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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 2754/89

97/342

BETWEEN FREDA ROWAN

Plaintiff

AND

THE ATTORNEY-GENERAL OF NEW
ZEALAND

Defendant

Hearing: 3, 4 and 5 February, and 12 March 1997

Counsel: P Cavanagh QC and IC Bassett for plaintiff
K Robinson and Ms CEA Townsend for defendant

Judgment: 10 April 1997

JUDGMENT OF SMELLIE J

Solicitors for plaintiff:
Kevin McDonald
DX BP 66086

Solicitors for defendant:
Crown Law Office
DX SP 20208, Wellington

Introduction

This is a claim in respect of residential land in St Heliers, Auckland which the plaintiff says was acquired from her and her late husband pursuant to the Public Works Act 1928 in 1962.

The plaintiff seeks compensation for losses alleged to have resulted from the Crown's failure to fulfil its statutory obligation pursuant to the Public Works Act 1981 to offer the land back to her and her late husband (he died on 16 February 1985) when it was declared surplus to its requirements by the Crown in 1983.

The Crown's response basically is that it acted within its statutory obligations by offering the land back to the successor-in-title of the Rowans and that, even if that is not so, the plaintiffs have suffered no loss or, if they have suffered loss, they have failed to mitigate.

Outline Of The Facts

An agreed statement of facts, together with a supplementary admission of facts by the Crown, puts beyond argument much of the history of the matter which is recorded either in the Land Transfer Office or in the agreed bundle of documents, which contains all correspondence between the Crown and the plaintiff and the solicitors acting for herself and her husband throughout. Other evidence adduced *viva voce* by the plaintiff was substantially unchallenged. The areas of factual dispute relate principally to whether or not the District Land Registrar at Auckland would have transferred a block of land-locked land back to the plaintiff and her husband when the Crown declared it surplus to its requirements and, beyond that, what loss, if any, did the plaintiff and her husband suffer as a result of not being given the opportunity to purchase the land back.

I interpolate before further elaborating on the facts established by the evidence, that the legal aspects of the case fall to be resolved primarily upon the correct construction of s 40 of the Public Works Act 1981 (which came into force on 1 February 1982), as amended by the Public Works Amendment Act 1982 (which came into force on 1 November 1982). And as already mentioned the other large area of the dispute is what loss, if any, has been suffered if the provisions of the Act have been breached.

The plaintiff's husband escaped from Vienna shortly before the outbreak of the Second World War. He lost his entire family in the Holocaust and left behind all his possessions and all prospects of inheritance that he could reasonably have expected. Here in New Zealand he established himself and in due course married.

Sometime prior to September 1959 he acquired a property at 200 St Heliers Bay Road, Auckland, comprising 1.9627 hectares more or less and he and the plaintiff became joint registered proprietors thereof following a settlement of the property as a joint family home on 29 September 1959.

The piece of land can be described as being in the shape of a cleaver. The handle of the cleaver consisted of a long residential section with road access to St Heliers Bay Road and the blade of the cleaver was the balance of the land comprising, approximately, 1.7943 hectares.

Mrs Rowan's evidence, which I accept, was that at the time that her husband acquired the land, and subsequently when they became registered proprietors, he held the firm view,

which she shared, that in due course the land would rise in value and that it had considerable potential which, at some stage, they would capitalise upon.

In 1958 or 1959, however, the Crown approached the Rowans seeking their agreement to sell the large, rear block of land which I have described as the blade of the cleaver containing 1.7943 hectares, for use as a site for a proposed intermediate school.

The initial price offered for the land was in the region of £3,000. It was rejected with an indication that the Rowans did not wish to sell. The Crown persisted, but the Rowans continued to resist, even though the Crown's offer rose steadily throughout 1960-61 and into mid-1962. Mrs Rowan's evidence was that by June of 1962 it had been made quite clear to her and her husband that if they did not agree to sell, the land would be taken compulsorily. The correspondence between the solicitors for the Rowans and the Crown and internal Crown documents contained in the agreed bundle of documents support that view of the facts. Furthermore, although Mr Robinson was careful to bring out that the land was not taken by proclamation, nonetheless, the Crown acknowledges that it was acquired in such a way that the provisions of s 40 of the Public Works Act 1981, requiring an offering-back when land becomes surplus, apply.

I am of the view, therefore, that the fact that the Rowans ultimately accepted the inevitable rather than resisting to the end does not affect their right to make a claim pursuant to the Act and receive compensation if they are entitled to it.

A written agreement pursuant to s 32 of the Public Works Act was signed on 31 August 1962 and the Rowans were paid £12,375 for the land acquired. The purchase was

gazetted showing that the Ministry of Works, pursuant to s 32 of the Act, had taken a portion of the subject land for a public school and the *Gazette* notice was registered against the title. Mr and Mrs Rowan, however, remained the owners of the handle of the cleaver on which they had their home and access to St Heliers Bay Road.

Between November 1964 and March 1969, Mr Rowan advised the Auckland Education Board and the Commissioner of Works of his, and the plaintiff's, interest in repurchasing the acquired land if it was ever declared surplus. There were letters by the Rowans' solicitors, Messrs Finlay Shieff Angland and McLaren to the District Commissioner of Works on 12 November 1964 and 28 March 1969, while Mr Rowan, himself, wrote on 6 May 1965 and 29 November 1965 to the Auckland Education Board. Both the Board and the District Commissioner advised Mr Rowan and the plaintiff by letters between 16 December 1964 and 8 April 1969 (four in all) that, if the acquired land was declared surplus, the appropriate authority would be informed of the interest of the Rowans and their desire to repurchase.

The next development was that in December 1969 the Rowans sold their residential property (the handle of the cleaver) comprising 1684 hectares to a Mr Rosenfeldt. Then, in November 1970, Mr Rosenfeldt sold to one, Keith Wallace Watson.

