IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY CP 297-SD/00

BETWEEN A.R. MORRISON
First Plaintiff

AND D.S. BLAMPED
Second Plaintiff

AND THE ATTORNEY-GENERAL OF NEW ZEALAND
First Defendant

AND THE CHIEF EXECUTIVE OF LAND INFORMATION NEW ZEALAND

Hearing: 4 May 2001

Counsel: D.E. Wackrow for Plaintiffs
M.T. Parker for Defendants

Judgment: 31 July 2001

RESERVED JUDGMENT OF FISHER J

Solicitors:
Wackrow & Co., P.O. Box 461, Auckland for Plaintiffs
Crown Law Office, P.O. Box 5012, Wellington for Defendants

Introduction

[1] The two plaintiffs are the purchasers of land which the Housing Corporation has agreed to sell them under the offer back provisions of s 40 of the Public Works Act 1981. The contracts fixed the purchase price as "the market value of the land as at the date when the land should have been offered back, to the offeree and family pursuant to the provisions of Public Works Act 1981". These proceedings have been brought to determine that date.

[2] Although the case starts from a contractual setting, the real question is the vexed one of the circumstances in which land taken under the Public Works Act must be offered back to its original owner when no longer required for public purposes. There are real difficulties in reconciling some of the Court of Appeal's reasoning in *Attorney-General v Hull* [2000] 3 NZLR 63 at 77 with the Privy Council decision in *Attorney-General v Horton* [1999] 2 NZLR 257. In this decision I have attempted to identify the principles intended to govern a case like this one.

Factual background

[3] The land in this case forms part of a larger block adjacent to the beach at Castor Bay in Auckland. It was thought to be of strategic value for guarding the approaches to Auckland. By proclamations made in 1934 and 1941 it was taken under the Public

Works Act 1928 “for defence purposes”. Some of the land taken was used for gun battery emplacements. The particular area which forms the subject of these proceedings was used for the construction of temporary housing for military personnel during World War II. The land relevant to these proceedings was divided into 13 sections, each with a house on it. After the war the Government decided that the buildings should be used as state housing for the general populace. By a proclamation of 26 May 1947 most of the land was set apart for “housing purposes”. A further proclamation of 1 July 1957 added another 1.7 perches for “state housing purposes”.

[4] That land was administered by the State Advances Corporation until 1974 when it came under the control of the Housing Corporation. The Housing Corporation was established as a distinct legal entity by the Housing Corporation Act 1974. The Housing Corporation was and is a body corporate with perpetual succession and a common seal capable of holding and disposing of real property (s 3(3)). By s 3(2) the Corporation was said to “consist of” a director-general appointed under the State Sector Act 1988 together with up to five other members from time to time appointed by the Minister of Housing (changed in 1991 to two or more members appointed by the Minister including one as chairperson). All of the Corporation’s officers and employees were initially appointed under the State Sector Act but as from 1 May 1993 they were directly appointed by, and paid for from the funds of, the Corporation (s 13). The Corporation was required to give effect to the policy of the Government as communicated to it from time to time in writing by the Minister (s 20).

[5] In the result, from 1974 a decision as to the future of any parcel of land held by the Corporation was required to be made in accordance with a hierarchy of directions - Government policy as communicated in writing by the Minister, the directions of Members of the Corporation acting according to resolutions made at meetings for the purpose (s 10), the directions of the Chief Executive (Director-General until 1991) and senior management, and then the directions of descending ranks within the Corporation to the extent that the necessary authority had been delegated to them. This case concerned directions declaring land to be surplus to Corporation requirements for housing. No direct evidence was offered as to the delegated authorities operating within the Corporation at the material times in this case but it seems a reasonable inference that a branch manager could give the necessary direction in the absence of a specific direction to the contrary from someone further up in the hierarchy.

[6] The land in question was occupied by state housing tenants. By 1986 the houses were in serious disrepair. Repairs would have been uneconomic. The houses had been constructed for temporary accommodation using substandard materials. Given the coastal location, the value of the bare land was high. The money could be used to construct a much greater number of houses elsewhere.

[7] In 1987 Corporation staff began to seriously consider selling the land. They obtained from the Ministry of Works an opinion (incorrect as it later turned out) that the offer-back provisions in s 40 of the Public Works Act did not apply. On 3 September 1987 a Corporation senior valuer recommended that the land be sold and the proceeds used to purchase replacement properties elsewhere. Discussion followed within the Department. Eventually on 5 February 1988 the Branch Manager concerned

decided to accept the senior valuer's recommendation. On 5 February 1988 he sent a memorandum to the Auckland Manager of property development, Mr Crookes.

[8] The Branch Manager's memorandum materially said this:

"I have been looking through this file and consider that the thought processes have gone on long enough. I would like to see the recommendations in the SV's memo of 3/9/87 acted upon ASAP and plans made to buy in the replacement dwellings. It seems we are not under any obligation to sell to previous owners under s 40 PW Act and can do what we please with the land. I can't see much point, for the HC, in swapping the block for a cliff-edge site - apart from wondering about how stable the cliff-edge would be, ultimately we'd want to sell that too. A swap wouldn't provide the proceeds to replace the state houses unless we could achieve a quick sale. Is Council prepared to pay the $1.4M or whatever the current market value is now, to extend the park? *Offer it to the Council 1st, then if they do not wish to buy it, put it on the market and start looking at existing properties in which to relocate the tenants. Sell the existing dwellings for removal if they are worth it. This should be achieved within the 88/89 planning year* - bearing in mind the possible effect of Dist Scheme revision. I would like to see figures on actual realisation offset by dwelling replacement costs. Any surplus to plough into more CRH's than just the 11 replacements?" (emphasis added)

[9] Mr Crookes appointed the Senior Valuer at the Takapuna branch of the Housing Corporation as Project Manager for disposal of the land. In a letter of 5 May 1988 Mr Crookes said "You have been appointed Project Manager for the abovementioned properties. It has been decided to dispose of these properties and use the proceeds from sales to purchase replacements." The Corporation then embarked upon the process of selling. What no-one realised at the time was that it would take 11 years before the land was finally disposed of.

