IN THE SUPREME COURT OF NEW ZEALAND SC 11/2005

IN THE MATTER	of an Application for Leave to Appeal
BETWEEN	James Alfred Hood Appellant
AND	The Attorney-General First Respondent
AND	The Queenstown Lakes District Council Second Respondent

Hearing 21 July 2005

Coram Elias C J
Gault J

Counsel WM Wilson QC for appellant
MT Parker for first respondent
ARJ Bowers for second respondent

APPLICATION FOR LEAVE TO APPEAL

12.15pm

Wilson May it please Your Honours I appear for the applicants.

Elias CJ Yes thank you Mr Wilson.

Parker May it please Your Honours I appear for the first respondent.

Elias CJ Yes thank you Mr Parker.

Bowers May it please Your Honours counsel's name is Bowers and I appear for the Council in this matter.

Elias CJ Thank you Mr Bowers. Yes Mr Wilson.

Wilson If Your Honours please, I assume that Your Honours have had an opportunity to read the written submissions for the parties. Your Honours I accept immediately that the ultimate issue of whether it would be unreasonable or unfair to offer the land back to the applicants is not in itself amenable to review by this Court, but it is my submission that the route by which the Court of Appeal reached the conclusion that it would be unreasonable and unfair to offer back raises five questions of law, all or some of which should be considered by this Court because of their general importance. Your Honours the first question of law is that set out in the.

Elias CJ Mr Wilson I'm a little puzzled as to whether that ultimate issue whether it would be unreasonable or not to offer the land back is ultimately a question first for the Courts at all.

Wilson Yes Your Honour there is acknowedged a strong argument that the appropriate Tribunal, using that word in its general sense, to make that decision would be the Chief Executive of the Department of Survey and Land Information and indeed.

Elias CJ You see I wondered really whether the Courts if they really should have gone further than determining whether the land was being held for public work or whether it had to be disposed of under s.40 because that then establishes that the Chief Executive has to take some steps.

Wilson Yes indeed and as I said I would certainly acknowledge that it would be appropriate for an ultimate decision to be made by the Chief Executive. The situation we now have though is that because it's our case that there were a number of errors in law in the approach taken by the Court of Appeal and if the judgment of the Court of Appeal were simply to stand the Chief Executive would then presumably regard himself as bound to give effect to those findings or at least implicit findings of law by the Court of Appeal. But certainly I think I included in the written submissions that one possible outcome if leave were to be granted and if this Court at a substantive hearing were to be satisfied that there was one or more errors of law in the Court of Appeal approach, one possibility would be to refer the matter back to the Chief Executive and on reflection I indeed would accept that and indeed submit that that would be the appropriate course.

Gault J If you didn't argue in the Courts below on the assumption that the Chief Executive would make this decision and that the Court of Appeal is simply saying that it was a reasonable decision, I mean how did you get to argue this point?

Wilson I didn't appear in the High Court I appeared in the.

Gault J No you I mean generally.

Wilson Yes indeed and I'm not seeking to avoid answering Your Honour's question on that basis but clearly I did appear in the Court of Appeal. It was an issue that should have been argued but was not.

Gault J It wasn't addressed in the Court of Appeal?

Wilson No it wasn't Your Honour.

Elias CJ And I was spurred on by that thought and looking again at s.40 more closely, and maybe this is a question for Mr Parker, but I would have thought that if we were in the position where the Court of Appeal has held the land is no longer required for a public work and there's no suggestion of it being required for any other relevant public work, s.41 imposes an obligation to dispose of the land. The Courts below seemed to have viewed whether it was reasonable for the land to be offered back to the former successors of the owner in the context of the now use of the land and on the assumption of Crown retention of ownership, but I'm not sure that that's really what the Act requires. Once there's a conclusion that the land is no longer required for a public work, then it seems to me that the Chief Executive is required to endeavour to sell the land and then there's an issue as to whether it's not reasonable to offer it back to the successors. That point at first instance didn't emerge sharply because the Judge decided that it was required for a public work.

Wilson Yes indeed Your Honour the position is perhaps a little more complicated and there are really three different concepts that arise here. Firstly whether the land was required for an essential work which was the test at the relevant time, then there's the question of whether it's required for a public work which is how the legislation now reads and the Court of Appeal at para.99 of its judgment at my submission introduced another concept, that of whether the land is used for public purposes which is a wider concept, so although there has been some confusion between those concepts but certainly the case for the applicant throughout has been that when the school left the site it was no longer required for an essential work, a play centre not being an essential work although Justice Wild had held to the contrary in the High Court that the Court of Appeal as Your Honours would have seen accepted that the play centre was not an essential work and our case was that that being so the obligation to dispose arises subject only to the possible application of subsection.2.

