IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2005-404-7348
[2014] NZHC 765

UNDER	The Public Works Act 1981
BETWEEN	J A ROBERTSON & ORS Plaintiffs
AND	AUCKLAND COUNCIL Defendant

CIV-2006-404-1881

BETWEEN	P D M SPENCER-WOOD Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2006-404-7350

BETWEEN	D J McCORMICK Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2005-404-7095

BETWEEN	THE ROYAL NEW ZEALAND FOUNDATION FOR THE BLIND & ORS Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2005-404-4351

BETWEEN	I B FLAVELL & ANOR Plaintiffs

	AND	AUCKLAND COUNCIL Defendant

CIV-2005-404-4250

	BETWEEN	C W WILLIAMS & ANOR Plaintiffs
	AND	AUCKLAND COUNCIL Defendant

CIV-2005-404-7351

	BETWEEN	D M STEWART Plaintiff
	AND	AUCKLAND COUNCIL Defendant

Hearing:	24-28 February, 3-7 March 2014
Counsel:	C Carruthers QC and W Aldred and P Cassin for plaintiff M Casey QC, G Hall and K Scott for defendant
Judgment:	14 April 2014

JUDGMENT OF FOGARTY J

This judgment was delivered by me on 14 April 2014 at 3.30 p.m.,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……..

Solicitors/Counsel :
Colin Carruthers QC. Wellington
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Paul Cassin, Auckland
M Casey QC, Auckland
Buddle Findlay, Auckland - G Hall and K Scott

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Introduction

[1] This case concerns the acquisition of seven different parcels of land in the Te Atatu Peninsula in the Upper Waitemata Harbour, west of the Auckland Harbour Bridge, by the Auckland Harbour Board (AHB) between 1951 and 1959.

[2] The plaintiffs are all descendants from the original vendors of the lands, except in one case, Royal New Zealand Federation for the Blind, which is a residual beneficiary of the estate of a vendor.

[3] The plaintiffs in these proceedings seek declarations designed to force the Auckland City Council (ACC) to offer back the land, being the current owner of the lands acquired by the AHB.

[4] For example, the plaintiffs Williams and Morley seek a declaration that the ACC offer for sale the remaining original land, acquired by the plaintiffs' predecessors, to the plaintiffs at a price fixed as at 1 August 1983, or such other date as the Court may determine.

[5] The seven original parcels of land are part of the Te Atatu peninsula. The AHB wanted the land for an "Upper Harbour development". By the 1970s AHB did not want the land for that purpose. Rather, the AHB thought it would be suitable for commercial uses compatible with nearby port development on Pollen Island.

[6] Since the 1950s the land has been partially subdivided and built upon. The balance is now owned by the ACC, developed for the public as open space, part of which is known as the Harbourview-Orangihina Park. The previous owners, after the AHB, were the Waitakere City Council (WCC) from 1989, Waitakere Properties Limited (WPL) from 1995, and the ACC from 2010.

[7] To obtain orders, the plaintiffs rely upon a statutory provision enacted in the Public Works Act 1981, which requires any government agency to offer land held for a public work, but not required for a public work, to be offered back to the original owners or their successors. This is s 40.

[8] The plaintiffs seek declarations as to the obligations of the AHB, WCC, and their successor, ACC to offer their families' land back, this offer to be at the value of the land when it should have been offered back, as at 1 February 1982 by AHB, 1 November 1989 by WCC, and 15 June 2010 by ACC. Alternatively, all plaintiffs seek the same declaration but as at on or about October 1983. Two of the plaintiffs (Williams and Flavell) also alternatively seek a declaration as at 26 April 1995 by WCC on the occasion of transferring the land to Waitakere Properties Limited (WPL).

[9] Section 40 of the Public Works Act 1981 (PWA) provides:

> **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 other public work; and
>
> (c) Is not required for any exchange under section 105 of this Act—
>
> the chief executive of the department within the meaning of section 2 of the Survey Act 1986 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 chief executive of the department within the meaning of section 2 of the Survey Act 1986 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 is held—
>
> 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 chief executive of the department within the meaning of section 2 of the Survey Act 1986 or local authority considers it reasonable to do so, at any lesser price.

(2A) If the chief executive of the department within the meaning of section 2 of the Survey Act 1986 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 not apply to land acquired after the 31st day of January 1982 and before the date of commencement of the Public Works Amendment Act (No 2) 1987 for a public work that was not an essential work.

(4) Where the chief executive of the department within the meaning of section 2 of the Survey Act 1986 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.

[10] Up to 1987, s 40(1)(b) used the standard "any essential work" rather than "any other public work". Subsection 3 originally read:

> Subsection (2) of this section shall only apply in respect of land that was acquired or taken:
>
> Before the commencement of this Part of this Act; or
>
> For an essential work after the commencement of this Part of this Act.

[11] In each proceeding the plaintiffs say that the subject lands were acquired for a public work, namely harbour works, being the construction of a port or port-related facilities in the Upper Waitemata Harbour, but that that purpose was abandoned before 1 February 1982, the date on which the Public Works Act 1981 came into force.

[12] On that basis, the plaintiffs claim that the subject land should have been offered back for sale to the original owners or their successors, the offer back provision designed to protect public authorities from "land banking".

[13] In the alternative, the plaintiffs say that the subject lands were no longer required for harbour works by October 1983, when special legislation was introduced to widen the AHB's leasing and licensing powers in respect of the lands to enable it to proceed with the proposed long-term and large-scale commercial development of the subject lands. AHB confirmed in its Select Committee submission on the proposed legislation that subject lands were no longer needed for the harbour purposes for which they have been acquired and its previous and subsequent conduct was consistent with that position. This special legislation is the Auckland Harbour Board and Waitemata City Council (Te Atatu) Empowering Act 1983 (Empowering Act). It became law on 2 December 1983.

[14] By contrast, the ACC's position is that this Empowering Act had the effect of displacing any existing obligation under the PWA to offer the land back. As it is a special provision, it overrides the more general provisions of the PWA.

[15] Following the nationwide restructuring of local government in the late 1980s, which led to the disestablishment of harbour boards and the creation of port enterprises on the one hand, and consolidation of local authorities on the other, the Minister of Transport, in 1990, exercising a special statutory power, decided that the land would not vest in the new port company, but rather in the newly constituted WCC.

[16] It is the plaintiffs' case that the WCC had no clear idea how the land should be developed when they acquired it as from 1 November 1989 and for some years subsequently. They say at this time in 1989 and subsequently, the land should have been offered back to the descendants of the original owners, the plaintiffs in these proceedings.

[17] The plaintiffs seek declarations accordingly as to the obligations of the WCC and its successor, the ACC as at 1 February 1982, October 1983 and 1 November 1989 and for some years subsequently.

The threshold arguments

[18] The defendant, the ACC, contends that the plaintiffs' claim must fail for any of a number of reasons. The ACC begin by contending as a threshold argument that the plaintiffs have failed to prove:

(a) That in each case the land was acquired in the 1950s for a public work.

(b) That it was acquired by compulsion or under such threat as to bring s 40 into play.

(c) That if so acquired, it was held for that or some other public work as at 1 February 1982.

(d) That if it was so held that it was not required for that public work on 1 February 1982, as at October 1983, or within a reasonable time thereafter (and in relation to the Williams and Speechlay land, that it was not required for a public work as at 26 April 1995 or within a reasonable time thereafter), then s 40 does not apply retrospectively to land acquired for a public works purpose but no longer held for that purpose prior to the commencement of the Public Works Act 1981.

The defendant reiterates that it is for the plaintiff to prove to the contrary.

The special legislation point

[19] The defendant says that the Empowering Act is a legislative enactment specific to the land and authorised its ongoing use and investigation by the AHB and the WCC for developments which did not need to be confined to essential works (up to 1987), and thereafter to any public works. As a consequence of the Empowering Act, the PWA has no application to the land.

If the PWA applies, s 40(2)(a) was validly determined by the WCC in 1996

[20] The ACC says that the statutory exemptions, especially in s 40(2)(a) of the PWA apply. The Court can and should take into account the current state of affairs and the history during and since the 1980s. Particularly, that the WCC made a valid determination in 1996 under s 40(2)(a) which has not been challenged by judicial review. (It does not apply to the Williams and Speechlay lands.)

The equitable defence of laches

[21] Overlapping all of this, the ACC say that these plaintiffs have no attachment to their land. Their interest is only commercial. Indeed, they have sold their rights to a litigation funder for all practical purposes. On the other hand, the ACC has substantial, indeed, overwhelming public interest in the land being retained for reserves, recreational and community uses. Further, the ACC say the plaintiffs and their predecessors have sat on their rights for over twenty years and it is too late for them to apply for discretionary relief now.

Residual exercise of discretion

[22] The ACC argues that the bone fides of the AHB, the WCC, the Waitakere Council and now the ACC cannot be questioned as at all times the proposed use of this land was discussed openly and covered extensively in the local newspapers. It is now too late to sue and, furthermore, the equitable principle of limitation by analogy to the Limitations Act 2010 applies. That it is not possible now to return the McCormick, Stewart, Kindersley, Smith or Clare lands as they are held as reserve land or are an integral part of subdivision consents for housing development. (As for the latter, the plaintiffs are not seeking the return of any land that has been subdivided for housing.) The former Williams and Speechlay lands are now part of the Harbourview- Orangihina People's Park, directly in response to strong public opinion and a desire to retain it. The Waitakere Council ratepayers were levied at a special rate for this purpose.

[23] The ACC argues that in relation to the Williams and Speechlay land in particular, the competing interests and prejudice must also take into account the very

tentative (if any) basis on which it is now asserted that the land was acquired under an element of compulsion some sixty plus years ago.

A literal or purposive of construction of s 40 of the Public Works Act 1981?

[24] In *Port Gisborne Ltd v Smiler*[1] the Court of Appeal had an occasion to look at the history of the Public Works Act 1981. The issue in the case was whether or not s 40 required Port Gisborne Ltd to offer a large area of land of approximately 40,000 acres acquired by the Crown in 1879 from the Maori owners, being ancestral land of the hapu of Tuawhareparae.

[25] At that time it was unlawful for private buyers to purchase any interest in the block of land. Rather, the Crown had the ability to acquire land, indeed take it, for both public works and for settlement of immigrants. The Court of Appeal held that s 40 of the Public Works Act did not apply because the Crown did not originally acquire the block for a public work. Rather, the land had been acquired pursuant to s 34 of the Immigration and Public Works Act 1870. The Court of Appeal held:

> [18] Unlike the more specific powers of acquisition contained in Part II of the Public Works Act 1876, s 34 was a broad provision enabling the government to negotiate the purchase of land for general purposes. The land has been described as forming part of the "land bank" of the Crown, available to be sold to settlers.

[26] There was at that time an offer back provision in the Public Works Act 1876. That finding of the purpose for acquisition was critical to the dismissal of the application of s 40 of the Public Works Act 1981. It influenced the interpretation of s 26 of the Port Companies Act 1988 where, in s 26, ss 40 – 42 of the Public Works Act should not apply to the transfer of land to a port company but once a port company acquired the land, ss 40 and 41 of the Act would apply as if the port company were a harbour board and the land had not been transferred. To examine the implications of that section, the Court of Appeal returned to examining the true intent and meaning of s 40 of the Public Works Act 1981.

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1 *Port Gisborne Ltd v Smiler* [1999] 2 NZLR 695 (CA).

[27] Keeping in mind the history already referred to in this judgment, the Court of Appeal observed:[2]

> Under s 9 of the 1878 amendment (to the Public Works Act 1876) any land "held, taken, purchased, or acquired", whether under certain specified acts or otherwise howsoever, for government works and not required for such works, could be sold in accordance with s 29 of the 1876 Act. The reason for extending coverage to land "held, taken, purchased or acquired" would appear to ensure that all land which came into ownership of the Crown for government works purposes was covered.
>
> …
>
> The broad principle was that land obtained for those purposes, but which ceased to be relevant to those purposes, should be offered back so as to reconstitute the original private holding insofar as that could be achieved.

[28] The Court went on to say:[3]

> [31] The 1876 Act was replaced by the Public Works Act 1928. Section 35, the offer-back provision, was in similar terms to its predecessor as amended in 1878. Section 35 was amended in 1935, by requiring the land to be sold either privately to the owner of any adjacent lands, or by public auction or tender. The consistent intention which comes through is that the offer-back concept is referable to land which has been brought into public ownership for public work purposes.
>
> [32] For the first time, the 1981 Act required the offer back to be made to "the person from whom (the land) was acquired". It also reduced the words qualifying the land in question to the single concept of "held".

[29] The Court of Appeal continued to reason from the detail of the law that the offer back provision was only dealing with land held for public works. It should be kept in mind that the Court had found as a fact that this subject land had not been acquired for public works. Relevantly, the Court said:[4]

> … The background to the offer back concept is that land is being acquired from a private person for a public work purpose, possibly under the threat or contemplation of compulsion. The rationale must be that it is only fair, if that purpose disappears, the Court should, so far as practicable, revert to the previous or equivalent private ownership.

[30] The principle reasoning therefore of the Court was that because this land had not been acquired for a public purpose, the respondents would have no entitlement

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2 At [30].
3 At [31] and [32].
4 At [35].

under s 40(2).[5] That ended the Court's analysis of s 40 on what it called first approach. It then had three paragraphs on what it called the second approach which allowed for the fact that if a contrary view was taken that s 40 applies for land currently held for a public work when its ownership was not obtained by the holder without any contemplation of a public work purpose, the respondents (Maori descendants of the original owners) still cannot succeed. Subsection (2) requires the land to be offered back to the person from whom it was acquired or to that person's successor. On a literal interpretation, this would require Port Gisborne to offer to sell the land to the Crown. The Court of Appeal then said:[6]

> We agree that in appropriate circumstances there is justification for disregarding intervening public owners so as to give effect to the intent of the legislation and return the land to its original private owners.

The same sentiment is repeated in the first sentence of the next paragraph[7]:

> Where land has continued to be held by successive public bodies for a public work throughout, the true intent and spirit of s 40 is that the land should be returned to the original owner.

[31] This last sentence can be seen as a repeated theme.