[10] In the early stages it appeared that the most likely purchaser would be the City Council. From time to time the Council had expressed interest in adding the land to an adjacent beach reserve. Inconclusive correspondence and discussions with the Council began with a Corporation letter to the Council of 1 July 1988 advising that the Corporation valued the land at $1.5 million and offering the Council a right of first refusal. If the Council decided not to purchase, the land would be offered at public auction. The Corporation also obtained a report of 14 November 1988 from a local real estate agent advising on asking price and auction procedures.

[11] In late 1988 the Corporation received a telephone call from a representative of a Maori tribunal trust suggesting that the land could be the subject of a possible Treaty of Waitangi claim. The Corporation obtained legal advice that there was in fact no legal impediment to a sale on that basis. However it decided to defer selling in recognition of a "moral obligation" in that regard. Inconclusive discussions with Maori tribes followed over the next twelve months but were then tacitly abandoned.

[12] The sale process dragged on under the twin influences of politics and inertia. The flavour is captured by the approach taken to demolition of the houses on the land. On 2 August 1990 the Portfolio Manager recommended that each house be demolished as

it fell vacant. His recommendation was accepted but a memorandum of 15 August 1990 recorded the scheming and duplicity involved:

"The committee made a decision to accept the recommendation made, whereby each unit as it became vacant will be demolished and the area reviewed for future development.

The project team, considering a PR strategy to implement this recommendation, suggests the following:

1. *None of the dwellings should be demolished prior to the election* - October 27.

2. *No publicity at all concerning the demolition* of the dwellings.

3. In the meantime any *enquirers should be advised* we are currently completing a cost analysis exercise in terms of *reviewing the condition and use of the dwellings*.

4. A copy of Mr Williams report and Harrison, Grierson Consultants report should be forwarded to Merrill Coke, Communications Manager so that Head Office is briefed should this issue blow up." (emphasis added)

[13] With the election duly over, demolition of the houses began and occupying tenants ordered to vacate. Three tenants managed to slow the process through judicial review proceedings. By 31 December 1991 all except one house had been demolished. The final one was demolished on 9 December 1992.

[14] The sale process dragged on even though the land was now vacant,. At one stage, 16 June 1993, a Cabinet Strategy Committee decided that land of this type (small developed sections ready for sale) should be sold but sold "under the Housing Act 1955" as distinct from sold as "land surplus to state housing purposes". Only the latter would be "disposed of pursuant to ss 40-42 (offer-back provisions) of the Public Works Act 1981".

[15] More years went by as discussions continued between the Corporation and the City Council. The indecision was due to conflicting local views on the need to add the land to an existing adjacent reserve. The Council did not see acquisition of the land as a high priority but outspoken local residents thought otherwise. They were aided in their efforts by the local Member of Parliament, the Hon Mr Murray McCully. His views assumed even greater importance in 1995 when he became the Minister of Housing. In that capacity he asked the Corporation to defer further efforts to sell the land pending further discussions he wanted to have with the Council.

[16] Within the Corporation itself, officers thought that when it came to the crunch the Council would not buy the land. The Council effectively confirmed this in 1997 but matters continued at their tortoise-like pace. In June 1998 Corporation officers obtained a further valuation for the purpose of selling elsewhere. They also consulted Land Information New Zealand (LINZ) about disposal, pointing out that in its directive of 16 June 1993 Cabinet had directed that land of this kind should be sold under the Housing Act 1955 rather than as land surplus to state housing purposes.

LINZ replied by letter of 25 March 1999 pointing out that a Cabinet directive could not override s 40 of the Public Works Act. After clearing the matter with the Minister in charge of the Corporation, and the local Member of Parliament, the Corporation wrote to a consultant on 23 April 1999 instructing him to implement the offer-back provisions of s 40 of the Public Works Act.

[17] The consultant made inquiries to locate successors in title to the original owner. Although the evidence is sparse, it seems probable that the original owner, Mr A. Morrison, had left a life interest in his estate to his wife with remainder to children or grandchildren living at the date of her death, that at the time the land was taken Mrs Morrison Senior was still enjoying her life interest in the residue of the estate, that by the time she died a number of grandchildren shared in the residue, and that by 1999 seven of those grandchildren were still alive. Of the seven only two expressed interest in purchasing the land when offered to them under s 40 of the Public Works Act. They were and are the current plaintiffs.

[18] Each of the two plaintiffs entered into an agreement with "the Crown acting by and through the Chief Executive of Land Information New Zealand". The first plaintiff agreed to purchase the properties at 121-131 and 137 Beach Road. The second plaintiff agreed to purchase 119 Beach Road. In both cases the price was defined as "the market value of the land as at the date when the land should have been offered back to the offeree and family pursuant to the provisions of Public Works Act 1981". The parties being unable to agree on that date, the current proceedings were issued to determine the point.

Issues

[19] The plaintiffs contend that the date when the land should have been offered back under s 40 of the Public Works Act was 1 July 1988, that being the date upon which the Corporation offered the land to the City Council. For its part, the Crown contends for 21 April 1999. Valuations as at the two competing dates have not been offered but rises in land value over the period give the plaintiffs an obvious incentive for promoting the earlier one.

[20] The plaintiffs say that in 1988 the Corporation made a decision to sell the land which it evidenced by the public act of offering it to the Council. The Crown contend that there was a state of indecision over selling the land until 1999. In the alternative it argues that (i) any earlier intention to sell contemplated merely a sale for housing purposes which remained within the public work requirement, (ii) the land was in any event required for other public works, namely a reserve for the City Council or to settle Treaty of Waitangi claims and/or (iii) the plaintiffs do not qualify as successors in title for the purpose of s 40 of the Public Works Act.