Matters then stood still for a decade. But after the passing of the Public Works Amendment Act 1982, there came into existence the Property Services Circular, identified as 1982/10 on 12 November 1982 which was for issue by District Commissioners of Works to District Property Officers for their guidance in respect of the new statutory provisions. I shall discuss the provisions in question in greater detail a little later. For the moment,

suffice it to say they deal broadly with the disposal to former owners, of land no longer required for Public Works. The circular, which commences at page 72 of the common bundle and occupies ten pages, is headed "Transfers and Disposals: Section 40 Public Works Act 1981". It then purports to set out the main objectives of s 40 and its applicability, together with the general procedure to be followed. Mr ED Fogarty, who prior to his retirement from the Public Service in 1990 was the assistant director of Property Sales Division of the Head Office of the Ministry of Works and Development in Wellington, gave evidence about this circular and the understanding within the Ministry as to how s 40 operated. In his prepared statement of evidence-in-chief Mr Fogarty, at paragraphs 7 and 8 said:

"7. I understand that one of the issues in this case involves the question of the choice of the successor in title of the former owner in preference to that former owner. The Circular does not address that question, as opposed to a successor on death, because finding a successor in title would usually be achieved by searching the land transfer title. The understanding in the Ministry was that the Act enabled a choice to be made between the former owner and the successor in title in one specific situation, namely where part only of a land holding had been acquired. That was a quite commonplace situation, and in some instances it made good sense to re-unite the two land holdings especially if the acquired land was otherwise landlocked.

8. I am informed that another issue is as to the use of s.129B of the Property Law Act 1952 to provide access to a landlocked section. I am not aware of that step ever having been taken by the Ministry in this context. The Ministry's view was that its obligation was to offer back the land which had been acquired; it was neither obliged nor empowered to offer additional land. Of course a former owner (or successor in title) could seek to purchase other land if some happened to be available."

It also came out in cross-examination that Mr Fogarty was responsible for the oversight of the preparation of Circular 1982/10 and he gave it as his evidence that he believed the circular itself would have been approved by an in-house solicitor before it was issued. But

he was unable to explain why nothing had been found on discovery of the Crown's documents indicating such approval. He suggested that the approval might have been informal. But, I am bound to say I found that rather unconvincing. It also came out in cross-examination that he had apparently not considered the provisions of s 129B of the Property Law Act 1952, which gives owners of landlocked land the right to apply to the Court for access to a dedicated road.

The next event of significance occurred in October 1983, when the Auckland Education Board declared the acquired land to be surplus to education purposes and instructed the Ministry of Works to dispose of it. It is important, however, that in so doing the Board also advised the District Commissioner of Works and the Commissioner of Crown Lands that the former owners of the acquired land, Earnest Michael Rowan and the plaintiff, had previously expressed the desire to repurchase the acquired land if ever it became surplus.

By this time, the Rowans had shifted to Australia because their children were living there, but the evidence is that no effort was made to contact them and, indeed, it seems no thought was given to offering the land back to them. Instead, the recommendation coming through the hands of various officers in the Ministry of Works was that the land should be offered to Keith Wallace Watson who, of course, had become the proprietor of the handle of the cleaver which was the balance of the land which had not been taken. Clearly, the understanding that Mr Fogarty referred to in paragraph 7 of his prepared evidence set out above resulted in the Ministry simply offering the land to Mr Watson without giving any thought to the possibility that the original owner should have the first option. Far less that, if the fact that the land was landlocked was an impediment, then the original owner might

be able to surmount that difficulty by an application to the Court pursuant to s 129B of the Property Law Act 1952.

A new certificate of title for the blade of the cleaver (1.7943 hectares) was obtained without difficulty. It was a large block of landlocked land, surrounded by properties with road access. This is shown by Exhibits "A" and "B" which are, respectively, an aerial photograph and a district plan. Exhibit "B" is particularly informative because it shows how the blade of the cleaver could easily have obtained road access through one of four building lots on Sierra Street which runs roughly parallel with St Heliers Bay Road at the rear of the property. The same exhibit also clearly shows other adjoining parcels of land which had road access and with which the land in question could have been amalgamated.

The evidence of various officers with responsibility for the disposal of land in the Ministry of Works at Auckland was to the effect that they understood that the District Land Registrar at Auckland would not issue a title for landlocked land, or, alternatively, would not agree to a transfer of the same unless road access was available to it. They therefore took the view that it was impractical to transfer back to the original owners and that only if the land was amalgamated with the title of an adjoining owner could it be transferred. That seems to be the reason why they elected to ignore the Rowans and offer to Mr Watson.

Here there is perhaps a mixed question of fact and law. The issue being, could a District Land Registrar at Auckland properly transfer the landlocked blade of the cleaver back to the Rowans despite the fact that the land did not have road access? Or, would he have been entitled to refuse the transfer unless the land was to be amalgamated with other land that did have road access?

Mr CC Kennelly, who was employed in the Land Transfer Registry from 1944 to 1984 and held the positions of District Land Registrar at Hawkes Bay, Otago and Wellington before taking up that position in Auckland in 1975, gave evidence. He said that he had never been approached by the Ministry of Works as to whether or not he would have transferred the landlocked land to the Rowans and, furthermore, that he would not have regarded himself as prohibited by any statutory provision from doing so. In my judgment, Mr Kennelly's view of his powers is correct and there was in fact no reason why, had the land been offered back to the Rowans and purchased back by them, they could not have received a transfer of this block of landlocked land.

Be that as it may, however, the new certificate of title issued on 30 November 1983, and on 20 December 1983 the Ministry of Works and Development offered to sell the land to Mr Watson for the sum of \$100,000. That offer was accepted informally on 15 February 1984 and an Agreement for Sale & Purchase was signed on 6 April 1984.