[32] It is no accident that New Zealand's earliest legislation required the offering back of land which had been acquired for public works but no longer was held for the same. This is because settlement in New Zealand brought with it a constitutional principle that government should not acquire private property except by operation of law and with full compensation. It is a short step to the "only fair"[8] consequence that if land is acquired for a public purpose and acquired so legitimately, it cannot then be used for another purpose, but should be offered back. This heritage can be traced to Chapter 29 of the Magna Carta, law in New Zealand by reason of Sch 1 of the Imperial Laws Application Act 1988. Chapter 29 relevantly provides:

> No free man shall be ... disseised of his freehold or liberties or free customs but ... by the law of the land.

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5 At [38].
6 At [39].
7 At [40].
8 At [35].

[33] Blackstone in his commentaries in 1765 wrote of the need for legislative authority, and for "full indemnification and equivalent" of the land taken.

[34] This policy of offer back had a hiatus in New Zealand between 1935 and 1982. As in 1935, s 35 of the Public Works Act 1928 was amended to confer on the agency holding surplus land a discretion to sell it either privately to the owner of any adjacent lands or by public auction or tender. Many local authorities did neither and held on to the land, a practice known as "land banking".

[35] More relevantly to the issue of a literal or purpose of construction of s 40, the Court of Appeal decision of *Smiler* demonstrates that the Court of Appeal was ready to make s 40 work, for example, by ignoring intervening public owners and invoking the underlying spirit of s 40 that land no longer required for public work should be returned to the original owner.

[36] In summary, s 40 is directly linked to one of the most important principles of the unwritten New Zealand Constitution, the protection of private property rights. Chapter 29 of the Magna Carta is not just a statute, it collects essential common law principles. For this reason alone, s 40 of the PWA should not be read restrictively but be read purposefully. This is also in accordance with the injunctions of the two statutes relevant at the time.[9]

[37] It is with this common law disposition and applying the statutory injunctions that I have scrutinised the issues of fact and law in this case. In summary, the Court proceeds on the basis that if land has been acquired private property for a public work, but is no longer needed for a public work then, it is "only fair" that it should be offered back. Section 40 of the PWA is an application of that principle.

Ordering of issues

[38] There are numerous issues of law and fact in this case. Counsel broadly agreed on the issues but not in the ordering of them. I have decided to deal with the

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[9] Interpretation Act 1999, s 5; Acts Interpretation Act 1924, s 5(j).

issues in chronological order. This is principally because the tale is best understood told chronologically, and the issues best grasped as they arise over time.

Issues

1. Did the AHB hold the land for a public work?

[39] The AHB was a body corporate. It was:[10]

> … for the purposes and subject provisions of this (Harbours Acts 1923, 1950) and the special Act, capable of purchasing, holding, disposing of and alienating real and personal property and of doing and suffering all other acts and things as body corporate may by law do and suffer. (Emphasis added.)

[40] As a body corporate the AHB did not have the full competence of a person. As a statutory body corporate it had such powers as given to it by any statutory provision, together with any implied powers reasonably implicit from the express statutory powers. As a harbour board it was by statute a local authority.

[41] The setting of this issue pre-dates the liberalisation of the New Zealand economy in the 1980s, the reform of local government in the late 1980s, and the general powers of competence given to local authorities in 2002. It is important to set aside the current mindset influenced by ports being operated as port enterprises and local authorities having powers of general competence, subject only to consultation obligations.

[42] In October 1949, the AHB published in the New Zealand Gazette a "notice of a scheme of development of the upper harbour of Port Auckland". The Gazette referred to as its authority under s 29(2) of the Finance Act (No. 3) 1944. Section 29(2) of that Act provides:

> (2) In the case of a comprehensive public work or scheme of development or reconstruction, the Minister or a local authority shall by notice gazetted and publicly notified state the nature of the works included in the comprehensive public work or scheme and the approximate boundaries of the area affected thereby. The notice shall remain in force for such period as may be specified therein, and for the purpose of any compensation claim arising during that period in respect of any work included in the comprehensive public work or scheme, the specified date for the purposes of

[10] Harbours Act 1950, s 17(1).

> the last preceding subsection shall be the date of the first publication of the notice. While any notice remains in force as aforesaid, the Minister or the local authority may from time to time by a further notice gazetted and publicly notified, extend the operation of the notice for such further period as he or it thinks fit. For the purposes of this section a government work or a local work may form part of a more comprehensive public work or of a scheme of development and reconstruction which includes both Government works and local works, and any notice under the subsection may include works commenced before the date of the notice, and whether or not after the passing of this Act. (Emphasis added.)

[43] The first schedule to the gazette notice describes the scheme of development and construction in this way:

> 1. The reclamation of tidal lands.
>
> 2. Construction of breastworks, wharves, docks, and other harbour works.
>
> 3. The subdivision or resubdivision of lands, laying out and construction of roads, streets and other means of access.
>
> 4. Dredging of channels and basins.
>
> 5. Provision of areas for industrial works.
>
> 6. Provision of areas and facilities for ship repairing.
>
> 7. Provision of areas for oil tanks and storage.
>
> 8. All harbour and other works necessary for the carrying into effect of the general object.

[44] These works were confined by being within the land described in the second, third, fourth and fifth schedules. Those schedules included the land which is the subject of these proceedings.

[45] About a fortnight later, the AHB wrote to the owners of a number of parcels of land off Te Atatu Road and Harbourview Road in these terms:

> **Upper Harbour Development**
>
> By Gazette Notice dated 10th November 1949, the Auckland Harbour Board has given notice of the work intended to be carried out in connection with the development of the Upper Harbour.
>
> By the same Notice the Board has defined the area which will be affected by such works. As the registered owner of the land described at foot hereof you are notified that such land is included in the area mentioned.

The Board wishes you to understand:

(a) The Gazette Notice mentioned does not purport to take any land;

(b) That if the Board at any time, within the period of 15 years from 25th October 1949, wishes to acquire for harbour works any of the land included in the area then the compensation to be paid by the Board shall not be enhanced by reason of such works.

Yours faithfully,

Chief Executive Officer & Secretary

[46] There was a minor dispute between counsel as to the immediate effect of invocation of the s 29 Notice. I am satisfied that the second sentence of subs (2) (underlined) was law at the time the Gazette notice was made and the letter sent. That sentence was repealed by the Finance Act 1951.

[47] The retrieved AHB files show the addressees to the letter. The owners of the parcels of land which are the subject of these proceedings are all recorded as having received the letters, except Mr J Williams, whose letter was returned unknown.

[48] These owners were neighbours in a rural area. Even without the benefit of evidence of their children and grandchildren, the Court would consider that on the balance of probabilities that the owners would have discussed with each other the extraordinary notice that they had been given: that the AHB intended to carry out works in the upper harbour which is defined to include their land.

[49] Mr Casey argued that weight should be given to sub-cl (b) of the letter as indicating that it was just a possibility that the Board might wish to acquire their land. I think the letter needs to be read as a whole. The first two paragraphs are positive that these works are "intended" and the areas described "will be affected". I find as credible and reliable the unanimous evidence of the descendants of the then landowners that this communication was regarded by the owners as notice of an intention on the part of the AHB to acquire their lands for harbour works. None of them described any belief within a family that it was just a possibility that the land

might be taken. Later in this judgment I will be referring in detail to the evidence of these witnesses.

[50] The notice included the description of the seabed as well as land. The total area of land and seabed was extensive. As well as the land, the subject of these proceedings, it included land further north also on the Te Atatu peninsula and south to Pollen and Traherne Islands and parts of the Rosebank Peninsula and Point Chevalier. A significant area of the seabed land was immediately adjacent to the land, the subject of these proceedings. This can be seen from a map described as Te Atatu Port Industrial Estate: Possible Development: Concept; dating from 1976.

[51] The land included in the Gazette notice consisted of terrace land, then sloping escarpment land and finally very low lying land, down to the seawater.

[52] Keeping in mind the adjacent seabed being intended to be reclaimed, and the intention to dredge access to the port works, one can readily imagine that the dredging would be used both for the reclamation and for building up of the low lying land and the escarpment so as to create a stable and horizontal platform for the off-lifting and depositing of cargo. This assumption was confirmed to the Court by Mr Brown, an expert planning witness called by the ACC.

[53] Mr Casey argued that this Gazette notice was stated to be for a "scheme of development and construction", not for a "public work". Mr Casey argued that items 5, 6 and 7 were not for "public works" as the term is used in the PWA. These were provision of areas for industrial works, facilities for ship repairing and for oil tanks and storage. He submitted that it was a mistake of law to perceive that a harbour board could only acquire land if it was for a public work purpose, that the Auckland Harbour Board Loan and Empowering Act 1946 and the Auckland Harbour Board Loan and Empowering Act 1951 specifically empowered the AHB to purchase land for a purpose that was, or might be other than public works.

[54] The 1946 Act had as its title:

> An Act to authorise the Auckland Harbour Board to borrow the sum of £1,500,000 for the purpose of constructing harbour works.

[55] The Schedule covered a number of items which clearly did not apply to this site, but did include the bulk import wharf and reclamation. In 1951 Parliament amended the Schedule to the 1946 Act, adding a Schedule 3:[11]

> UPPER Harbour development – preliminary survey and purchase of properties.

[56] Section 5 of the 1946 Act provided:

> 5. All moneys borrowed under and by authority of this Act shall be applied and expended in the construction of the harbour works and for the other purposes specified in the Schedule hereto.

[57] The plaintiffs argued that the phrase "harbour works and for other purposes" fell within the concept of a scheme of development or reconstruction which includes both government works and local works, as that phrase appears in s 29(2) of the 1944 Act. Mr Casey argued that if the intent of that section was that only public works could be the subject of a notice under it, there would be no need to refer to anything more than "a comprehensive public work".

[58] The defendant's argument does not accommodate that the Finance Act (No 3) 1944, upon enactment, became part of the Public Works Act 1928.[12] If the ACC's argument is upheld, it has the result that land can be compulsorily acquired for works which are not public works. Such an interpretation is contrary to the constitutional history of both New Zealand and Great Britain, dating from the Magna Carta, which is that compulsory powers of acquisition are given to government bodies only for public purposes. In 1946 – 1950s, it would be unthinkable that Parliament would empower a harbour board to compulsorily acquire land under the PWA for non-public works. Prior to the manifold reforms associated with liberalising the economy from the 1980s, there was a clear divide between private property and public property. Private property could not be compulsorily acquired by government for other private purposes, e.g. to be on-sold to a private person. Since the introduction of state owned enterprises (SOEs) in the late 1980s and local trading enterprises (LATEs) in the 1990s, that divide has been weakened.

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11 Auckland Harbour Board Loan and Empowerment Act 1951, s 6.
12 Finance Act (No 3) 1944, s 28.

[59] In 1944, the definition of public work in the PWA 1928, begins in s 2(a) with this broad clause:

> Every work which Her Majesty, or the Governor General, or the government, or any Ministry of the Crown, or any local authority is authorised to undertake under this or any other Act or Provincial Ordinance, or for the construction or undertaking of which money is appropriated by Parliament.

[60] Then the definitions go on in s 2(b) to include "any harbour work". The underpinning bedrock concept is that Parliament will only vote public finance to local authorities for the public works, as discussed above.

[61] The defendant's argument overlooks that there is a common failing of Parliaments and other English speakers to use more words than necessary. The fact that the section uses the concept of a "comprehensive public work" as well as "a scheme of development or reconstruction", both capable of being a mix of central and local government works, does not mean the two concepts cannot overlap and must be thoroughly distinguished one from the other.

[62] Mr Casey argued that at this distance of time, coupled with the lack of detailed information as to the detail of the scheme of development, it is not realistic for this Court to go back and make a judgment as to whether it was wholly for public works. Much of the material relied on by the parties in this case came from archives held by the Maritime Museum, the AHB now being defunct.

[63] The presumption must be the other way. It would be a remarkable, and likely a unique event, prior to the 1989 – 2002 reforms, for Parliament to have voted money or authorised the AHB to borrow money and to acquire land compulsorily for a purpose which was not a public work. To be sure, there is and was then no clear boundary between public and private works. Harbour boards had the power to lease land and regularly did lease land to port users. The important point to keep in mind, however, is that the question is not whether or not the scheme of development naturally fits into a layman's concept of a public work, but rather, whether or not it is deemed to be a public work by reason of the very broad definition of public work

contained in subs (a) as quoted above, reinforced by the rather general reference to "any" harbour work.

[64] Implicit in Mr Casey's argument is the proposition that the AHB must have been labouring under a mistake of law when it gazetted the works under s 29 of the Finance Act (No 3) 1944, anticipating taking the land for these works.

[65] If one keeps in mind the constitutional setting of the grant by statute of a power of compulsory acquisition, and the function of the Finance Act (No 3) 1944 to apply to both (central) government work and local works, the interpretation advanced by the ACC is not a purposive interpretation. It has no merit. Rather, one of the purposes of s 29 was to make it clear that the obligation, not a discretionary power, to give prior notice by gazette, and it was an obligation, and the benefit of having the compensation payable fixed as at the date of the notice, extended to both government and local works. There is absolutely nothing in s 29(2) which would justify the Court drawing the extraordinary constitutional conclusion, that by this section Parliament intended to give local authorities, including harbour boards, the power to acquire land compulsorily at values fixed from the notice, for works which were not public works, rather some inchoate property falling between public property and private property, or to sell on to private users of ports, such as oil companies, and thereby revert to being private property.

[66] At that time, s 5(j) of the Acts Interpretation Act 1924 provided:

> (j) Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit:

[67] For these reasons I conclude that the whole of the Upper Harbour development was a public work for the purposes of the Public Works Act 1928 and its successor of 1981. The AHB was intending to purchase this land for a public work. It did purchase the land. Therefore, when the titles were acquired in the 1950s they were land held for the public work of Upper Harbour development. This

latter proposition follows swiftly because there was no statutory power given to a Harbour Board to acquire land for a particular public work, and then hold it for another public work. I say that on the basis that no statutory provision to that effect was drawn to the attention of the Court, and as will later appear in the judgment, were there such a power, it would be likely that there would be a special process if the purpose for which the land were held changed. It needs to be kept in mind, as the statutes have already indicated, that these statutes are providing for the funding of these works, as well as the power to acquire the land.