Offer-back procedures

[21] Although the dispute ultimately lies in contract (what did the parties intend by the phrase "the date when the land should have been offered back to the offeree and family pursuant to the provisions of Public Works Act 1981") the parties plainly intended to take the statute and its judicial interpretation as their starting point.

[22] The intention appears to be that the statutory law to be applied was that which prevailed as at the time when the land ought to have been offered back. Although in this case little turns on the point, s 40 has been the subject of amendments in 1982, 1987, 1988 and 1996. Following the amendment to the Public Works Act in 1988, and prior to its further amendment in 1996, s 40 materially read as follows:

"(1) Where any land held under this or any other Act or in any other manner for any public work -

(a) Is no longer required for that public work; and

(b) Is not required for any other public work; and

(c) Is not required for any exchange under section 105 of this Act -

the chief executive of the Department of Survey and Land Information or local authority, as the case may be, shall endeavour to sell the land in accordance with subsection (2) of this section, if that subsection is applicable to that land.

(2) Except as provided in subsection (4) of this section, the [chief executive of the department within the meaning of section 2 of the Survey Act 1986] or local authority, unless -

(a) He or it considers that it would be impracticable, unreasonable or unfair to do so; or

(b) There has been a significant change in the character of the land for the purposes of, or in connection with, the public work for which it was acquired or is held -

shall offer to sell the land by private contract to the person from whom it was acquired or to the successor of that person -

(c) At the current market value of the land as determined by a valuation carried out by a registered valuer; or

(d) If the chief executive of the Department of Survey and Land Information or local authority considers it reasonable to do so, at any lesser price.

. . .

(4) Where the chief executive of the Department of Survey and Land Information or local authority believes on reasonable grounds that, because of the size, shape, or situation of the land he or it could not expect to sell the land to any person who did not own land adjacent to the land to be sold, the land may be sold to an owner of adjacent land at a price negotiated between the parties."

[23] In short, with certain exceptions referred to in s 40(2) and (4), land acquired or held for a public work which is no longer required for that or any other public work

nor for exchange purposes must be offered back to the person from whom it had been acquired or his or her successors.

[24] "Public work" is materially defined (s 2, meaning (a)) as:

"(a) Every Government work or local work that the Crown or any local authority is authorised to construct, undertake, establish, manage, operate or maintain, and every use of land for any Government work or local work which the Crown or any local authority is authorised to construct, undertake, establish, manage, operate or maintain by or under this or any other Act; and include anything required directly or indirectly for any such Government work or local work or use:"

[25] When land is taken s 23(1)(b) of the Public Works Act 1981 requires the Minister to publish a notice in the Gazette containing a description of the land to be taken and "a description of the purpose for which the land is to be used" (formerly "a general description of the works proposed to be executed": s 22 of the Public Works Act 1928). After traversing appropriate objection procedures the lands are then taken by a Gazetted proclamation issued by the Governor-General (s 26, formerly s 23).

[26] Further, s 52(1)(d) of the 1981 Act (formerly s 25 of the 1928 Act) provides for a change in the original purpose by way of formal notice, under the 1981 Act by ministerial notice in the gazette (s 52(1)) and under the 1928 Act by a fresh proclamation. I respectfully agree with the view expressed by Randerson J in *Hull v Attorney-General of New Zealand* (unreported Auckland M 118/89, 27 November 1998 at p 30, 31) that neither the 1928 nor the 1981 Acts contemplated any permissible change in the original purpose other than by way of formal notice under those provisions. The result is that any departure from the "purpose for which the land is to be used" (formerly "works proposed to be executed") can be demonstrated from public documents should that issue later arise under s 40.

Principles applicable to the offer back provisions of s 40

[27] Counsel differed markedly in their approach to s 40. As the case turns largely on the differences it becomes necessary to identify the legal principles with some care.

Right vests once conditions satisfied

[28] To begin with, it now seems clear that as soon as the conditions upon which the right to receive an offer under s 40(1) have been satisfied, the right vests subject only to those special grounds of defeasibility expressly referred to in s 40(2) (impracticable, unreasonable or unfair to return, or significant change in character) and s 40(4) (need to sell to neighbour due to size, shape or situation). The fact that the land might subsequently be required again for a public work, even within a short period, can not operate to divest that right: *Attorney-General v Horton* supra at 262 (PC).

Whether land is no longer required depends on intention of land-holding agency

[29] Secondly, the question whether land is "no longer required" for a public work normally turns on the intentions of the land-holding agency: see *Attorney-General v*

Horton, supra, p 261 ("a decision that land is no longer required will usually be internal to the government department or state-owned enterprise"). In the usual case the broadness of the purpose for which land had been taken or was held, and the sheer number and diversity of potential uses falling within that purpose, will make it impossible to prove that the land is no longer required for that purpose on any objective basis. Exceptions will be confined to those in which the purpose was defined so narrowly and unequivocally that it is possible to demonstrate objectively that on a given date the land was no longer required for the stated purpose, as was the case in *Macfie v Callender & Oban Railway Co* [1898] AC 270 (land taken for a specific railway project) discussed in *Horton* at p 262.

[30] Those indications that land-holding intentions are the key must be reconciled with the Court of Appeal's description of the test in *Hull*, supra, at p 77 and 78, as "an assessment of intention *in the light of objective circumstances*" and its comment that "had we accepted the interpretation of "state housing purposes" proposed by Mr Williams, the facts satisfying para (a) of s 40(1) would have been established, but they would have been established in essence by reference to an *unequivocal public act* by the Crown - its support for the zone change" (emphasis added). The Court went on to add (p 78; para 48):

"We are not of course saying that the relative width and complexity of the assessments that s 40 calls for mean that Court review is excluded. For instance, were the facts to establish that the original purposes had clearly been abandoned (as perhaps envisaged in the *Hendon* case, para [39] above), the Chief Executive of the Department of Lands might well come under an enforceable duty to consider whether paras (b) and (c) of subs (1) and subs (2) are satisfied and whether subs (4) does not apply to prevent the offer, with the consequence that an offer back to the original owner should be made. As we have already indicated, a formal recorded decision by the land-holding agency in terms of s 40(1)(a) may not be required in such circumstances."

