IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-Ā-TARA ROHE

CIV-2017-485-703
[2018] NZHC 953

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER	of an application for review of a decision under the Land Act 1948 to decline an application for allotment of a property without competition
BETWEEN	TIMOTHY GRANT VOGEL AND GEOFFREY JOHN VOGEL Plaintiffs
AND	COMMISSIONER OF CROWN LANDS Defendant

Hearing: 9 April 2018

Appearances: RJB Fowler QC and R Moon for the Plaintiffs
R L Roff and N Anderson for the Defendant

Judgment: 4 May 2018

JUDGMENT OF MANDER J

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[1] In 1965 a substantial property situated in Lower Hutt (Vogel House) was gifted to the Crown by its owners, James and Jocelyn Vogel. The land became Crown land administered by the Commissioner of Crown Lands (the Commissioner). In 2013, the Government determined that Vogel House was surplus land and that it be disposed of by the Commissioner under the Land Act 1948 (the Act), which provides various means by which Crown land may be alienated.

[2] In April 2017, the Deputy Chief Executive Corporate of Land Information New Zealand (the Deputy Chief Executive), acting under powers delegated to him by the Commissioner, decided that Vogel House should be sold on the open market. In

doing so, he declined an application by the grandchildren of the original owners, Timothy and Geoffrey Vogel (the applicants), to allot the property without competition to them.[1]

[3] In making his decision, the Deputy Chief Executive adopted the reasoning and recommendations of a report prepared by a barrister engaged by Land Information New Zealand (LINZ) to provide a recommendation regarding the disposal of Vogel House (the Hansen Report). The applicants challenge by way of judicial review the Deputy Chief Executive's decision on the basis material errors were made in the report.

Background

[4] The factual and procedural background is not in dispute.

Vogel House

[5] Vogel House comprises some 9,637 m^2 of land and includes a substantial two-storey residential house that was built in the 1930s by James and Jocelyn Vogel on land acquired by their forebears in 1855. Mr and Mrs Vogel lived at the property from 1932 until late 1966. The property is listed as a Category 1 Historic Place of Outstanding Value on the New Zealand Heritage List (Rārangi Kōrero) due to its association with a number of historical figures regarded as significant in New Zealand's history.[2]

[6] Subject to them retaining a life interest, Mr and Mrs Vogel gifted the property to the Crown by a Deed of Gift (the Deed) dated 7 September 1965. Under the Deed, Mr and Mrs Vogel declared they held the land in trust for the Crown for the purposes of the Act. The Deed recorded that the donors, in making the gift, were "moved by their duty and loyalty to Her Majesty and by a desire to benefit her present and future subjects in New Zealand". They expressed the wish that the land "be kept intact as an entity for such purposes as the Government of New Zealand may from time to time

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1 Land Act 1948, s 54(1)(f).

2 James Vogel was the grandson of Premier Sir Julius Vogel and the great-grandson of Premier James Edward Fitzgerald. Jocelyn Vogel was the daughter of Vivian Rutherford and the great-grandniece of Governor Sir George Grey.

see fit". However, the Deed expressly stated no trust was imposed to that effect. In a subsequent deed executed by the Vogels the following year, they surrendered their life interests in the property. A Finance Act was passed in 1965 to exempt the gift of Vogel House from stamp, estate, and gift duties.

[7] Between 1966 and 1976, Vogel House was used as the Australian High Commissioner's residence. The property then served as the official residence of the Prime Minister and was subsequently used as an official residence for ministers, and as temporary accommodation to house the Governor-General between 2008 and 2012 while Government House was being renovated. Thereafter, Vogel House was no longer used as an official residence.

[8] In April 2013, the applicants, who are the only direct descendants of the donors, approached the Department of Internal Affairs to advise of their interest in acquiring the property. They expressed their concerns regarding the status of the house and its disuse. Their inquiry led to a determination by the Department of Internal Affairs, which held responsibility for ministerial accommodation, that Vogel House was no longer required for government purposes. The property was under-utilised and expensive to maintain, and a change in policy in providing official residences for ministers led officials to seek ministerial approval to engage the Commissioner to dispose of the property.