Elias CJ I don't really understand why the reversion to essential works since the s.40 obligations only arise where any land is held for any public work.

Wilson The point as I understood it Your Honour is that as at 1982 the question was whether the land was being held for an essential work and on the evidence it was not.

Elias CJ Oh when was that amendment?

Wilson 1987 but certainly post 1982 and I'm sure I'm right in saying that it was common ground between the parties that the test as at 1982 was whether it was held for an essential work and that's why the second issue before the Court of Appeal took the form that it did. So Your Honours the five particular legal issues Your Honours I can address relatively briefly. The first issue is in our submission whether it may be unreasonable or unfair to offer the land back because if I can use a somewhat colloquial term the land has been swapped for land to be used for the purpose for which the land was compulsorily acquired. The Court of Appeal found that the arrangement between the Council and the Crown was quite highly relevant and at para.98 that that arrangement surmounted the threshold of establishing in the Court's words "good reason to disregard the interests of the former owners". Your Honours it's certainly not relevant today and indeed may not be at a substantive appeal but we do take issue in a number of respects with the factual analysis of the Court and I simply record that without seeking to go into detail on that.

Elias CJ Whether it's, I'm sorry to labour this point but whether it's unreasonable or unfair to offer it back needs however to be contrasted with what else the section requires, which is sale of this land if it's no longer required for a public work and there may be a very different outcome, I don't think this point is adverse to you Mr Wilson, there may be a different outcome if you instead seek to compare the fairness of offering back worth retention in Crown ownership and its application as it's currently used.

Wilson Yes I certainly understand Your Honour's point.

Elias CJ But am I right in thinking that the Courts below did only assess it in terms of retaining its use as at present and offering back?

Wilson Yes.

Elias CJ There was no question of selling it for example to the local Council?

Wilson My very clear recollection of the hearing in the Court of Appeal that third course wasn't an important issue, the choices were either retain for use as a play centre in the expectation that the land would go to the Council or reversion to the applicants. Indeed Your Honours given the interests of time I won't go into detail but the **Edmonds** case which is referred to by my friend Mr Parker in his submissions and included in his authorities, which coincidentally involved the land on which this very building stands, did involve the judgment subject to appeal and

cross-appeal but Justice Miller there, if I can take your Honours to it if necessary, discussed the appropriate course in a situation which was broadly similar to the present facts and there His Honour said "well the appropriate course was for the land to go back to the former owners then if in that case the Wellington Council still required the land for its purposes it could either negotiate with the owners or if it could satisfy the criteria, resort to the compulsory acquisition procedure" and that's what we say should happen here, the land should go back to the successors of the former owners. We're a little unclear as to whether the Council does still seek to use this land but if it does it can negotiate with the former owners or if necessary invoke its compulsory acquisition powers.

Elias CJ I think in fact I've misled you about s.40, I don't think there is an obligation to sell regardless, it's only an obligation to sell pursuant to subsection.2.

Wilson Yes Your Honour prior to the offer-back provision coming in in 1982 there was a power.

Elias CJ Yes that's right. Yes, I'm sorry.

Gault J Prior to 1982 there were some offer-back provisions, offer priorities.

Wilson No offer priority for former owners, it's simply a power, logically a power of the Crown to dispose of.

Gault J Is that all there was before then?

Wilson Yes and that was a very important reform introduced in 1982 and Hansard demonstrates the significance facing that - the first recognition of the interest of former owners by the enactment of the offer-back regime.

Elias CJ There was an interest of adjoining owners under the former legislation wasn't there?

Wilson Yes indeed. There was certainly a degree of priority accorded to adjacent owners but not to former owners.

Gault J That's what I was enquiring about. If the land ceased to be required for relevant public work sometime before 1981, was there any accrued rights of others?

Wilson Your Honours if you care to look under tab 5 of the applicant's authorities you will see the s.35 of the 1928 Act which was the section governing this position of land taken for public work and no longer required there and Your Honours will see in para.35 (1)(b) the reference to the position of the owner of adjacent lands which says "should be offered back to the former owners" and then at (b) "on the

hypothesis the land to be used for the purpose that Crown should acquire either by negotiation or if it can satisfy the relevant criteria by compulsory acquisition".