During 1973/74 the Australasian Conference Association Limited (the Seventh Day Adventist Hospital) purchased and established upon adjacent land, its private hospital which is one of several which are extensively patronised, especially in the more affluent suburbs of Auckland. The Adventist Hospital, upon learning that the land was surplus to the Crown's requirements, immediately instructed agents to seek out the Rowans, or other potential owners, and advise them of the Hospital's desire to negotiate to purchase the land. Subsequently, on 6 April 1984 Mr Milne, the Chief Executive of the Hospital, sent a telegram to the Member of Parliament for Tamaki, because the land in question was in that electorate. The Member was the then Prime Minister, the Rt Hon Sir Robert Muldoon,

who had taken an interest in the Hospital's development. The Prime Minister responded by telegram the same day. By that means, the plaintiffs say the Crown was made aware of the Hospital's interest in purchasing the land. Ironically, the exchange of telegrams occurred on the very day the Agreement for Sale & Purchase with Mr Watson was signed. The Prime Minister's telegram directed the Hospital to Mr Dobbie, the senior official at Auckland involved in the sale and contact was made with him within a day or two. It follows that on the day on which the agreement to sell to Watson was signed, and in the days immediately following, the Crown was aware of the fact that the Hospital wished to purchase and that anyone who acquired the land would have an adjacent interested buyer which wished to expand its activities and use the land for that purpose.

Despite the known interest of the Rowans and the fact that the Hospital was a willing, if not eager buyer, the sale to Mr Watson went ahead, the written agreement containing a special condition that the land acquired was to be amalgamated with adjoining land owned by Mr Watson, who had in fact, as earlier recorded, purchased the Rowans' former home from Mr Rosenfeldt to whom the Rowans had sold.

Mr Watson did not immediately sell to the Hospital. Instead, he acquired, it seems without too much trouble, Lot 431 for \$53,000 which is a building site with road access to Sierra Street, the rear boundary of which adjoins the land originally acquired from the Rowans. He then applied for a subdivision scheme of the whole block. The Hospital, however, remained a keen buyer.

It was shortly after this, in June 1984, that Shieff Angland and Dew, the successors of the Rowans original solicitors, wrote on their behalf to both the Ministry of Education and the Ministry of Works protesting their clients' right to have been offered the land back.

Unhappily, in February 1985, Mr Rowan died. One can readily understand as Mrs Rowan said from the witness box, that he was bitter, having lost his European inheritance, to have been denied the opportunity to capitalise upon his Auckland investment and to see that advantage go to someone else.

In the meantime, having obtained approval for the subdivision so that he was in a position to demonstrate an alternative use to the Hospital, Mr Watson finally, on 26 June 1986, accepted an offer of \$2 million for all the land he held, that is the disputed land plus the residential property with access to St Heliers Bay Road which he had purchased from Mr Rosenfeldt who had purchased from the Rowans and the additional rear section providing access to Sierra Street. The parties are agreed that the Hospital paid a 77% premium above market value in order to acquire the land in those three titles.

Section 40 of the Public Works Act 1981

The section has been amended from time to time. But for the years 1983/84/85, which cover the period we are concerned with, it was on the statute books in the following form:-

- “40. Disposal to former owner of land not required for public work -
 (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 essential work; and
 (c) Is not required for any exchange under section 105 of this Act -

the Commissioner of Works 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 Commissioner of Works 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 to the successor of that person -
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 Commissioner of Works or local authority considers it reasonable to do so, at any lesser price.
- (2A) If the Commissioner of Works or local authority and the offeree are unable to agree on a price following an offer made under subsection (2) of this section, the parties may agree that the price be determined by the Land Valuation Tribunal.
- (3) Subsection (2) of this section shall only apply in respect of land that was acquired or taken -
- (a) Before the commencement of this Part of this Act; or
 - (b) For an essential work after the commencement of this Part of this Act.
- (4) Where the Commissioner 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.
- (5) 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."

Although there were subsequent amendments in 1987/88/89, they do not affect the dispute between the parties in this case.

The Crown accepts that the disposal of the land in question in these proceedings, was governed by Section 40 in the above form.

The Correct Construction of Section 40

The dispute between the parties regarding the construction of s 40 turns on two questions. First, whether s 40(2) provides for a priority in favour of the person from whom the land was first acquired, or the successor of that person. Secondly, the proper construction of "successor" in s 40(5).

The Crown expressly disavowed reliance on s 40(2)(a)(b) - thus it was not argued that it would have been impracticable, unreasonable or unfair to offer the land back to the Rowans, or that there had been any change in the character of the land that might affect the position. Nor was s 40(4) - reasonable grounds to sell to adjoining owner, relied upon.

In essence, the plaintiff argues that s 40 represents a legislative commitment to returning land no longer required to the person from whom it was originally acquired, and that that is its primary purpose. Thus there must be read into ss (2) a priority in favour of the former owner. The Crown, on the other hand, contends that s 40(2) vests a discretion in the Commissioner which allows him to offer to sell the land either to the former owner, or the successor in title. Thus it is said, that so long as he offers to one or the other, there can be no breach of the section's requirements. The Crown argues that in circumstances such as those thrown up by this case where the former owner is alive, and only part of the land is taken, the Commissioner must consider both ss (2) and the second part of the definition of "successor" in s (5) -

"...and in any case where part of a person's land was acquired or taken, includes the successor in title of that person."

It follows of course, if the Crown's construction is correct, that in a case where all the land is taken there is no room for the application of the second limb of the definition of "successor" in s 4(5). This last point was acknowledged by Mr Robinson when making his final submissions.

