Compensation = Injurious affection - Appellant owned orchard taken for Clutha River development by agreement granting lease of land back to appellant - Provision exluding claim for damage except for work for purposes associated with development - Roading work affects export crop - whether right to claim for injurious affection precluded - Public Works Act 1981 S.63.

IN THE COURT OF APPEAL OF NEW ZEALAND
CA 106/92

IN THE MATTER of the Public Works Act 1981

BETWEEN HENRY JOHN O'REILLY
Appellant

AND THE MINISTER OF WORKS DEVELOPMENT
Respondent

Coram: Casey J
Hardie Boys J
McKay J

Hearing: 24 September 1992

Counsel: R J Somerville for Appellant
J A L Oliver for Respondent

Judgment 24 September1992

JUDGMENT OF THE COURT DELIVERED BY MCKAY J

The appellant was for many years the owner of an apricot orchard in the Cromwell Gorge. The land was required for the Clutha Valley development and will be submerged as the filling of Lake Dunstan proceeds. It was acquired by the Crown under the Public Works Act 1928 by an agreement dated 4 September 1979, and compensation of $74,287 was paid. That agreement included a provision by which the Crown offered the appellant a lease of the land for six years from the date of settlement on terms set out in an attachment to the agreement.

The appellant accepted the offer of a lease, and an agreement to lease was entered into dated 4 May 1981. The lease was for a term of 6 years from and including 10 October 1979, at a rental of $5,400 payable quarterly in advance. By clause 14 the lease was terminable by the lessee at any time on 3 months' prior written notice. By clause 15 the lessor was given the right to terminate the lease in the event of the land being required by it for any purpose, subject to the giving of 12 months' written notice to coincide as near as possible with the end of a fruit growing season. No compensation was to be payable to the lessee for early termination under this clause. The other significant provisions, for present purposes, were the following:

"4 TO permit the Lessor or her agents to enter upon the said land and to carry out work for purposes associated with hydro-development provided reasonable prior notice is given.

...

8 THAT the rental shall be reviewed as at 10th October 1982 to a rental agreed upon between the parties hereto or failing agreement to be settled by arbitration in accordance with the Arbitration Act 1908 PROVIDED that the Lessee may have the rental reviewed if and when the Lessor renders part or parts of the said land incapable of being utilised for horticultural purposes.

9 THAT the Lessee acknowledges that the land is liable to damage by the Lessor's operations in accordance with Clause 4 hereof and accepts that the Lessee shall have no claim whatsoever against the Lessor for damage to the land or any improvements thereon caused by the Lessors operations save and except the right of rental review as provided in Clause 8 above."

A memorandum of variation of the lease agreement was entered into on 17 May 1983, by which the rent was reduced to $3,740 for the year commencing 10 October 1982 and payment of that rent was to be made on or before 31 March 1984. For the remaining two years of the lease the rent was to revert to $5,400 per annum, payable quarterly in advance. Clause 2 contained a proviso in the following form:

"PROVIDED THAT the Lessee may have the rental reviewed to a rental agreed upon between the parties hereto or failing agreement to be settled by arbitration in accordance with the provisions of the Arbitration Act 1908 if and when the activities of the Lessor pursuant to clause 4 of the said Agreement result in part or parts of the said land becoming incapable of being utilised for horticultural purposes."

On 22 December 1988 the appellant lodged a claim to compensation under section 63 of the Public Works Act 1981, alleging that his interest as lessee had been injuriously affected by a public work, namely the roading and blasting work carried out during 1983-84 on the section of road opposite the orchard. The claim alleged dust damage to the appellant's export apricot crop as a result of which it did not reach the standard of cleanliness required for export, and damage from falling debris and rocks which are said to have fallen on the orchard and caused damage to land and buildings.

The matter came before the High Court on a preliminary question of law whether such a claim was precluded by certain provisions in the relevant documents, in particular clause 9 of the lease agreement of 4 May 1981. The Judge held that clause 9 applied, and that the only remedy that the appellant would have for damage arising from the operations of the Crown in the area was either to withdraw from the lease or to endeavour to negotiate a lower rental. The claim was accordingly dismissed. The present appeal is from that judgment.

Mr Somerville for the appellant accepted that the appellant would have no claim if clause 9 had not included the words "in accordance with clause 4 hereof".

The lessee's acknowledgment in the first part of clause 9 was that the land was liable to damage by the lessor's operations in accordance with clause 4, under which the Crown was permitted to enter on the land and to carry out work. What was contemplated, he said, was damage caused by the Crown's entry on the land for the purpose of carrying out work.

The second part of the clause provided that the appellant should have no claim for damage caused by the lessor's operations, and this was subject to the same limitation. It referred back to the same words "lessor's operations" earlier in the sentence, and imported the same qualification referring to clause 4.

Mr Oliver for the respondent accepted that the reference to "Lessor's operations" in the second part of clause 9 was similarly qualified by reference to clause 4, but he submitted that clause 4 gave the Crown as lessor two quite separate and independent rights. The first was a right of entry on the land.

