IN THE LAND VALUATION TRIBUNAL
HELD AT AUCKLAND **LVP 4/02**

IN THE MATTER of Section 40(2A) of the Public Works Act 1981

BETWEEN EVAN VINCENT KERR-TAYLOR

Applicant

AND CHIEF EXECUTIVE OF LAND INFORMATION NEW ZEALAND

Respondent

TRIBUNAL:

Chair: His Honour Judge J D Hole

Date of Hearing: 22 May 2007

Date of Decision: 8 June 2007

Appearances: Mr R E Bartlett for Applicant
Mrs R Chan for Respondent

DECISION OF TRIBUNAL

The application

[1] By way of an originating application dated 18 March 2002 the applicant applied to the Tribunal seeking a number of orders including the fixing of value for a certain parcel of land being transferred to him by the respondent and for the fixing of costs. The initial document in response filed by the respondent was a notice of

intention to appear dated 22 March 2002 which indicated simply that the respondent intended to appear and be heard in opposition to the application. On 3 April 2006 a memorandum was filed in the Tribunal recording that the parties had agreed upon the value of the land. The memorandum requested the Tribunal to make consent orders fixing the value of the land in the sum of $750,000 excluding GST; reserving costs, and that any party seeking costs should file a memorandum in support of the application by 13 April 2006, any memorandum in reply to be filed by 26 April 2006.

[2] As the parties have failed to reach an agreement as to costs, a hearing of the Tribunal was convened and evidence and argument were heard on 22 May 2006. This decision is intended to determine the outstanding costs issue.

History

[3] In the 1930's a property in Mount Albert was acquired by the Crown pursuant to the Public Works Act. The land is located at 120 Mt Albert Road, Mt Eden, Auckland and is described as Lot 1 DP200541 being a subdivision of Lot 2 DP155403 contained in certificate of title 92D/434.

[4] For many years the land was used by the Department of Scientific and Industrial Research. In the early 1990's the functions carried out by that department were transferred to a number of Crown Research Institutes and one of those, the Horticultural and Food Research Institute of New Zealand Limited ('Hort Research') acquired the land. To prevent the operation of s 40 of the Public Works Act 1981, s 30 of the Crown Research Institutes Act 1992 had been enacted and was applied.

[5] In due course Hort Research determined that it no longer required the land for a public work and ultimately the provisions of s 40 of the Public Works Act 1981 were invoked. The applicant is one of the successors of the registered proprietor of the land when it was acquired in the 1930's.

[6] On or about 19 October 2001 the respondent, acting for Hort Research, offered the land to members of the applicant's family at a price of $2,250,000

(inclusive of GST, if any) or, if there was failure to agree on price, at a price to be determined by the Land Valuation Tribunal. The applicant was the only member of his family who decided to accept the offer. This he did: but suggested that the price should be $1,115,000 (inclusive of GST) or at such price to be determined by the Land Valuation Tribunal as at the date the land should have been offered back in accordance with the Public Works Act 1981.

[7] Between the time that that agreement was entered into and the consent memorandum of 3 April 2006 both parties undertook various actions which had the ultimate result in the price for the land dropping to the agreed $750,000.00 excluding GST. It is apparent that the main reason for the drop in price was that in a judgment dated 3 May 2004 the High Court declared that the date at which the price was to be determined was to be 1 July 1997. (The respondent had submitted that the correct date was on or about the date of the s 40 agreement).

[8] After having entered into the agreement to acquire the land, the applicant began to suspect that the land might be contaminated in some way due to the previous activities conducted on it by the Department of Industrial and Scientific Research. Hort Research was not convinced; and for some time refused the applicant permission to enter the land to conduct appropriate investigations. After the High Court decision, however, Hort Research recognised investigations as to contamination should be conducted. Both the applicant's engineers and Hort Research engineers conducted appropriate investigations but were unable to agree on the extent of the contamination. One reason for their difference of opinion seems to have been that the Auckland Regional Council was reluctant to specify a standard that would be acceptable and which would not give rise to any adverse notation on the land information memorandum nor be a barrier to development for residential use. Ultimately, and all parties accept, wisely, Hort Research decided that it should decontaminate the land in accordance with the standard ultimately set by the Auckland Regional Council.

[9] Once this was done, both parties went through a hypothetical subdivision exercise employing surveyors and valuers.