The disposal process

[9] In August 2014, Vogel House was valued at $5 million (inclusive of GST). The market value based on its condition in 1965 was assessed at $4,585,00 (including GST) and the value of improvements to the property post-1965, at $415,000.

[10] In October 2014, LINZ took the view that the Government's Gifted Land Policy (GLP) applied. The GLP provides that, in the absence of evidence that a gift was absolute, surplus land should be returned to the donor or beneficially entitled persons at nil value, exclusive of improvements. Approval would be sought from the Commissioner to allot the land without competition to beneficially entitled persons under s 54(1)(f) of the Act.

[11] That provision is the focus of the present proceeding. It provides for the alienation of Crown land without public notice in cases where, because of the special circumstances of an applicant and the hardship that would be caused by calling for public applications, it would be equitable to allot the land to the applicant without competition.

[12] LINZ reviewed the wills of James Vogel who died in 1971 and Jocelyn Vogel who died in 1988. Six parties were identified as beneficially entitled persons under the donors' respective wills. These included the applicants and two charities, the Vogel Charitable Trust and the Wellington SPCA. All parties were invited to express their interest in receiving a Crown offer, and all but one party expressed some level of interest in the property.

[13] In December 2015, the then Deputy Commissioner, acting under delegation, allotted the property under s 54(1)(f) to the two charities at a price of $415,000. The Deputy Commissioner determined the applicants did not meet the statutory criteria. However, upon application to the Commissioner, the applicants were granted a rehearing and they reapplied for allotment of the property pursuant to that provision.[3]

[14] In June 2016, the then Commissioner reached the same conclusion as the earlier December 2015 determination. However, the applicants again challenged the decision and applied for another rehearing, which was granted in August 2016. As a result, an opportunity was given to the six parties, previously identified by LINZ, to submit fresh applications under s 54(1)(f) of the Act.

[15] Responsibility for determining the applications was delegated by the Commissioner to the Deputy Chief Executive, and Ms Hansen was instructed as an independent legal expert to consider those applications, prepare a report, and make recommendations for that officer's consideration. A further application was received from the applicants and a joint application was made by the Wellington SPCA and the Vogel Charitable Trust.

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3 Land Act 1948, s 17.

The Hansen Report and the decision the subject of review

[16] In April 2017, the Deputy Chief Executive adopted the reasoning and recommendations contained in the final version of the Hansen report dated 17 February 2017. These included the following conclusions:

(a) Neither the applicants nor the charities had satisfied the requirements of s 54(1)(f).

(b) Section 54(1)(f) did not authorise the Commissioner to effectively gift land valued at between $5 million and $6 million for $450,000, being the value of the improvements.

(c) The GLP cannot override the express provisions of the Act, and it is not possible to use s 54(1)(f) to give effect to the GLP in the present circumstances.

(d) The land was gifted absolutely and the GLP does not apply.

(e) The land ought to be disposed of by way of a public application process on the open market.

[17] In summary, therefore, the application to be allotted Vogel House without competition under s 54(1)(f) of the Act was declined. Vogel House could not be allotted for the cost of its improvements ($415,000) alone, and the property was required to be disposed of by public application.

The statute

[18] The Act, together with the Crown Pastoral Land Act 1988, regulates the administration and management of Crown land. The Act was passed to consolidate and amend other pieces of legislation relating to Crown land.[4] Crown land is defined

[4] Land Act 1948, long title.

as land vested in Her Majesty which is not for the time being set aside for any public purpose or held by a person in fee simple.[5]

[19] The operative provisions of the Act primarily relate to the purchase and development of Crown land (pt 3), the classification and alienation of Crown land (pt 4), and leases and licenses (pts 5-9). The Act also has a number of provisions designed to provide preferential treatment for returned servicemen and their spouses or widows, such is the vintage of the legislation.[6]

[20] The Commissioner has the power to alienate Crown land in accordance with ss 52-54 of the Act. References to "the Board" are to be read as meaning the Commissioner.[7] Section 52 provides:

> **52 Board may alienate Crown land**
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> (1) The Board may alienate Crown land on any tenure under this Act either after calling for applications therefor or without competition in accordance with the provisions of this Act.
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> (2) In addition to the powers conferred by the last preceding subsection, the Board may offer any land for acquisition under this Act by public auction at an upset price or rental value or by public tender at a minimum price or rental value.