Gault J Accepting that, does that exclude consideration of the fact that having done that it can be considered as part of the issue of impracticality, unreasonableness or unfairness to offer it?

Wilson Impracticability could potentially arise if there was a contractual commitment but in my submission it cannot as a matter of law constitute unfairness or unreasonableness.

Gault J Mr Wilson why cannot it be taken into account in that assessment by the Chief Executive, it having been done, I mean you say well that they should have done way back then was change it but this was before your client had any right?

Wilson Yes indeed but what they should not have done under the previous legislation or indeed should not do under the current legislation is to indirectly acquire land through the invoking of the compulsory acquisition procedures, rather it should be a direct acquisition of the land by negotiation or by compulsion.

Elias CJ But we're not talking about acquisition of land. There's no question that it was appropriately acquired under the Public Works Act, we're talking about the application of s.40 and whether this land was held in any manner for a public work and there's no question but that it was held as at 1980 for a public work in the sense that that's the status of the Crown's holding.

Wilson With respect Your Honour it comes back to the earlier issue as at 1982 it was not held for an essential work and I certainly don't take issue with what the Court of Appeal said at para.46 in the context of the second issue but it's relevant to Your Honour's question. If Your Honours care to look at para.46 of the judgment "was the play centre an essential work"?

Gault J I understand that the Court of Appeal said it's not an essential work, it's not a school but is it a public work?

Wilson It probably is a public work.

Gault J Any land held under this or any other Act or in any other manner for any public work. Now was it held in some manner for a public work when this Act came into force?

Wilson Your Honour when the Act came into force it spoke of essential work.

Gault J It's not an essential work, I understand that.

Elias CJ Well when the Act came into force s. 40 referred to it an essential work.

Wilson Yes and that's why Your Honours I have taken you to para.46 of the judgment where the Court of Appeal identified the next question as to whether the play centre was an essential work and then went on in the second part of para.46 to explain the significance of that issue, namely if it was not then it could not be said the play centre was required for an essential work for the purposes of s.41 (b) of the 1981 Act when the 1981 Act came into force. That would mean the requirement to endeavour to sell the land in accordance with s.42, subject to the qualifications in that section would have been triggered on the coming into force of the 1981 Act. This is another ground on appeal that I can anticipate at this point that it was wrong in law for the Court of Appeal to conclude correctly in our submission that the play centre was not an essential work but then and therefore as I stated in para.46 the offer-back obligation was triggered and then deciding well it's unreasonable or unfair to offer back because it's a public work. It makes a nonsense in my submission of the dichotomy which the 1981 Act when introduced established between essential work and the broader concept of public work.

Elias CJ This is a very difficult section in many respects but it certainly seems to have been accepted by the Court of Appeal that on the Act coming into force everywhere where land had been acquired and wasn't required as of the date of coming into a force of the Act for an essential work, there arose an obligation to offer it back. I mean that's a very sweeping proposition. It is central to your argument?

Wilson Yes well it is and could I make two points in response to Your Honour.

Elias CJ But self-executing.

Wilson Yes but it may well have been I'm speculating that that is why the legislature subsequently amended s.40 to be based on public works rather than essential works and the second point is that yes it is a.

Elias CJ Doesn't that just make it wider?

Wilson Well it's only if the land is not required now for any other public work that the obligation to sell arises under s.41, so the excepting provision is widened, the provision that derogates from the otherwise power to sell and my second point in response is yes, that's one of the reasons why the law reports are replete with cases on this section. It's of no legal relevance but whether it was anticipated when the Act was enacted in the form in which it was in 1982 that it would have such wide application.

Elias CJ I can't remember whether it's actually addressed in the judgments below but is it also part of your case that s.40 requires the valuation to be as at 1982?

Wilson Yes and to be frank that's why we're here. Your Honour I'm conscious of time, could I just.

Elias CJ Yes I'm sorry, I've interrupted.