The second was the right to carry out work for purposes associated with the hydro development. such work was not limited to work on the land itself, but extended to work carried out elsewhere. It extended to the work on which the present

claim was based, which was carried out on the other side of the river, but affected the appellant's land.

We think this is a forced construction of clause 4. The obvious meaning of the clause is that the lessor is permitted to enter on the land and to carry out work for purposes associated with the hydro development.

The entry on the land and the carrying out of work are both to be for such purposes, and both are subject to the requirement of reasonable notice. The Crown did not need the permission of the lessor to carry out works not involving entry on the land, unless it could be suggested that what was contemplated was a permission to carry out works which might otherwise constitute a nuisance. That would be a sufficiently unusual provision that if such was the intention, one would expect it to be dealt with separately and explicitly. The obvious and natural meaning of the clause is that the lessor is permitted to enter on to the land and to carry out work on the land for purposes associated with hydro development.

The right to claim for injurious affection where no land is taken was conferred for the first time by section 63 of the Public Works Act 1981. That Act was enacted on 3 October 1981 but did not come into force until 1 February 1982. Mr Oliver accepted that the provisions of section 63 would not have been in the contemplation of the parties when they entered into the agreement of 4 May 1981.

Mr Oliver's second submission was that regard should be had to the earlier documentation in order to determine the intention of the parties.

It was this argument which was adopted by the Judge. He considered that the wording of clause 9 was ambiguous, and that he was entitled therefore to have regard to the prior documents. He referred to the original agreement of 4 September 1979 and to the terms on which the lease was offered.

Those terms included the following:

"4. The Lessee reserves the right to have the annual rental reviewed if and when the action of the Lessor renders part or parts of the said land incapable of being utilised for horticultural purposes.

5. The Lessee shall permit the Lessor, or its agents the right of ingress and egress and or carrying out work for purposes associated with hydro development, provided reasonable prior notice is given.

6. The Lessee acknowledges that the land is liable to damage by the Lessor's operations and accepts that the Lessee shall have no claim whatever or howsoever by or against the Lessor for damage to the land or any improvements thereon caused by the Lessor's operations."

It will be noted that clause 6 refers to damage "by the lessor's operations", and acknowledges that the lessee is to have no claim for "damage to the land or any improvements" caused by those operations. Those words are of the widest scope, and are not subject to any such limitation as is contained in the later document. Mr Somerville conceded that if the later document had followed the wording of the original offer, the appellant would have no claim.

The Judge did not regard the earlier document as being mere evidence of negotiation or of subjective intentions, but as evidence of what the parties agreed. He accepted that where such an agreement is intended to be followed by a formal document, the parties cannot refer to the earlier agreement to defeat the clear wording of the later formal document, but he said:

"That is not the case here. There is an ambiguity arising from the words used in clause 9 of the document and I am satisfied that clause 9 does not apply only to damage caused by the operations of the Crown following an entry on the leased land, but applies as is stated in the latter part of clause 9 so as to prevent any claim against the Crown 'for damage to the land or any improvements thereon caused by the lessor's operations.'"

We respectfully disagree with the Judge as to clause 9 of the later document. We agree that if clause 9 were ambiguous, then it would be permissible to refer to the prior agreement as an aid to its proper construction, although it is the later document which must govern the situation and which is to be construed. We do not, however, find any ambiguity in clause 9. It is an acknowledgment that the land is liable to damage from the lessor's operations under clause 4, and an acceptance that there is to be no claim in respect of those operations.

It deals only with operations in accordance with clause 4. That clause refers to work carried out pursuant to the lessor's right of entry on the land, and cannot apply to activities on other land.

The provision for review of rental in clause 8 does not appear to us to assist the Crown. It applies when the lessor renders part of the land incapable of being utilised for horticultural purposes, which is a different situation.

Mr Oliver referred to other provisions in the 1981 document as evidencing an intention that there should be no compensation.

These included clause 10, under which there was no obligation to repair or maintain building or improvements; clause 13 under which there was to be no compensation for improvements following termination or expiry; clause 14 entitling the lessee to terminate on three months' notice; and clause 15, under which no compensation was payable in the event of the lessor requiring the land and giving 12 months' notice.

None of these provisions, however, address the question of compensation for injurious affection as a result of activities carried out on other land. The right to such compensation was conferred by statute on 1 February 1982, and it is not surprising that the 1981 agreement did not deal with it.

One cannot, however, write into the agreement an exclusion of liability which was not in the contemplation of the parties at the time.

Mr Oliver also referred to the low rental for the property, which recognised the risk and uncertainty of crop yields in the orchard.

The rental of $5,400 on land valued for the purposes of compensation at $74,287 may be lower than an ordinary market return, but given the uncertainty of tenure, the location and the specialised nature of the land use, this would not be surprising. It does not call for any further explanation by way of construction of clause 9. In any event, however, the wording of clause 9 is clear, and such considerations are irrelevant.

We accordingly allow the appeal and set aside the orders made in the High Court.

We allow the appellant costs in this Court in the sum of $2,500 together with disbursements, including the cost of printing and the reasonable travel and accommodation expenses of counsel, as fixed by the Registrar. The question of costs in the High Court is to be dealt with by that court.

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