IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.219/99

BETWEEN	THE SISTERS OF MERCY (ROMAN CATHOLIC DIOCESE OF AUCKLAND TRUST BOARD) Plaintiff
AND	THE ATTORNEY-GENERAL First Defendant
AND	THE RESIDUAL HEALTH MANAGEMENT UNIT Second Defendant
AND	WAITEMATA DISTRICT HEALTH BOARD Third Defendant

Hearing: 29 November 2001

Appearances: D E Wackrow for Plaintiff
P J Andrew for First and Second Defendants
D L Schnauer for Third Defendant

Judgment: 14 December 2001

RESERVED JUDGMENT (NO.2) OF RANDERSON J

Introduction

[1] On 6 June 2001, I delivered a reserved judgment dismissing an application by the defendants to strike out the plaintiff's claim seeking declaratory relief under s 40 of the Public Works Act 1981. Certain land was acquired from the plaintiff in the 1950's for the North Shore Hospital and the plaintiff claims it has since become surplus. The principal relief sought is a declaration that the defendants are bound to offer the land back to the plaintiff.

[2] Since then, there have been several developments. First, in terms of my earlier judgment, the Auckland Hospital Board and the Auckland Area Health Board have been struck out of the proceedings and the Waitemata District Health Board substituted for Waitemata Health Ltd. This latter change occurred as a result of further health sector reforms effected by the New Zealand Public Health and Disability Act 2000 and the Health Sector (Transfers) Amendment Act 2000 with effect from 1 January 2001. As well, the plaintiff has now filed a second amended statement of claim dated 21 August 2001 which introduces a number of additional causes of action and amends the existing ones.

[3] As a result of these developments, the Waitemata District Health Board (now the third defendant) has brought a second application to strike out portions of the amended statement of claim. As filed, the application seeks an order striking out those portions of the amended statement of claim which seek a declaration or order that the third defendant is obliged to offer the subject land back to the plaintiff pursuant to s 40 of the 1981 Act. The third defendant relies on clause 3 of the First Schedule of the Health Sector (Transfers) Amendment Act 2000 which, it is said, precludes any such claim so long as the land is held by the third defendant for its purposes. I will call this Act the Amendment Act 2000.

[4] Mr Schnauer for the third defendant made it clear in the course of his submissions that the third defendant does not, for the purposes of this application, submit there is no arguable case for other remedies not involving recovery of an interest in the land. He accepted, for example, there may be arguable issues of

damages against one or more of the defendants. Mr Schnauer also accepted for the purposes of this application that the relevant provisions of the Amendment Act 2000 (whether in their current form or in the form originally enacted with effect from 10 May 1993) would not necessarily preclude the grant of relief to the plaintiff relating to the recovery of the subject land if rights under s 40(1) of the 1981 Act were triggered prior to 10 May 1993.

[5] Mr Schnauer's submission is, however, that clause 3 of the First Schedule of the Amendment Act 2000 in its present form precludes a claim for the plaintiff for recovery of the land so long as the third defendant was using the land for its purposes at 1 January this year and continues to do so. He submitted that such a claim would be precluded even if, at some stage between 10 May 1993 and 1 January 2001, the land had ceased to be required for the purposes of the transferee and s 40(1) of the 1981 Act had been triggered during that period.

[6] To the contrary, Mr Wackrow submitted that clause 3 of the First Schedule as enacted in its present form was not intended to have retrospective effect in the way suggested by Mr Schnauer and did not preclude the grant of relief under s 40 if those rights were triggered at any stage between 10 May 1993 and 1 January 2001.

[7] The choice between these competing submissions is the issue I have to decide.

