown's forest assets:
> (b) The transfer of those assets while at the same time protecting the claims of Maori under the Treaty of Waitangi Act 1975:
> (c) In the case of successful claims by Maori under that Act, the transfer of Crown forest land to Maori ownership and for payment by the Crown to Maori of compensation:
> (d) Other incidental matters.

[3] The scheme accordingly provides for the sale of forests while preserving Maori claims to the underlying land, and requiring transfer of ownership of that land if a final recommendation is made by the Waitangi Tribunal. The land is effectively protected from disposition unless and until exonerated by the Tribunal from any claim for return to Maori. Crown forest assets on the other hand, which include forests and improvements, can be transferred to a purchaser who will also be granted a licence in respect of the land on which those assets are situated. The Act also places some restrictions on the licensee's rights of user. Protective covenants, and public access easements may apply, and in respect of land which is the subject of a

Tribunal recommendation for return, particular areas when clear felled will then be excluded from the licensee's rights of user and that land returned to Maori. Importantly all licence fees are paid into a forestry rental trust pending the making of recommendations by the Tribunal. The setting which gave rise to the licences in question was therefore one in which forestry land was recognised as being available for return to Maori through the Tribunal jurisdiction, but was able to be used commercially by third parties in advance of the determination of claims. In other words, sale of the forests and the commercial use of the land on which the forests stood sensibly was not put in abeyance pending Tribunal recommendations. The Act clearly envisages a regime under which the Crown may sell its forests at market value, and as a necessary adjunct allow on terms the use of the forestry lands at market rates while still maintaining ability to meet its Treaty obligations.

The review provision

[4] The licences in question generally are in common form. That granted to Juken Nissho Limited can be used as the appropriate document for present purposes. The term of the licence commenced on 10 December 1990 for an initial period of 10 years and thereafter year by year by way of automatic extension but subject to termination provisions not directly relevant. The licence fee was fixed at $191,477.00 per annum. Clause 4.3 provides:

> 4.3 Periodic Review of Licence Fee
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> The licence fee shall be reviewed on the 10th day of December 1993 and every third successive anniversary thereafter (each such date being herein called a "Review Date") in accordance with the following provisions so that the yearly licence fee payable for the next three year period commencing on any Review Date will be 7% of the Land Value as at that date:

[5] Land value is defined in the licence under cl 1.1.6:

> 1.1.6 "Land Value" in relation to the Land (as defined in Clause 1.1.5) as at any Review Date (as defined in Clause 4.3) means the sum that the Land, if encumbered by any mortgage or other charge thereon, might be expected to realise at that Review Date if offered for sale on such reasonable terms and conditions as a bona fide seller of the Land might be expected

to impose but adjusted as may be necessary to take into account the terms and conditions of this Licence;

[6] In his awards, the umpire determined that the land value which was required to be fixed before adjustments for the term and conditions of the licence was the fee simple value of the land. He rejected the contentions that the value was to be of the land subject to the licence (i.e. of the Crown's estate or interest in the land), and that the constraint on sale provisions contained in particular in s35 of the Act were to be taken into account in that exercise. The umpire placed reliance on separate opinions to that effect provided to him by two Queen's Counsel. Following appeals to the High Court, Paterson J in a carefully reasoned judgment upheld the awards.

The Issues

[7] The core issue identified by Mr Curry for Carter Holt Harvey Forests Limited was embraced by his submission that the subject matter of the valuation was the Crown's interest in the land. This too was the substance of the submissions of Mr Williams QC for Juken Nissho, although they were framed with particular reference to s35 of the Act and the need to take that into account in assessing the land value under cl 1.1.6 for the purposes of the review. For the Crown, Mr McGrath QC in a comprehensive argument supported the conclusions reached by both the umpire and Paterson J.

Discussion

[8] The grant of a Crown forestry licence is permitted by s14. A licence is binding on the Crown's successors in title, and is unaffected by transfer of the land or by its return to Maori ownership (s15). Section 29 is concerned with the annual licence fee. Its relevant provisions are:

> **29. ANNUAL LICENCE FEE**
>
> (1) Every Crown forestry licence shall provide for the payment, and periodic review, of an annual fee for the use of the licensed land.