[31] Counsel effectively equated those remarks with the need for some public and external change of position. I agree that the inherent subjectivity of actual intention does not sit comfortably with "objective circumstances" and "unequivocal public acts". However the answer appears to lie in the distinction between the substantive requirements of s 40(1)(a), on the one hand, and matters of mere evidence on the other. Putting to one side those exceptional cases such as *Macfie*, supra, in which lack of need for the land can be demonstrated objectively, the only ultimate question appears to be whether the land-holding agency has decided that it no longer requires the land for the designated purpose. Once it has formed that intention it would be difficult to argue that it still requires the land for that purpose. That would seem to accord with *Horton* and passages found elsewhere in *Hull*. The fact in issue appears to be simply whether the agency made the decision. The means by which that fact might be proved is another matter. The *Hull* Court's reference to "objective circumstances" and "unequivocal public acts" was presumably intended to direct the reader to some of the ways in which the critical change of intention might be proved. If the only ultimate question is whether a certain intention was in fact formed, it would seem wrong in principle to circumscribe the means by which it might be established. Sources of evidence, and the weight to be attached to them, are squarely for the tribunal of fact.

[32] It follows from the focus upon the intentions of the land-holding agency that it will normally be necessary to identify within each agency the level at which, and the means by which, effective decisions can be made as to the future use of the land. At the highest level the agency may be affected by Cabinet directives as to the land's future. At the lowest level the necessary authority may have been delegated down to branch manager level.

[33] The hierarchical level at which the necessary decision can be made is not to be confused with the purely evidentiary question of the means by which the decision might be proved. It is solely in the latter area that unequivocal public acts become relevant, since they can provide the basis for drawing an inference that the relevant decision must have been made. But if the fact in issue ultimately involves no more than the question whether the decision was made, there can be no arbitrary limits upon the possible means of proof. There could be no objection, for example, to reliance in this case upon the internal memorandum of an agency officer if it is reasonable to infer that he or she had the authority to make the decision on the agency's behalf, and that the decision was that the land was no longer required for the designated purpose.

Condition (a)

[34] Given that "public work" is the critical expression used in s 40(1)(a), it will be convenient to concentrate on those words rather than "the purpose for which the land is to be used" (s 23(1)(b) 1981 Act) or "the works proposed to be executed" (s 22 1928 Act). Whether land is no longer required for a designated public work requires identification of the exact scope of the public work. The public work for which the land is held is to be ascertained by reference to the formal instruments by which the land was originally acquired, or where that has since changed, the formal instrument by which the change was effected: *Attorney-General v Hull* (CA) pp 71 and 73). In the usual case the critical document would appear to be the Gazetted proclamation taking the land (s 26 1981 Act; s 23 1928 Act). If the public work is not stated therein (and there appears to be no statutory requirement in that respect) the governing document would appear to be the Gazetted notice that the land is intended to be taken. That notice had to include "a description of the purpose for which the land is to be used" (s 23(1)(b) 1981 Act) or "a general description of the works proposed to be executed" (s 22 1928 Act).

[35] Mr Wackrow sought to rely upon the entry of a memorial on the certificate of title as an indication of the purpose for which this land was held. Section 47(1) of the Public Works Act 1981 provides that at the request of the relevant minister or local authority the District Land Registrar is to issue a certificate of title to the land including a reference to the purposes for which the land is held. However on my interpretation of the legislation the purpose to be entered in the certificate of title is merely a matter of recording purposes ascertained from elsewhere. It is for the Minister or local authority taking the land to state the relevant public work or purpose, not the District Land Registrar. Owners are entitled to clear notice of the purpose for which their land is taken: *Slough Estates Limited v Slough Borough Council (No 2)* [1971] AC 958, 962 (HL). The scheme of the legislation envisages that the original owner will be able to refer to a Gazetted notice for this purpose.

[36] For the same reason, the only changes of purpose with which the original owner needs to be concerned are those formally notified in the Gazette. The scope of the intended public work is to be ascertained as at that date. Mr Parker referred to subsequent legislation. Subsequent legislation might affect choices as to the individual uses to which the land might be put within the overarching public work, but it is difficult to see how it could affect the scope of the public work itself. That is predetermined in the Gazetted notice.

[37] The words used to describe the public work are to be given their natural and ordinary meaning unless the legal and factual context otherwise requires. That does not mean that the words used in the Gazetted notice are to be interpreted in a vacuum. As with all matters of interpretation, the notice is to be interpreted in the full legal and factual context in which the language was used: *Hull* (CA) 71, 73. Statutes in force at the time of the acquisition or change, and facts which must have been within the joint contemplation of those affected at the time, are permissible aids to its interpretation (ibid). But the exercise is still ultimately concerned with interpretation of the Gazetted notice. As the Court said in *Hull* (p 73) "our immediate concern is the determination of meaning in context rather the alteration of apparent meaning".

[38] In this case counsel went to past and present statutes as their guide to the scope of the designated public work. It seems clear that contemporary statutes will often form an important part of the legal and factual context in which the words used in the Gazetted notice itself are to be interpreted. However the fact that the public work might have been described in words which were also used in a statute, or that the public work was intended to be administered by a department or agency which then operated under a statute, does not mean that the meaning flows directly from the statute. *Hull,* supra, illustrates the point. In that case the Court of Appeal pointed out (para 22) that the definition of "state housing purposes" in the Housing Act 1955 is a definition for the purposes of that Act. Although the statutory context was relevant, the range of potential uses falling within the described public work could be expanded or restricted by the wider factual and legal context. The Court was prepared to consider, in addition to the contemporary statutory context, such matters as the contemporary annual reports of the Housing Corporation, the notice served on the original owner, the compensation certificates, and communications to the original owner at the time of taking.