[21] The term "alienation" is defined as follows:

> **Alienation** includes a limited disposal by lease or licence, as well as an absolute disposal by sale or otherwise, and **to alienate** has a corresponding meaning.

[22] Section 53 provides:

> **53 Board may call for public applications for Crown land**
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> (1) The Board may by public notice call for applications for any Crown land available for alienation under this Act.
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> ...

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5 Land Act 1948, s 2.
6 See, for example, pt 10 of the Act and s 54(1)(a).
7 See Land Act 1948, s 2.

[23] The power of the Commissioner to allot land without competition is set out in s 54(1) of the Act:

> **54 Allotment of land without competition**
>
> (1) The Board may alienate any Crown land without public notice under the last preceding section and without competition, either by way of sale, or lease, or licence, at such price or rent and subject to such terms and conditions as the Board may determine, in any of the following cases:
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> (a) where the applicant is a serviceman or discharged serviceman, or the wife or widow or civil union partner or surviving civil union partner of a serviceman or of a discharged serviceman:
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> (b) where the land already owned, leased, or held by the applicant is insufficient in the opinion of the Board for the maintenance of himself and his family, or where the Crown land is required to provide a homestead site, or an adequate water supply, or for any similar purpose:
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> (c) where the Crown land is without a convenient way of access, or lies between land already alienated and a road which forms or should form the way of approach to the alienated land:
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> (d) where the Crown land is insufficient in area for public sale or lease, or is for any other reason suitable only for use in conjunction with other land:
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> (e) where the Crown land is required for a charitable, religious, or educational purpose, or for any purpose which in the opinion of the Board makes the alienation desirable in the public interest, or in the interest of the inhabitants of any particular locality:
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> (f) where because of the special circumstances of the applicant and the hardship which would be caused to him by the calling of public applications it would be equitable to allot him the land without competition.

[24] In summary, the Act provides the Commissioner with a broad discretion. This includes the power to alienate Crown land without public notice and without competition but only in the circumstances of the six particular situations described in s 54(1). The Commissioner is permitted to do so under subparagraph (1)(f) where satisfied that because of:

> (a) the special circumstances of the applicants; and

(b) the hardship that would be caused to him by the calling of public applications;

(c) it would be equitable to allot him the land without competition.

The findings of the Hansen Report and the application for review

[25] The Hansen Report accepted that because of the applicants' position as the sole surviving descendants of the donors and their historic family association with Vogel House, they met the criteria of special circumstances for the purposes of s 54(1)(f) of the Act. However, it was not accepted that hardship would be caused to them by the calling of public applications such that it would be equitable to allot them the land without competition.

[26] There is no dispute that the Deputy Chief Executive adopted the reasoning and recommendations contained in the Hansen Report in full and therefore that the reasoning contained in the Hansen Report is the focus of the judicial review.

[27] The applicants bring their application for review on three grounds:

(a) It is alleged the Hansen Report which the Deputy Chief Executive adopted for the purposes of his decision contained three material errors of law, namely:

(i) it incorrectly interpreted the term "hardship";

(ii) it incorrectly interpreted the meaning of "equitable"; and

(iii) it came to the erroneous conclusion that the Crown cannot alienate land under s 54 "with any element of gift or reduction in market value".

(b) The decision-maker took into account irrelevant factors; and

(c) Failed to take into account relevant considerations.

Interpretation of "hardship"

[28] The applicants submitted the Hansen Report failed to apply the plain and ordinary meaning of the term "hardship" and incorrectly applied a gloss to the statutory language which excluded any hardship that did not involve actual detriment in the form of loss of property or direct financial loss. The Crown rejected that criticism. It submitted that what the applicants portray as an error of law is really a complaint that the report concluded that the hardship relied upon by the applicants did not in combination with their special circumstances meet the statutory threshold.