Wilson Don't say sorry, you've been very helpful if I may say so. The next issue I'll deal with, it's the second ground on which we seek leave to appeal is founded on the way in which the Court of Appeal relied on s.25 of the Act Interpretation Act and the relevant part of the judgment is to be found at para.88 where the Court of Appeal found there was no reason for assuming that the Minister of Works would not have fulfilled any commitments made by his or her colleagues and the short point here Your Honours is that the Minister of Works was a designated Minister. It's quite clear on the evidence that the Minister of Works had not entered into any arrangements with the Council, it was the Minister of Lands who did so but the Court of Appeal found that in para.88 that difficulty was overcome by s.25 (e). The short point here Your Honours, and I invite you to look at 25(e) as it read at the relevant time and it is to be found under tab 1 of the appellant's authorities. Your Honours' will see that the Court of Appeal at the end of para.88 summarise the effect of s.25 (e) as empowering a Minister to do an act included any member of the Executive Council in place of that Minister and also the Minister's successors in office. With respect to the Court of Appeal that is not an accurate statement or summary of s.25 (e) because if Your Honours look please at 25(e) the relevant words are reference to any member of the Executive Council acting for, or if the office is vacant, in the place of such Minister. In other words 'acting in place of the Minister' those words only come into play where the office is vacant but there's no suggestion that the office of the Minister of Works was vacant here and there's no basis in the evidence in our submission for saying that the Minister of Lands was acting for the Minister of Works, rather the Minister of Lands was acting quite independently. Yours Honours just to move on to the final two grounds advanced which arise out of.

Elias CJ I'm not sure really why s.25 (e) is so important in this case. Can you just explain a bit because the concept of fairness and I think this is what Justice Gault put to you may be a fairly wide consideration and if there's been a commitment entered into by any Minister does it matter that it's not the relevant Minister?

Wilson Well arguably it may not but that's not the basis in which the Court of Appeal dealt with the matter.

Gault J Mr Wilson the three issues that seemed to be identified early on all decided one way by Justice Wild and two of them reversed but not the

third and the third one was this application of ss2 (a) impractical, unreasonable, unfair, that seemed to be approached fairly broadly by the Court of Appeal and the fact that these various issues or errors arose don't really effect the factual situation down there which seem to be what really influenced the Court of Appeal.

Wilson Well with respect Your Honour the Court of Appeal, reading its judgment, relied on a number of different reasons as cumulatively establishing unreasonableness or unfairness and it's my argument today that on most of those points there is an issue of law which arises as to whether they were entitled to do so except of course this isn't the Court for the facts but one of the things that I said before was the applicants are very unhappy about the, let me put it this way, I'd invite Your Honours to consider the legal issues I'm raising, particularly having regard to the observation Your Honour Justice Gault just put to me, without assuming that it's common ground between the parties that the facts are as set out in the judgment and just to give one very fundamental example of that, what does not emerge from the judgment is that when 2.3 hectares of reserve land were taken as the site for the new primary school; 2.4 hectares of land were added to the reserve at no cost to the Council, so they got the reserve they uncompensated for by land in the same locality and so on and it's a question now whether they get the additional benefit of the Martilli site. There's no mention of that in the judgment, so I appreciate that this isn't a Court of fact but if Your Honours do have the impression from reading the judgment that the facts were undoubtedly as set out in the judgment, well that's certainly not common ground. And Your Honours can I just again develop my answer to the question of Your Honour Justice Gault by this very briefly and these are really the final two issues that arise. I invite Your Honours to look at para.99 and you will see that the Court started off by referring to the use of the land continuously for public purposes, that concept I mentioned earlier of public purposes. As Justice Wild pointed out reserve land is needed in Central Queenstown and there are no suitable alternative sites and there again in our submission the test in determining what the decision on offer that should be in terms of point of time was back in 1982 and what the position was there, and while again there is certainly an issue so far as the appellants are concerned as to whether there are alternative sites, the question is at least arguably what was the position in 1982 when in my instructions Queenstown had a population of 5,000 permanent residents and now 20,000, so there's been a very material change in terms of matters such as the demand for pre-school education and the sites available. And again although it's a little difficult in my submission to understand the Court's approach at the end of para.99 that says "in addition, the Hood land can be seen loosely as being used for a primary school and within the purpose for which it was taken", and that's contrary to the Court's own answer on the first. It was not a play centre, it is not a primary school, and finally Your Honours in para.100 it does raise a point which is in my submission of undoubted general importance where the Court seemed to have minimised the

significance of the applicant's interests by saying that there is no evidence that they had anything other than a commercial interest in re-purchase and in my submission it must at least be an arguable question of law as to whether the rights of the former owners of land compulsory acquired are reduced because if the land is offered back to them and they acquire the land on offer back the use that they'll make of the land differs from the use for which the land was being put when originally taken and in my submission if there's an entitlement to offer back it's then entirely up to the former owners to determine what use they choose to make of the land.