[39] In the present case there were various changes of intention regarding the property. Important in that respect is the distinction between the public work for which the land had been taken on the one hand and the range of possible uses falling within the public work on the other. Land taken for defence purposes, for example, could be successively used for an ammunition depot, gun batteries, and then housing armed services personnel, without ever going outside the public work for which the land had been originally taken. Such uses are to be contrasted with those which venture outside the scope of the original public work itself. A change of that nature can not be achieved without attracting the offer-back consequences of s 40(1)(a) unless there is a Gazetted Ministerial notice changing the purpose pursuant to s 52(1) (formerly s 25).

Conditions (b) and (c)

[40] Most judicial commentary on s 40 has been confined to the first of the preconditions to relief posed in s 40(1), namely that the land "is no longer required for that public work" (s 40(l)(a)). There remain the two further preconditions that the land is "not required for any other public work" (s 40(1)(b)) and "not required for any exchange under s 105" (s 40(1)(c)). Those two provisions also involve a problematic relationship between certain obiter dicta in *Hull* and the implications of the Privy Council decision in *Horton*.

[41] The preconditions imposed by paras (b) and (c) of s 40(1) both presuppose that the land is not "required" for another qualifying purpose. As we have seen, *Horton* established two important principles. One is that except in rare cases where lack of requirement can be demonstrated objectively, the key determinant in deciding whether land is not "required" for the purpose of para (a) is the intention of the agency in question. The other is that once the conditions upon which the right to receive an offer under s 40 have been satisfied, the right vests subject only to those special grounds of defeasibility referred to in s 40(2) and (4). When turning to paras (b) and (c) one would expect a number of consequences to follow.

[42] First, it seems clear that the same meaning of the word "required" would have been intended for all three paragraphs in s 40(1) unless and to the extent that the context required something different. We know that intention is the key for the purpose of para (a). For the purpose of paras (b) and (c) it would be even more difficult to approach the matter on any basis other than the state of mind of the agency that is said to hold the alternative purpose. The range of other government departments and local authorities which might require the land for another public work in terms of para (b) would be large, as would the range of possible alternative public works. Similar considerations apply to the possibility that the land was required in order to offer it to another private owner in exchange for that owner's land in terms of para (c) and s 105. In both cases proof that the land is not required on any objective basis is out of the question. So in terms of *Horton* the issue must be whether any agency, whether the original or any other, has formed the desire or intention that the land be used for one of the purposes referred to in paras (b) or (c).

[43] Secondly, for the purpose of paras (b) and (c) the intention which mattered would have to be the intention of the particular agency which required the land for the new public work or exchange. The new agency could, of course, be the original one. It could be any other government department or local authority. But it would have to be the state of mind of the agency with the new requirement.

[44] A third consequence appears to flow from the *Horton* principle that once the conditions upon which the right to receive an offer under s 40 have been satisfied, the right vests subject only to those special grounds of defeasibility referred to in s 40(2) and (4). The only event contemplated by s 40(1) appears to be the change of agency intention envisaged in para (a). Until that point the land will have been required in order to satisfy the originally designated public work. The loss of the requirement contemplated in the words "is no longer required" could only have come about by virtue of a change of intention on the part of the original land-holding agency. In other words, para (a) contemplates a specific event.

[45] Paras (b) and (c), on the other hand, are expressed in terms of status. No event is referred to. The question there is whether, at the relevant time, the land "is not required" for the alternative purposes. On a natural and ordinary interpretation, the time at which the status of the land is to be determined for the purpose of paras (b) and (c) must be when the relevant event occurred, namely when the original agency decided that it no longer required the land for the designated purpose. No other time is hinted at anywhere else in the section. And if at that time all three preconditions are satisfied, *Horton* indicates that the right to an offer vests subject only to those special grounds of defeasibility referred to in s 40(2) and (4). It would be too late for further inquiries to stimulate the formation of a new requirement.

[46] Finally, the intention underlying s 40(1)(b) and (c) appears to be that in the absence of positive evidence that the land is required for one of the purposes stated therein, the Court is to assume the contrary. That is the way in which all the cases, including this one, have been approached. It was tacitly assumed, for example, in *Horton*. Any other approach would render s 40 otiose, since no claimant could ever prove the negative proposition that no government department or local authority in the country held the desire or intention to use the land for any public work or exchange. Para (a) of s 40(1) is distinguishable in that respect. To satisfy para (a) the claimant has only to prove the occurrence of a specific event, namely an authorised decision by a specifically identified agency that the land is no longer required for a specifically identified purpose.

[47] The challenge at that point is to see whether those principles can be reconciled with certain obiter dicta in *Hull*. In that case the Court of Appeal said (p 77; para 43):

"Once para (a) of s 40(1) is satisfied, we consider that the land-holding agency, the Chief Executive of the Department of Lands or both are obliged to take reasonable steps to ascertain whether the land is or is not required in terms of paras (b) and (c). If, after reasonable inquiry, no such requirement emerges, the Chief Executive must act in respect of the land in accordance with s 40(2)."

The passage is a puzzling one. There is nothing in the section expressly or impliedly requiring the land-holding agency or the Chief Executive to inquire into the matters referred to in paras (b) or (c). Nor is it clear what the consequence of such an inquiry might be. Section 40(2) and (4) expressly stipulate the matters which the Chief Executive is to take into account. They do not include revisiting the preconditions imposed by s 40(1). To whom would the agency and/or Chief Executive go if they wanted to inquire into s 40(1)(b) and (c)? Every government department and local authority in the country would be a potential inquiree. And if the inquiry were to be made, to what date would it be addressed? Presumably it would have to be a retrospective inquiry as to what other agencies had already required at the date when the original agency decided that it no longer needed the land for the designated purpose. Any other date would be difficult to reconcile with the wording of s 40(1) discussed earlier. And once the land had achieved the status that it was not required under the three paragraphs in s 40(1), it would be too late for fresh requirements to be created.