[29] The Hansen Report commenced its consideration of the term "hardship" by reviewing dictionary definitions that suggest it is something that is hard to endure or causes "suffering":

> a. "The quality of being hard to bear; painful difficulty. Hardness of fate or circumstance; severe suffering or privation". (The New Shorter Oxford Dictionary)
>
> b. "Conditions of life that are difficult to endure. Something that causes suffering". (The Collins Dictionary)

[30] Reference was then made to *Holster v Grafton* where, in the context of a case involving an application to partition land under s 339 of the Property Law Act 2007, Fogarty J stated:[8]

> [50] "Hardship" is a value laden criterion. It suggests an adverse effect which is of significant impact to the applicant. It has to be read consistent with the policy of the statute which respects property rights of tenants in common, but seeks to resolve conflicts fairly…

[31] No complaint is made by the applicants to the approach taken in the report to the meaning of hardship to that point. It is the following paragraph which is the focus of the applicants' challenge. After referring to the dictionary definitions and *Holster*, the author of the report concluded:

> 48. In my view, hardship has to have some real "bite" to it. It requires actual detriment. For example, loss of property or direct financial loss...

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8 *Holster v Grafton* (2008) 9 NZCPR 314 (HC).

[32] The approach to be taken to an issue of statutory interpretation is well-established. In accordance with s 5 of the Interpretation Act 1999, "the meaning of an enactment must be ascertained from its text and in light of its purpose". Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to meet the dual requirements of s 5.[9]

[33] The applicants submitted the approach to the concept of "hardship" in the Hansen Report, which describes "actual detriment" by reference to "loss of property" or "direct financial loss", imported a need for them to be able to demonstrate they would incur such loss as a result of calling for public applications. That was to impose an illegitimately higher threshold than the section envisaged and was submitted as being inconsistent with the approach taken by Fogarty J in *Holster*, and in subsequent cases concerned with applications under s 339(1) of the Property Law Act seeking orders to sell jointly held property.

[34] In *Coffey v Coffey*, Associate Judge Osborne considered the concept of "hardship" as one of the relevant considerations to be taken into account in determining whether to invoke s 339(1) of the Property Law Act.[10] In that case, family members could not agree on whether a bach of sentimental value should be sold. Fogarty J's earlier consideration of hardship in *Holster* was referred to without demur, although the Associate Judge observed that he would not view the term as embracing mere inconvenience or disappointment.[11] The Court found that requiring the deeply divided family to continue in co-ownership of the property was of itself a source of hardship notwithstanding the financial ramifications for each party.

[35] Similarly, in *Nicholson v Dunick*, where an order for partition under the same Act was sought, Fogarty J's approach in *Holster* was adopted.[12] In that case, the plaintiff claimed the absence of an order would result in the continuation of neighbourly friction which would negatively affect her health and wellbeing and cause

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9 *Commerce Commission v Fonterra Cooperative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].
10 *Coffey v Coffey* [2012] NZHC 1765.
11 At [155].
12 *Nicholson v Dunick* [2017] NZHC 2126.

her further stress. This was rejected as hardship warranting the partition of a cross-leased property. However, neither in that case, nor in *Coffey,* was it suggested that such personal detrimental effects could not constitute hardship.

[36] The parties accept the Hansen Report correctly acknowledged that dictionary definitions suggest "hardship" as being something that is hard to endure or which causes suffering. Nor is it disputed that the approach taken by Fogarty J to the meaning of "hardship" in *Holster* was other than appropriate. Indeed, the Commissioner in his submissions cited the Court of Appeal's decision in *Director-General of Education v Morrison*, where it held that "hardship" was not to be understood as being restricted to financial strain or stringency and did not connote extreme privation.[13] That case involved accommodation grants for students payable by reason of "hardship", which was considered by Woodhouse P as being "descriptive of adverse repercussions of every kind".[14]

[37] The Commissioner accepted that in the context of the Act, hardship should not be restricted to financial hardship. However, it was not accepted that every adverse effect arising from the calling of public applications was capable of constituting hardship for the purposes of s 54(1)(f). In that regard, the Commissioner emphasised that he was charged with the administration and stewardship of Crown land for the benefit of the people of New Zealand.

[38] He submitted that responsibility extended to the disposal of Crown land by a public process, in order to provide fair opportunity to all to purchase surplus Crown land and ensure fair returns. The applicants disputed that proposition, but insofar as it was put forward in support of the submission that not every adverse effect, however minor, was capable of constituting hardship, the applicants did not suggest otherwise.