Elias CJ But it can't be an irrelevant consideration when considering questions of fairness because if you look at the structure of the Act there's specific concern about those who have lost part of their land and still continue to own part of it and the Act also indicates that how the land may have been modified for a public work has to be taken into account, so it's quite a wide-ranging inquiry that's contemplated simply by the terms of the section and then the provisions or the reference to fairness, inconvenience, or whatever the language is, they're not limited at all so those factors can't be irrelevant it must assist someone in your client's position if they can demonstrate some particular attachment to the land surely.

Wilson With respect Your Honour, as a matter of law it cannot be relevant in determining whether or not it's unfair or unreasonable to offer back, whether the previous owners upon acquisition of the land will use it in this case for residential purposes or commercial. If it was of course it would be a very easy answer, they would just use it for residential initially and then for commercial. In my submission while accepting that unfairness and unreasonableness are inherently broad and flexible concepts I would certainly seek the opportunity to argue substantively that on the specific point of the use to which the land would be put if offered back as a matter of law, that cannot be relevant to questions of fairness or unreasonableness.

Gault J Would you be arguing that way if this was land which the former owners had a specific longstanding and particular attachment to and there were competing considerations?

Wilson I would still be arguing yes Your Honour that as a matter of law the use to which they put it, the point Your Honours make could possibly be relevant to the threshold question of whether to make the offer back, but in my submission you couldn't bind it as to subsequent uses because once the owners reacquire ownership they are free to use the land as they wish.

Gault J Well I can't take any issue with that, it's just that in making that sort of broad assessment that seems the Chief Executive is called upon to make I'm a bit surprised that you should argue that under no

circumstances are the circumstances of the people from whom it was taken relevant.

Wilson Well I don't see it to go quite that far Sir and I put the argument rather more narrowly.

Gault J Well it would seem to me you enjoined to that, that was all.

Wilson No, no, in my submission I should be entitled to argue on the specific issue as to whether the actual use to which the land is intended to be put can be a disqualifying factor in terms of.

Elias CJ No I didn't put it to you on that basis. I was putting it to you on the basis that these considerations must be relevant if there is a particular attachment. If it is the case that part of the land only has been taken, if it is the case that the character of the land has changed in the interim, because those are matters identified in the provision.

Wilson Yes Indeed.

Elias CJ Well not the attachment perhaps.

Wilson No but while I accept that I still maintain that the argument that the intent of use cannot be a disqualifying factor. That's the better way to put it I think than the way I did earlier.

Elias CJ Can I just ask you also, you mentioned that the test for fairness or the test under subsection.2 falls to be applied as at 1982 and you've said that value is established at 1982, is that a matter upon which there is authority?

Wilson Yes indeed.

Elias CJ What authority's that.

Wilson I'll have to check that Your Honour and let you know.

Elias CJ Is that Court of Appeal aurthority?

Wilson My friend Mr Parker is an expert here and I'm obliged to him. It's High Court but I'm not aware of any conflicting authority on that.

Gault J That authority is focused upon when the land ceased to be required for the particular use as dictating the date. I don't myself recall any case that said the date had to be the date on which the Act came into force.

Wilson No but obviously I accept Your Honour's point but I submit by analogy here it's when the Act comes in but I accept the point. May I close Your Honours, those are my submissions?

Elias CJ Yes thank you Mr Wilson. Yes Mr Parker.