[48] On the last point, it is worth repeating that in *Horton*, supra, the Privy Council said that "if s 40 confers an enforceable right to buy, then . . . when the conditions upon which it comes into existence have been satisfied, it must be subject only to those grounds of defeasibility expressly stated in the statute." In this the Privy Council was simply approving the view expressed by the Court of Appeal itself. In the same case (*Horton v Attorney-General* (CA 43/97, 3 December 1997 at p 17) the Court of Appeal had said:

"There are two features of this statutory scheme. The first is that once paras (a) and (b), and possibly (c), of s 40(1) are satisfied there is no further role for the department or agency responsible for the public work for which the land was held. The responsibility passes to the Chief Executive of the Lands Department. The second is the mandatory language: the Chief Executive "shall endeavour to sell the land"; the Chief Executive "shall offer to sell the land" to the former owner. While the section does not impose express time limits, it requires the Chief Executive to follow the statutory process and by necessary implication to do so with due expedition. The Chief Executive is required to endeavour to sell the land in accordance with that subsection: unless the exceptions apply, the Chief Executive is required to offer to sell the land to the former owner. There is no room for reconsideration of the earlier conclusion that the land was not required for a public work. And that legislative approach also reflects the special position of the former owner who was dispossessed under the compulsory acquisition provisions of the Act."

[49] It is not easy to reconcile the obiter dictum in *Hull* with the view expressed by the Court of Appeal in *Horton*, supra, that "once paras (a) and (b), and possibly (c) of s 40(1) are satisfied there is no further role for the department or agency responsible for the public work" nor with the constrained role the Court clearly contemplated for the Chief Executive. I can see nothing in s 40 to support the suggestion that when land is no longer required for the public work for which it was originally taken, officials are authorised to hawk it around the countryside until they can find another department or local authority interested in using it for something else.

[50] Another source of difficulty has been the further dictum in *Hull*, supra, (p 77; para 46) that:

"Again, the circumstances of this case are illustrative. Even were para (a) satisfied in 1982 or 1983, the fact that the conditions of paras (b) and (c) of s 40(1) were satisfied in 1989 in the mind of the relevant officials (including the second official involved in s 40(1): the *Chief Executive of the Department of Lands*) does not mean that they would have been similarly satisfied were the critical date to have been in 1983 or 1982. By contrast, in *Horton*, on the trial Judge's findings, *Coal Corp had acted for a time as if the land were for sale (p 261). It could therefore not deny that s 40 was satisfied.*" (emphasis added).

It is difficult to know what to make of this passage. With the exception referred to earlier, *Horton* equates an agency's land requirement with that agency's intention to use the land. Transposed to paras (b) and (c), that must mean that the relevant state of mind is that of the agency which wishes to take over the land for the purpose of a new public work or exchange. The quoted dictum appears to confuse the intentions of the

agency which now requires the land with "satisfaction" on the part of others. The others who needed to be "satisfied" were evidently thought to be the original land-holding agency and/or the Chief Executive of the Department of Lands. It is difficult to find any relationship between that passage and the statute. I respectfully prefer the approach which appears to have been contemplated by the Court of Appeal and Privy Council in *Horton*.

Summary of principles

[51] What I would take from the statute when read in the light of the Court of Appeal and Privy Council decisions in *Horton* is that in a case like the present one the principles to be applied are as follows:

[a] Once the conditions upon which the right to receive an offer under s 40 have been satisfied the right vests subject only to those special grounds of defeasibility expressly referred to in s 40(2) and (4).

[b] With rare exceptions, land is no longer "required" for a designated public work only when the relevant land-holding agency (in the sense of the government department or local authority currently holding the land) decides that it no longer requires it for that purpose.

[c] Whether an agency intends to use land for a designated purpose is a question of fact susceptible to proof in a manner which differs in no way from the proof of intentions in any other legal context. There is no special requirement involving "objective circumstances" or "unequivocal public acts".

[d] The meaning and scope of the relevant public work are to be ascertained as at the time of the taking or formally notified change under s 52 and are to be gleaned from the words used in the Gazetted proclamation, or subsequent Ministerial Notice, as interpreted in their contemporary legal and factual context. No assistance is derived from the memorial subsequently entered on the certificate of title by the District Land Registrar.

[e] The fact that the public work for which the land was taken or held may have been described in words that were also found in a statute does not mean that their meaning is to be equated with the statute. Contemporary statutes simply form part of the context in which the words used in the Gazetted proclamation or notice are to be read.

[f] Subsequent statutes cannot affect the scope of the designated public work, although they may affect the detailed uses to which the land may be put without going outside the designated public work.

[g] The issue under s 40(1)(b) and (c) is whether an agency, whether the original or any other, has formed the desire or intention that the land be used for a new public work (para (b)) or exchange (para (c)).

[h] For the purpose of deciding whether the preconditions in s 40(1)(b) and (c) are substantively satisfied, the desire or intention which matters is that of the agency now requiring the land for another public work or exchange.

[i] The state of mind of the original land-holding agency, and of the Chief Executive referred to in subss (1), (2) and (4), is not relevant to the question whether the preconditions referred to in subs (1) have been substantively satisfied. Any inquiries into that subject by the Chief Executive could only have as their purpose the proper discharge of procedural obligations to facilitate a sale once the substantive basis for a sale has independently arisen.

[j] To qualify under s 40(1)(b) or (c), the relevant desire or intention must already exist at the time when the original land-holding agency decides that it no longer requires the land for the original public work.

[k] In the absence of evidence from which an inference can be drawn that the land is required for another public work or exchange in terms of s 40(1)(b) or (c), the Court is justified in assuming that it is not so required. There is an evidentiary burden on the Crown or local authority in that respect.

Those principles can now be applied to the present case.

When did this land cease to be required for the designated public work in terms of s 40(1)(a)?