[68] For the purposes of this litigation, all the relevant land was acquired in the early 1950s except for the land owned by Mr John Williams. That parcel of land was acquired in 1959. Relevantly, there is no evidence against the proposition that the AHB was acquiring the land for the purposes other than those stated in the Gazette notice issued in 1949.

[69] That brings me to the conclusion that the AHB held this land for a public work of Upper Harbour development for port purposes.

2. Was the land <u>required</u> by AHB for a public work in 1982/1983?

[70] There was no significant dispute between the parties that by at least the mid-1970s the AHB had effectively abandoned the concept of the development of the Upper Harbour on the subject land.

[71] Rather, if there was going to be an Upper Harbour development it would centre on the nearby Pollen Island.

[72] It was also common ground that the AHB nonetheless was interested in controlling the uses to which the subject land at Te Atatu would be put. The AHB Board foresaw advantages in having industrial and commercial uses which would be suitably adjacent to nearby harbour activity. Although the documents that the Court has seen did not spell it out, it also seems more probable than not, that the AHB had a continuing interest in controlling the land use activities (as activities were referred to in the days pre-Resource Management Act 1991), to ensure that they were

complementary to harbour activities and thus did not raise issues of nuisance, (reverse sensitivity being jargon which only came in with the RMA).

[73] By 1976 this remaining AHB land at Te Atatu was included in an area generally described by the AHB as the "Port Industrial Estate". The AHB 1976 report records that: "Generally, the higher level land is zoned Industrial B1 which provides for general manufacturing uses" subject to specific conditions to protect the amenities of adjacent residential areas. The lower level lands zoned Port Industrial Estate providing for industries which require a waterfront or water-related site (including bulk oil storage and handling). The AHB 1979 report recorded that the policy was to develop the land as an industrial estate.

[74] Over this time the local rates burden on the land was a concern of the AHB. In June 1976 in that context an internal AHB report recorded:

> While the possibility of obtaining some reduction in rating has been raised with the Council legal and administrative difficulties could prevent any reduction being granted thus leaving the Board no alternative but to develop as soon as possible that land not required to be reserved for future port development.

[75] A report by the AHB in February 1979 records that the WCC was expressing concern about the absence since 1949 of any firm proposals for the use of the land and was requiring the AHB to demonstrate the need for an Upper Harbour port, and that the land was required as an adjunct to it. The location of any Upper Harbour port had been identified as Pollen Island, not Te Atatu. The report concluded that it was the Board's policy to retain the Te Atatu estate for a wide range of uses, including both industry and uses requiring direct water access. However, it did not say that the uses would be carried out by the AHB or under its control. Consistent with this, the AHB proposed to subdivide and lease the land in stages. Part of this proposal was put into effect, in that several sites along Te Atatu Road were subdivided with some being leased.

[76] It is quite clear that by 1979 if not earlier, and certainly by 1982, the land, the subject of these proceedings, was not required for public works of the AHB. Its new name, Port Industrial Estate, bespeaks the concept that it was an industrial estate that

might be built adjacent to Upper Harbour port developments which, if they were to be built as a public work, would be on, and in the immediate vicinity of Pollen Island.

[77] Nor was there any suggestion by either side that the land was required for another essential work prior to 1987, or another public work thereafter. It needs to be kept in mind that at this time there was no equivalent duty to offer the land back, in the then Public Works Act 1928.

3. If the land was not required for a public work is it still held for a public work?

[78] In Waitakere City Council v Bennett the judgment the Court held:[13]

> Whether the subject land is "*held ... for any public work"* at the relevant date is essentially a question of fact and may be a matter of some complexity. (Emphasis added.)

[79] The Court also referred to the requirement to consider:[14]

> … all evidence bearing on the purpose for which the land was acquired; how this was documented and any relevant proclamations, memorials, resolutions, land titles and other written material; and the evidence of what has since occurred.

[80] There is nothing in the *Bennett* judgment which says that a finding of fact that the land was not required for a public work meant that it was not held for a public work. The reasoning is to the contrary. It is plain from the latter passage above that the Court of Appeal clearly envisaged resolution of whether or not land continued to be held for public work to be a question of mixed fact and law.

[81] Mr Casey argued, no doubt drawing from the same passage, that the fact there is nothing in the nature of proclamations, memorials etc recorded on the subject titles, supported the proposition that the land was not held for a public work.

[82] The simple answer to that proposition is that the statute does not require proclamations to be entered on titles. Section 32 of the Public Works Act 1928

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13 *Waitakere City Council v Bennett* [2008] NZCA 428 at [42].
14 At [43].

expressly empowered any local authority to enter into agreements to purchase land, without complying with the provisions in s 22 of the Act providing for a formal taking, which process provides for objections and ends with the land being taken by proclamation, under s 23. When land was acquired by agreement under s 32, it was nonetheless "deemed" land taken under the Public Works Act 1928:

> **32 Contracts to take or purchase land for public works –**
>
> …
>
> (5) Where an agreement for the purchase of an estate or interest has been entered into, such estate and interest shall be conveyed or surrendered to His Majesty, or (except in the case of roads) to the body corporate represented by such local authority, or (if not incorporated) to some person on behalf of such local authority, as the case may be.
>
> (6) An estate or interest purchased and conveyed or surrendered hereunder shall be deemed land taken under the authority of this Act, applicable in any such case except as specially provided.

[83] Local government, including harbour boards, had at the time no general power of competence and could only acquire and dispose of land when authorised by statute to do so, then in the absence of a specific statutory power, they could not acquire land for public work A, and then require it for public work B, without specific statutory authority. As we have seen on the facts of this case, money could be advanced to acquire land for a particular purpose. The AHB or any local authority then had the obligation to use the funds for that purpose.

[84] The concept of land being "held" is a common law property law concept. There are no absolute property rights at common law. All property rights are by way of character of tenure, coming of course from the French "to hold". With this concept in mind, it makes perfect sense for Parliament to envisage that land may be held as an authorised acquisition and authorised use for a particular purpose, but no longer in fact required for that purpose. In the long run this would normally generate another local act, or exercise of a statutory power, authorising the change of purpose to ensure that funds were not voted by Parliament for one purpose, but used for another.

[85] Under s 20 of the Public Works Amendment Act 1952 there was a process to be followed where a local authority sought to change the purpose. The local authority was required to publicise the proposal and call upon all persons affected to give them an opportunity to make submissions in opposition.[15]

4. Was the land compulsorily acquired?

[86] There is no reference in s 40 of the Public Works Act 1981 to acquisition by compulsion being a prerequisite to the application of that section. Therefore, if it is a requirement, it is so by judicial interpretation.

[87] Mr Casey argued that it was a well settled requirement. He cited first the decision of the Privy Council in *McLennan v Attorney-General*,[16] relying particularly on [2] and [34]. By contrast, Mr Carruthers argued it is not a requirement that there is no binding authority to that effect. He argued that the language of the Privy Council in *Mr Lennan*, refers to compulsory acquisition naturally as it was an undisputed fact in that case, that the land had been compulsorily acquired.

[88] Paragraphs [1], [2] and [34] are as follows:

> 1. T W McLennan and E D McLennan were respectively the owners and registered proprietors of certain lands which were from time to time compulsorily acquired by the Crown under the Public Works Act 1928 or subsequent legislation. The lands were eventually occupied by the New Zealand Defence Department and were known as Papakura Military Camp. The first appellant (plaintiff) is the successor to T W McLennan within the meaning of the Public Works act 1981 and s 40(5).
>
> 2. Sections 40 and 42 of the 1981 Act as amended provide for steps which can or must be taken when land compulsorily acquired is not required for public works. In such a case by sub-section 40(1) the Commissioner of Works (subsequently the designated chief executive of the relevant department) "shall endeavour to sell the land in accordance with subsection (2) of this section, if that subsection is applicable to that land". Section 40 continues:
>
> …

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15 Public Works Act 1928, s 2: **Local authority** means and includes any City Council, Borough Council, County Council, Town Board, District Council, Regional Council, United Council, river Board, Harbour Board, Electric-Power Board, Education Board, and other Board, Commissioners, trustees, or other persons or body however designated, having authority, under any Act or Provincial Ordinance, to undertake the construction of any public work.

16 *McLennan v Attorney-General* [2003] UKPC 25.

> 34. Their Lordships consider that the basic structure of section 40 and section 42 of the Act is clear. (a) Where land is no longer required for the purpose of which it was compulsorily acquired the chief executive must endeavour to sell the land in accordance with subsection 40(2). (b) Subject to certain exceptions set out in the section he must offer to sell the land by private contract to the person to whom it was acquired or his successor. (c) Unless the chief executive considers that it is reasonable to offer a lesser price he "shall" offer it at the current market value of the land as determined by a registered valuer. (d) Unless the offeree accepts the offer within 40 working days or such further period as the chief executive considers reasonable he may cause the land to be offered for sale to adjacent owners or by public auction, tender or private treaty.

[89] The Privy Council did not have to decide whether compulsory acquisition was a pre-condition to the section triggering. The two issues before it are discussed in [32] and [33] of the judgment. The first issue was whether or not certain offers, having been made by the Crown, but having lapsed, discharge the Crown's obligations under s 40. The issue is whether or not the Crown had given warning that the statutory time limit for accepting the offers would be insisted upon, and whether or not the appellants had relied upon a representation that the time would be extended. The second issue turned on whether or not the Crown had the power to make another offer, or had otherwise not discharged its obligation under s 40.

[90] Mr Casey submitted that the Court of Appeal in *Bennett* has positively found the requirement of compulsion before s 40 can apply and that this Court is bound by that decision to that effect. The ACC relies particularly on [33] of the judgment. I would prefer to read that section in the context of [32]-[38] and [95] inclusive:

> [32] When enacted, s 40 no longer included the phrase adopted in s 35 of the 1928 Act "any land held, taken, purchased or acquired at any time ...". Rather, it used the simple phrase "any land held ... for any public work".
>
> [33] Despite that difference, it has been held by this Court that s 40 is directed to the acquisition of land for public works and continues to apply to land acquired or taken from a private person for public work purposes under compulsion or at least against a background of compulsion: *Port Gisborne Ltd v Smiler* [1999] 2 NZLR 695 at [35] (CA). This is evident from the terms of s 40(3) which uses the expression "land that was acquired or taken". The rationale was said to be that it is only fair, if the public work purpose disappears, that the land should, so far as practicable, revert to the previous or equivalent private ownership.
>
> [34] This Court also said in the *Port Gisborne* case at [35] that:

> The Act clearly has no application to land which has been acquired, and is currently being used, for purposes other than public work.

[35] It is common ground that the 1981 Act applies to land acquired or taken before the commencement of the 1981 Act: s 40(3). It is also accepted that the Harbour Board was a local authority under both the 1928 and 1981 Acts.

[36] Mr Casey correctly submitted that the offer-back rights asserted in this case would not be triggered under s 40 as first enacted unless the respondent could demonstrate that at 1 February 1982:

> (a) The land was held under the 1981 Act or any other Act or in any other manner for any public work; and
>
> (b) (i) Was no longer required for that public work; and
>
> (ii) Was not required for any essential work; and
>
> (iii) Was not required for any exchange under s 105 of the Act.

[37] If all these matters could be demonstrated, then *prima facie* the offer-back obligation is triggered subject to:

> (a) Any determination under s 40(2), if applicable, that it would be impracticable, unreasonable, or unfair to offer the land to the person from whom it was acquired or that person's successor; and
>
> (b) A belief on reasonable grounds on the part of the relevant authority under s 40(4) that, because of the size, shape or situation of the land, the authority could not expect to sell the land to any person except an adjacent owner.

[38] Focusing on the two prerequisites described in [36] above it is accepted in the statement of claim that by 1 February 1982, the land was no longer required for the public work (port facilities) for which the land had been acquired or for any other public work or for exchange. It is also accepted that the land had not been required for the purpose for which it was acquired for some time prior to that date. However the question is whether, in the circumstances pleaded, the land can still be regarded as "held ... for any public work" at that date in terms of s 40(1).

…

[95] In summary, Mr Casey submitted:

> (a) Section 40 Public Works Act 1981 applies to land acquired or taken prior to the commencement of the 1981 Act.
>
> (b) For the purposes of this case as pleaded, the respondents must initially satisfy two pre-requisites under s 40 Public Works Act 1981 as originally enacted:

(i) That, at 1 February 1982, the land was held for any public work; and

(ii) At that date, the land was no longer required for that public work, or for any essential work, or for exchange under s 105 of the Act.

(c) The fact that the land is no longer required for a public work does not preclude the possibility that the land may be held for a public work in terms of s 40.

(d) Whether land is held for any public work as at 1 February 1982 is a question of fact requiring consideration of all the evidence bearing on that issue against the relevant statutory background.

(e) Since the statement of claim asserts that the land was held for a public work as at 1 February 1982, that fact must be accepted for strike-out purposes.

[91] The Court of Appeal in *Bennett* was considering an appeal from the judgment of Williams J reviewing a decision of Associate Judge Faire who refused to strike out the proceeding. The argument before the Court of Appeal was that s 40 did not have retrospective effect, and so did not apply to the land. That was the point decided by the Court of Appeal. In [33] the Court did not repeat that requirement in [36], nor more pertinently in [95].

[92] I think there is a simple explanation for the frequent and almost invariable references to compulsory acquisition when applying s 40, which is that land however acquired, even by sale and purchase agreement, after a notice of taking has always an element of compulsion. This was explained by Tipping J in *Bowler Investments v Attorney-General*.[17] There were two issues in that case; the first being whether or not the property had to be offered back to a corporation, and the second was an examination of the grounds upon which the Commissioner can determine that a prima facie entitlement to have the land offered back was not to be acted upon in a particular case. The Judge was examining particularly the standard of unreasonable or unfair to offer back, as appearing in s 40(2)(a). So this is not a case in which a question of compulsion was contended to be an essential element before the duty to offer back applied. This was a case where the property was acquired by a memorandum of agreement in which the property owner agreed to sell the land, or to its taking by proclamation. As it happened the latter means was used. The argument

[17] *Bowler Investments v Attorney-General* HC Christchurch CP320/86, 18 November 1987.

before the Court was that the Commissioner had good reason not to offer it back because it was not taken by compulsion. The Commissioner of Works Property Manager relied on the fact that Bowler Investments had given reasons other than the designation behind the company's desire to sell.