[39] Ultimately, there is little dispute between the parties as to the correct approach to the interpretation of "hardship" in s 54(1)(f). The question distilled to whether the approach taken in the Hansen Report to the concept of hardship was erroneously

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13 *Director-General of Education v Morrison* [1985] 2 NZLR 430 (CA) at 436.

14 At 434 citing *Returned Sailors', Soldiers' and Airmen's Imperial League of Australia (Henley and Grange Sub-Branch) Inc v Abbott* [1946] SASR 270 at 273.

restrictive. The Commissioner submitted that the report had not excluded consideration of emotional hardship, but rather, after weighing the effects contended for by the applicant, had reasonably concluded that the hardship threshold had not in the circumstances been met. It is necessary therefore to set out the assessment of the applicants' claimed hardship in some detail.

[40] After recording the applicants' contention that they would struggle to afford to pay for the land at market value, and if they did buy it, it would leave them financially vulnerable, and struggling to maintain Vogel House, the report's author concluded:

> 103. I do not consider this constitutes financial hardship for the purposes of s 54(1)(f). The counterfactual against which the Vogels are measuring the hardship is that the land is effectively gifted to them for $415,000. I do not consider that not receiving a gift is a hardship for the purposes of the provision. Neither do I consider not being able to afford the land, if that is the case, is a hardship for the purposes of the statute. Purchasing the land at the market value cannot create a hardship as they would have exchanged value for value.
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> 104. In terms of the alleged emotional hardship if they miss out on purchasing the land, the emotional attachment based on history is important and is acknowledged. The Vogels say that their special association with the land will be extinguished if the land has sold, but that is not accepted. The land has been in Crown ownership for more than 50 years and so any sale of the land is not going to change that attachment or connection. In other words, they will always have an historic association with the land. The nub of the applicants' claim is that they (and their wives and children) will have lost the opportunity to develop an association with the land through owning it, and that will cause distress and anger and disappointment and resentment. I do not consider that a loss of an opportunity to own property where there is no statutory entitlement to a preferential offer, or disappointment or anger or distress arising from that lost opportunity**, constitute hardship in the context of s 54(1)(f)**.
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> 105. If the land is sold to another party, the Vogels' position as non-owners of the land will not have changed. For them the status quo remains the same. **They will not lose property that they were occupying or suffer any direct financial loss.** They are no worse or better off. Their emotional attachment to the land as a result of an historic association is not a hardship which requires the intervention of equity and a preferential allocation without competition.
>
> (Emphasis added)

After taking into account the applicants' response to the draft report, the author concluded:

> 111. **I do not consider that the emotional hardship per se of disappointment and anger** if the land was sold to a third party through a public process **is the sort of hardship required under s 54(1)(f) to justify a preferential allocation** at the approximate current market value. I say approximate current value because I have already noted that a disposal at $415,000 would not cause hardship. Rather it would constitute a significant windfall, and further, would be unlawful.
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> (Emphasis added)

[41] The Hansen Report addresses the applicant's claim by reference to what are separately described as financial and emotional hardships the applicants maintain they would suffer if the property was disposed by way of public application. Each of those grounds are assessed. In respect of the emotional hardship, the Hansen Report did not consider the anger and distress caused by the calling of public applications constituted hardship for the purposes of s 54(1)(f). That was not a finding as to whether the pleaded hardship would make it equitable to allot the land to the applicants without competition, but rather that for the purposes of the section, the hardship relied upon could not as a matter of law constitute hardship. In reaching that conclusion regarding the emotional impact on the applicants and their family, reference was expressly made to the fact that they would not lose property that they were occupying, or suffer any direct financial loss.

[42] Later in the report, the author states that she does not consider the emotional hardship "per se" of disappointment and anger if the land was sold to a third party through a public process "is the sort of hardship required under s 54(1)(f) to justify a preferential allocation". Again, rather than a conclusion that the emotional hardship contended for by the applicants was insufficient to make it equitable to allot the land without competition, the hardship the applicants contend for is excluded as being incapable of consideration for the purpose of s 54(1)(f) because of the approach adopted to the interpretation of the term earlier in the report, it not being "the sort of hardship" required by the section.