[52] On the foregoing principles the first step must be to identify with some precision the public work for which this land had been required. Although taken originally "for defence purposes" the bulk of the land was later set apart "for housing purposes" by a proclamation of 26 May 1947. The remaining 1.7 perches was set aside "for state housing purposes" by a further proclamation of 1 July 1957. The public works for which the land was held turns on the meaning of the quoted phrases.

[53] The bulk of the land was held "for housing purposes". Those words are to be interpreted in a 1947 legal and factual context. No evidence was adduced as to any relevant facts at that time but it is significant that state-provided housing was then governed by the Housing Act 1919. I accept that while not the ultimate criterion, that Act was the most important component of the context at the time.

[54] The Housing Act 1919 was expressed to be "an Act to consolidate and amend the law relating to the erection and disposal of workers' dwellings, and to make further provision for the housing of the people" (long title). Dwellings erected or acquired by a housing board constituted under the Act could be disposed of by way of sale or lease (s 12), but only to those who were "workers" (s 13(1)), and even then only to those whose annual income did not exceed a stated level (s 13(2)). There were detailed provisions for the disposal of such dwellings to individual recipients by way sale (ss 14-22) or lease (s 24).

[55] In this case there is no reason for thinking that the setting apart of the land "for housing purposes" was for any purpose other than use by the Housing Board and its

successors to provide housing for members of the public by way of sale or lease to those members of the public. The precise way in which that was achieved could no doubt be changed by subsequent legislation. But without another formally Gazetted notice, the fundamental purpose could not be changed without triggering the consequences of s 40.

[56] The remaining 1.7 perches were added by proclamation of 1 July 1957 "for state housing purposes". The added area was so small that it could only have been in the nature of a boundary adjustment. It is inconceivable that it was intended to be treated differently from the rest. In any event for the purpose of this particular case, I do not see that application of the State Housing Act 1955 would have produced a different outcome.

[57] Certainly under s 2 of the 1955 Act "state housing purposes" was defined in broad terms:

"State housing purposes means the erection, acquisition, or holding of dwellings and ancillary commercial buildings by the Crown under this act for disposal by way of sale, lease, or tenancy; and includes the acquisition of land by the Crown -

(a) As sites for dwellings and ancillary commercial buildings:

(b) For schemes of development and subdivision into sites for dwellings:

(c) For motorways, roads, streets, access ways, service lanes, reserves, pumping stations, drainage and water works, river and flood protection works, and other works upon or for the benefit of the land so acquired or the occupiers thereof:"

[58] That definition was, of course, much wider than the purposes to be inferred from the 1919 Act (under the new Act see, for example, "ancillary commercial buildings" and "schemes of development and subdivision into sites for dwellings"). Fundamentally, however, "state housing purposes" still envisaged that the land itself would be used, whether as a site for a dwelling or for some purpose ancillary to other sites to be used for dwellings. There could be no suggestion that the land was held for the purpose of disposal or realisation per se.

[59] On the last point Mr Parker pointed to the phrase "for disposal by way of sale" in the definition of "state housing purposes". He submitted that that embraced disposal by way of sale for any purpose at all, including disposal on the basis that the Housing Corporation no longer required that land for housing but intended to sell and use the proceeds for housing elsewhere. Aside from the fact that the 1955 Act could have been relevant to only a miniscule proportion of the land in question, I would not read the definition of "state housing purposes" in the 1955 Act in that way. The same expression is used in s 15 which provides that state housing land can be "disposed of by way of sale, lease or tenancy" by the Housing Corporation (originally "Board"). A reading of the following provisions (ss 16-23), however, makes it clear that in that context the sales envisaged are sales for the purpose of using the land sold as housing for members of the public.

[60] Mr Parker also pointed out that s 18 of the Housing Corporation Act 1974 confers upon the Housing Corporation the function of undertaking housing and urban developments, and that s 19A of that Act authorises the Housing Corporation to sell its land. I do not think that this adds anything useful. The Housing Corporation Act 1974 was enacted long after the Gazetted proclamations. Further, the fact that a land-holding agency has the power to apply land to a particular use does not mean that the use will fall within the public work for which land had been set aside. The aim is to ascertain the scope of the public work as envisaged by those who were responsible for the original proclamation.

[61] I conclude that the public work for which this land was held was nothing more nor less than the provision of housing for members of the public by letting or selling it for residential occupation on the land. The decision to dispose of the land on the basis that it was not required for tenants or purchasers to occupy it was the antithesis of requiring it for state housing purposes. From the time that that decision was made, the land was no more than a marketable asset to be realised at the earliest opportunity. To hold otherwise would also have meant that s 40 of the Public Works Act could never have applied to land held for state housing purposes.

[62] The next step is to establish the date upon which the land ceased to be required for housing in the sense I have described. The critical document here was the internal memorandum which the Branch Manager sent the Senior Valuer on 5 February 1988. Two matters provide the setting for that memorandum. It has not been questioned that the Branch Manager had the authority to make a decision as to the future of the land. Secondly, in an affidavit filed on behalf of the Crown Mr Crookes agreed that at that time the Corporation believed that the best option was to dispose of the properties and use the proceeds to purchase replacements elsewhere.

[63] In the memorandum the Branch Manager accepted the Senior Valuer's recommendation that the land be sold to provide funds for replacement dwellings. That this was a decision intended to be acted upon is reinforced by the direction that "This should be achieved within the 88/89 planning year - bearing in mind the possible effect of District Scheme revision." In my view the critical decision was the one made and expressed in that memorandum. It was followed by an instruction of 5 May 1988 to the Senior Valuer stating "you have been appointed project manager for the abovementioned properties. It has been decided to dispose of these properties and use the proceeds from sales to purchase replacements" and a letter of 1 July 1988 to the City Council offering a right of first refusal with advice that if the Council decided not to purchase the property would be offered at public auction. The letters confirm the commitment expressed earlier but in my view the critical decision had already been made. From 5 February 1988 it was no longer open to the Corporation to argue that the land was still required for "housing" or "state housing" within the meaning intended by the relevant proclamations.