The starting point is to recognise that s 5(j) of The Acts Interpretation Act 1928, requires that a purposive approach is required. The provision also requires that every enactment be deemed remedial and given

"such fair, large and liberal construction and interpretation as will ensure the attainment of the object of the Act ... according to its true intent, meaning, and spirit."

On the face of it the plain meaning and intent of the section appears to be remedial, bringing to an end a perceived injustice where land could be compulsorily taken by the Crown for one purpose, and arbitrarily used for another without giving the original owner the opportunity to buy it back. That was the view taken by Hammond J in Deane v The Attorney General CP 65/94 see p 18 line 14 when referring to s 40, His Honour said:-

"The section cannot be understood in isolation from its broad purpose: the vindication of inchoate rights of the former owner."

Baragwanath J was of the same view in SC Glucina v Auckland City Council & Ors. M 931/95 Judgment 28/2/96 Auckland Registry. At p 24 of the judgment, line 7 to 12:

"The statutory language establishes what is in my view a clear code as to what is to occur. The language of the provision is specific; it provides explicitly to whom the offer is to be made, namely the former owner and if the former owner is a deceased individual 'successors' as defined in s.40(5)."

And on the following p 25 between lines 1 and 2:

“The former owner has the privilege of receiving the first offer.”

That a priority in favour of the original owner was the intention of Parliament, is demonstrated by the remarks of the Hon WL Young, Minister of Works & Development, when introducing the second reading of the bill on 2 September 1981, to be found at p 3165 of *Hansard*. Having moved the second reading and referred to the careful consideration that the bill had received before the Lands & Agriculture Select Committee, the Minister said:-

“As a result, the Committee has recommended several changes to the bill. One of the most significant of the changes that have been recommended is the rewriting of clause 39. That clause will now give effect to the general principle that when land has been acquired by the Government or by Local Body for a public work, and subsequently ceases to be required for a public work in respect of which there is a power of compulsory acquisition, the land should be offered back to the original owner, or his representative, except in circumstances where there was no element of compulsion at the time the land was originally acquired.”

Mr Robinson for the Crown urged caution in relying upon *Hansard*, contending that if such references are ever permissible, they are restricted to cases where an ambiguity requires resolution, and that, he contended, was not this case.

I reject that submission in the context of this case. Resort to *Hansard* as an aid to statutory interpretation has occurred not infrequently, both in the High Court and the Court of Appeal in New Zealand over the last decade. The process was endorsed by the House of Lords' recent decision in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593. In that case, a committee of seven Law Lords (Lord McKay dissenting) approved such

“questioning of Parliamentary proceedings.”

Lord Browne-Wilkinson delivering the leading speech said at p 634:-

“It is an inescapable fact that despite all care taken in passing legislation, some statutory provisions when applied to the circumstances under consideration in any specific case are found to be ambiguous. One of the reasons for such ambiguity is that the members of the legislature in enacting the statutory provision may have been told what result those words are intended to achieve. Faced with a given set of words which are capable of conveying that meaning it is not surprising if the words are accepted as having that meaning ...”

That the words in s 40(2) and (5) are ambiguous in the circumstances of this particular case, is demonstrated by the competing arguments and the different results that are said to flow from taking a purposive as opposed to literal approach.

In my judgment, the Crown’s suggested interpretation is flawed. It provides no explanation as to why, in cases where only part of the land has been taken, there should be two policy considerations of equal weight:

1. The return of land to the former owner; and
2. The restoration in one title of the original piece of land.

There is no indication that that was the intention of Parliament in passing the provision.

On the contrary, in my view both the policy underlying the section and the wording of it show that if the first limb of the definition of “successor” in s 40(5) is inapplicable (ie where the former owner is still alive), then the second limb of the definition is also inapplicable. Had the legislature intended to vest a discretion in the Commissioner to chose whether, in any case where part only of the land was taken, to make the offer to the person from whom the land was taken or to the successor in title, then that would have been expressed in ss (2).

Put another way, the Crown's interpretation would elevate the secondary policy (recreating the original land holding) to a status equal to "righting the wrong" of not returning land to those who had been required to give it up. Furthermore, even if the second limb of the definition of "successor" in ss (5) can give rise to competing claims between the successor of a deceased former owner and the successor in title, the policy underlying the section dictates that the land be offered to the successor by will to the original owner, whether all or only part of the parcel is taken. But of course, that question does not arise for resolution in this case. Here the original owners were alive at the time when the land was offered for resale.

In summary then, I uphold the plaintiff's submission. The correct interpretation of s 40 means that Mr and Mrs Rowan were entitled to the first option to repurchase the land originally taken from them and the Crown's failure to afford them that option, breached the provisions of s 40.

land must be offered to the original dispossessed owner.

Cause of Action Based on Breach of Statutory Duty

The Crown's argument is that there can be no cause of action based upon breach of statutory duty because no such duty was breached. Mr Robinson put it this way in paragraph 34 of his closing submissions:

"If one starts to examine whether the Commissioner was right to select a successor rather than the original owner, one is really considering the exercise of a statutory discretion, rather than a statutory duty, and the tort of breach of statutory duty does not extend to discretion - *Balkan and Davis* Law of Tort second edition p 503. *Halsbury Laws of England* fourth edition paragraph 1208.

'It is axiomatic that before there can be an arguable case for the tort of breach of statutory duty, there must be a statutory duty to be breached.'

See *E v Kay* [1995] 2 NZLR 239 at 245."

Mr Cavanagh QC for the plaintiff, likewise acknowledged that if the construction of s 40 for which the plaintiff contended was wrong and the Commissioner really did have a discretion, then the cause of action based upon breach of statutory duty could not be sustained.

To succeed on such a cause of action the plaintiff must not only establish that the statute imposes a mandatory duty, but also that it is of the kind which is enforceable by a personal damages action. Furthermore, the plaintiff must show that he or she has suffered the kind of loss or "mischief" which the statute was intended to prevent.