(2) The annual licence fee shall be a market rate agreed, or determined in a manner agreed, between the Crown and the licensee and specified in the Crown forestry licence.

(3) For the purposes of this section, a Crown forestry licence may, if the Crown and the licensee agree,–
(a) Provide that on a periodic review the annual licence fee shall be an amount equal to a specified percentage of the value of the licensed land:

[9] The licences in question were granted in terms of subs (3)(a), with the specified percentage being 7. Land, and licensed land, are defined in s2:

"Land", whether or not used as part of any other defined term, includes any interest in land, but does not include a Crown forestry licence:

"Licensed land" means Crown forest land that is subject to a Crown forestry licence and includes land that was at any time Crown forest land and that is subject to a Crown forestry licence:

[10] Section 35 restricts the Crown's right of sale of the land. It states:

35. RESTRICTIONS ON SALE OF CROWN FOREST LAND–
(1) The Crown shall not sell or otherwise dispose of any Crown forest land that is subject to a Crown forestry licence except in accordance with section 8 of this Act.
(2) The Crown shall not sell, assign, or otherwise dispose of, or deal with, any rights or interests in any Crown forestry licence unless the Waitangi Tribunal has made, in relation to the licensed land, a recommendation under section 8HB(1)(b) or section 8HB(1)(c) or section 8HE of the Treaty of Waitangi Act 1975.

[11] The recommendations referred to in subs (2) are those exonerating land from return to Maori ownership. Section 8 gives the responsible Ministers power to transfer an interest in Crown forest land in exchange for an interest in adjoining land. It has no present relevance. Section 36 requires land which is the subject of a final recommendation for return of licensed land to Maori ownership, to be returned. It also provides for the payment of compensation to Maori.

[12] We turn next to the terms of the licence. Under section 2 the licensee is granted the right to use the land for any purpose, without unreasonable interference by the Crown. Land is defined as that described at the commencement of the

document, where it is recorded by means of a legal description, and absent of any form of encumbrance. The term excludes trees, and also improvements acquired by the licensor. Section 3, which stipulates the term of the licence, and Section 4 which sets the licence fee and its review provisions have already been referred to. The latter also contains a mechanism for reviewing the basis upon which the licence fee is to be fixed.

[13] To support the submission that the land to be valued under cl 4.3 was the land subject to the licence, or the Crown's interest in the land, reliance was placed on the requirements of s29(3)(a) for the reviewed licence fee to be a percentage of the value of "the licensed land". It was contended that because that term was defined as being land subject to a licence it was that which had to be valued. In our view the contention is misconceived. The Act uses the terms "Crown forest land", "land", and "licensed land". Licensed land is simply a means of identifying the land which is under consideration. To read the term in the way suggested would be to make the fee determination process not only commercially unreal, but also illogical. The licensee is to pay a market fee for use of the land. The use it is entitled to is not of the land subject to a licence to itself, but of the "unencumbered" land in accordance with the terms of the licence. From a practical viewpoint, the position is similar to that which arises on review of a ground rental under a commercial lease. It would be nonsense to suggest that where the methodology adopted was the acceptable one of applying a percentage to the value of the land, the value to be assessed is the lessor's interest in the land, or the land encumbered by the lease. There is no cause whatever to treat this licence differently, and the statutory definitions and the requirements of s29 do not dictate otherwise. No sensible reason could be proffered as to why the Crown effectively should devalue its land and the return from it in this way. It would also run directly in conflict with the whole concept of the owner receiving a market return for permitting a third party to have extensive rights of user of the land.