[93] Tipping J accepted the submission of Mr Milligan that while there are different methods whereby land can be taken or acquired by the Crown or otherwise for a public work, all three: taking by agreement, compulsory taking and taking by conventional purchase "lead to the land being held by the Crown for a public work".[18] Tipping J relevantly said:[19]

> All these three lead to the land being held by the Crown for a public work. Indeed, in the 1981 Act a reference to Part II dealing with acquisition of land for public work, demonstrates that the emphasis is now on acquisition by agreement, if such can possibly be achieved.

[94] In the course of that hearing the Court took judicial notice of that practice to acquire by agreement. Tipping J went on:[20]

> While I accept Mr Parker's submission that the Commissioner or his delegate is entitled to look at all the circumstances, both of acquisition and otherwise, in determining whether it is unreasonable to offer the land back, I am concerned that the guidelines do appear to place the element of compulsion in the original acquisition in an erroneous light.
>
> It might well be possible to find a case where, there being no element of compulsion, it could be regarded as unreasonable to offer back, but it does not seem to me to be right to adopt the stance that the absence of any element of compulsion leads ipso facto to the proposition that it is unreasonable to offer the land back to the original owner.

[95] In *Bowler*, at the time of the agreement, no formal designation of the land for the Northern Motorway had taken place. There was a subsequent Gazette Notice. However, the Judge found as a fact that the Crown must have been satisfied in 1967 that it was proper to expend public moneys on the acquisition of the land.[21] Then the Judge said:[22]

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18 At 11.
19 At 11.
20 At 11.
21 At 14.
22 At 15.

> The case falls, in my view, into that category … where an owner sells to the Crown because the prospect of a public work has denied him a market. He is, in a sense, compelled to sell to the Crown.
>
> While I do not overlook the fact there is no formal designation, it seems to me that in substance if the market is anticipating the designation the property is thus unsaleable, no material distinction should be drawn on the basis that a formal designation has not yet been imposed. (Emphasis added.)

[96] On the facts of *Bowler*, the owner of the property had been unable to sell the property after designation and declared that he believed this was because it was likely to be affected by the proposed Northern Motorway. Indeed, one prospective purchaser who had signed an unconditional contract backed out when she ascertained the effect of the proposed motorway. This was the context within which the Judge made the finding that in substance if the market is anticipating the designation, the property is thus unsaleable.

[97] This is a normal circumstance not peculiar to *Bowler*. Normally the market for land in New Zealand is competitive. There will be multiple sellers and multiple buyers for the same category of property. Both buyers and sellers are choosing the time in which they want to buy or sell. Sellers are competing with other properties on the market. Buyers are competing with each other for the properties they want. Sellers are able to choose between competing offers. Sales between such sellers and buyers establish market value.

[98] Where formal notice has been given that a property is to be taken for a public work, the competitive market disappears. There is, for all practical purposes, only one buyer – the government or local authority. The otherwise complete freedom of the vendor to choose the time to sell property has, at the very least, been constrained, if not gone. The ability to force buyers to compete has gone. The derivation of the consideration, which has to be current market value, becomes academic and is usually determined by valuation from comparable sales.

[99] The reason why there are no other prospective purchasers is that the only long-time use of the land is for the public work. The present use and any interim uses are only short term. In that context, while the agreement for sale and purchase of land intended to be taken for a public work can be said to be a voluntary contract,

and in that sense not compulsory, it is in a broader sense compulsory because the vendor has only one person to sell to and a limited timeframe within to sell.

[100] With respect, Tipping J's judgment is facing the realities of the position which is commonplace in acquisitions of land for public purposes. Once the market knows that the Crown intends to acquire land compulsorily if necessary, it is not possible for the owner of the land to sell in the normal way. Normally there is no commercial incentive for a person to buy land which is likely to be taken in the near future by the Crown compulsorily if an agreement cannot be reached. The effect of a notice to take or clear intention that that is likely, is to force the owner to negotiate an agreement with the Crown. That is what normally happens.

[101] Tipping J also went on to say in the course of his examination of the Commissioner's guidelines:[23]

> It is noteworthy that the expression "there has been no element of compulsion" when put conversely suggests a sale to the Crown which has been a purely voluntary one. Even if such were the case I cannot see that as being a complete bar nor in the present circumstances do I regard the sale to the Crown as being completely voluntary.

[102] For these reasons I reject the submission of the ACC that the law requires proof by the plaintiffs that their land was acquired compulsorily by the AHB as a precondition and essential element in establishing a cause of action for a declaration that s 40 has been breached and that there should have been an offer back. Once the AHB gave notice, the subsequent sales – all to the AHB – were not market sales, and would have had an element of compulsory acquisition.

5. Were the properties, the subject of these proceedings, in fact compulsorily acquired?

[103] Notwithstanding my finding that this is not an essential element, I go on to make findings of fact as to whether the lands were compulsorily acquired, and to what degree. I do this for two reasons. First, in case I am wrong on the law, and in my competitive market analysis, and the Court of Appeal in its decisions in *Smiler* and *Bennett* has held that it is a necessary element. The second reason is that all

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[23] At 16.

counsel agreed that the degree of compulsory acquisition or lack thereof is a relevant consideration when applying the criteria in s 40(2)(a).

[104] The ACC submits that each one of these purchases should be considered separately. I will do that but it is important that the individual transactions be examined in their common context. The context has largely been set out in the analysis so far. But to sum up, all but one of a group of landowners of rural land on the Te Atatu Peninsula in 1949 received written advice from the AHB, giving notice of work intended to be carried out on their land, with the development of the Upper Harbour. They were then advised that the Gazette Notice mentioned does not purport to take any land, so they were told that the land has not yet been taken. They were then advised that the AHB can at any time within the period of 15 years acquire the land, in which case compensation to be paid by the AHB will not be enhanced by reason of the proposed harbour works. If they had taken advice from their solicitor at the time they would also have been told that by reason of the wording of s 29(2) of the Finance Act (No. 3) 1944, being the section relied on in the Gazette Notice, the value to be paid by the Board would be the value as at the date of notice, 16 November 1949, even if the land was acquired many years later within the 15 year period.

[105] On 17 April 1950, the AHB resolved that the property owners be advised that if the AHB decided to acquire any of their property, the AHB would pay the real value thereof, and such value would not be related to 1949 values, and would also pay for any present or future improvements on the properties. It is presumed that advice was given.

[106] On 19 January 1951, the AHB wrote to a number of the subject owners, Messrs Smith, McCormick (JJ and A), Stewart, Clare (CV and N) and Mr Kingsley, advising them that the AHB was to proceed with the acquisition.

[107] Subsequently the AHB entered into agreements for purchase from all the property owners. Secondly all the transfers were done by ordinary conveyancing and no notice was entered on the title of the land being taken under the Public Works Act 1928. Thirdly, there is no evidence at all that the AHB ever had to compete on

the market to purchase the properties, such as buying at auction or dealing with a real estate agent retained by the owners to sell on the open market.

[108] In that sense the acquisitions fall into the normal pattern of which this Court, and Tipping J in *Bowler*, takes judicial notice that acquisitions of land required for public works are usually by agreement for sale and purchase. The formal route of taking is rarely embarked upon.

[109] Notwithstanding this context, the ACC pursued the argument that these agreements were voluntary and unaffected by the prospect of the land being taken by law, whether or not the landowners agreed.

Each acquisition

The purchase from the Clares, claim by Royal New Zealand Foundation for the Blind McIntosh and Ryan claim – CIV-2004-404-7095 (Clare land)

[110] The owners of the land at the time were Charles and Nellie Clare. On 13 July 1950, their solicitor wrote to the AHB in these terms:

> **CV and N Clare Upper Harbour Development**
>
> We act for the abovenamed who own the land in cert of title 360/150 which may possibly be affected by your Upper Harbour development scheme.
>
> We enclose a copy of their subdivisional scheme and also a letter addressed to your Mr Taylor offering the land in terms thereof.
>
> Our clients are indifferent as to whether or not the land is acquired by your Board; however, they are concerned in obtaining an early decision for (failing purchase by the Board) they wish to take advantage of the present buoyant market for vacant sections.

[111] The ACC presented this letter as showing no evidence of compulsion. I disagree. They are tendering a subdivision scheme of their land. They are not proceeding with that subdivision plan. They are not going to the market to look for buyers interested in subdivisible land in the face of advice by the AHB that the Board will decide sometime in the next 15 years whether or not to take their land. They are seeking an early decision, that is now. If the Board decides not to take their land they can go ahead with a subdivision or market the land as subdivisible . If the Board does decide to take their land they can get a price now. There is nothing in the

letter which suggests they have the present freedom to go to the open market or to proceed with subdivision indifferent to the position that the AHB may take.

[112] Mr Carruthers submitted that offering to sell the land at the earliest possible date was simply an astute commercial decision and that the scheme of subdivision may well have been simply a good negotiating tactic to demonstrate the present value of the land by reference to its highest and best use. I agree.

[113] Mr MacIntosh gave evidence as a great grandson of Charles and Nellie Clare. Mr MacIntosh was born in 1951, but could recall visits from his great grandfather in the late 1950s and onwards and family discussions about the sale of the land. He gave evidence of a sense of a *"sense of resentment in the family about losing their Te Atatu land even though I was only a child at that time, I remember very clearly that when talking about the sale of the land my great grandfather said he had no choice, and that the land had been taken by the Harbour Board under the PWA"*. Mr MacIntosh presented as a straightforward gentleman who had for many years run two family businesses, which owned a reasonable amount of commercial property. He is an experienced man of commerce. He said that had the land been offered back at any stage, his family would certainly have had discussions with the residuary beneficiary of his great grandfather's estate, the Royal New Zealand Foundation of the Blind, with a view to coming to some arrangement which would have included the foundation "purchasing our interests in the land". In 1983, he and his family were reasonably wealthy.

[114] As the reader will find, Mr MacIntosh's recollections coincide with the recollections of many other descendants of the original owners, who considered they had no choice but to deal with the AHB. There was also evidence, to be noted shortly, that the owners had met to discuss the issue and had an informal meeting.

[115] I have dealt with the Clare land first because Mr Clare, a very experienced businessman and a wealthy man in his own right, was the first to approach the AHB and may have taken his initiative before these more general discussions between all the owners. One fact which is more probable than not is that upon receipt of these notices in 1949, before 1950, the landowners would have talked about it among

themselves as they were in a common predicament, and lived in a rural area which of its nature requires neighbourliness.

[116] I find that at the very least there was at least the degree of compulsion as explained by Tipping J in *Bowler*, and second that but for the notice, had Mr Clare intended to sell his land, he would as an experienced and wealthy businessman gone to the open market not just dealt with one potential buyer.

Flavell and Hensley (Speechlay Land) CIV 2005-404-431

[117] On 23 August 1950, Mr Speechlay wrote to the AHB stating that he was desirous of selling his property and asking if the AHB required the property. The finance committee of the AHB resolved on 26 September 1950 that the AHB's solicitors be instructed to enter into negotiations. The Council argued that this was before the AHB had decided that it would acquire any of their land. The formal motion that the AHB take the necessary action was not passed until 19 December 1950. However, the resolution does not suggest, as was the submission to this Court, that this was a new decision to acquire the land. The resolution reads:

> Te Atatu area that, as this area is required for the Board's purposes, the Board proceed with the acquisition of the Te Atatu lands which are *(illegible)* to the stay order and for that purpose the Chairman be authorised to open negotiation with the owners forthwith and valuation and *(illegible)* valuation options and take such other action as may be necessary subject to the actual purchase of any lands being submitted to the Board for approval.

[118] The motion was amended to insert the word "immediately" and was carried. As a result of that resolution, another letter was sent to all the other owners except Mr Speechlay and possibly the Clares in these terms:

> **Upper Harbour Development**
>
> The Board by Resolution dated 19th December, 1950, decided to proceed with the acquisition of your land, which in common with other lands at Te Atatu, is the subject of the Stay Order.
>
> The Board is anxious to avoid the expense which would be incurred by both parties if the land were taken under the PWA.
>
> Mr Stace Bennett, therefore, has been instructed to call upon you with a view to an amicable agreement being arrived at as to price.

> It is acknowledged that any purchaser not be subject to the jurisdiction of the Land Valuation Court.
>
> Yours faithfully

[119] A descendant of Mr Speechlay, one of his daughters, Mrs Flavell, gave evidence. She was born in 1931 so about this time was about 20 years old. She gave evidence of remembering her father talking about the AHB freezing the value of the land and he talked about how what he could do with his land was limited. She recalls her father being notified the land was required for upper harbour development and that she said he was quite distraught about having to sell the farm, that it knocked the stuffing out of him. Her evidence was that the very impression she had is that he felt he had no choice about selling it to the AHB, that it would be taken by the AHB if he did not agree to sell it. She gave other evidence of what his plans would have been if he had not sold the land to the AHB. The family appeared to have been reasonably wealthy.

[120] In 1983, Mrs Flavell and her husband owned a 14 acre farm block with a brand new house on it, freehold, and a two-bedroom apartment in Ellerslie and had cash in the bank. These assets were acquired following sale of an inheritance to her sister and herself of a block of four shops in Herne Bay Road, Ponsonby, as well as her mother's house in Mt Albert. Mrs Flavell presented in evidence as an elderly lady in her eighties and a reliable witness. Nothing in her evidence surprised me. It confirms the probabilities of the situation, given the context. Again, I find in respect of this acquisition that there was an element of compulsion, as explained in *Bowler*.

J A Robertson and Ors CIV-2005-404-77348

[121] There was an agreement for sale of the Smith land on 29 August 1951. Following the resolution of the AHB to proceed with the acquisition of the land and the letter, the AHB's purchasing agent, Mr Stace Bennett, appears to have made contact with Mr Smith, and Mr Bennett's reported to the AHB on 25 May:

> This is an attractive property an owner asking £15,000 negotiations continuing.

[122] The sale agreement was reached on 29 August 1951.