A consideration of the authorities shows that a statutory duty will be enforceable by personal action if:

- (i) It is for the benefit of a limited class of person; and
- (ii) Parliament intended to confer a right of action on members of that class.

Authority for the above statements is to be found in both the United Kingdom and New Zealand. In *Atkinson v Newcastle Gateshead Waterworks Limited* (1877) 2 Ex D 441 it was established that an action for damages does not automatically lie upon breach of every statute: the question is whether the legislature intended the Act to confer a civil right of

action for its breach. See also *R v Deputy Governor of Parkhurst Prison Ex-parte Hague* [1992] 1 AC 58, 159 per Lord Bridge.

The authorities recognise that the purpose and scope of the statute, the mischief it was designed to remedy and the circumstances in which it was passed, are all relevant. The leading case now appears to be *X v Bedfordshire County Council* [1995] 2 AC 633. The main judgment in the House of Lords was given by Lord Browne-Wilkinson who recognised that the protection or benefit of a limited class of the public is a necessary precondition of liability. (See p 731.)

His Lordship went on to say that a private law cause of action will arise:

“If it can be shown, as a matter of construction of the statute, the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of duty.”

Then a little later:

“If the statute provides no other remedy for its breach and that parliamentary intention to protect a limited class is shown, that indicates that there may be a right of private action, since otherwise there is no method of securing the protection the statute was intended to confer.”

Obviously the “class test” is particularly important when it is a public authority which is charged with performance of the statutory duty. Thus, neither road legislation (*Gardener v McMamus* [1971] NZLR 475) nor Town & Country Planning provisions (*AG v Birkenhead Borough Council* [1968] NZLR 383) give rise to rights of action because those enactments are for the benefit of the community as a whole.

Although historically there has been reluctance in the past to impose liability on public authorities for failing to carry out statutory duties, the main reason for that seems to have been the “flood gates” argument. Demonstrably, however, s 40 of the Public Works Act is not susceptible of that concern.

In my judgment, the principles applicable in such a case as this dictate that the breach of statutory duty in failing pursuant to s 40 to offer land back to the person from whom it was originally acquired, does give rise to a private cause of action.

It is also my view that there is no impediment to the plaintiff pursuing that cause of action. The duty owed was absolute and there is a direct causal link between the breach and any loss suffered.

Cause of Action in Negligence

There has been no case so far in which a breach of s 40 of the Public Works Act 1981, as amended by the Public Works Amendment Act 1982, has been held to support a cause of action in negligence.

Judicial opinion throughout the common law world has differed as to the correct approach to be applied to determine whether a duty of care should be imposed in a new situation. In New Zealand, however, the Courts have held firmly to the two-stage approach first articulated by Lord Wilberforce in *Amis v Merton London Borough Council* [1978] AC 728 at 751-752. That this is the correct approach was recently reaffirmed in the judgment of Richardson J in *Fleming v Securities Commission* [1995] 2 NZLR 514 at 526 where,

under the heading "principles governing duty of care in new situations" the judgment reads from line 50 on that page to line 20 on the following page:

"It is sufficient to restate in the briefest terms the approach taken in this Court over the last 15 or more years when determining whether in circumstances not previously dealt with a duty of care arises. The ultimate question is whether in the light of all the circumstances of the case it is just and reasonable to recognise a duty of care by the defendant to the plaintiff. That depends on consideration of all the material facts in combination. It is an intensely pragmatic question. Drawing on *Anns v Merton London Borough Council* [1978] AC 728 we have found it helpful to focus on two broad fields of inquiry. The first is the degree of proximity or relationship between the alleged wrongdoer and the person who has suffered damage. That is not of course a simple question of foreseeability as between parties. It involves consideration of the degree of analogy with cases in which duties are already established and reflects an assessment of the competing moral claims. The second is whether there are other policy considerations which tend to negative or restrict - or strengthen the existence of - a duty in that class of case."

Duty of Care
 a) Proximity
 b) Foreseeability
 (see p27)

A more elaborate discussion will be found in the judgments of Cooke P and Richardson J in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants Ltd* [1992] 2 NZLR 282 at 294 and following and 306 and following respectively.

Here the proximity was of the closest kind and the moral obligation on the Crown to comply with the statute and offer back to the original owners land which, for all intents and purposes, had been compulsorily acquired from them was of the highest order. In my judgment the plaintiff's claim that she should be afforded a cause of action in negligence satisfies the first requirement overwhelmingly.

So far as the second requirement is concerned, the plaintiff's submissions drew attention to Cooke P's fifteen points of reference in the *South Pacific* case (supra) at 296 and, in particular, argued that the following factors were relevant:

- the seriousness of the harm
- the broader appeals to the requirements of justice
- the opening of the floodgates
- impact on existing bases of liability
- reasonable alternatives for self-protection
- encouraging reasonable care in determining wrongdoing
- economic implications.

In elaboration of those points, the plaintiff argued that obviously the cause of action here will not open the floodgates and lead to an unacceptably wide category of liability. Further, that it will still be necessary for a claimant to establish loss. And that this is the kind of loss in respect of which various kinds of self-protection (eg, insurance) are not realistically available. Also, it is now generally accepted in New Zealand that a duty of care can lie against a public authority to avoid causing economic loss pursuant to the exercise of particular powers or duties - see *Invercargill City Council v Hamlin* [1994] 3 NZLR 513.

I have referred to the high moral quality of the plaintiff's claim as a principal justification for satisfying the first limb of the *Ams* inquiry. I consider also, however, that the dual considerations of the requirements of justice and the necessity for making it clear to the servants of the Crown that duties owed to citizens, (especially those secured by statute), cannot be breached with impunity are compelling points at the second stage.