[14] It was also argued for the licensees that s35 of the Act was a constraint on disposition of the land which affected its value for review purposes. It was contended that although what is in effect a prohibition against sale is to be disregarded because an hypothetical sale is envisaged, the constraint must still be

taken into account because it will impact on the hypothetical purchaser, who will be subject to the same constraint. Reliance was placed on the judgment of this Court in *Valuer-General v Mangatu Inc* [1997] 3 NZLR 641. At issue in that case was a valuation under the Valuation of Land Act 1951. The land was Maori freehold land within the meaning of Te Ture Whenua Maori Act 1993 which placed significant constraints on the sales of Maori land. Those constraints expressly applied to an alienation such as that envisaged by the hypothetical sale, and would bind any purchaser.

[15] We do not see *Mangatu* as assisting the licensees in the present cases. First, the valuation there was required to be of the owner's estate or interest in the land - not of the fee simple. Secondly, the 1993 Act constraints against alienation applied to any purchaser of the land. By contrast, the present cases require the valuer to determine what the hypothetical purchaser would pay for the land, not the owner's estate or interest in the land. The statement of Lord Radcliffe in *Gollan v Randwick Municipal Council* [1961] AC 82, 94 is apposite:

> It is not in dispute that a formula of this kind requires the making of certain hypotheses. A sale of the fee simple has to be assumed whether or not the land in question can legally be sold, and the fact that there is some lawful impediment to sale cannot be allowed to enter into the assessment of value. Similarly, it is irrelevant that the land may be so settled or encumbered that there is no single person or even combination of persons who can at the relevant date effectively transfer the fee simple. All this follows from the fact that a sale of such an estate has to be assumed.

[16] Further, s35 of the Act is expressed in terms which apply only to the Crown - not to any hypothetical purchaser. And perhaps more importantly, the whole purpose of the review provision is to provide a mechanism for determining the market fee to be paid for the use of the land, which is markedly different from a valuation for rating purposes. The s35 constraint has no bearing on the licensee's right of user, or the value of the land to it. On analysis, the s35 argument is in essence another way of contending that it is the Crown's estate or interest which is to be valued, not the fee simple - a proposition which must be rejected. This conclusion does not offend valuation principles, and in addition is necessary if effect is to be given to the clear intent of the licence as it fits into the statutory regime.

[17] Authorities relied upon by Mr Williams such as *In re the Hutt Park and Racecourse Board* (1907) 27 NZLR 246 and *The Valuer General v Ormsby* (1907) 27 NZLR 44 were also concerned with a statute which required valuation of the owner's estate or interest, and are distinguishable on that basis alone. The statutory context in each is also far removed from that of the present cases.

[18] There remains for consideration the concluding part of cl 1.1.6 which allows the land value to be adjusted as may be necessary to take into account the terms and conditions of the licence. In context the purpose of this provision becomes clear. It is a drafting provision common to all the licences and is designed to ensure that the valuer gives weight to any particular terms or conditions which may impact on the licensee's rights of user. The market rate which the Crown is entitled to receive and which the licensee is required to pay must take into account the terms and conditions of the licence, otherwise it would not be a true market rate for the transaction. Where the determination process is governed by applying a fixed percentage rate to value, the available method is restricted to some adjustment to value (if necessary). That gives recognition to the reality of the situation. It is also significant that the adjustment exercise is applied to the value as determined by the hypothetical sale, which is the initial step in the process. It is that value which is, if necessary, adjusted to give a final value to which the percentage rate is applied. Accordingly the validity of the theoretical sale is not impugned, and there is no inconsistency between that exercise and the subsequent adjustment exercise. The provision neither requires nor supports a construction which results in the valuation being of the Crown's estate or interest in the land, which again is the effect of the submissions for the licensees.

Conclusion

[19] For the above reasons we hold that the umpire made no error of law in making the awards, and that Paterson J was correct, essentially for the reasons given by him, in dismissing the appeals to the High Court.

[20] Both appeals are accordingly dismissed. The respondent is allowed costs in the separate sum of $7500 as against each appellant, together with reasonable disbursements to be fixed by the Registrar if necessary.

Solicitors
Hesketh Henry, Auckland, for Appellant in CA93/99
Russell McVeagh McKenzie Bartleet & Co. Auckland, for Appellant in CA96/99
Crown Law Office, Wellington