Use for alternative public works or exchange in terms of s 40(1)(b) and (c)

[64] The next question is whether there is any evidence that as at 5 February 1988 the land was required for an alternative public work (s 40(1)(b)) or for exchange (s 40(1)(c)). Mr Parker did not suggest that it was required for exchange. He did submit

that in terms of s 40(1)(b) it was required for two other public works, namely for a public reserve and alternatively to settle Treaty of Waitangi claims.

[65] Use of the land as a public reserve would clearly qualify as a public work to which s 40(1)(b) could attach. It was not argued that the need to use the land as a public reserve could be demonstrated on any objective basis. The question, then, is whether by 5 February 1988 the Takapuna City Council or some person or persons with the power to make the requisite decision had decided that the land was required for that purpose.

[66] Mr Parker submitted that if the Court did not accept his principal argument that in 1988 the land was still required for housing, "any sale to the Takapuna City Council would have been for the purposes of another public work, a reserve, and therefore s 40(1)(b) would have applied". He said that at that stage "there was some interest on the part of the local authority in acquiring the land for a reserve" and that "a sale to the local authority, presumably for a reserve, would have been exempt from offer-back under s 40(1)(b)".

[67] The guarded language of those submissions appropriately captures the equivocal nature of the Takapuna City Council's interest in the land. Without doubt the Council maintained an interest in purchasing all or part of the land over a period of about 20 years. It was not until 1997 that the Takapuna City Council's successor, the North Shore City Council, finally and unequivocally advised that it would not be purchasing. In the intervening period the Council's interest waxed and waned in response to various pressure groups. There is no suggestion, however, that the Council ever finally resolved to acquire all or part of the land. Nor was it suggested that someone with the authority to commit the Council made an unequivocal decision about it. The closest that they came to it appears to have occurred at about the end of 1988. There is inconclusive evidence that at that stage an understanding was negotiated under which the Council would have acquired three of the 13 individual lots. But there is nothing to suggest that those involved had the authority to commit the Council, or purported to do so. Later events suggest otherwise. In my view the evidence falls short of that level of commitment required to satisfy s 40(1)(b), still less that the commitment had already been made by 5 February 1988.

[68] In the alternative Mr Parker submitted that by the end of 1988 the Corporation "faced iwi opposition to any sale of the land". In oral argument he suggested that this might have constituted an independent requirement as a public work. The submission was not developed further, and in my view for good reason. There was no evidence of iwi opposition in early 1988 when the decision was made to sell the land. The land was never the subject of any specific or formalised Treaty of Waitangi claim. There was never any decision to retain it to use in satisfaction of Treaty of Waitangi settlements. "Public work" is materially defined in s 2 as a work which the Crown or local authority "is authorised to construct, undertake, establish, manage, operate, or maintain". Even if the land had been required for Treaty of Waitangi settlement purposes, it is difficult to see how it could have qualified as a public work.

[69] I conclude that the offer-back obligations stemming from s 40 were not obviated by any requirement that the land be used as an alternative public work in terms of s 40(1)(b) or for exchange in terms of s 40(1)(c).

Qualification as successors

[70] Mr Parker submitted that there was no evidence that the plaintiffs were successors for the purposes of s 40(5). That subsection provides:

"For the purposes of this section, the term *successor*, in relation to any person, means the person who would have been entitled to the land under the will or intestacy of that person had he owned the land at the date of his death; and, in any case where part of a person's land was acquired or taken, includes the successor in title of that person."

Mr Parker submitted that the plaintiffs do not qualify because under the original owner's will they were residuary beneficiaries only.

[71] It is not easy to understand why the Crown would have wanted to advance this argument. The agreements provide that the purchase price "shall be the market value of the land as at the date when the land should have been offered back to the offeree and family pursuant to the provisions of the Public Works Act". Viewed as a whole, the agreements manifest an unconditional intention to sell to the plaintiffs. The sole function of the quoted words is to provide a formula for establishing the purchase price. They presuppose that the land should have been offered back to the offeree and family at some stage. Their focus is the date when the offer should have been made, not whether it should have been made at all. Having adopted that formula for ascertaining the date, it is odd to find the Crown wanting to resile from it.

[72] Even if the contract had left eligibility as an open question, I would have found that the plaintiffs qualified under the statute. It is true that in *Port Gisborne Ltd v Smiler* [1999] 2 NZLR 695 (p 707; para 45) the Court of Appeal remarked obiter that "Where an entire section of land is acquired the provision [s 40(5)] is narrower and provides only for offer back to the immediate beneficiaries, under the will or on intestacy, of the original owner." There is nothing in that passage, however, to suggest that the Court was distinguishing between specific and residuary beneficiaries. Nor is any such distinction drawn in subs (5) itself. It requires merely that the claimant "would have been entitled to the land under the will". Whether entitled as specific or residuary beneficiary seems immaterial. No point was taken over the fact that there were a number of grandchildren of whom the plaintiffs were only two and I disregard that aspect.

Conclusion

[73] It was not suggested that the Chief Executive would have encountered any complication under s 40(2) or (4). The only real question was the date on which the three conditions in s 40(1) were satisfied.

[74] I have concluded that as from 5 February 1988 the land was no longer required for the originally designated public work of housing, or state housing, and that there is

no evidence to suggest that on that or any other date it was required for an alternative public work or for exchange in terms of s 40(1)(b) and (c). Mr Wackrow had contended for 1 July 1988. The difference of several months is scarcely likely to produce any difference in value. I would prefer to adopt the date resulting from an application of the law to the evidence as I understand it.

Result

[75] There will be a declaration that the date when the land should have been offered back to the offeree and family pursuant to the provisions of the Public Works Act 1981 was 5 February 1988 in the case of each plaintiff. In accordance with my discussions with counsel on the point, the Crown must pay the plaintiffs' costs on a 2B scale plus disbursements, the details to be determined by the Registrar.