As with the first requirement, I have little difficulty in concluding that the second is satisfied and, as a consequence, I hold that a cause of action in negligence is available to the plaintiff in this case.

Has Breach of the Duty of Care Been Established?

I mention first a major plank of the Crown's argument in order to dispose of it. Mr Robinson submitted that there was no reliance by the Rowans. This because there was no evidence that they were aware of the Public Works Act 1981 as amended in 1982. In short, that they did not know that they were entitled to have the land offered back to them. That they were aggrieved that they had been obliged to give up the land and considered they had a moral right to be offered it back is clearly established by the facts and reinforced by the quite considerable lengths they went to to register their interest in re-purchase if the opportunity ever presented itself. That, on its own, however, would not be enough. But I consider that Mr Cavanagh's answer to Mr Robinson's reliance argument is conclusive. He submitted that what the Rowans relied upon when they registered their desire to re-purchase, if the opportunity ever presented itself, was that the Crown would comply with the law.

Turning now to a consideration of whether or not the duty of care was breached.

I have already referred to the steps taken by the Assistant-Director of the Property Sales Division of the Head Office of the Ministry of Works & Development in Wellington to prepare the Property Services Circular 1982/10, dated 12 November 1982 for the guidance of officers of the Department engaged in the disposal of Crown land throughout the country. When the Ministry of Works received instructions from the Department of

Education to dispose of the land originally acquired from the Rowans because it was no longer required for an intermediate school, the Senior Land Purchase Officer at Auckland delegated the task to an Assistant-Land Purchase Officer (Mr Higgins) in Auckland. Mr Higgins considered the file in detail. Although he noted the declared interest of the Rowans to re-purchase he made no attempt to trace them. This was because he understood that s 40 gave the Department a choice as to whether the land was offered to the Rowans or to their successor in title, namely, Mr Watson. He decided that it would be impracticable to offer the land to the Rowans because it had no road frontage and he believed, under those circumstances, that the District Land Registrar would not issue a title for landlocked land. He acknowledged that the position that faced him was not covered by Circular 1982/10 and that he was quite unaware of s 129B of the Property Law Act. He was unable to recall whether he had had his view of the Act checked by anyone. Having gone through that exercise, he recommended a sale to Mr Watson.

The file was then handed on to a Mr Keech who was an Assistant-District Property Officer at Auckland. He also understood that the District Land Registrar would not issue a title for landlocked land and he gave no consideration to the significance of s 129B. Mr Keech acknowledged that he made no special inquiry as to whether his understanding as to title was correct. He was acting upon what he said was the general understanding in the Department. He accordingly endorsed Mr Higgins' recommendation.

The matter then went on to a Mr Dobbie, who was the District Property Officer, and as such, senior to both Higgins and Keech. He read the file. He said in evidence that he was sure that he had inquired of the District Land Registrar and had been told that no separate title for landlocked land would issue. In view of Mr Kennelly's evidence that he would

have issued a title and he recalls no inquiry being made, I am obliged to say that I do not accept what Mr Dobbie says on this point. I prefer Mr Kennelly's evidence.

Mr Dobbie, like the others, agreed that the Circular 1982/10 did not cover the position that he was addressing on the file. He, however, saw no need to take legal advice and I infer from the answers he gave that he was either unaware of, overlooked or consciously disregarded the provisions of s 129B as they related to the issue of whether or not the Rowans could have obtained access had they become registered proprietors of the balance of the land, albeit in the first instance, landlocked. In the circumstances, therefore, Mr Dobbie endorsed the recommendation with the words "I concur" and after that it seems to have been purely a matter of form when the District Commissioner, acting on delegated authority from the Commissioner himself, gave his final approval.

It should also be noted that when, on 14 June 1984, a little over two months after the agreement had been signed with Mr Watson, the Rowans' solicitors wrote recording their clients' rights in the matter, it was Mr Higgins who replied on 22 June (CB 187), saying, *inter alia*:

"The land acquired by the Crown from your client formed part of his property and does not have legal road frontage. Your client has sold the balance of the land and it was therefore considered that it would be impractical to offer the land back to your client as the District Land Registrar would only issue title to this land on the basis that it be amalgamated with an adjoining Certificate of Title. If your client had still been the owner of the balance of the land the surplus school site land acquired from your client would have been offered back to him. The land was therefore offered to the successor in title pursuant to Section 40(2) and (5) of the Public Works Act 1981 and the sale was completed on 30 April 1984." [Emphasis added]

On those facts, I consider that the Crown clearly breached its duty of care owed to the plaintiffs in the following ways:

- i) recognising that the 1982/10 Circular did not cover the position at no stage was legal advice sought or acted upon;
- ii) the Crown officials engaged in the sale apparently considered that s 40(2) and (5) gave the Crown a choice in the circumstances, but none of the officers involved had legal qualifications and none of them sought legal confirmation of the view they formed;
- iii) all the officers, Higgins, Keech, Dobbie and the Assistant-Commissioner, took the view that it was "impracticable" to return the land to the Rowans because it was landlocked. That was not so because the District Land Registrar would have issued a title to the Rowans and because no account was taken of s 129B of the Land Transfer Act which was available to facilitate the acquiring of access from vacant, adjoining Crown land;
- iv) all the officers acted on an erroneous understanding that the District Land Registrar would not issue a title for landlocked land but none of them made a specific inquiry and had they done so the correct position would have been disclosed;
- v) no attempt was made to trace the Rowans, whereas, I infer that their solicitors, who acted for them throughout and who wrote shortly after the sale, would have been an immediate and simple point of contact.

In all the circumstances, therefore, I conclude that the plaintiff has proved that the Crown breached its duty of care and is liable for damages as a consequence.