[43] I consider the conclusion that, for the purpose of s 54(1)(f), "hardship" requires "actual detriment" in the form of loss of property or direct financial loss constitutes a material error of law. That definition has the effect of excluding anything other than a tangible economic loss as being capable of constituting hardship. The absence of

that type of hardship may well make it difficult for an applicant to demonstrate that it would be equitable to allot land without competition, but that is a different consideration relating to the overall test to be applied rather than to the parameters of what may constitute hardship for the purpose of the statutory test.

[44] I acknowledge the Commissioner's submission that the reference in the Hansen Report to "loss of property or direct financial loss" was made in the context of providing examples of what may constitute "actual detriment", or of hardship that has some "real bite". The term detriment, which conveys injury, damage or loss when combined with the qualifier "actual", denotes something which must be "real" or "tangible". By itself, that interpretation may be unobjectionable. However, when coupled with the examples provided, it has the effect of excluding subjective or emotional effects which may be relevant to the fairness of the situation and which in a given case may be capable of significantly impacting on a person. Such an effect can appropriately be assessed as something more than a mere inconvenience or disappointment.

[45] I accept there is some support for the Commissioner's submission that the report's assessment of the applicants' situation, and the impact upon them should they not secure a preferential offer, could be interpreted as a conclusion of fact. There is at times a conflation in the report's findings regarding whether what is claimed by the applicants is capable of constituting hardship under the Act, and determinations that the statutory threshold has not been achieved. However, on balance, I consider it unavoidable that the unduly restrictive approach to what may qualify as hardship under the provision has resulted in a material error in the way the assessment was approached.

[46] That conclusion, which relates to the approach taken to what has been referred to as the emotional hardship relied upon by the applicants, should not be interpreted as reflecting on the merits of those claims. My finding is limited to a conclusion that the applicants were entitled to have the impact upon them considered under the ordinary meaning of hardship which is to be applied as it is used in the section. Whether such claims of hardship would make it equitable to allot them the land without competition is a different consideration. Much of the reasoning that sits

behind the analysis in the report, but which is focussed on the question of hardship, may well have application to that more central question.

Interpretation of the term "equitable"

[47] The applicants submitted the report's author erred in her approach to the term "equitable" as it is used in s 54(1)(f) by introducing principles associated with the exercise of the equitable jurisdiction of a Court when assessing whether the statutory test was met. The applicants argued the provision only requires the Commissioner to consider whether, if the preceding requirements of the paragraph are met, it would be fair to allot the land without competition. The Commissioner does not dispute that this is the appropriate test, but submitted the approach taken in the Hansen Report did not result in an error of law.

[48] After observing that the term "equitable" is not defined in the Act, the report refers to a dictionary definition which defines equitable as "characterised by equity and fairness; fair, just", before concluding:

> 52. In broad terms I consider the question is whether the particular special circumstances and hardship justify the intervention of equity, ie whether it is just and convenient to allot without competition. The question is whether the person would suffer a hardship if the land was sold [to] someone else such that it was just and equitable that they should be offered the land without competition.

[49] That approach appears to be derived from a statement taken from a House of Lords decision, *Ebrahimi v Westbourne Galleries Ltd*, which is set out in the paragraph immediately preceding that conclusion.[15] The House of Lords held that the test of "just and equitable" under the UK Companies Act to determine whether a company should be wound up:[16]

> ... does, as equity always does, enable the Court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

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15 *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492 (HL).
16 At 500.

[50] The applicants submitted that all the Commissioner was required to consider was whether it would be fair to allot without competition, which, they argued, was something different from the invocation of the equitable jurisdiction of a Court.

[51] In response, the Commissioner submitted the report's reference to the intervention of equity is no more than shorthand for an assessment of whether the circumstances make a preferential offer fair and just. It was submitted that fairness underpins the intervention of equity,[17] and that it was difficult to see how the definition contended for by the applicants differs in any practical sense from that adopted in the Hansen Report.

[52] Fairness and good conscience are dominant factors when considering the intervention of equity to achieve a just outcome. However, as submitted by the applicants, the risk that arises from referencing or invoking equitable principles is that the analysis is framed with regard to whether the applicants have a right or interest recognised by equity which is capable of displacing legal rights.