[123] The granddaughters of the late Mr Smith gave evidence in these proceedings. They told the Court that their grandfather ran the property as a dairy farm and also owned a poultry farm on a three acre block down the road. Quite often during the weekends the girls used to go out to the farm because they kept horses at the poultry farm. They told the Court remembering their parents and grandparents talking about the AHB's intention to take the dairy farm for a port at Te Atatu and that they were all very unhappy about it. It was a frequent topic of conversation. They also recalled that their grandfather had been discussing with neighbouring landowners, and gained the impression that none of them wanted to sell either. The daughters were in their teens at the time. All three were straightforward witnesses, and again their evidence came as no surprise to the Court.

[124] I find on the probabilities that again, following *Bowler*, that there was an element of compulsion in the sale and more significantly, there was no choice but to deal with the AHB, now that the AHB had made it quite clear that they were proceeding to take the land compulsorily if an amicable agreement was not reached.

[125] The three daughters gave general evidence that the family had significant assets in 1983, plus of course there was the residuary beneficiary, the Royal New Zealand Foundation for the Blind.

The McCormick sale CIV 2005-404-7350

[126] This land was sold on 12 December 1951. In October, Mr Bennett had reported to the AHB that he had had numerous interviews, he understood the family had two valuations but could not agree among themselves as to price. Mr David McCormick, the great grandson of the owner, gave evidence. He did not favour the Court with his age, but advised that at the time the AHB wished to acquire the land he was a young teenager. His knowledge was derived mainly from conversations with his mother. He knew that the members of the Ryder family were very opposed to having to sell the land to the AHB.

[127] At the time of the sale, his grandfather had died and the matter was in the hands of the family via his Uncle Joe who was a trustee of his father's estate. He understood the general feeling in the family was that land values in Te Atatu had

been going up for a long period and showed no signs of slowing. This plaintiff had always felt aggrieved about the land being taken for harbour purposes, and when the land passed from the AHB to the WCC in 1989/90, he took legal advice and alerted the Council to the family's claims under the PWA. I will deal with this part of his evidence later in the judgment.

[128] As with the other witnesses, I found the family's hostility to the sale and sense of being obliged to sell not surprising, nor did I think he was in any way shaken on cross-examination as I would note none of the witnesses were in this regard.

[129] On the probabilities I find, following *Bowler*, that there was an element of compulsion. Realistically, the family knew they had no option but to sell to the AHB.

The Stewart land CIV-2005-404-7351

[130] This land was purchased on 18 December 1950. Mr Donald Stewart, son of the owner gave evidence. The land was a modest 10 acre block to which the family had moved because the father had health problems and had to leave his job as a bank employee. The son was eight years old at the time the land was sold. He remembers his parents were very unhappy about having to sell the land and relocate. But he knew that if dad did not agree to sell the land, the AHB would take it. He remembers his father joining with the other affected landowners in the committee, trying to influence the AHB, and also his father was a bit grumpy at being asked to be the informal secretary due to his past experience as a bank clerk.

[131] None of this evidence surprises me. It confirms what I would expect, that the neighbours would talk about this among themselves and equally realise the futility of trying to persuade the AHB to change its mind.

[132] Again, following *Bowler*, I find on the probabilities that there was an element of compulsion in the acquisition of this land. In the case of this particular family it was a sale they probably would not have made to anyone, let alone the AHB, but was required to because of the AHB's proposals for acquisition.

The Williams' land CIV-2005-404-4250

[133] The Williams' parcel was the last to be acquired, the transfer not taking place until 11 October 1956. Two members of the family gave evidence, Mr Charles Williams, son of the owner James Williams, born in 1945, and so a young boy at the time, and his sister Jean Morley, born in 1943. The evidence was that their father was an Irish immigrant who had walked off his family farm after the troubles in Ireland. He came to New Zealand in the 1920s and developed a very successful blacksmithing business and assembly of car parts which developed into building buses and trucks, leading to a successful firm called Cadner & Co Coachbuilders. The property was a country farm for a wealthy family, who lived in the city. His father was a businessman who mixed with professional people. The evidence of these two family witnesses was that their father co-ordinated the neighbouring landowners and held meetings with them to discuss the proposed acquisition of the land by the AHB, with the general objective of opposing it. That was the recollection of the son. The daughter's evidence was that as the other owners backed down and agreed to sell, her father was horrified, but in the end with the divisions between his neighbours, he felt he had no option but to sell.

[134] It was put to both witnesses that this was not the case because the correspondence with the AHB had demonstrated her father negotiated the sale on the basis that he had plans to subdivide the land.

[135] The original letter sent by the AHB following the Gazette Notice was not received by Mr Williams. This is because, as we now know, he was not then living at the property. But the evidence does not surprise me that he knew very early on all about the sale, and indeed as a prominent businessman, took a leading role in discussing it with his neighbours.

[136] Mr Bennett's report indicated that Mr Williams would not sell, so the AHB did not press the matter. It was not until June 1954 that Mr Williams approached the AHB and offered to sell the land. The file note of an AHB property officer on 26 June 1964 opens with this sentence:

> Williams has been approached by prospective purchasers of sections and wants to decide whether to proceed with subdivision of his property. He had indicated when the Board negotiated previously that he would advise if he contemplated any dealing with his property. He would be prepared to sell to the Board if he could get a satisfactory price for the whole property and spoke in terms of £600 per acre. He asked for an early decision as to whether the Board was still in the market for his land.
>
> And so it goes on.

[137] This document was relied upon by the Council as clear evidence t hat this was a voluntary sale. It needs to be placed in the context that at that time, so far as Mr Williams would have known, his land was still subject to the notice given in 1951 of acquisition with intention to acquire compulsorily if necessary the Te Atatu land of which his was part.

[138] Internally within AHB there was some doubt as to whether his land was needed, it being in the most southerly edge of the land, and his coming back into the negotiations in 1954 prompted discussions within the AHB as to whether or not they still required it.

[139] As to the weight that should be attached to the proposed subdivision, in my view a similar analysis is required to that of the Clare family.

[140] It is normal these days, and almost certainly was in those, when negotiating a sale, to provide evidence of the best value of the land by giving evidence of its highest and best use. In the case of farm land on the outskirts of an expanding city it is natural and prudent to talk in terms of a scheme of subdivision in order to obtain a price reflecting its most valuable use, but for the public works.

[141] The evidence of Mr Williams and his sister Mrs Morley, is corroborated by their late mother's letter. In October 1989 Mrs Williams wrote a letter as follows:

> Mr B Carr
> Chairman
> Auckland Harbour Board
> Auckland
>
> Dear Sir,
>
> I have been concerned for years at the situation where our land (some 20

> acres) at Te Atatu was taken by the Board under threat of Public Works Acquisition for petrol and oil Installation, in the 1950s. Discussion had taken place over this matter many, many times with Mr Burgess who was the property Manager at the time, but to no avail.
>
> In Daily press I have seen where the land is to be transferred as part of the dissolution of the Auckland Harbour Board to the Waitakere City and in the circumstances I forward this letter to you stating my strong feeling of injustice, as this land has never been used for the purpose for which it was taken and I believe I am entitled to some redress in this matter.
>
> This newspaper article came at an opportune time as my daughter and son-in-law (Mr and Mrs B Morley, Directors of Children's Bible Crusade) are currently looking for land on which to locate to NZ headquarters of their work, and also accommodation for myself.
>
> The site would be used for staff accommodation, training centre, and centre of operations for our work with socially stressed children of Auckland. This would be an ideal location for access to children at risk in the Western and Central Suburbs. I believe that such a community use of the land would be preferable to selling it off for short-term profit.
>
> I await your earliest reply.

[142] Counsel for the ACC did not dispute this letter, although it had not turned up in their research. The fact that it is professionally and beautifully written is explained by the late Mrs Williams' background career at a bank. Rather, the submission on behalf of the ACC was that her letter does not accord with the facts at the time of the purchase.

[143] It was Mrs Williams, the letter writer, who closed the sale. In a telephone call made on 8 December 1954 and recorded in a minute of the property officer, she rang and advised that if the AHB was prepared to renew its offer of £18,000 for the property, Mr Williams would be prepared to sell. The approval was given.

[144] There is nothing inconsistent with her closing the sale and her 1989 letter, if one reflects for a moment on the information known to the Williams family at the time as set out above.

[145] Interestingly, in the context of this argument by counsel for ACC, it would appear that the AHB at the time thought that they were acquiring this land under the PWA. In a letter dated 15 December, of which the Court has only part, someone

from the AHB is advising Russell McVeagh, their solicitors, that an agreement had been reached with Mr Williams regarding the AHB's acquisition of the property. There was a consideration of him retaining about one-third of an acre in the north west corner. The letter goes on:

> The Board to take the remainder of the property by agreement under the Public Works Act at £18,000 less the assessed value of the section retained after survey.

[146] Similarly, on 16 February 1955, the general manager is writing to Russell McVeagh:

> Please arrange for the necessary survey and proceed to acquire this property by agreement to purchase under s 32 of the Public Works Act on the terms set out in my letter of 22 December 1954 to Williams.

[147] It will be recalled that I have referred to s 32 before. This is the section of the Public Works Act 1928, which gave the acquiring authority the alternative of acquiring the land under the Act, but by agreement.

[148] All in all, following *Bowler*, I am satisfied that on the balance of probabilities the Williams' land was "taken by the Board under threat of Public Works acquisition for petrol and oil installation in the 1950s".

6. Was the land held for an "essential work" in the period 1982 to 1987?

[149] This is an issue on which little was said during the hearing, the defendants' closing submissions taking up less than half a page, and not being mentioned in the 44 page opening address.

[150] Prior to 1987, s 40(1)(b) required any alternative public work to be an essential work, as noted earlier.[24] The defendant argues that parts of it were in as much as there were plans for roads, as part of a subdivision of the land. Any private subdivision provides for roads, usually at the cost of the subdivider. "Essential work" is a subset of "public work". It was defined in s 2 of the PWA. It included any road. But it is a misuse of the concept here, between 1983 – 1987, to use it, as

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[24] See [10] above.

the proposed industrial estate was not a public work, and had more of the character of a private development of the land. "Essential works" as defined did include:

> (e) The creation of reserves or wildlife habitats for the protection of rare, endangered, or threatened species or fauna.

There was no evidence the land was required for this purpose.

[151] In summary, the lands taken were not required for any public work, let alone an essential public work, between 1983 – 1987. Rather, the industrial estate, if it proceeded, would have been a commercial exploitation of the land for profit, leveraging off the neighbouring port development, albeit undertaken by the AHB.

7. Did the Auckland Harbour Board and Waitemata City Council (Te Atatu) Empowering Act 1983 displace the obligations on the AHB from its enactment on 2 December 1983 to offer back the land?

[152] Section 40 of the PWA came into effect on 1 February 1982. The Empowering Act came into effect on 2 December 1983. This is nearly two years later. From February 1982, the AHB should have been examining whether it was still requiring these lands for Upper Harbour development and, if not, whether it was requiring them for another public work. If the answer to both questions was no, as it should have been, the next question for the AHB was to examine whether or not there were grounds in which it could bona fide and in good faith exercise a discretion reserved to it under s 40(2). The decided cases allow some time for these questions to be considered and the local authority to decide what to do.[25] This task should have been completed before December 1983. By December 1983 the AHB was under a duty to offer the lands back to these plaintiffs. It was in breach of that duty. There is case law authority that it is not a continuing duty. In the case of *Attorney-General v Edmonds*,[26] the Court of Appeal reversed Miller J on this point.[27]

[153] This was a local Act. The long title is:

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25 *Deane v Attorney-General* [1997] 2 NZLR 180 (HC); *Ngahina Trust v Kapiti Coast District Council* HC Wellington CIV-2008-485-1657, 31 May 2010 at [103]; *Hill v Attorney-General* (1998) PRNZ 523.

26 *Attorney-General v Edmonds* [2006] NZCA 146.

27 At [55].

> An Act to grant powers to the Auckland Harbour Board and the Waitemata City Council in relation to the development of certain land at Te Atatu.

The land, subject to this Act, includes the land subject to these proceedings. There are four relevant provisions, ss 3, 4, 5 and 6:

> **3. Power of Board to grant investigation licences**
>
> (1) The Board may grant to the Council or any other person a licence or licences to permit the land to be used and occupied for the purposes of investigating its development.
>
> (2) Any such licence may include an option for the licensee or a nominee or nominees of the licensee to take a lease of the land from the Board in terms authorised by this Act.
>
> **4. Power of Board to grant leases**
>
> (1) The Board may lease, or grant one or more options to lease, the land in such manner and on such terms and conditions as it thinks fit.
>
> (2) Sections 7, 8, 9, 17, 18 and 19 of the Public Bodies Leases Act 1969 shall not apply to or in respect of any lease or option to lease under this section.[28]
>
> **5. Powers of Council**
>
> Subject to the Local Government Act 1974, the Council is hereby empowered to promote the development, subdivision, and leasing of the land and may in connection with any actual or proposed development of the land, in addition to all other powers exercisable by it:
>
> (a) Prepare, carry out, approve, or publish any plan, development, scheme, survey, or investigation;
>
> (b) Take any licence or lease or option for lease granted by the Board under s 3 or s 4 of this Act and, if appropriate under the terms thereof, transfer or assign the same or nominate the lessee thereunder.
>
> **6. Application of existing Acts**
>
> Except as otherwise provided in this Act, nothing in this Act shall be construed as limiting the application of the Harbours Act 1950, the Local Government Act 1974, the Rating Act 1967, the Town and Country Planning Act 1977, or the Public Bodies Leases Act 1969.

[154] The ACC's submission was that this local Act was jointly promoted by the AHB and the Waitemata City Council to address provisions in the Public Bodies

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[28] Section 7 – limits leases to 89 years without renewal, or 21 years with perpetual right of renewal, in various forms.
Section 8 – requires leases to be sold by auction.

Leases Act 1969, which prevented the AHB from granting a lease without public tender. Thus, it was enacted specifically so that the AHB and the Waitemata City Council could investigate the use and development of the land for commercial and other purposes, and to grant leases and licences to other parties for such use and development. Neither of these were public work purposes. AHB had stated in its submission to Parliament on the Empowering Bill that any port or port-related purpose had been abandoned.