[10] It was only after this exercise had been completed by both parties that the valuers could seriously attempt to fix a price for the land as at 1 July 1997. Initially, the respondent fixed a price of $1,200,000 for the land. The applicant fixed a price of $810,000 (if off-site storm water was available) or, $680,000 (if on-site ponds were needed). Ultimately both the valuers advised their respective clients to settle at $750,000.00 plus GST. (Apparently the land has been on-sold for in excess of $5,000,000).

[11] This whole convoluted exercise has involved the applicant in occurring costs which are greater than would normally be the case. The total costs which the applicant seeks from the respondent total $133,497.86.

The 'Buy-Back' procedure

[12] Section 40 Public Works Act 1981 sets out what is to happen where any land held for a public work is no longer required for that public work. In terms of s 40(2) the Crown must offer to sell the land by private contract to the person (or his successors) from whom it was originally acquired. The sale price is to be the current market value of the land as determined by valuation or such lesser price as the Crown determines. Section 40 (2A) provides that if the Crown and the offeree are unable to agree on a price following such an offer, the parties may agree that the price be determined by the Land Valuation Tribunal.

The agreement.

[13] In accordance with its usual practice, the respondent presented the applicant with an offer for sale document which included a number of provisions (some of which are not expressly authorised by s 40). The recorded price was $2,250,000 (inclusive of GST, if any,). It required a deposit of 10% of the purchase price. In the general conditions of sale it stated that the purchase price was the current market value set by valuation.

[14] Clause 1.2 provided:

'If the chief executive (or authorised vendor agency) and the offeree are unable to agree on a price following an offer made under subsection (2) of this section, the offeree may execute this contract agreeing to purchase the property at the price determined by the Land Valuation Tribunal (in accordance with section 40 (2A) Public Works Act 1981). This should be noted as a special condition of sale'.

[15] Clause 8.1 of the offer stated:

'Each party shall bear their own legal expenses'.

[16] However Clause 3.3 required the offeree at its own expense to prepare the memorandum of transfer.

[17] The applicant accepted in writing the offer to purchase the property on the terms and conditions set out in the written offer. However, under the special conditions contained in Clause 16 of the offer the applicant inserted an additional condition as Clause 16.2 reading

'The offeree agrees to purchase the property for the sum of $1,115,000.00 (inclusive of GST) or at the purchase price to be determined by the Land Valuation Tribunal as at the date the land should have been offered back in accordance with the Public Works Act 1981'.

[18] It is apparent that Clause 16.2 was inserted pursuant to the requirement in the offer set out in Clause 1.2. However, Clause 16.2 went further than what was envisaged in Clause 1.2 by stating the price at which the applicant was prepared to purchase the property.

[19] Initially, I had some doubts as to whether the offer and acceptance document (exhibit A) to Mr Storey's evidence was a contract as envisaged in s 40(2) Public Works Act 1981. I am now satisfied that it did constitute a contract which is binding upon the parties because:

a) This was accepted by both parties and the Court in the High Court proceedings;

b) At all times (including the payment of a deposit) both parties have acted as if it were a binding contract;

c) Whilst the new Clause 16.2 did add two new aspects to the proposed offer neither of them was of significance.

[20] The first was a declaration by the applicant as to the price at which he was prepared to purchase the property; the second was a requirement that the date of purchase price to be determined by the Land of Valuation Tribunal should be the date when the land should have been offered back in accordance with the Public Works Act 1981.

[21] I am satisfied that the effect of Clause 16.2, however, was an acceptance of the respondent's offer. The insertion of the price at which the applicant thought it should purchase the land was merely an indication of what he thought the price should be and its only real significance was to determine the amount of deposit which he should pay. Other than that, the effect of it was to indicate that price was not agreed. The addition of requiring the date for the purchase price to be determined as at the date the land should have been offered back simply accords with the law and adds nothing to what had been offered by the respondent.

[22] As indicated earlier in this decision, some of the provisions of the offer were outside the specific ambit of s 40. This includes Clause 8.1. Notwithstanding this comment, however, a provision such as Clause 8.1 would be a normal provision in a contract for the sale and purchase of land. Nevertheless, the document which was presented to the applicant was merely an offer and it was up to the applicant as to whether or not all the terms and conditions therein stated were accepted.