The second amended statement of claim

[8] It is now alleged that the plaintiff's right to receive an offer to sell the subject land back to it arose under s 40 of the 1981 Act at two alternative times. In paragraph 18, it is pleaded that the land has not been required for public work at any time from May 1993. Although no specific date is specified in May, the pleading is sufficiently wide to include any date from 1 May 1993 onwards. If so, it is alleged that the triggering event under s 40(1) occurred prior to 10 May 1993 when the predecessor to the present clause 3 of the First Schedule of the Amendment Act 2000 was first enacted.

[9] Then, it is alleged that between 26 March 1996 and October 1997, the land continued to be surplus to requirements. This allegation is supported by a recitation of correspondence and steps taken by the third defendant's predecessor, Waitemata Health Ltd, to obtain clearance for the disposal of the land as being surplus to requirements.

[10] The plaintiff seeks a declaration that the defendants have breached a statutory obligation under s 40 to offer the land back to the plaintiff. Supplementary declarations are sought to the effect that the land ought to have been offered back at 31 May 1993 or alternatively on certain dates between May 1996 and December 1997.

[11] There are alternative claims (described as an *in personam* cause of action) for declaratory relief of the same nature based on varying forms of constructive trust, estoppel or breach of fiduciary relationship. However, Mr Wackrow acknowledged that those claims were all dependent upon the existence of an obligation under s 40. To the extent that they seek a declaration that the defendants were bound to offer the land back to the plaintiff under s 40, they are also covered by the strike out application insofar as they depend on a triggering of the s 40 rights after 10 May 1993.

[12] There are further alternative claims for damages for negligence and breach of statutory duty which I am not presently concerned with.

The background facts and statutory provisions

[13] These were covered in my judgment of 6 June 2001 and I do not intend to repeat them in full. This judgment should be read along with my earlier one. For present purposes, it is sufficient to note that the subject land was transferred under successive health reforms as follows:

[a] From the Auckland Hospital Board to the Auckland Area Health Board in 1992 under the Auckland Area Health Boards Act 1983.

[b] From the Auckland Area Health Board to Waitemata Health Ltd under the Health and Disability Services Act 1993 and the Health Reforms (Transitional Provisions) Act 1993, with effect from 1 July 1993.

[c] From Waitemata Health Ltd to the Waitemata District Health Board pursuant to the New Zealand Public Health and Disability Act 2000 and the Amendment Act 2000, with effect from 1 January 2001.

[14] As noted in my earlier decision, the first of these last two pieces of legislation repealed the Health and Disability Services Act 1993 and effected fresh reforms in the public health and disability sector. By s 95(3), the assets and liabilities of the former Crown Health Enterprises such as Waitemata Health Ltd were transferred to the corresponding District Health Boards. Under the Amendment Act 2000, the Health Reforms (Transitional Provisions)Act 1993 was renamed the Health Sector (Transfers) Act 1993 and other changes were enacted, including the amendment to the critical provisions about claims under the 1981 Act.

The 1993 version of clause 3

[15] By s 9 of the then Health Reforms (Transitional Provisions) Act 1993, the provisions of the first schedule of that Act were to apply to the transfer of assets or liabilities from Area Health Boards to Waitemata Health Ltd and other Crown health enterprises. The relevant parts of clause 3 of the First Schedule as they stood before the Amendment Act 2000 were:

> **3 Modification of provisions of Public Works Act 1981**
> (1) This clause applies to the transfer to the transferee under this Act or by another transferee of land or an interest in land that at the date on which this Schedule comes into force is subject to sections 40 to 42 of the Public Works Act 1981.

> (2) Nothing in sections 40 to 42 of the Public Works Act 1981 shall apply to the transfer of land or an interest in land to a transferee (being a transfer to which this clause applies) so long as the land or interest in land continues to be used for the purposes of the transferee, but, if all or any part of the land or interest in land is no longer required for such purposes, sections 40 and 41 of that Act shall apply to the land or interest no longer required as if the transferee were the Crown and the transfer of that land to that transferee were not a transfer to which this clause applies.
>
> ...