[155] The ACC also submitted that the 1983 Act provided in s 6 that it did not "limit the application" of the Harbours Act 1950. That was subject however to the preface "except as otherwise provided in this Act". In any event, the powers conferred by the empowering Act were by way of extension, not limitation. They gave additional powers to the AHB and to the Waitemata City Council. Once enacted, it was submitted that the land was then held for the purposes of the Empowering Act, and each of the titles to the land were notated with memorial which recorded that the land was subject to it.

[156] The ACC's principal submission then was as follows:

> If a general statutory provision is followed by a later special one that is inconsistent with it, the effect of that special statute is to engraft an exception onto the general one. It takes away part of its subject matter and deals with it specially. This general provision remains intact. It is not repealed or changed, but it is now inapplicable to one of the circumstances it previously covered.

[157] In reply the plaintiffs' submission is:

> The defendant's characterisation of the Empowering Act is misconceived. The Empowering Act makes no reference to the "purposes" of the leasing and licensing powers it conferred. It is clear that its purpose was simply to provide for more extensive powers in this regard, <u>but did not purport to effect ownership of the fee simple</u>. (emphasis in the original). There is no tension between the Empowering Act and the PWA – both pieces of legislation could apply to the subject lands.
>
> Neither did the Empowering Act exclude the operation of s 40. In fact the converse is true, as:
>
> (1) Section 6 stated that except as otherwise provided in the Act nothing in it should be construed as limiting the application of (*inter alia*) the Harbours Act 1950; and

(2) Section 143A(1)(b) of the Harbours Act provided that the Harbour Board's powers to sell did not authorise the Board to deal with land taken or acquired under the Public Works Act 1928, otherwise than in accordance with the provisions of the Public Works Act.

Section 40 PWA imposes an important qualification on the ability of the estate (or local government) to deal with land acquired for public works. The corresponding rights or original owners and their successors should not be held to be abrogated by other legislation, except where that has been clearly indicated by Parliament. There is no such indication in (the) Empowering Act.

[158] It will be recalled that the Court of Appeal in *Waitakere city Council and Waitakere Properties Ltd v Bennett & Ors*,[29] dismissed an appeal from the High Court, confirming Associate Judge Faire's judgment, which dismissed strike out proceedings brought by the appellants. Two paragraphs of this judgment discuss the Empowering Act:

> [93] This Act was enacted on 2 December 1983. It concerned land on the Te Atatu Peninsula, including the subject land. Under the Act, the Harbour Board was authorised to grant to the (then) Waitemata City Council or any other person a lease or licence to investigate the development of the land. The Act also empowered the Council to promote the development, subdivision and leasing of the land.
>
> [94] Mr Casey submitted that Parliament would not have considered enacting this legislation (which could lead to commercial or other development of the land) for non-public works purposes if the land might have been subject to s 40. We do not attach weight to this submission. It is stretching matters to accept that, when enacting the legislation, Parliament must have considered whether or not the land was subject to possible offer-back obligations under s 40. It is equally likely that the issue was simply overlooked. No evidence has been produced to suggest that Parliament turned its mind to the issue at all.

[159] The principal reason for the Court of Appeal refusing to strike out is that it considered the issues raised by the parties "will require a consideration of all relevant evidence assessed against the legislative background in force".[30]

[160] The Court concluded:

> [96] Nothing in this judgment should be taken as expressing any view on the substantive merits of the case or on any other issues which may arise including any issues of limitation.

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[29] *Waitakere City Council v Bennett & Ors*, above n 12.

[30] Extract from [92] but applied more broadly to the whole of the reasoning.

[161] In this Court, Mr Casey did not persist with the argument that the Court should examine whether or not Parliament would have turned its mind to the effect on the application of s 40 when enacting the 1983 Act.

[162] I would not have been attracted to such an argument. Every Parliament is sovereign. All statutes are law until they are repealed. The concept of implied repeal is deployed in the case law and is difficult, if not dangerous to apply.[31] It is sufficient that if a later statute specifically applies to authorise the holding and use of land, that later statute will be given full effect. This is because there is no hierarchy of statutes in our constitution.

[163] The decision of the Court of Appeal in *Auckland Gas Co Ltd v Auckland City Council*,[32] is instructive. The issue in that case was whether the Auckland City Council was obliged to pay the Auckland Gas Company the whole cost of carrying out alterations to gas pipes and roads that had been required by the Council. The material facts are set out by Somers J delivering the judgment for the Court of Appeal:

> The gas company is a franchise holder authorised to supply gas to those parts of the City of Auckland described in the Auckland Gas Company's Act 1871. The Council is the local authority having jurisdiction over roads in the franchise area including the two with which this case is concerned.
>
> In early 1987 the Council required the company's gas main in Nugent Street to be lowered to enable it to upgrade the road. The gas company installed a new main along the line of a new footpath on one side of the road and when that was in place the old pipes were purged and sealed. A new main was laid because the old one was difficult to relocate without fracturing. The gas company sent the Council a bill for $7504.22 for the work.

[164] There were two competing provisions. Section 48 of the Gas Act 1982 enabled any local authority having jurisdiction over a road to require the franchise holder (the gas company here), to alter the pipe or any other equipment but at the cost of the local authority. The other provision was s 132 of the PWA 1981, later repealed but replaced by a virtually identical provision in s 42 of Transit New Zealand Act 1989.

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[31] See discussion on implied repeal by Griffiths CJ in the High Court of Australia in *Goodwin v Phillips* (1908) 7CLR 1 at 7.

[32] *Auckland Gas Co Ltd v Auckland City Council* [1990] 2 NZLR 420 (CA).

[165] Under s 132 of the PWA 1981, such costs were to be shared. After examining the facts, the Court of Appeal held that the works done at the request of the Council, fell within s 48 of the Gas Act 1982, which provided that such works should be paid for by the local authority. That finding of fact decided the case because as the Court of Appeal then said:[33]

> That conclusion is really the end of the case for it cannot reasonably be contended that the terms of the Gas Act 1982 which is a later enactment than the PWA 1981, are not to be given their full effect. (Emphasis added.)

[166] Somers J is typically succinct. But his words are always carefully selected. That reasoning does not rely on any concept of implied repeal. Rather, it relies on the proposition that where there are two statutory provisions applicable to a set of facts which conflict, it is the later statutory provision in time which will apply.

[167] There is no higher law resolving the relationship between specific and general statutes, except the principle that each parliament is sovereign. Where any later specific statute clearly applies, it will be given effect. It must be given effect because earlier Parliaments cannot bind later Parliaments. This is a basic proposition, so basic that Somers J did not need to cite authority.

[168] The question then becomes whether or not the 1983 Empowering Act enabled the AHB to hold the land for purposes which were not public works.

[169] The context of the Empowering Act is that the Public Bodies Leases Act 1969 strictly controlled the leasing powers of local authorities, including Harbour Boards. If the Empowering Act had merely relaxed those powers in s 4, the statute would not have been of any great moment. For when land is taken for a public work, the work itself is often programmed to be undertaken at some considerable time in the future. Highways are a good example. A prudent local authority will acquire land for a highway many years, even decades, before the highway is planned to be constructed, in order to acquire the land at a reasonable cost. At that stage it may be rural land on the outskirts of a city which is expected to grow and spread across that land. The farm land taken for roads might then well be leased back for quite significant periods

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[33] At 424.

of time. The leased land cannot and so will not, however, be used in a way which precludes the development of the public works for which the land is held or required.

[170] The significant provisions in the Empowering Act for the purposes of this litigation are ss 5 and 3, in combination. Section 5 enables the Waitemata City Council, being the planning authority, to promote the development, subdivision and leasing of the land "in connection with any actual or proposed development of the land". That power needs to be read in the context of the specific power to the AHB to grant investigation licences in s 3. Section 3 is the companion to s 5, and enables the AHB to take advantage of any new Waitemata City initiative and uses very general language of "investigating its development". Section 5 enables the preparation, carrying out, approval or publishing of "any plan, development scheme, survey or investigation."

[171] When interpreting a statute, it is always useful to examine the reason why it is enacted. If one can discern the reason or "mischief" which explains why the statute was enacted, it is so much easier to understand the intent and purpose of the legislation.

[172] By 1983 the Upper Harbour port development was a development that the AHB no longer envisaged pursuing on that land. Both the AHB and the Waitemata City Council had separate but not necessarily incompatible interests in other development of that land. The AHB still had a long term plan of maybe developing Upper Harbour works around Pollen Island nearby, and as previously discussed,[34] therefore had an interest in compatible uses of land on this Te Atatu land.

[173] Similarly, but differently, the Waitemata City Council was governing all the land in this Te Atatu Peninsula, much of it being residential subdivision. As a planning authority under the Town Planning Act 1977, the WCC had to have a keen interest in compatible use and development of the undeveloped land.

[174] These interests of both the AHB and the Waitemata City Council had been in place for many years. Certainly, before the enactment of the new PWA in 1981

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[34] See [5], [75], [76] above.

because, as already found, the idea of an Upper Harbour development had died by the end of the 1970s, probably as early as 1976.

[175] As the Court of Appeal in *Bennett* noted, local government bills may not be rigorously examined by central government draftspersons and lawyers for compatibility with other statutes.[35] That is one practical reason, in addition to the constitutional reasons, why the statute should be read for what it says without any presumption that it will be consistent with other statutes. There are other critical words in the long title – "An Act to grant powers … in relation to the development of certain land at Te Atatu. That title reinforces that the text of s 5 inasmuch as it enables development subdivision and leasing of land. There is no suggestion in the long title or elsewhere that this is for development pending use of the land for public works.

[176] By specifically broadening the powers of leasing, and empowering the Waitemata City Council to promote the development and subdivision and leasing of land, the statute is providing for the land to continue to be held by the AHB as owner during this process, as it is not empowering the AHB to sell the land. Rather, it is releasing the AHB from some of the restrictions on leasing of the land. It is empowering the AHB to explore the best use and development of the land in conjunction with the planning authority, the local council, free of some of the restraints of the Public Bodies Leases Act. Inevitably this statutory policy, to be given effect, has the AHB to develop and hold the land for an indefinite time, the very antithesis of offering it back.

[177] In summary, this Empowering Act is consistent with enabling the AHB to continue to hold the land, and allowing both the AHB and the Waitmata City Council to consider development and schemes over the land. There is no limit imposed as to the purposes for which the land can be used. The power is rather expressed to include "any, actual or proposed development of the land".[36]

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35 *Waitakere City Council v Bennett*, above n 12, at [94].

36 Auckland Harbour Board and Waitemata City Council (Te Atatu) Empowering Act 1983 s 5(a).

[178] Mr Carruthers submits that the Empowering Act did not exclude the operation of s 40. He argued:

> In fact the converse is true, as:
>
> 1. Section 6 stated that except as otherwise provided in the Act, nothing in it should be construed as limiting the application of [*inter alia*] the Harbours Act 1950; and
>
> 2. Section 143A(1)(b) of the Harbours Act provided that the Harbour Board's powers to sell land did not authorise a board to deal with land taken or acquired under the PWA 1928, otherwise than in accordance with the provisions of the PWA.
>
> …
>
> Section 40 PWA imposes an important qualification on the ability of the estate (or local government) to deal with land acquired for public works. The corresponding rights of original owners and their successors should not be held to be abrogated by other legislation except where that has been clearly indicated by Parliament. There is no such indication in the empowering Act.

[179] Section 143C enacted in 1977, gave the AHB the power to sell any land vested in it by public auction with some restrictions.

[180] Section 143A restricts those s 143C powers and s 143A(1)(b) specifically says that the power of sale in s 143 does not authorise the AHB to deal with land taken or acquired under the PWA 1928 other than in accordance with the provisions of that Act. Section 40 of the PWA 1981 applies to land "held under this or any other work". It appears s 143(1)(b) was not specifically amended, but that is of no moment because of the scope of s 40.

[181] It is clear that the local Empowering Act enabled future investigation of the development of this land, while it remained owned by the AHB and it empowered the Waitemata City Council to promote this development. As I have emphasised, it did not impose any restrictions on the use to which the land could be put.

[182] The Empowering Act powers granted by s 5 are, for these reasons, inconsistent with the maturing of, or discharge of, any duty under s 40 of the PWA on the part of the AHB to offer it back to the successors in title of the persons from whom it was acquired. A number of conclusions follow.

[183] The PWA 1981 came into force on 1 February 1982,[37] 22 months before the 1983 Empowering Act came into force.

[184] As from 2 December 1983, the 1983 Empowering Act has to be given effect, and is inconsistent with the AHB holding the land for a public work, and/or requiring it for another public work. Therefore from that date the AHB had no duty to offer the lands back to the successors.

[185] The next question is whether or not this local Act continued to have effect consequent upon the re-organisation of local government in the late 1980s which led to the land being transferred to the new Waitemata City Council in 1990.

8. Was the Waitemata City Council ever under a statutory obligation to offer the land back under s 40 and if so, can it rely on the exemptions contained in s 42A and B as reasons for not offering the land back.

[186] The 1980s marked a major change in the government of New Zealand, both central and local. Local government was reformed, concentrating the number of local authorities. Harbour boards were disestablished and replaced with commercial port enterprises, and finally in 2002 local authorities were given general competence of all persons in the new Local Government Act 2002.

[187] In 1988 the Port Companies Act was enacted. It provided for companies to carry out and control ownership of port-related commercial activities. Section 21 of the Act provided for establishment units to prepare and agree a port company plan with the harbour board and to identify the port-related commercial undertakings which would be purchased by the Port Company.

[188] By the Act the Minister of Transport had the power to resolve any disagreements between the harbour board and the establishment unit, including the identification of port-related commercial undertakings of the harbour board.[38]

[189] In this context a dispute developed as to whether the Te Atatu land should go to the Port Company or to the local authority. It was resolved with eventually being

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[38] Section 22(1)(3).

vested in the Waitakere City Council (WCC) being the new local authority absorbing the Waitemata City Council.