Parker It may be useful for me Your Honours just to begin with the point that was repressed right at the outset which is why or how we got into the situation of considering fairness and that is because the land was acquired under the Public Works Act 1928 and held for a public school. There was a gazette notice to that effect but the school had relocated by 1981 or 1982 when the 1981 Act came into force and was occupied by the play centre. So the argument for the plaintiffs was that wasn't a public school so the land should have been offered back. The Crown's first defence was that the land was still held for a public school because a play centre came within that description and Justice Wild upheld that but it was set aside by the Court of Appeal. The second argument was that under s.41 as it then stood it would not be necessary to offer the land back if it was required for an essential work, that is a new work, different from the one for which it was previously held and the Court of Appeal held that a public, sorry, the a play centre was not an essential work, although it was a public work. Now the concept of essential work was introduced in 1981 because it was only types of works which were considered to be essential and there was a description of them in the Act and only those types of work or land for those types of work could only be acquired compulsorily. If it wasn't an essential work it had to be acquired by negotiation, and so that explains why it was also introduced in s.40. The reason it was taken out and repealed in 1987 has really nothing to do with the offer-back provisions it relates to presumably difficulties that Crown and the local authorities were encountering in acquiring land. So the Crown's third argument was that well if it had to be offered back in 1982 the exemptions in s.42 would have been applied by the then Minister of Works because of the circumstances in which the primary school had relocated that that is both the primary school and the, well the primary school relocated to reserve land on the basis that the Minister of Lands was given an undertaking that when the existing site in Stanley was no longer required for education purposes it would be best as a reserve and that in fact has been implemented in part because that once both the primary school and the High School had relocated there were vacant buildings and sites and those were gazetted as reserve under the Reserves Act and their management or administration invested in the local authority. Now there's no issue of the local authority wanting to buy this land even now. It would become a reserve and the local authority would be the administrator of the reserve. The situation with the **Edmonds** case is quite different which is where land was held by the Crown for public work; it ceased to be required. This was a period when it was just no-man's land and the City Council came along with a requirement to use it for a bus station and what the Court held then was that it should have been offered back when the Crown ceased to require it and if the Council still wants it it will have to acquire it from the former owners. Coming back to the s.42 argument, it essentially rests on the arrangement under which the schools were able to relocate. The

evidence showed that reserve land was in short supply in Queenstown at the time, even with its limited population.

Elias CJ Are you content to deal with this on the basis of the position in 1982?

Parker That was the Crown's argument because the argument of course faced was that the land should have been offered back in 1982 so it had to look at the situation then.

Elias CJ But do you accept that that's the correct construction of s.40?

Parker The correct construction of s.40 is that one looks to when the land is no longer provided for a public work and when that date can be ascertained that is the date in which it should be offered back, allowing a reasonable period to trace the former owners, consider when the exemptions apply and soforth. So I agree with my friend that we look at it at 1982 and while he says in his submissions in part of the grounds of appeal that the Court looked beyond that, in my submission it didn't, the focus was on the pre-existing arrangement under which land had become available. Now both the High Court and Court of Appeal have considered the issue of whether it was fair or unreasonable. It's essentially a question and evaluating the facts as they attained them and they came to a conclusion on that and in my submission the interest of justice don't really require that to be considered again. Now my friend referred to some specific grounds which I could probably deal with quite quickly. The first was use of land for an alternative purpose. In this case it would be as in 1982 used for a reserve. It's inherent in s.40 that land can be used for another purpose. S.42 doesn't come into play if the land is required for some other public work, so the fact that this is achieved in the absence of the play centre being an essential work by application of the unreasonable exemption, doesn't offend the general purpose of the provision. My friend relied then, I refer to a second ground of s.25 of the Acts Interpretation Act under s.35 of the 1928 Act, but I don't understand that really to be part of the Court's decision. It made reference to the provision but if you take it out and ignore it it doesn't effect the Court's decision at all, and on the question of whether it would have been unreasonable to offer the land back, that was just based on an evaluation of the Crown's position with land. Because of pre-existing arrangements it wanted to continue to hold it as a reserve as against whether land which had previously had a house on it been removed to the school, whether that should have been offered back, and both Courts held that in the point of view of reasonableness and fairness it was appropriate to apply the exemptions.

Elias CJ And Mr Parker you were also content were you to have this matter dealt with on the basis that the Court would look at s.42 and whether it was unfair or unreasonable.

Parker Yes I was. I can see now that there may have been attractions in dealing with it differently but quite frankly it didn't occur to me at the

time. The other factors my friend raised or related to is the application of all the factors which go into deciding whether it's unreasonable. He seems to rely upon the fact that land continues to be used for a public purpose. That's purely historical because this proceeding has only arisen for nearly 20 years after the event, but if we look at it back in 1982, 1983 when it came up the demand on the requirement for the reserve was still there, it was part of an arrangement which the evidence shows was negotiated between Ministers over a long period of time because the Minister of Lands took a lot of satisfying before he would allow, with the consent of the District Council, the reserve designation to be uplifted from what is now the primary school site. And I agree with the fact that the applicant's interest could be described as purely a commercial one is not a disqualifying factor, it's just a question of what weight one can give to the former owner's interests when evaluating it against the alternative use to which the land would be put if it was retained and used for a reserve.