Damages : Breach of Statutory Duty : Breach of Duty of Care

Since "The Wagon Mound" (No 2) [1967] 1 AC 617 it has been accepted that foreseeability of harm is a pre-requisite to liability for negligence. The tendency has been to apply the same approach to cases of strict liability - see *Cambridge Water Company v Eastern Counties Leather plc* [1994] 2 AC 264 at 301, 304-306 per Lord Goff. In New Zealand, even before "*Wagon Mound*" (No 2) (supra) foreseeability was the test employed by McGregor J when awarding damages for breach of statutory duty in *Pease v Eltham Borough* [1962] NZLR 437 at 443. I hold that in this case foreseeability is the test for both causes of action.

The plaintiff's claim is advanced on the basis that her loss results either from the lost opportunity to sub-divide the land or, alternatively, a lost opportunity as at June 1986 to sell on to the Australian Conference Association - Seventh Day Adventist Hospital.

The Crown accepts that the loss of an opportunity to sub-divide profitably was foreseeable. Mr Robinson submitted, however, that the loss of the opportunity to sell to the Hospital at a substantial premium, "was damage of a kind no-one could have foreseen".

On the evidence, in this case, I am satisfied, contrary to Mr Robinson's submission, that the prospect of a sale at a substantial premium was reasonably foreseeable. It was not so far fetched that it could be brushed aside. It was a real prospect. And as the evidence shows, one which materialised for Mr Watson, providing for him what the Crown acknowledged was a significant windfall.

Mr Robinson sought to persuade me that the breach of either statutory duty or duty of care, if established, should be regarded as having occurred on 9 November 1983, being the

date upon which the District Commissioner recommended that the land be offered to Mr Watson. But Mr Higgins' evidence shows that it was not until 20 December 1983, after a separate Certificate of Title and a valuation had been obtained, that Mr Watson was approached. Mr Watson accepted the offer on 7 February 1984, at which point there may have been a binding contract. But the formal agreement for sale and purchase was not signed until 6 April 1984. As earlier recorded, 6 April 1984 was the very day upon which the Adventist Hospital Chief Executive declared its interest as a buyer to the Rt Hon Sir Robert Muldoon. I infer that the Prime Minister was immediately in touch with Mr Dobbie, in the Auckland office of the Ministry, because he referred the Hospital authorities to him. Mr Dobbie acknowledged that at least by 18 April 1984, as is shown by point 6 of page 171 of the common bundle, he was well aware of the Hospital's interest.

There was some debate between counsel as to whether it could be inferred that the Hospital telegram of 6 April 1984 alerted the Crown to its interest before the Crown signed up with Mr Watson. Of course, the Crown contended there was a binding contract at the earlier date when the December 1983 offer was accepted in writing on 7 February.

In my judgment, all that is rather beside the point. I find that the Crown did know that the Hospital was keen to negotiate with whoever purchased the land by 6 April 1984. But it is common ground that settlement did not take place until on or about 30 April 1984. The Crown's hands were not tied by the signing of the agreement and the position only became irrecoverable once Mr Watson became the registered proprietor - the statement of agreed facts shows that that did not happen until 16 May 1984.

So the Crown knew, for in excess of three weeks before settlement, of the Hospital's interest and could foresee the opportunity that that interest provided and the kind of loss that would result if it sold to the wrong party. Because of the provisions of s 17 of the Crown Proceedings Act 1950, specific performance would not have been ordered and any Declaration by the Court in the circumstances would have been restricted to Watson's remedy in damages. So the crucial consideration is the opportunity that the Crown had once it could foresee the kind of damage to withdraw from the sale.

The view I take of the matter, therefore, is that the nature of the loss was foreseeable and once that point is reached I understood the Crown to accept the statement in *The Law of Torts in New Zealand* (2nd ed) by Todd *et al*, found at page 1065:

"If the relevant kind of damage is foreseeable it matters not that the defendant might not have been able to foresee the full amount or extent of the damage".

Among the cases cited in support of that statement is *Attorney-General v Geothermal Produce NZ Ltd* [1987] 2 NZLR 348 (CA). That case has similarities with this in that the causes of action there were tortious and there was a claim for economic loss based upon the anticipated profits from an expanding enterprise which was summarily halted by the negligent spraying of herbicide. At page 354, under the heading "Damages", Cooke P said at lines 43-45:

"It is elementary that only the general nature of a head of damage caused by a tort must be reasonably foreseeable, not the details. For the purpose of this case the negligent spraying can be treated as one tort."

At page 359, on the same topic, McMullin J said between lines 25 and 42:

"The measure of damages in tort is the sum of money which will put the party who has suffered a loss in the same position as he would have been in had he not sustained the wrong for which he seeks compensation: *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39. The injury for which damages are claimed must be a foreseeable one. If it was not foreseeable then, without putting too fine a point on it, the damages may be said to be too remote. An injury will be foreseeable if the possibility of that kind of injury was foreseeable; not necessarily the specific injury itself. It was foreseeable that damage would result to Geothermal's plants resulting in a loss of profits if they were hit by spray because both the Department and Goldie knew that Geothermal had a greenhouse in use for rose growing. The fact that they may not have known of the details of Geothermal's operation and the expansion which it contemplated does not affect their liability. The relevant inquiry is whether the claimed loss was within the kind of loss, not necessarily the precise loss, which the Departmental officers and Goldie might have foreseen to be a consequence of the drift of spray.

Any award of damages depended on whether the loss for which they were claimed was of a foreseeable kind and, if so, what sum of money would compensate the respondent for it."

My conclusion is, therefore, that the plaintiff has a sound ground for recovery either on the basis of lost opportunity to sub-divide or lost opportunity to sell on to the Adventist Hospital at a significant premium.