[190] The new WCC assumed ownership by virtue of the Local Government (Auckland region) Re-organisation Order 1989. The certificate of title records the transmission to the WCC on 27 November 1989. The Minister's reasons are contained in a letter dated 11 October to the Chief Executive of the Ports of Auckland. It records that he originally excluded from the Auckland Port Company plan the transfer of land at Te Atatu North. He considered that the AHB's actions over the years indicated they did not seriously contemplate using this land for port purposes:

> For example, the Board submission to the Local Bills Committee on the Auckland Harbour Board and Waitemata City Council (Te Atatu) Empowering Act 1983, implied it did not believe that the land was now required for port purposes.

He also noted that the land is not zoned to anticipate future port activities:

> And I understand that when the zoning was altered from Industrial 4 (Waterfront Development) to Industrial 2 (General industry), and more recently to a business zone, the Board did not object to these changes.

[191] The land was vested by the Minister pursuant to this order without regard to its purpose. The documents of the working party set up by the new WCC to decide its future use show no recognition whatsoever that the land was held for public work purposes. Plainly the WCC was looking for some combination of revenue earning development on the land which would provide a rates income stream, coupled with other community related uses.

[192] As we have seen, the whole argument and eventually the basis for vesting the land in the new local government entity rather than the new port enterprise, was because it was not intended for port public works.

[193] In the absence of a provision providing for continuity of tenure, I am of the view that Part II of the Port Companies Act 1988 providing as it did for only limited transfer of assets to port companies and enabling the Minister to divert other assets

to territorial authorities, ended the tenure of the AHB of the land and with it the purpose of the tenure.

[194] Section 26 of the Port Companies Act 1988 in Part II provided:

> Nothing in sections 40-42 of the Public Works Act 1981 shall apply to the transfer of land to a port company pursuant to this Act, but ss 40 and 41 of that Act shall, after the transfer, apply to that land as if the port company were a Harbour Board and the land had not been transferred pursuant to this Act.

[195] That provision applies to land transferred to a port company. It does not apply to land held by the AHB but not transferred to the port company.

[196] There is no evidence that the land when transferred pursuant to the reorganisation order as enabled by s 36 of the Local Government Act 1974 (since repealed) was transferred to the WCC to be held for public works.

[197] The Empowering Act was repealed as from 1 July 2003 by s 266 of the Local Government Act 2002. The reason why it was repealed is because of the enactment of general competence for all local government in s 12(2) of the Local Government Act 2002 which provides:

> For the purposes of performing its role, a local authority has—
>
> (a) full capacity to carry on or undertake any activity or business, do any act, or enter into any transaction; and
>
> (b) for the purposes of paragraph (a), full rights, powers, and privileges.

[198] Until then all local government corporations, of which the AHB and Waitemata City Council were, could only do what they were specifically empowered by statute to do, or acts which were necessary implications from the specific empowerments.

[199] These findings, in parts 7 and 8 of this judgment, are fatal to these claims by the plaintiffs against WCC's successor, the ACC. From the date of commencement of the Empowering Act in 2 December 1983, there was no duty on the AHB to hold the land for Upper Port development, or require it for another (essential) public

work. The fact that there was a breach of s 40 prior to December 1983, (see [152] above) became of no significance, upon the Empowering Act coming into effect.

Contingent issues

[200] In the event this judgment is appealed, I go on to consider the other issues before me. This is particularly in order to make findings of fact, in the event these issues become relevant, if my finding that from the enactment of the Empowering Act in December 1983, the duty of the AHB to offer back was extinguished, and never revived in its successors the WCC and the ACC.

[201] On the discretionary issues of laches, limitation by analogy, and grant of declaration, my analysis is necessarily brief, as I will explain on each topic.

9. Are the plaintiffs' "successors" entitled to sue as persons entitled to offers back under s 40?

[202] The ACC challenges the standing to sue in the following claims:

(a) Donald McIntosh and Linda Ryan

(b) David McCormick

(c) Patricia Spencer-Wood

(d) Donald Michael Stewart

[203] The ACC does not challenge the standing of the plaintiffs in the remaining claims:

(a) Charles Williams and Jean Morley

(b) Inez Flavell and Leslie Hensleigh

(c) Janice Robinson, Jillian Clark and Rosalie Nayland

[204] The dispute turns on whether or not the challenged plaintiffs are successors of the vendor of the land to AHB.

[205] It will be recalled that s 40(2) provides that unless the authority exercises its discretion under subsection 2(a) or (b), the authority:

> Shall offer to sell the land by private contract to the person from whom it was acquired or to the successor of that person…

[206] Section 40(5) provides:

> For the purposes of this section the term successor, in relation to any person, means a 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.

[207] Mr Carruthers, for the plaintiffs, argues that the plaintiffs' standing in each case as being either successors of the original owners of the land or as personal representatives of successors.

[208] The ACC relied upon [45] of the Court of Appeal's judgment in *Port Gisborne Ltd v Smiler*:[39]

> [45] The division in subs (5) is immediately apparent. Where part of a person's land was taken, and that part is available for offer back, the offer is to be made to the "successor in title" of the original owner. In other circumstances however, the offer is to be made to "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". Parliament has made a deliberate distinction. Offer back provisions allowing for sale to owners of land from which the subject land was severed have existed since 1876. Such provisions give effect to a legislative policy of re-amalgamating blocks of land where only part was acquired by the Crown. Owners of adjacent land have been alternative offerees. In both cases it was the person then holding title to the land who became entitled. In 1981 new offer back provisions were introduced. Where an entire section of land is acquired the provision is narrower and provides only for offer back to the immediate beneficiaries, under the will or on intestacy, of the original owner. In making these observations, we are not to be taken as expressing any views in relation to the particular facts of this case. (Emphasis added.)

[209] The first underlined passage is a quote from s 40(5). The second underlined passage is a liberal interpretation of that text. Such an interpretation is necessary to give the statutory provision effect. This is because it is inherently unlikely that the vendor owner will have bequeathed land he or she no longer owns. It is necessary then to assess a class of persons intended by Parliament to benefit from the offer back. The Court of Appeal has collected as a class the "immediate beneficiaries". I

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[39] *Port Gisborne Ltd v Smiler*, above n 1, at [45].

read that as the persons benefiting under the will of the former owner or on his or her intestacy. But excluding beneficiaries of those beneficiaries.

[210] I have analysed much of the Court of Appeal's judgment in *Smiler* earlier in this judgment. I have had occasion to observe there that the Court understood s 40 as giving effect to a principle of "right and fair" that the land should be offered back if it is no longer required for public works.

In *Mark v Attorney-General*,[40] Mallon J held:

> The person to whom an offer back is to be made under s 40(2) is "a person from whom it was acquired or … the successor of that person". The term successor is defined in s 40(5). The relevant part of that definition is that a successor "means a 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". Thus, the term "successor" is confined to the original owner's immediate beneficiaries (the definition is discussed in *Port Gisborne Ltd v Smiler* [1999] 2 NZLR [45]).

[211] I note the cautionary last sentence of the Court of Appeal in *Smiler*[41]:

> In making these observations, we are not to be taken as expressing any views in relation to the particular facts of this case.

[212] The only reliable way to find the meaning of a statute is to apply it to a set of facts. So far, therefore, I make these preliminary considerations:

(a) I do note again that the text of s 40(5) cannot be applied literally when the whole title has been acquired. Rather, the Court of Appeal has substituted a test of "immediate beneficiaries";

(b) The plaintiffs' suggestion that the offer back can be the entitlement of the personal representatives of an eligible successor maybe an attractive application of s 40(5) but is not mandated by the dictum in *Smiler*.

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40 *Mark v Attorney-General* HC Wellington CIV-2002-485-799, 27 October 2009 at [165].
41 At [35].

[213] Against these preliminary considerations, I turn to the particular facts and issues arising in each of the causes of action in this case.

CIV-2005-404-7095 Claim by RNZFB, Donald McIntosh and Linda Ryan

[214] The will of Charles Clare contained the following provisions:

(a) A life interest to his daughter-in-law, who died in 1976 (before any offer back obligation is pleaded);

(b) A life interest to his granddaughter, who died in 1994;

(c) A life interest to his great-grandchildren, Mr McIntosh and Ms Ryan who are plaintiffs in this proceeding; and then upon their death and residue to the Royal NZ Foundation for the Blind.

[215] Mr Clare made his will in December 1967; after the property had been acquired. The ACC's submission is:

> Mr McIntosh and Ms Ryan claim to be successors in terms of s 40. However, their only interest under the will of Mr Clare is as contingent life tenants. If the land had remained in the estate they would have been entitled to income from it, but not to the land itself. As such, they were not entitled to have the land offered to them. Only the Blind Foundation, is the remainder after the life interest, can be properly described as "entitled to the land" in the event that s 40 applies at all.

[216] Mr McIntosh and Ms Ryan are "immediate beneficiaries" as I have understood the phrase in *Smiler*.[42] It is completely hypothetical to assume that if the land had not been acquired by the AHB, it would not have been left to the owners' grandchildren. They were clearly contemplated by him as immediate beneficiaries and he might have left the land to them.

[217] I do not think any great difficulty arises in accepting the plaintiff's argument that all three of them are successors in terms of s 40(5), being persons who would have been entitled to estates of interest in any real property under the will or intestacy of the person from whom the land was taken, had he owned the land at the

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42 *Port Gisborne Ltd v Smiler*, above n 1, at [35].

date of his death. By the terms of the will of which we have only an extract, the life interest is expressed as an entitlement to the net income arising from the whole of the residuary estate.

[218] For these reasons all three have standing to sue.

CIV-2005-404-7350 Claim by David McCormick

[219] The original owner of the McCormick land died on 14 May 1948. Under his will dated 1941, all his estate was to be sold and distributed to the beneficiaries. He appointed his brother, Joseph McCormick as his executor and trustee. The proceeds of the sale of the land were to be divided into four equal parts and distributed to his three surviving children, and the family of his deceased son John. Mr David McCormick's claim is that he is the only surviving member of that family, and therefore the only surviving beneficiary.

[220] The ACC submits that the acquisition by the AHB of the McCormick land in 1954, did not therefore deprive the beneficiaries of any interest to which they would otherwise have been entitled, that the purpose of s 40 is to return land to owners who would otherwise continue owning the land had they not been required to sell it to the local authority at a specific point in time.

[221] As discussed above, the ACC reliance on the text of s 40(5) has been displaced by the Court of Appeal's liberal interpretations to read it as including all immediate beneficiaries. Mr David McCormick falls within that test.

[222] In the course of argument I put it to Mr Casey that a will creates a trust upon the death of the testator, and that there will be nothing to stop the McCormick family applying to the High Court in its inherent jurisdiction and pursuant to its statutory jurisdiction under the Trustee Act, for a scheme of arrangement whereby the land would be acquired on an offer-back, and then resold and distributed or held as the case may be. Mr Casey reiterated that the interpretation of s 40(5) is that persons entitled to offer back must receive that entitlement under the will or intestacy, and there is no room to extend the meaning to allow for the way an estate can be

managed, including varied, with the consent of the beneficiaries and the Court's consent provided for children and unborn.

[223] I find this argument unappealing on the merits. Although it is not clear, we can presume that the original owner of the land in 1941 had no intention of disposing of his capital to the disadvantage of his three surviving children and the family of his deceased son John. Before he died in May 1948, owning this land, he would have had the expectation that the benefits of it and the value of the proceeds of sale would be divided amongst his children. In that sense they remained successors of his estate, certainly are immediate beneficiaries of his estate.

[224] David McCormick, by virtue of cls 5 and 8 of the will had (with his sister Bernadette) a contingent entitlement to part of the capital of the estate provided he attained the age of 21 years. Subsequent to the sale of the land to the AHB, David McCormick's contingent interest (apart from the trust for his maintenance as a child), matured to an entitlement to part of the estate's capital when he attained the age of 21 years. Accordingly, it was submitted that the correct view is that David was a contingent beneficial owner of the land at the date it was sold; that the nominal ownership of Joseph McCormick as trustee needs to be ignored if any sense is to be made of the words "person from whom it was acquired", applying *Smiler*.

[225] The reality is that the persons from whom the land was acquired were the beneficial owners of it. For example, if all the beneficiaries were adults they could have united and required the trustee not to sell the land.

[226] David McCormick, it was pointed out, is not claiming all the land for himself but for the purposes of a deed of family arrangement made in April 2009. In a substantial sense, the Court is invited by the plaintiffs to conclude that the beneficiaries of the will were the owners in a substantive sense, of the land at the date it was sold to the AHB, and thus were the persons from whom it was acquired in terms of the language of s 40 of the Act.

[227] I agree with the analysis of the plaintiffs. I think it accords with the purpose of the Act. It is consistent with *Smiler*. In this case the Act should be given a

purposive construction, especially because of the importance of limiting the power of government to acquire private land for one public purpose and then using it for another purpose for which Parliament has given no authority.

[228] For these reasons David McCormick has standing to bring these proceedings.

CIV-2006-404-1881 Claim by Patricia Spencer-Wood

[229] This is the claim in respect of the land known as the Kindersley property. Mr Kindersley died on 9 July 1984, after the first date (1983) when the plaintiffs say the land should have been offered back. By his will, made in 1979, Mr Kindersley provided that his entire estate be left to his wife; Mrs Spencer-Wood was only to benefit if her mother predeceased her father. Assuming that s 40 applied, the ACC submitted that the Court must determine who was entitled to have the land offered to them at the date that the obligation arose, there being two dates pleaded, August 1983 and April 1985. In August 1983 the original owner was still alive and any claim in relation to that date was personal to Mr Kindersley and could only be pursued by his estate. By April 1985, Mr Kindersley had died, so his successor was Mrs Kindersley. The plaintiff therefore is not a successor and her claim accordingly must fail.

[230] Mrs Spencer-Wood was a contingent beneficiary under the will. In that sense she was in contemplation of the owner who sold to the AHB. She was an "immediate beneficiary" applying *Smiler*, albeit contingent. As originally noted, the last sentence of [35] in *Smiler* may be a qualification. The issue of the duty to offer back has arisen after the death of her mother. I consider that Mrs Spencer-Wood satisfies the *Smiler* test, as an immediate beneficiary.