[23] This comment is made because Mr Storey (the solicitor for the applicant) stated that the applicant had no choice but to accept the terms and conditions upon which the respondent made its original offer. I am not certain that that is correct: I can see no reason to prevent the applicant, upon being presented with the offer document, to have amended it to suit his requirements, in which case it would have constituted a counter offer to be accepted by or rejected by the respondent. The suggestion that the applicant was in a poor bargaining position is difficult to accept. Indeed, I think it was the respondent which was in the worst bargaining position because of its statutory obligation to offer the land back to the designated

offeree. Section 40(2) envisages negotiations leading to a contract. Thus, if the applicant had been particularly concerned as to the operation of Clause 8.1, it would have been possible for him to have amended it to provide, for example, that the costs of any land valuation proceedings should be determined by the Tribunal. This was not done. Clause 8.1 was accepted by the applicant and is binding on him.

Issues

[24] In the course of the hearing, five issues emerged. They are:-

a) Does Clause 8.1 of the agreement preclude the making of an award of costs in respect of the land valuation proceedings?

b) If so, is the Crown estopped by its conduct from being able to rely on Clause 8.1?

c) Does Clause 8.1 include all the costs claimed?

d) If the answer to (c) is 'no', upon what basis can the Tribunal award 'the other costs'?

e) If Clause 8.1 of the agreement does not preclude the making of an award of costs in the land valuation proceedings, are the costs claimed fair and reasonable in the circumstances?

Clause 8.1 of the Agreement

[25] The respondent's principal submission was that Clause 8.1 of the agreement had the effect of precluding the making of an award of costs by the Tribunal in respect of the land valuation proceedings or in respect of negotiations leading to a settlement. Crown relied upon a decision of this Tribunal ***Chief Executive Land Information New Zealand v David Anthony Culav & Ors*** LVP 056/00 dated 23 July 2002. ***Culav***, as in this case, involved a s 40 transaction. There the parties failed to agree upon a price and the Land Valuation Tribunal was obliged to fix it.

[26] In ***Culav*** it was held that the Tribunal did not have jurisdiction to award costs when considering an application under s 40(2A) of the Act. In this regard, both parties to this proceeding and I accept that what was stated in ***Culav*** in para 2 as to jurisdiction is wrong. I am satisfied that this Tribunal does have power to fix costs as it is deemed to be a Commission under the Commission of Inquiry Act 1908 pursuant to s 19(14) of the Land Valuation Proceedings Act 1948. Section 11 of the Commission of Inquiry Act 1908 gives power to the Tribunal to give order payment of costs.

[27] In ***Culav***, not withstanding its determination as to jurisdiction, the Tribunal considered the merits of the application for costs in case it was wrong in respect to the jurisdictional question. The Tribunal stated:

> *'The second submission made by the respondents is that the principles applicable to compensation claims referred to in s 90 of the Public Works Act 1981 apply. In this regard the respondents refer to such cases as* ***Minister of Works and Development v Cromwell Farm Machinery Limited*** *[1986] 2 NZLR 29. In compensation cases, where land is compulsorily acquired, litigants constitute "litigants of a special kind". This is because of the compulsory nature of the transaction. In respect of s 40(2A) transactions the parties to the transaction enter into it voluntarily. This is particularly the case in respect of parties in the position of the respondents. They are not required to re-purchase the land; this is their choice. The valuation procedure referred to in s 40(2A) is there to assist them in exercising their choice. They are not obliged to take advantage of it. They are not "litigants of a special kind". Accordingly, the principles applicable to compensation cases are not relevant to s 40 (2A) applications*
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> *Before the procedure envisaged in s 40(2A) was undertaken, it was necessary for the parties to enter into an agreement for the sale and purchase of the land. There is nothing in the Act, which dictates the terms of such an agreement. Those terms were entered into voluntarily by the parties. The Agreement for Sale and Purchase document entered into by the parties contains a warning that "This is a binding contract. If you have any doubts, professional advice should be sought before signing." The Agreement states that the price to be paid for the land is "to be determined by reference to the Land Valuation Tribunal, in accordance with the Land Valuation Proceedings Act 1948". In addition, under the general conditions of sale at clause 1.1 the Agreement states "The parties have, pursuant to s 40 (2A) Public Works Act 1981, agreed that the price is to be determined by reference to the Land Valuation Tribunal, in accordance with the Land Valuation Proceedings Act 1948". Thus, the Agreement for Sale and Purchase envisages the price being fixed by the Land Valuation Tribunal. Clause 6.1 states "Each party shall bear their own legal expenses". The respondents claim that this was not intended to mean the costs of and incidental to the Land Valuation proceedings. Instead, so the respondents claim, it was simply intended to mean the costs of the Agreement for Sale and Purchase. The Tribunal considers that as the Agreement for Sale and Purchase envisages the proceedings before the Land Valuation Tribunal, these proceedings are intended to be covered by clause 6 of the Agreement. To attempt to limit clause 6 to the conveyancing aspects of the transaction is artificial given the overall nature of the Agreement. The respondents submit that the Tribunal has no jurisdiction to rule on the contents of the Agreement. However, clause 6 clearly states the intention of the parties who entered into the Agreement and this is a factor, which is relevant in determining this application. The Tribunal considers that the respondents are not entitled*