Gault J Was a reserve an essential work?

Parker A reserve was not an essential work except in certain categories which would not apply to this particular parcel of land. It is of course a public work.

Gault J Yes, I understand that.

Parker The only matter I would comment on was perhaps suggested that when the Act came into force if land wasn't an essential work it had to be offered back. That's not the case, it was still held for a public work, offer-back wasn't required, it's only if that public work ceased and one wanted to use it for another public work.

Elias CJ Because that's to mirror the taking revision, yes I see.

Parker Is there any other matters I can help Your Honours with?

Elias CJ No thank you. Mr Bowers do you want to be heard?

Bowers Yes I would, yes, I would Your Honour. Thank you Your Honours the thrust of the Council's position is really by reference to the Act which is I fail to see what general or public importance can attach to a decision from this Court in these particular circumstances where it was to use the Court of Appeal's expression "a land swap arrangement" I'm trying to elevate that to an agreement for a contractual obligation but the Court of Appeal is determined that it was nothing more than an arrangement. In circumstances where back in 1971 a deal was struck whereby land would be swapped, all of which occurred prior to the coming into force of the 1982 Act. Now I would suggest Your Honours that these circumstances are quite peculiar and by reference to the Act where there must be a matter of general or public importance or general commercial significance my submission is it doesn't meet that

threshold. The geneses of the Court of Appeal's decision Your Honours is in relation to this land swap arrangement. It took it into account when it made its decision about the unfairness, unreasonableness aspect of the section. It was suggested by Mr Wilson in his written submissions that there were subsequent events that had made it unreasonable or unfair but in my submission it's clear the evidence was as at 1971, the arrangement at least was in place.

Gault J Can I just take you back to your point about no public importance. What was going through my mind was to wonder how much land there might be that was taken sometime prior to 1981 for one public purpose but was applied to another public purpose not an essential work before 1981 so that a position would arise on the passing of this Act on the appellant's argument that there is from 1982 onwards an accrued right. Now I don't have any feel for how much land there might be out there in that category.

Bowers I should say Sir that there are at least one, if not two, other small parcels of land that are adjacent to this Hood land that are the subject of some proposed litigation so it has an impact or effect on that, in other words there's the Hood land in the middle and I'm just struggling to remember the name of the owners, they're adjacent, so there is some litigation pending the outcome of this litigation which will be effected by the decision of this Court in exactly the same way that the circumstances aren't different really at all.

Elias CJ The problem is that all parties in this case seem to be content to deal with matters on the basis of a snapshot when this legislation came into effect.

Bowers In response Ma'am we were faced with the papers as filed and the claim as structured and the defence that was raised was that it was unfair or unreasonable in the circumstances for the land to be offered back to the Hood family. It may sound somewhat convenient to say it, but it was always a query I had in my mind that surely the judicial review process adopted would be in relation to any decision made by the Chief Executive rather than asking the Court, High Court, Court of Appeal or indeed this Court to rule on the issue of unfairness or unreasonableness. I would merely say that in that context that I was not sure that I was necessarily happy with it but that was what we were faced with and that's the decision that I took in relation to presenting defence in that way, but to repeat my submission these circumstances to my mind anyway, and I'm in your position Sir too, I have no feel for it generally, are quite unique whereby.

Gault J That's really what troubles me. I'm not sure that there might not be a very wide-ranging issue out there of people in other parts of the country who want to assert accrued rights to land that the Government perhaps didn't dot all the I's and cross all the T's prior to 1981 but changed the public use from one public use to another public use, it

doesn't meet the essential use requirement. Now if there is out there it's a matter indeed of real public importance but unfortunately that isn't resolved simply by looking at whether this particular case raises questions of unreasonableness or unfairness.

Bowers Absolutely.

Gault J Well you face the case that was brought but I'm just a bit troubled.

Elias CJ Well I must say I'm surprised that the respondents have been content to meet this case on the basis of a snapshot at 1980 approach because, and again perhaps I should have asked Mr Parker this, but if land has been taken many years ago for a public purpose, and that public purpose has not eventuated but no steps have been taken to deal with the status of that land, my understanding is that the land still has the status of land held for the public purpose for which it was taken and there may be a huge amount of land that that applies to, and on the appellant's argument if the public purpose had been spent the Act comes into force then there is an accrued right to have had that land offered back and that will continue for the future and when somebody picks up to this in the future they will be entitled to have the question of fairness, the question of value on the basis it's been accepted by all parties to this case, assessed as at the date the Act came into force.