[16] The royal assent to the Health Reforms (Transitional Provisions) Act 1993 was given on 10 May 1993 but the effective date of the transfer of assets and liabilities was 1 July 1993.

The 2000 version of clause 3

[17] By s 12 of the Amendment Act 2000, the First Schedule of the 1993 Act was amended by repealing clause 3 and substituting the following clause so far as it is relevant for present purposes:

> **3. Modification of provisions of Public Works Act 1981 -**
>
> (1) In this clause **public work land** means any land or interest in land owned by a transferee that –
>
> (a) on 10 May 1993 was subject to sections 40 and 42 of the Public Works Act 1981; and
>
> (b) has on 1 or more occasions been transferred by or under this Act.
>
> (2) Sections 40 to 42 of the Public Works Act 1981 do not apply to any public work land so long as the land –
>
> (a) is held by a transferee (regardless of whether or not those purposes are the purposes for which the land was acquired under the Public Works Act 1981 or under any corresponding former Act)-
>
> (i) for the purposes of the transferee; or
>
> (ii) to enable the transferee to determine prepare for the disposal of the land; or
>
> (iii) to enable the transferee to determine whether to transfer or hold the land for any purpose referred to in this subclause; or
>
> (b) is transferred under this Act to enable another transferee to hold the land for any of the purposes specified in paragraph (a); or
>
> (c) is held under a lease or licence granted by a transferee to any person other than a transferee for health-related purposes or, with the consent of the Minister, for any other purpose.
>
> (3) If any public work land is not held or transferred in accordance with subclause (2), sections 40 and 41 of the Public Works Act 1981 apply as if the land were owned by the Crown. However, the proceeds of any sale of

> the land must nevertheless be applied for the purposes of the transferee that, immediately before the sale, owned the land.
>
> ...

The Counties Manukau litigation

[18] In *Counties Manukau Health Ltd v Dilworth Trust Board* [1999] 3 NZLR 537, the Court of Appeal considered clause 3 of the First Schedule in the form in which it stood in 1993. The case was then taken to the Privy Council (*Dilworth Trust Board v Counties Manukau Health Ltd and The Attorney-General*, PC.13/2000, 7 March 2001). By the time the case reached the Privy Council, the health sector reform legislation of the year 2000 had been enacted and had come into force. Nevertheless, the Privy Council considered the appeal in terms of the 1993 version of clause 3 although some comment was also made on the 2000 version.

[19] The upshot was that the Privy Council agreed with the view of the Court of Appeal that under the 1993 version of clause 3, it remained arguable that Dilworth's rights had arisen prior to the time the subject land had been transferred to Counties Manukau Health Ltd with effect from 1 July 1993. It was therefore arguable on the basis of *Attorney-General v Horton* [1999] 2 NZLR 257, 261-262 (PC) that Counties Manukau Health had taken the transfer of the land subject to Dilworth's statutory right, in the nature of an option, to re-purchase. Both the Court of Appeal and the Privy Council agreed that in those circumstances, it was not appropriate to strike out Dilworth's claim.

[20] I discussed both the Court of Appeal and Privy Council decisions in my earlier judgment at paragraphs [71] to [89] and expressed some tentative views on the effect of the Amendment Act 2000 at paragraphs [90] to [92].

The argument in this case

[21] I have now had the benefit of full argument on the effect of the 2000 version of clause 3 in the context of the latest statement of claim. Mr Schnauer carefully

analysed the differences between the 1993 and 2000 versions of clause 3 which I now propose to discuss.

The 1993 version of clause 3

[22] Several matters are now common ground:

[a] The transfer from the Auckland Area Health Board to Waitemata Health Ltd is a transfer to a "transferee" within the meaning of the legislation.

[b] At 10 May 1993 and on the effective date of the transfer (1 July 1993), the subject land was "subject to ss 40 to 42 of the Public Works Act 1981 in the sense that the land was "... held under this or any other Act or in any other manner for any public work ..." within the meaning of s 40(1) of the 1981 Act. To adopt the words from paragraph [76] of my previous decision:

> "... whether or not the obligation to offer back the land to the original owner or the successor of that person had arisen, the land was held in such a way that that obligation could arise in the event of the statutory triggers being activated."