to succeed on this application when they have specifically indicated at the commencement of the transaction that they would bear their own costs.'

[28] For the applicant, Mr Bartlett argued that Clause 8.1 only referred to conveyancing costs. This was the very issue which was determined in ***Culav***. The decision in ***Culav*** is not binding on this Tribunal: it is of persuasive value only. Given that I was the author of the ***Culav*** decision, it is axiomatic that I should be cautious about accepting that decision at face value and without further thought. However, upon further consideration, I am satisfied that what was stated in paras 5 and 6 of the ***Culav*** decision is correct. Clause 8.1 of the agreement (in this case) cannot be confined to the conveyancing aspects only of the transaction. In my opinion it applies to all the events indicated in the agreement leading to a settlement of the transaction. One of those events is the fixing of the price by the Land Valuation Tribunal.

[29] Accordingly, I consider that Clause 8.1 of the agreement does preclude the making of an award of costs in respect of the land valuation proceedings arising out the agreement. Further, it precludes the making of an award of costs in respect of any activities mentioned in the agreement and undertaken by the applicant which lead to the agreement as to price.

Estoppel by conduct

[30] Mr Bartlett, for the applicant, argued that if Clause 8.1 did preclude the Tribunal from making an award of costs in these circumstances, by its conduct the respondent was estopped from relying upon Clause 8.1. In this regard the conduct upon which the applicant relies to found the estoppel is:

a) The failure to plead Clause 8.1;

b) The failure to oppose an award of costs in respect of the High Court proceedings; and/or

c) The fact that the respondent consented to costs being reserved in the consent memorandum of 3 April 2006.

[31] The principles pertaining to estoppable by conduct are well known. In order for conduct to constitute an estoppel, the conduct must be clear and unequivocal. As a result of it, the representee needs to have changed his position to his detriment.

[32] The failure to plead Clause 8.1 is insufficient to constitute conduct founding an estoppel. Pleadings before the Land Valuation Tribunal are normally very brief and lack particularity. The reason for this is that the jurisdiction of the Land Valuation Tribunal is very limited and, in general terms simply involves the fixing of the value for a piece of land. There is no necessity in proceedings before the Land Valuation Tribunal to have the sort of pleadings normally required in civil cases. In this case, the notice of intention to appear as filed by the respondent indicated that it opposed all the orders sought in the originating application. Whilst this opposition was of a very general nature, in my opinion it was sufficient to indicate to the applicant that any application for costs was opposed.

[33] It is clear that neither the applicant nor the respondent considered Clause 8.1 when the costs issue was determined in the High Court proceedings. However, in my opinion there was no reason for either of them to do so. The High Court proceedings were proceedings brought by the applicant to determine the date at which the valuation should be undertaken. They were not referred to in the agreement and I doubt that they were envisaged by it. In these circumstances I doubt that Clause 8.1 would have prevented an award of costs in respects of the High Court proceedings.

[34] The consent memorandum of 3 April 2006 did reserve costs. This was because neither party could agree on whether or not costs should be paid by the respondent to the applicant. Mr Storey, who represented the applicant in the negotiations leading to the settlement, was very concerned that the respondent should meet some of the substantial costs incurred by the applicant. Mr McGilvary, the Chief Executive Officer of Hort Research, who conducted the negotiations for the respondent, was unaware of Clause 8.1. He thought that Hort Research had already incurred enough costs incidental to the transfer of the land to the applicant and that it was unfair for Hort Research to bear any further costs in these circumstances. In my opinion, the fact that both parties consented to costs being

reserved does not mean that an award of costs would inevitably be made. Rather, it means that the issue of costs remained at large and involved not only a determination of quantum but also as to whether or not any costs at all should be awarded. To try to limit a reservation of costs as to quantum only is unrealistic. Indeed, if Mr Bartlett is correct in his submission in this regard, then a short answer to it is to make a nil award notwithstanding liability. In my opinion that would be a somewhat dishonest approach to the reservation of costs and the issue of liability must always be at large in these circumstances.