Bowers I obviously cannot disagree with you about this.

Gault J It's a unique case then that it is so narrowly confined and no decision made on this case cause have any precedent value on some very broad issues that seem to be taken for granted or assumed in this case. It's a bit worrying to have it brought here on that narrow basis.

Bowers Yours Honours, that is really the thrust of why I'm here today to say that any decision out of this Court is really not going to provide guidance into the future in my submission because of the peculiar circumstances of this case. I'm at risk of lurching into responses to some of the factual matters which I don't consider to be relevant and for that reason I don't propose to add anything further.

Elias CJ Yes thank you Mr Bowers. Yes Mr Wilson, do you want to be heard in reply?

Wilson Yes only for a few minutes in terms of timing Your Honour. I would like to make four points in reply. It is understood my friend Mr Parker used the term 'undertaking' and in my submission there is no question of an undertaking here at the Court of Appeal there was not even a binding commitment of any kind. This is also a very real issue which would not arise in this Court if leave is given but could arise on referral back to the Chief Executive or any other Tribunal as to the relevant material. I don't say this critically because I know discovery is very difficult in cases like this but discovery was carried out in the usual

way. It appeared to me following the hearing in the Court of Appeal that there should be further documents which would also be relevant in my instructing my solicitors to therefore search for further material under the Official Information Act and that has been provided that obviously wouldn't be tended to this Court but would be relied on referral back if that were to occur. Your Honours my second point in reply is that I cannot and do not contend that the Court of appeal would necessarily have come to a different view on unreasonableness or unfairness if the legal issues that I had sought to identify had been answered differently but I do make the submission as strongly as I can that it may well be that the outcome would have been different on a specific point. I understood my friend Mr Parker too accepts that the intended use upon offer back cannot be a disqualifying factor and if one relates that acknowledgement to what the Court of Appeal had to say in para.100 of its judgment in my submission it appears from the wording there that reconsideration must be required because as the Court said in para.100 "the Hood brothers rights must be taken into account and accorded appropriate weight but there is no evidence that they have anything other than a commercial interest in re-purchase. This is not in our view enough to outweigh the factors favouring the Crown and more particularly the Council and the public with regard to the site, so clearly seen in my submissions is a very material factor. Your Honours the final two points are both very brief except of course there is no evidence other than the fact that immediately adjacent sites raise similar issues as to the extent to which the issues sought to be raised would have wider application but I can say as counsel that anecdotally I have heard from counsel and a number of other pending or proposed cases that the issues raised will be of relevance to those cases. Fourthly, and it's more in a concrete way Your Honours, I accept that if leave to appeal were to be granted it should be open to the respondents to raise at the substantive hearing the argument that the, if I can use the term of Your Honour Chief Justice the 'snapshot' approach is not correct in law. Quite apart from that in my submission the.

Elias CJ On which we wouldn't have the benefit of judgments in the lower Courts.

Wilson No you're right, I can see that and I see the point you're making. But quite apart from that my submission with respect going back to my opening submission leaving aside the question of who should have made the decision as to unreasonableness or unfairness I sought to acknowledge in opening my submissions in support of the application I wouldn't suggest at all that that in itself is an issue which this Court should be called upon to explain. Your Honours those are the submissions.

Elias CJ I'm sorry I'm not sure that I quite understood that last submission that was directed at.

Wilson Well it's really the general response to my friend's submissions, if it is suggested that I'm seeking to have this Court, or I can put it this way if the only issue where to use my earlier phrase, 'the ultimate question of whether it was unfair or unreasonable', I would not be standing here. It's only because of my submission by which the Court of Appeal reached its conclusion did raise the issues I've sought to identify that I am here. Those are the submissions Your Honour.

Gault J And therefore you accept in effect that it's too late to raise the question that the wrong Tribunal made the decision?

Wilson Accept that it's too late to raise that issue as a ground for second review but in terms of the appropriate course if leave were to be granted and this Court were to be satisfied that reconsideration was required it would still be appropriate then in my submission to refer the matter back to the Chief Executive to make the decision in the light of the judgment of this Court but this is a different issue that Your Honour put to me. Those are the submissions.

Elias CJ Yes, we'll take time to consider a decision in this matter. Thank you counsel for your assistance.