[c] In accordance with the decisions of the Court of Appeal and Privy Council in the *Counties Manukau* litigation, the reference in clause 3(2) to the land being held "for the purposes of the transferee" is not restricted to the purpose for which the land was originally taken or held but is to be construed as including any statutory purposes of the transferee.

[d] Following the decisions of the Court of Appeal and Privy Council, the first limb of clause 3(2) ensures that the mere transfer to the transferee under the 1993 legislation does not itself trigger the statutory rights under s 40.

[e] It is at least arguable that clause 3 does not affect or limit rights which have arisen under s 40 prior to 10 May 1993.

[23] I also agree with the view expressed at paragraph [32] of the Privy Council's decision that the remaining part of clause 3(2) means that if the statutory rights under s 40 have not been triggered prior to 10 May 1993, they are not activated after the date of transfer to Waitemata Health Ltd unless and until the subject land is no longer required for any of that company's statutory purposes.

The 2000 version of clause 3

[24] There are also several matters not in dispute in relation to this version of the clause:

[a] The land in question is owned by a transferee in terms of subclause (1).

[b] The land was subject to ss 40 to 42 of the 1981 Act at 10 May 1993 in the same sense already described.

[c] The land has on one or more occasions been transferred by or under the Health Sector (Transfers) Act 1993.

[d] Subclause (2) now makes it explicit that land is held for the purposes of the transferee whether or not those purposes are those for which the land was acquired under the 1981 Act or any corresponding former Act.

[e] At least from the time the new clause came into effect on 1 January 2001 to the present, the Waitemata District Health Board has held the land for its statutory purposes and continues to do so.

[25] I accept Mr Schnauer's submission that the new version of clause 3 is substantially more elaborate than the previous one and has, to an extent, enlarged its

effect. In the 1993 version, the opening words of subclause (2) focused on the transfer of the land. However, in the 2000 version, the relevant provisions of the 1981 Act are not to apply to any public work land as defined "so long as the land" is held or transferred in accordance with any one of the provisions of subclauses (2)(a), (b) or (c).

[26] The focus is now on the manner in which the land is held rather than on the effect of the transfer as such. As well, the exclusion of ss 40 to 42 of the 1981 Act is to include the continued holding of the land by the transferee to enable it to be prepared for disposal or to enable the transferee to determine whether to transfer or hold the land for any purpose referred to in the subclause. The application of the 1981 Act is also precluded so long as the land is transferred to enable another transferee to hold the land for any of the identified purposes, or where it is held under a lease or licence granted by the transferee to some other person for health related purposes (or, with the Minister's consent, for any other purpose).

[27] Mr Schnauer submitted that the new version of the clause was intended to replace the 1993 version with effect from 10 May 1993. He further submitted that so long as Waitemata District Health Board held the land for its purposes as at the commencement of the new clause on 1 January 2001 (or otherwise fulfilled the requirements of subclauses (2)(a) or (b) or (c)), then ss 40 to 42 of the 1981 Act did not apply. He submitted that on the true construction of the clause, it did not matter if, at some stage during the period from 10 May 1993 to 1 January 2001, s 40 may otherwise have been triggered by the land no longer being required for any public work.

[28] To the contrary, Mr Wackrow for the plaintiff submitted that subclause (1) was simply a definition clause and the new clause was not intended to have any retrospective effect. He relied particularly on ss 7, 17 and 18 of the Interpretation Act 1999 which provide that an enactment does not have retrospective effect and that the repeal of an enactment does not affect an existing right or duty or the bringing or completion of proceedings that relate to any such right or duty. However, Mr Wackrow acknowledged that the provisions of the Interpretation Act do not apply if the context of the legislation in question requires a different interpretation.