[35] I conclude, therefore, that none of the matters alleged to constitute conduct giving rise to an estoppel is sufficient to do so. Likewise, the conduct cumulatively is insufficient to give rise to an estoppel.

[36] In addition, I am of the opinion that the applicant's position did not change to his detriment. Mr Storey said that the applicant would not have entered into the settlement if he had thought that he could not recover some of his costs. It was suggested that if the applicant could not recover his costs, then he would have permitted the matter to have gone for determination before the Land Valuation Tribunal. In the light of ***Culav***, however, even if the applicant had permitted the matter to go to the Land Valuation Tribunal for determination, the applicant would not have received costs. Given that both valuers were agreed as to price, the Tribunal would have made an order fixing the price in the sum of $750,000 (exclusive of GST). Thus, given the settlement as to price already achieved, any suggestion of going to the Land Valuation Tribunal would have been a futile exercise.

[37] I conclude that the Crown is not estopped from its reliance on Clause 8.1 of the agreement.

Remaining issues.

[38] Given my conclusions on the first two issues, only minimal comment is required in respect of the balance.

'Legal Expenses'

[39] For the applicant, it was argued that Clause 8.1 referred to 'legal expenses' only and did not cover such expenses as valuers' fees, surveyors' fees and engineering expenses. Thus, if costs were being awarded by the Land Valuation Tribunal, then the only costs recoverable pursuant to such an order would be legal and witness expenses.

[40] Presumably, in proceedings before the Land Valuation Tribunal there would have been surveying evidence relating to the hypothetical subdivision, possibly engineering evidence relating to it and, of course, valuation evidence.

[41] Most of these expenses would have been included as "witness expenses". However, the engineering fees relating to the contamination issue do not relate to any evidence which is likely to have been given for the purpose of fixing the price of the land. They would be outside the ambit of witness expenses.

Other Costs

[42] Accepting that some of the expenses claimed by the applicant could not be witness expenses, it was not indicated to the Tribunal as to how the Tribunal would have power to order that the respondent should pay those other expenses (relative, for example to the contamination issue). In short, the Tribunal would not have jurisdiction to make such an order.

Are the costs claimed fair and reasonable?

[43] Mr Storey conceded that approximately 40% of the fee charged in his account of 20 October 2005 relates to the High Court proceedings and thus should be excluded in respect of any claim made in respect of these proceedings. The Telfer Young account does not relate to any evidence likely to be given by a member of that firm before the Tribunal: it related to the fixing of the original response figure of $1,115,000. The only valuation expenses which could probably be construed as giving rise to possible evidence are those fees incurred after the date of the

High Court decision fixing the date at which the valuation exercise needed to be undertaken.

Conclusion

[44] When I initially reached the conclusion that the application for costs should be declined, I thought the result was a harsh one for the applicant. Upon reflection, however, I doubt it is onerous. The applicant is in the same position as anyone else who wants to buy a piece of land except he has the arbitral process available if a price cannot be agreed. He has engaged in quite a sophisticated negotiating process with the respondent and has used every negotiating weapon available to him including the High Court action and the threat of proceedings before this Tribunal. His efforts have been very successful. In the overall scheme of things, for what has been a relatively small outlay, he has managed to have the price for the land reduced from in excess of $2,000,000 to $750,000.

[45] Whilst this may be a simplistic way of looking at what happened, nevertheless, however one looks at it, an excellent result has been achieved for the applicant. If the applicant had not taken all the steps he did, he could easily have been left with paying somewhere in between $2,250,000 and $1,115,000 for contaminated land. Throughout, it has been a commercial transaction conducted in a businesslike way. To achieve a profit, a businessman usually incurs some expenditure.

[46] Whilst this case has not been decided on these grounds, these comments may be helpful to the applicant in his rationalisation of what has occurred.

[47] The application for costs is declined.

Judge J D Hole (Chairman)