Assessment of Damages

Each side called a valuer. Mr Mahoney, for the plaintiff, Mr Gamby, for the Crown. Both are well-qualified.

They agreed on the general approach to sub-division and each assumed that the Rowans would have purchased the back section for \$53,000 to gain access to Sierra Street just as Mr Watson did.

Mr Mahoney, however, did not build in a profit and risk factor because he considered the price of the land was fixed at \$100,000. Also, his selling values for the Lots at \$48,000 each was higher than Mr Gamby's figure. Otherwise, costs were comparable but

Mr Mahoney estimated a year or less for holding costs at 12%, whereas Mr Gamby allowed 1.5 to 2 years at 14%. Mr Mahoney's estimated loss of opportunity to make a profit on the sub-division was \$361,700, whereas Mr Gamby's top figure was \$158,000. In my judgment, the probable profit, assuming a purchase at \$100,000 for the original land lay somewhere between the two. I tend to favour Mr Gamby's rather more conservative approach. If I were awarding damages on this basis, I would fix them at \$225,000.

It was the plaintiff's strong submission that, with the assistance of a son qualified as a valuer both here and Australia, she and her late husband would have done as well, if not better, than Mr Watson in their dealings with the Adventist Hospital. That would have involved the Rowans in purchasing the Sierra Street section and pushing ahead with plans to sub-divide to the point of getting planning permission and holding out for two years until June 1986, when the Adventist Hospital finally purchased. The purchase by the Hospital from the Rowans would not, of course, have included the original dwelling with access to St Heliers Bay Road.

As earlier recorded, both valuers agreed that, as at June 1986, the Hospital paid a 77% premium over market-value for land. It is beyond question, however, that not only was the price asked for by the Crown in November 1983 at \$100,000 favourable, but land prices rose dramatically between then and June 1986. Mr Mahoney's view was that the original land at \$100,000 plus the access section to Sierra Street at \$53,000 had risen in value to over \$700,000 by June 1986 and that the 77% premium paid by the Hospital yielded Mr Watson a capital gain of over \$1,000,000 as a result. Even without the premium, the capital gain was, in Mr Mahoney's view, over \$550,000.

Mr Gamby, on the other hand, insisted that applying valuation principles and given market conditions in 1984, any foreseeable premium would not have exceeded 15%, which, on his top valuation of \$180,000 for the section, yielded \$27,000. That approach, however, does not accord with the law as I have explained it earlier in this judgment, and I therefore put Mr Gamby's approach aside as unhelpful in this part of the case.

In my judgment, however, even on Mr Mahoney's approach, there must be significant discounts. First, the Rowans, by 1984, were living in Australia and did not have the advantage of being on the spot, like Mr Watson. Secondly, unlike Mr Watson, they did not have the anxious buyer right next door and were therefore not in a position to assess the strength of their hand in the way that he was. Thirdly, Mr Rowan died on 16 February 1985. Even allowing for such advice the valuer son could give (he was not called as a witness), the business of holding out for the top price would have become increasingly difficult as Mr Rowan approached the end of his life and for his widow after his death. I also take judicial notice of the fact that investment opportunities for the Rowans in Australia would have been equally attractive as those in New Zealand. In short, I think, on the balance of probabilities, they would have sold within a year. Fourthly, although they would have had the same right to bid for the Sierra Street access section as did Mr Watson, they may not have acquired it and then their bargaining position would have been diminished as a result. Even if they had taken an application under s 129B of the Property Law Act that also would have meant more cost, anxiety and time.

The end result is that I do not consider that the June 1986 market price is the one to base the calculation of the premium on and, furthermore, I consider the Rowans would, in all the

circumstances, have accepted a lower premium. Also, Mr Mahoney's calculations all included a premium on the Sierra Street section, whereas I am of the view that it should only apply to the original land.

The valuation evidence before me does not enable me to make a precise calculation of the increase in value over the year from purchase. The rise from \$153,000 for the original land and Sierra Street in April 1984 to \$700,000 odd in June 1986, however, suggests a land value rise in excess of 400%. In striking that figure I have taken into account that the \$100,000 offered by the Crown was probably less than the market would have paid.

Approaching the matter as best I can on the information before me, and recognising that to some extent my assessment is a matter of impression, I consider, nonetheless, that the probability is that the original Rowan land (even without the Sierra Street access) would have risen in value to about \$300,000 by mid-1985. At that stage, had the Adventist Hospital offered a premium of 50% above market value, or \$450,000, I consider the Rowans would have sold.

I find therefore that the loss to the plaintiff, on an onsale to the Auckland Adventist Hospital as a result of the Crown's breach of statutory duty and duty of care, was of the order of \$450,000 less, of course, the \$100,000 they would have had to pay the Crown for the land in the first instance. The quantum of her loss therefore was \$350,000.

Mitigation

Mr Robinson's submission was that the Rowans should have taken the \$100,000 that they did not invest in the land originally and invested it elsewhere and that their recovery in that

regard should be deducted from any award. Mr Cavanagh, on the other hand, submitted that any mitigation could be taken care of in the area of any award of interest on amounts awarded.

As can be seen from the way I have approached the matter, the Rowans hypothetically enjoyed the use of \$100,000 for approximately one extra year and it would be appropriate to take account of that on the question of interest, but otherwise in my view, no further reduction on account of mitigation is called for.

Result

The plaintiff will have judgment against the Crown for \$350,000 as from the date of entry of this judgment.

The plaintiff is also entitled to claim interest and costs. Mr Robinson, for the Crown, expressly requested that, if an award was made against the Crown, questions of interest and costs should be reserved for further submission. I do not consider that a further hearing is warranted but I will receive submissions on both topics (ten pages maximum) from the Crown within 14 days of the issue of this judgment and from the plaintiff within 28 days of the issue of this judgment.

Robert Smellie J

Smellie J