IN THE SUPREME COURT OF NEW ZEALAND

SC 11/2005
[2005] NZSC 53

BETWEEN	JAMES ALFRED HOOD, ROBERT GEORGE HOOD, KENNETH JOHN HOOD Appellants
AND	THE ATTORNEY-GENERAL First Respondent
AND	THE QUEENSTOWN LAKES DISTRICT COUNCIL Second Respondent

Court: Elias CJ and Gault J

Appearances: WM Wilson QC for Appellants
MT Parker for First Respondent
ARJ Bowers for Second Respondent

Judgment: 5 August 2005

JUDGMENT OF THE COURT

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[1] The appellants seek leave to appeal against part only of the judgment of the Court of Appeal (McGrath, Glazebrook and O'Regan JJ) given on 2 March 2005 in CA 16/04. They claim to be entitled under s 40 of the Public Works Act 1981 to an offer to purchase land compulsorily acquired from their father in 1960 for the purposes of a public school.

[2] In the High Court the appellants were unsuccessful in judicial review proceedings to obtain declarations against the Attorney-General that the land was no longer required for any of the purposes described in s 40(1)(a), (b), and (c) of the Public Works Act 1981 and ought to have been offered for sale to them. Wild J held that the property, which was being used as a playcentre operated by the Queenstown Lakes District Council, was still held for the public purpose for which it was

acquired. The obligation to offer the land back therefore did not arise under s 40(1)(a). The Judge also determined that, if wrong in his assessment of the application of s 40(1)(a), a playcentre was an "essential work" so that the retention of the land was authorised by s 40(1)(b). Finally, the Judge determined that, in any event, it would have been "impractical, unreasonable or unfair" within the exception provided by s 40(2) of the Act for the land to be offered back to the appellants. The basis on which the exception in s 40(2) arose were arrangements between the Ministers of Lands and Education and the Queenstown Lakes District Council. Those arrangements dated from 1971 and predated the enactment of s 40. Under them the Council had acquiesced in the lifting of reserve designation over reserve lands so that the school for which the land had originally been taken could be re-sited on the reserve. The Council had established a playcentre on the subject land in the expectation that it would become reserve land administered by the Council for community purposes.

[3] The Court of Appeal held that the use of the land for a playcentre was not the public work for which the land was taken. It also held that a playcentre was not an "essential work", which would have justified its retention under the Act as it stood when the obligation to dispose of the land was said to have arisen (the date of the coming into effect of s 40). Reversing the High Court on these points, the Court of Appeal accordingly held that the obligation to offer the land back under s 40(1) had arisen. The Court of Appeal however agreed with the High Court in finding that the arrangements between the Ministers and the Council made it unfair or unreasonable for the land to be offered back and brought the exception under s 40(2) into operation. Since the appellants had to succeed on all three points found against them in the High Court in order to obtain the relief sought, the appeal was dismissed.

[4] Leave is sought in this Court to bring a second appeal from the determination that the arrangements with the Council made it "impractical, unreasonable, or unfair" under s 40(2) for the land to be offered back to the appellants. This is an assessment upon which the two Courts below have agreed. It is specific to the circumstances of the particular land and its history.

[5] The circumstances in which it may be "unreasonable" or "unfair" to offer land back are not circumscribed by the statute. It is open to the Chief Executive of LINZ

(the officer called upon to make the determination) to consider the matter broadly and to take into account the expectations of any other body or person affected. Although the Court of Appeal did not consider that the arrangements between the Ministers and the Council were legally enforceable, they were not irrelevant to the assessment to be made. Nor is it material to the inquiry as to fairness in the offer back that the Minister of Works was not involved in settling the original arrangements with the Council, as was suggested in argument. While under the 1928 Act it would have been necessary for the Minister of Works to declare the land to be Crown land before reserve status attached to it, that is not determinative of the application of s 40(2). No general principle relating to the application of s 25(e) of the Acts Interpretation Act accordingly arises. Counsel for the appellants criticised the Court of Appeal for referring to the fact that the appellants do not claim any connection with the land other than the right to have it offered back to them. Indeed, they have assigned their interest in the land to another party which proposes to develop it if it is offered back. Mr Wilson argued that the absence of such attachment did not disentitle the applicants. We accept that proposition. But we are unable to read the decisions in the Courts below as suggesting any such disqualification. Mr Wilson accepted that any question of particular attachment to the land cannot be an irrelevant factor where there are competing claims to fairness. The absence of any such suggestion here meant that the arrangements with the Council had to be assessed against the statutory entitlement in determining whether the offering back of the land was fair and reasonable. That is the exercise undertaken in the High Court and the Court of Appeal, with the same resulting judgment. Nor is it correct to characterise the result as effecting a retention of the land for the purposes of a non essential work (a reserve), contrary to the scheme of s 40(1) as it stood in 1982. The decision in the High Court and Court of Appeal was not that it was unfair to offer the land back because it was required for a reserve. Rather it was that the arrangements with the Council which predated s 40 and which had been acted upon by the Crown and the Council made it unfair to offer the land back. That is a determination that raises no point of general or public importance.

[6] There is no basis upon which it can be maintained that a substantial miscarriage of justice may have occurred or that the appeal involves a matter of general commercial significance. The questions of law in the application of s 40(1)

considered in the High Court and Court of Appeal are not longer live. The only issue sought to be argued is the application of s 40(2) to the facts. There is no question of wrong approach or consideration of irrelevant matters. The decision was made on the facts peculiar to this case and was reached concurrently in the High Court and the Court of Appeal. We are not persuaded that any of the points raised on the application would have affected the decision or are of general or public importance. There is no occasion under s 13 of the Supreme Court Act for leave to appeal to this Court.

[7] In the Courts below and in the argument of counsel it was apparently assumed that the application of s 40 turned on the circumstances at the date the obligation to offer back arose. In the present case that was treated as the date upon which s 40 came into effect, because by that date the land was no longer being used for the purposes of a school. No argument on the correctness of this approach was addressed to us. Our refusal of leave to appeal should not be taken to indicate agreement with it. Similarly, the parties appear to have been content to have the application of s 40(2) dealt with by the Courts on application for declarations as to what the Chief Executive of LINZ should have done. Mr Wilson did indicate in his submissions that the outcome of a successful appeal might be to return the matter for the determination of the Chief Executive, rather than to have the Court determine whether it was fair and reasonable for the land to be retained. Again, the basis on which leave is declined should not be taken to indicate approval of the course the litigation has taken.

[8] The application for leave to appeal is declined. The applicants must pay the costs of the respondents which are fixed at $2,500 together with disbursements as settled by the Registrar.

Solicitors:
Anderson Lloyd Caudwell, Dunedin for Appellants
Crown Law Office, for First Respondent
Macalister, Todd, Phillips, Bodkins, Queenstown for Second Respondent