[231] I note the different route taken by counsel for the plaintiffs, which was that up to the time of Mrs Kindersley's death she was entitled to receive an offer back, and on her death her right to an offer in the absence of anything to the contrary in the statute, passes to her personal representative. He was an English solicitor who is

now deceased. But the Court will not permit a proceeding to fail for want of parties. In *Taylor v McDougal,* Henry J said: [43]

> Two clear principles seem to have emerged and they are firstly that the Court should never dismiss an action for want of parties…

[232] The plaintiff's counsel also relied on High Court Rule 4.56 which enables a joinder of a plaintiff or defendant if the person ought to have been joined. So that all that is required in this case if joinder is required at all, is the joinder of the personal representative who stands in place of the person to whom the offer ought to have been made. The beneficial right to receive the offer has passed to Mrs Spencer-Wood. The argument of the plaintiff's counsel then becomes pragmatic and says given Mrs Kindersley's beneficial interest, it does not matter whether the right to sue is of her personal representative or passes to Mrs Spencer-Wood as the relevant beneficiary.

CIV-2005-404-7351 Claim by Donald Michael Stewart

[233] Donald Erskine Stewart died on 30 August 1985. He was alive as at both the dates pleaded by the plaintiff in the Stewart proceeding when the land should have been offered back. The ACC argued as before that any right to have the land offered back was personal to Mr Stewart, and does not survive his death. There is no need to explore who his successors are.

[234] The plaintiff, Donald Michael Stewart is a beneficiary of Donald Erskine Stewart under his will. The ACC disputes he is a "successor" under s 40(5) because his father was alive on the dates pleaded.

[235] The purpose of the Act should not be defeated by a lapse of time in which the person who should have received an offer back dies. On this view, Councils could all simply refuse to make offers back, wait until the current owner or their first successor as the case may be if the owner has died, and then be relieved of any responsibility under the law to make the offer back. It is hard to imagine a more hostile interpretation of a statute. The plaintiff is an immediate beneficiary on the *Smiler* test.

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[43] *Taylor v McDougall* [1963] 1 NZLR 694 (SC) at 695.

[236] I conclude Mr Donald Michael Stewart has standing to sue.

The remaining claims

CIV-2005-404-4280 Claim by Charles Williams and Jean Morley (the Williams land)
CIV-2005-404-4351 Claim by Inez Flavell and Leslie Hensleigh
CIV-2005-404-7348 Claim by Janice Robinson, Jillian Clark and Rosalie Nayland

[237] The defendants accept that the plaintiffs in these proceedings would be successors in that term in s 40 if that section is applicable. So there is no dispute as to the standing of these plaintiffs.

Laches

[238] The High Court has an inherent jurisdiction to declare the law. That jurisdiction is confined to be used to resolve genuine disputes and to be exercised with a residual discretion. There is no comprehensive list of all the factors that can be taken into account. All government bodies, central and local, have a duty to exercise their powers in good faith and for their proper purpose. For that reason, it is usually sufficient, and in the case of the Crown always, for the Court to declare the legal obligations pertaining to a matter before local government.

[239] Government, either central or local, can be presumed by the Court, to act upon that declaration of law, or take the matter on appeal if it wishes to challenge it. In the long run to act on whatever is the final declaration as to the obligations of government in a particular contentious matter.

[240] It is agreed by counsel that a declaration in this context operates, in fact, like an injunction. An injunction is a remedy of equity. All equitable remedies are discretionary. One of the discretionary factors to be taken into account is whether or not there has been unacceptable delay on the part of the plaintiff in applying to the Court for a remedy. This unacceptable delay is given the old French Norman word of Laches. As the Privy Council once summed it up, laches is "inaction with one's eyes open".[44]

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[44] *Lindsay Petroleum Co v Hurd* (1873-74) LR5 PC 221 (PC) at 237.

[241] The defendant ACC in these proceedings has asserted laches against the plaintiffs. For the Court to become interested in that defence, it is necessary for it to find that the plaintiffs or their predecessors, knew that they had an argument that s 40 was not being given effect to, but took no steps to bring it to the attention of the relevant officials, or to commence proceedings in the High Court.

[242] In considering a discretionary matter such as laches, the Court is following the legal method of equity. Equity requires he who comes to equity, to do equity. Accordingly, if the party pressing laches is also guilty of delay, or of some error which has contributed to the plaintiffs' delay, the assertion of laches will fail.

[243] Were the defendant in this case the AHB, or were the ACC responsible for delays on the part of the AHB, then that would be a very material consideration, if it were found that the AHB as successor to the WCC, as successor to the AHB, accumulated all the failures of those three bodies in taking action.

[244] I have found that s 40 did not apply to the land from the time of the coming into effect of the 1983 Empowerment Act. The ensuing analysis assumes that finding is wrong and that the land continued to be held by the WCC and by the ACC for a public work, namely Upper Harbour development, but was not required for that public work from about 1976, and that it should have been offered back to successors of the original owners from whom the land was taken from 1 February 1982 when the PWA 1981 came into effect.

[245] There were two written protests, the first by the McCormick family in 1996 which was rebutted by the Auckland Council arguing that the complainant was not a successor because under the terms of his grandfather's will, the land holdings of the original owner were to be sold.

[246] In the course of this judgment I have found that that reasoning was an error of law, but it hardly lies for the Auckland Council to complain that the McCormick family should not have accepted their protest to jurisdiction, but to continue to pursue the claim.

[247] The second complaint was the letter written in 1989 by Mrs Williams. There is no record available as to how that letter was processed within the AHB. It needs to be recalled that 1989 was the year in which the lands in question were transferred by the Minister from the Port Establishment Unit to the WCC. It may well be the topic was simply of no interest to the AHB at the time, the AHB considering its effect almost spent and the matter to be taken up by either the Port Company or a local authority, depending on to whom the land was transferred.

[248] Otherwise there is no indication that the plaintiffs or their predecessors grasped that there may have been breach of the PWA by the AHB, WCC or ultimately the ACC. The conduct was therefore not laches as it was not, "delay with eyes open". Accordingly, the laches argument is dismissed.

10. Can the Court review or declare the resolution passed by the WCC pursuant to s 40(2)?

[249] Section 40(2) of the PWA provides:

> (2) Except as provided in subsection (4) of this section, the chief executive of the department within the meaning of section 2 of the Survey Act 1986 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 is held—
>
> 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 chief executive of the department within the meaning of section 2 of the Survey Act 1986 or local authority considers it reasonable to do so, at any lesser price.

[250] In this context, the task is given to the local authority itself, not the chief executive of the local authority.

[251] In April 1996, the corporate solicitor and secretary of the WCC prepared a memorandum, being a summary of the position on the occasion of a meeting to decide whether to transfer the undeveloped balance of the lands to WPL. The land would be applied for the purpose of laying out, forming and vesting roads and the subdivision of the remaining lands into residential housing and building allotments and associated public reserve and recreation areas.

[252] The corporate solicitor and secretary's memorandum was an analysis of how the land was acquired "by agreement" by the former AHB, and vested in the WCC since the local reorganisation in 1989 "free of any specific direction as to its future utilisation". It recorded that most of the land was subject to the Empowering Act 1983. It argues that the WCC has succeeded to the benefit of the provisions of that Act as the successor authority. It records that transfer to WPL for the benefit of the WCC as a public work "ensures that the offer back provisions of the Act do not apply". It then goes on:

> While Council's legal advice indicates that the PWA does not apply to the land concerned, Council also has no obligation to offer back if:
>
> (a) Council considers it would be impracticable, unreasonable, or unfair to do so; or
>
> (b) there has been significant change in the character of the land for the purpose of the public work for which it was acquired.
>
> It is now over 40 years since the land was originally acquired and the use and development entitlement now attributed to that land under the Resource Management Act have entirely changed from those times. Portions of the land have been developed in the intervening period for road and commercial or industrial purposes in conjunction with the Te Atatu peninsula commercial centre, the factory complex along Harbour View Road and the service station on Te Atatu Road and in association with the former Adventure West Fun Park. The original land holding has itself been subsequently overlaid by further subdivisional activity and associated retitling. There has been previous legislative acceptance that the land should be developed under the control of the (then) Waitemata City Council. There has been no indication in the intervening period of continuing interest in the land by any former owner or any successor of such owner as defined by s 40(5) of the Public Works Act 1981, despite the extensive public consultation in relation to the intended development concept by this Council since 1989.
>
> Nothwithstanding the intention to comprehensively develop the land for public works purposes in an integrated fashion, it is appropriate

> that WPL be provided with the greatest degree of certainty possible that such a claim cannot subsequently be advanced.
>
> No submission or comments have presently been received as a result of the public advertising now completed and any received subsequent to the issue of this agenda will be tabled. Accordingly, Council is requested to resolve as set out in the recommendation.

[253] Recommendation 5, being part of the resolution, is as follows:

> That it be noted, in the event that s 40 PWA 1981 be deemed at any time to have any application to the lands concerned, that Council considers on the information available to it that it would be impractical, unreasonable, or unfair to offer to sell the land to any person from whom it was acquired or any successor of that person, and further, that there has been a significant change in the character of the land for the purposes of the public work for which it was acquired.

[254] The ACC argues that this was a precautionary resolution but was nonetheless valid. It was a resolution that could only be made by the local authority, but it cannot be made by the Court; that it has not been judicially reviewed.

[255] Exercises of statutory or other government power can be judicially reviewed by the Courts of inherent jurisdiction and occasionally are. However, it is always otherwise open to a Court to declare whether or not the conduct of a government body is lawful or not. This can occur sometimes for example, by way of appeal, or indeed in a civil action. Such examinations of the lawfulness of government actions, outside of judicial review proceedings proper, are known as "collateral review".

[256] The High Court will not stand by and tolerate illegal conduct in government. If the High Court is engaged in proceedings which make the legality of conduct relevant, then it will, to the extent required to resolve the civil dispute before it, examine the government conduct and judge whether it is legal or not. This is not a task whereby the Court exercises jurisdiction given to the government authority. It is, however, a review of that government authority's exercise. For sure, where the judgment raises questions of degree which are a form of exercise of discretion, the Court will never tell government how that discretion can be exercised. It will confine its judgment as to whether or not such exercise as has happened, has happened with due process and otherwise lawfully.

[257] The defendant Council's submissions mainly addressed the inability of the Court to exercise the jurisdiction given to the local authority. That seems unanswerable. I adopt the reasoning of Miller J in *Edmonds v Attorney-General*[45] and in the Supreme Court in *Hood v Attorney-General.*[46]

[258] Considering all these authorities, Mallon J in *Mark v Attorney-General*[47] said:[48]

> ... If it is still now open to the [local authority] to invoke s 40(2)(a) and if it is a role that is only to be formed by the Chief Executive, it is a role that is only to be formed by the local authority subject to any application for judicial review.
>
> (b) If section 40(2)(a) is assessed at the time the offer back ought to have been made, then factors that have arisen since then are potentially relevant to whether declaratory relief should be granted ...

[259] The Court of Appeal in *Mark v Attorney-General*[49] said:[50]

> Even if a declaration were granted, there would still be an outstanding issue as to whether transferring back the acquired land would be unfair or unreasonable. It is not necessary for us to resolve whether that decision is open for the Court or the Chief Executive of LIMZ (here the local authority).

[260] It is in this context that the Court examines the criticisms of that resolution advanced by the plaintiffs in this case.

[261] The agenda item, as preparatory to the exercise of discretion is, with respect, perfunctory. The exercise of discretion needs to be set in context. The remedy afforded by s 40 of the PWA is an important remedy. As I have explained, it was not just to assuage hurt feelings. Considerable damage can be done to society if private property, can be compulsorily acquired for public works and then used for some other purpose, being a purpose which would not justify a compulsory acquisition.

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45 *Edmonds v Attorney-General* [2006] NZCA 146.
46 *Hood v Attorney-General* [2007] NZRMA 28 at [128].
47 *Mark v Attorney-General*, above n 39.
48 At [254(a)].
49 *Mark v Attorney-General* [2011] NZCA 176; [2011] 2 NZLR 538.
50 At [94].

[262] If the Court had got to the point where all the plaintiffs' grounds had been established, and the question is only as to discretion to grant relief, very good grounds need to be made out to deny relief. The criteria in s 40(2) are apposite but, like all criteria which are in the category of standards or principles rather than rules, they can only be applied by having regard to the purpose which the statute is intended to achieve. The memorandum and the resolution merely recite a summary narrative of events, and the statutory criteria.

[263] Had this Court decided that there was a duty now to offer back, I would not have accepted that the decision made in 1996 was adequate. It would need to have been re-examined by the ACC.

Residual discretion to grant a declaration

[264] As a common law remedy, the remedy of declaration is discretionary. The factors relevant to the exercise of such a discretion are made relevant by the material facts of the case so they differ from case to case.

[265] I have found that, in this case, the 1983 Empowering Act ended the duty to offer back, and that Act meant that the WCC acquired the property without holding it for a public work, so that s 40 of the PWA 1981 simply did not apply. No question then arises of grant of declaration, let alone the need for an examination of the residual discretion not to grant the remedy.

[266] I have considered whether or not I should embark on that hypothetically, but am reluctant to do so and have decided not to do so because residual considerations made relevant in the exercise of residual discretion are always directly connected with the error of law that is being identified.

[267] Had I found that the 1983 Empowering Act did not have the effect of ending the obligation on the AHB to hold the land for a public purpose and similarly to the ACC as a successor, then I would have had to have embarked on a consideration of whether or not the very presence of the 1983 Act had blind-sided the ACC to the s 40 PWA requirements or left the Council genuinely unsure as to whether s 40 applied. They would only be two of many considerations. Because of the findings that I have

made, to embark on a detailed examination of the exercise of residual discretion would, from my point of view, be an exercise that is moot and thus run the risk of not reflecting what I would have decided were it necessary to decide it.

Result

[268] The plaintiffs' actions fail for a single reason, which is that the Auckland Harbour Board and Waitemata City Council (Te Atatu) Empowering Act 1983 ended the AHB's obligation to offer back the lands to the successors of the vendors, from whom the titles were acquired. It rendered irrelevant the prior breach by the Board. There is judgment for the defendant.

[269] Costs are reserved. The defendant has succeeded, by reason of only one of its many defences. That may be a fact relevant to costs.