[29] The Court of Appeal has accepted in *Foodstuffs (Auckland) Ltd v Commerce Commission and Anor* (CA.163/01, 19 September 2001) that s 7 of the Interpretation Act only creates a presumption against the retrospective operation of statutes and does no more than confirm the pre-existing presumption at common law: *Maxwell on The Interpretation of Statutes*, 12th ed., 1969 at 215. That result would also follow if s 4(1)(b) were interpreted as meaning that particular provisions of the Interpretation Act (as distinct from the Act as a whole) were to apply unless the context of the enactment in question required a different interpretation. That approach is assumed in *Burrows Statute Law* (1999) at 368 in commenting on the Bill then proposed. I would favour that construction but it is a pity the legislature did not provide greater clarity on this fundamental point. It was, after all, a central feature of the Acts Interpretation Act 1924 that its provisions were generally subservient to the context of the legislation being interpreted: refer for example to ss 2 and 20. I would be reluctant to conclude that Parliament intended by s 4(1)(b) of the 1999 Act that none of its provisions were to apply where the context of the enactment in issue required a different interpretation.

[30] As to whether a provision does have retrospective effect (in the sense that it takes away or limits existing or vested rights), the meaning of the provision is to be ascertained from its text and in the light of its purpose: s 5(1). There is a need to strike a balance between giving effect to Parliament's will and protecting positions already established under the law: see the discussions in *Foodstuffs* by Keith J at paragraph [20] and by Thomas J in paragraphs [48] to [53]. Considerations of justice and fairness also come into the process.

[31] Mr Wackrow further submitted that the 1993 version of the clause was to apply during the intervening period 10 May 1993 to 1 January 2001. The new version of the clause was only to apply prospectively from 1 January 2001. Otherwise, he submitted, rights accruing from circumstances in the intervening period which would activate s 40 would be retrospectively removed or at least deferred by the 2000 version of clause 3.

[32] To counter that submission, Mr Schnauer submitted if that were the intended result, the legislature would not have referred to the date of 10 May 1993 in

subclause (1). He compared the use of the past tense in subclause (1) and the use of the present tense in subclause (2) as supporting his argument that the critical time to consider the status of the land is at and after 1 January 2001 when the new clause came into force.

Conclusion

[33] I have concluded that the new clause was clearly intended to apply from 1 July 1993 but not quite in the way Mr Schnauer submitted. First, it is evident from subclause (1) of the 2000 version of clause 3 that it was intended to apply to land subject to ss 40 to 42 of the 1981 Act as at 10 May 1993 and which had then been transferred at least once under the Health Sector (Transfers) Act. In relation to the subject land, the first transfer (from the Auckland Area Health Board to Waitemata Health Ltd) occurred with effect from 1 July 1993. So, the new clause would apply to the land whether or not there was a second transfer. It follows that Parliament must have intended that the new clause would apply as soon as the first transfer was effected on 1 July 1993. Second, I accept Mr Schnauer's submission that there was no need for Parliament to refer to the date of 10 May 1993 if the new version of clause 3 were to apply only from 1 January 2001. Third, the new version of clause 3 came into force after the Court of Appeal decision in the *Counties Manukau* litigation and it is reasonable to infer it was intended to remove any difficulties of interpretation which became apparent in that decision and to ensure that the clause was effective to implement the statutory intention to avoid the consequences of s 40 while the hospital authorities continued to hold or use the land for their statutory purposes.

[34] Fourth, while I accept that subclause (2) of the 2000 version of clause 3 widened the exclusion imposed by the 1993 version, its general statutory intention remains the same in both cases. Both versions contemplate that the rights under ss 40 to 42 are excluded or deferred "so long as" the land is held or used for the purposes of the transferee. Both versions also provide that ss 40 to 42 of the 1981 Act do not apply where the land is transferred to a transferee (or another transferee as defined) for any of the defined purposes. Under both versions, if the land is no

longer used for the purposes of the transferee or (in the case of the 2000 version the circumstances described in sub (2)(a) or (b) or (c) are no longer fulfilled), then there is no further impediment to the application of the 1981 Act.

