

IN THE SUPREME COURT OF NEW ZEALAND

SC 124/2015  
[2016] NZSC 20

BETWEEN

CHARLES WILLIAM WILLIAMS,  
JEAN ELIZABETH MORLEY, INEZ  
BEVERLY FLAVELL, LESLEY ANNE  
HENSLEIGH, THE ROYAL NEW  
ZEALAND FOUNDATION OF THE  
BLIND, DONALD ALEXANDER  
MACKINTOSH, LYNDA ANNE RYAN,  
JANICE AILEEN ROBERTSON,  
GILLIAN MADGE CLARK, ROSALIE  
HILDA MAILAND, DONALD  
MICHAEL STEWART, PATRICIA DORA  
MARY SPENCER-WOOD, SOPHIE  
MARIA HUNT AND DAVID JOHN  
MCCORMICK  
First to Seventh Applicants

AND

AUCKLAND COUNCIL  
Respondent

Court: Elias CJ, William Young and O'Regan JJ  
Counsel: C R Carruthers QC for Applicants  
M E Casey QC and G W Hall for Respondent  
Judgment: 11 March 2016

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**JUDGMENT OF THE COURT**

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- A The application for leave to appeal is dismissed.**
- B The applicants must pay costs of \$2,500 to the respondent.**
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## REASONS

[1] The applicants seek leave to appeal against a decision of the Court of Appeal.<sup>1</sup> In that decision, the Court of Appeal dismissed an appeal from a decision of Fogarty J in relation to a case involving the offer back provisions in the Public Works Act 1981.<sup>2</sup> The Court of Appeal's decision led to the same outcome as that of Fogarty J, but its reasoning was quite different.

[2] The points that the applicants seek to raise on appeal are:

- (a) the question of the proper interpretation of the term "successor" in s 40(5) of the Public Works Act; and
- (b) the basis on which the Court should exercise the discretion as to whether declaratory relief should be granted.

[3] We will deal with these in reverse order.

### **Discretion**

[4] This proposed ground of leave deals with the Court of Appeal's decision to exercise its discretion not to make a declaration in favour of those claimants who were found to come within the s 40(5) definition of successor. The applicants argued that there was either an error in principle or that the exercise of the discretion was plainly wrong.

[5] The Court of Appeal declined to give a declaration for two main reasons. The first was delay. The second was that the applicants had only an economic interest in the land, rather than a personal familial interest.

### *Delay*

[6] The applicants' case was that their right to have the land offered back to them arose in 1982, when the Public Works Act came into effect, or alternatively in 1995.

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<sup>1</sup> *Williams v Auckland Council* [2015] NZCA 479 (Harrison, French and Mallon JJ) (CA judgment).

<sup>2</sup> *JA Robertson & Ors v Auckland Council* [2014] NZHC 765 (Fogarty J) (HC judgment).

The present litigation was commenced in 2005, so the delay was either more than 20 years or about 10 years. There was a dispute about the time at which the applicants became aware that the land was no longer held for a public work, but even if the most favourable view is taken they still delayed for 10 years in commencing their litigation.

[7] The applicants submit that they should not be penalised for delay because the respondent should have come forward and offered the land back to them as soon as it became subject to the offer back process. That submission must be seen against the background that the respondent did not, and still does not, believe that the land is subject to that process.

*Personal interest in the land*

[8] The Court considered that the applicants did not have any personal or familial interest in the land, but only an economic interest.<sup>3</sup> It noted that the claims had been conducted and financed by a litigation funder, under an arrangement which would yield only a small proportion of the proceeds of a successful claim to the named applicants. The applicants say they should not be penalised for having used a litigation funder, because this was the only way they could pursue the litigation which has been very expensive to conduct.

[9] We do not read the Court of Appeal's judgment as being critical of the use of a litigation funder, but rather as emphasising that the purpose of the Public Works Act is to restore to someone whose land has been compulsorily taken land with which that person has a personal or familial connection. That is in keeping with the fact that the offer back right applies only to the original owner and the original owner's successor, as that term is restrictively defined in s 40(5). In the present case the land was taken in the 1950s and the present named applicants did not have any real personal interest in the land.

[10] The evaluation of these factors was very specific to the facts of the present case and we do not see the issues that the applicants now wish to raise as being

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<sup>3</sup> CA judgment, above n 1, at [118]–[125].

matters of general or public importance. Nor do we see any risk of a miscarriage of justice in the event that leave is not given.

### **Successor**

[11] The term “successor” is defined in s 40(5) of the Public Works Act as follows:

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.

[12] The Court of Appeal considered this provision in its decision in *Port Gisborne Ltd v Smiler*.<sup>4</sup> It noted that there was a distinction between cases where only part of the land was taken and cases where all of an area of land was taken.<sup>5</sup> In the latter case, the persons entitled to enforce the offer back provision are only those who would have been entitled to take under the will or intestacy of the original owner, whereas a wider class of claimants is permitted in relation to the former category. In *Smiler*, the Court of Appeal described the more limited class of claimants where the whole section of land was taken as “immediate beneficiaries under the will or intestacy of the original owner”.<sup>6</sup>

[13] Fogarty J interpreted the reference to “immediate beneficiaries” as “a liberal interpretation” of the text of s 40(5).<sup>7</sup> He said it should be read as referring to persons benefiting under the will of the former owner of the land or on his or her intestacy.

[14] The Court of Appeal said that Fogarty J erred in this broad interpretation and applied a narrower interpretation, involving a more literal interpretation of the words of s 40(5).<sup>8</sup> The Court then considered each of the relevant claimants in turn, in an analysis that was based on the facts of each individual case.<sup>9</sup> It found that a number

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<sup>4</sup> *Port Gisborne Ltd v Smiler* [1999] 2 NZLR 695 (CA).

<sup>5</sup> At [45].

<sup>6</sup> At [45].

<sup>7</sup> HC judgment, above n 2, at [209].

<sup>8</sup> CA judgment, above n 1, at [65].

<sup>9</sup> At [67]–[85].

of the claimants were not “successors” in terms of s 40(5) and therefore had no right to receive an offer back under s 40 in respect of the land taken from the person of whom the relevant claimant claimed to be a successor.

[15] The applicants whose claims failed on this basis wish to argue that the broader interpretation of Fogarty J was correct and more in keeping with the remedial nature of the Public Works Act than the more restrictive interpretation of the Court of Appeal.

[16] We accept that there is an arguable point as to the interpretation of s 40(5). We also accept that it is potentially a point of public importance. But given our conclusion on the discretion issue, it is essentially moot. Even if we were to find that the applicants succeeded on this point, it would have no impact on the result. We do not therefore see this as an appropriate case for this point to be considered by the Court.

### **Result**

[17] We therefore decline leave to appeal.

### **Application to cross-appeal**

[18] The respondent indicated that if leave were given, it would wish to cross-appeal on a number of other aspects of the Court of Appeal decision. As leave has been declined, it is not necessary to address those issues.

### **Costs**

[19] We award costs of \$2,500 to the respondent.

Solicitors:  
P M Cassin, Auckland for Applicants  
Buddle Findlay, Auckland for Respondent