[35] Fifth, in the general run of cases, there may be no great difference between the application of the 1993 and the 2000 versions of clause 3. For example, if a hospital board is considering whether to transfer the land or to hold the land for any other of its statutory purposes, then it will probably not be found that the land is no longer required until a decision to that effect is made: see the helpful analysis by Fisher J in *Morrison v Attorney-General* (CP.297/00, 31 July 2001). The same conclusion may be reached where preliminary steps are being taken towards a sale but before any final decision is taken to declare the land surplus. In those situations, the amended clause simply confirms the existing law under s 40. Even where the land is leased or licensed to someone else for health related purposes, it is difficult to see how that effects any practical change from the 1993 version of the clause (assuming that the "health related purpose" was one which the District Health Board could itself carry out under its statutory functions). Even the prospect of the Minister consenting to some other use of the land under clause 3(2)(c) would not diminish the plaintiff's rights under s 40 of the 1981 Act so long as that use is a public work as defined: see s 40(1)(b). It follows from this analysis that any diminution of existing rights is more apparent than real.

[36] Where I take issue with Mr Schnauer is his submission that so long as the land is held in accordance with subclause (2) from 1 January 2001, it does not matter that there may have been a triggering event under s 40 in the period from 10 May 1993 to 1 January 2001. For the reasons already indicated, I consider that the new clause was intended to apply with effect from the date of the first transfer (1 July 1993). The expression "is held" in relation to the land connotes a continuing state of affairs during the period after that date. If the conditions of subclauses (2)(a), (b), or (c) are not satisfied at any time after that date (other than for a period which is *de minimis*), the restriction no longer applies and the rights under ss 40 to 42 become available if the s 40 conditions are fulfilled. In *Horton*, the Privy Council made it clear that the rights under s 40 vest as soon as the statutory conditions are fulfilled.

Summary

[37] I find:

[a] It remains arguable that the plaintiff may be able to establish at trial that rights accrued under s 40 of the Public Works Act 1981 prior to 9 May 1993.

[b] It remains arguable that the plaintiff may be entitled to damages against one or more of the defendants upon any of the bases set out in the second amended statement of claim.

[c] It remains arguable (assuming the truth of the current pleadings) that the plaintiff will be able to establish at trial that rights accrued under s 40 of the Public Works Act 1981 in 1996 or 1997, notwithstanding the 2000 amendment to clause 3 of the First Schedule of the Health Sector (Transfers) Amendment Act 1993.

[d] In the last case, the plaintiff would have to establish that the land no longer fulfilled any of the conditions in clause 3(2)(a), (b), or (c) of the First Schedule at some point on or after 1 July 1993 and that the conditions of s 40 of the Public Works Act were otherwise fulfilled.

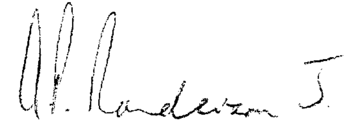
Result

[38] The application by the third defendant to strike out portions of the second amended statement of claim is dismissed. The plaintiff is entitled to costs against the third defendant on a 2B basis. I make no order against the first and second defendants. Their stance was simply one of non-opposition to the third defendant's application. If counsel are unable to agree on costs, memoranda should be submitted by 31 January 2002.

[39] This matter should now be allocated a conference before me in the week commencing 11 February 2002 at 9.15 am (half an hour required). A fixture will

then be made for the substantive hearing and directions given as to any remaining interlocutories, as well as trial directions. Counsel should confer and file a joint memorandum (or separate memoranda if agreement cannot be reached) by 31 January 2002.

Signed at 12 noon this 14th day of December 2001.



A P Randerson J

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