[53] In amplification of the approach to be taken to the statutory test, the Hansen Report identified a situation that it considered may satisfy s 54(1)(f). The author, in providing that example, stated:

> 54. In my view it would [be] appropriate for equity to intervene and allot without competition an area of land where improvements had been carried out by the applicant and where the person would suffer hardship if they were not sold the land as they would lose the benefit of the improvements. This would be an example of how proprietary estoppel (*Wilmott v Barber*) might justify the intervention of equity.

[54] The Commissioner emphasised that in providing that example and others, the author had expressly made the qualification that it was "not intended to limit the possible scenarios that might apply, but simply to provide a concrete example", and that at no point in the report is it expressly stated that s 54(1)(f) is reliant on the existence of an equitable remedy or cause of action. However, there are further references in the report to the requirement of "the intervention of equity" and the

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[17] *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [90]-[93].

establishment of an equitable remedy in order to demonstrate it would be equitable to allot the land without competition. In assessing the application, the report states:

> ... [The applicants'] emotional attachment to the land as a result of an historic association is not a hardship which **requires the intervention of equity** and a preferential allocation without competition.
>
> (Emphasis added)

And further, in reference to whether the donors would have wanted the family to benefit if the gift failed, it was stated:

> 110. The claim that it can be inferred that the donors would have wanted the family to benefit if the gift failed needs to be considered in light of the actual terms of the gift. Statements made by Mrs Vogel many years after the gifting are not relevant. In that context, the Vogels have no reasonable or legitimate expectation of a preferential offer, nor do they have any other interest **that requires the intervention of equity**.
>
> (Emphasis added)

[55] I consider the test of whether it would be equitable to allot the land to the applicants, by reference to whether the circumstances would justify the intervention of equity in favour of the applicants, does not in the circumstances amount to a material error of law. I accept the term "equitable" employed in s 54(1)(f) requires an assessment of fairness, rather than proof by the applicant of an equitable right or an entitlement to an equitable remedy the absence of which would make it unjust or inequitable to insist on a public allocation of the land. However, I do not consider the test as formulated in the Hansen Report, set out above at [48], led the decision-maker into error.

[56] The reference to the "intervention of equity" was expressly explained as meaning whether it would be "just and convenient to allot without competition" and whether the hardship caused by not doing so and selling to another person would make it "just and equitable" for the land to be offered without competition. As already noted, the need for fairness to obtain a just result will predominate when considering the question of equitable relief. While I consider references in the report to the "intervention of equity" were unhelpful and unnecessary, it is apparent the term was used by the author as an elongated description of what would be just in the circumstances.

[57] Neither the language of equity used in the report, nor the references to such remedies as proprietary estoppel or legitimate expectation, assist in clarifying the approach to be taken to the question of whether it would be equitable to allow the application. However, the references to "the intervention of equity" are explicitly explained in the report as effectively meaning "just", which is a close synonym for "fair". I do not consider the complaint that the approach taken in the report was other than to assess whether it was "fair" to allocate the land without competition is sustainable.

Commissioner's authority to gift land

[58] The applicants allege the Hansen Report erred in determining that any land sold by the Commissioner under s 54(1) must be for "market value" or for "proper consideration" and cannot involve an element of gift or reduction from its market value.

[59] The report's author noted that the GLP has no status in law and can only operate in conformity with the legal requirements of s 54. In examining whether the GLP was consistent with s 54(1)(f), the report concluded:

> 67. Subject to one of the subparagraphs (1)(a) to (f) being satisfied the Commissioner is entitled to alienate Crown land without public notice by "way of sale or lease or licence" "at such price... and subject to such terms and conditions as the Board may determine".
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> 68. While "alienation" is defined in s 2 as including "a limited disposal by lease or license, as well as an absolute disposal by sale or otherwise", and could include a gift, s 54 specifically restricts the method of alienation to sale, or lease or licence.
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> 69. In this context, "sale" clearly connotes a disposition for valuable consideration. Although there is no express requirement to set a market value, in my view, the requirement to sell "at a price the Board determines" must be interpreted to require the Board to act reasonably in setting the price. First, there must be a price and it must be a reasonable price. It does not in my view include a power to gift land or to sell at a nominal price which effectively constitutes a gift.
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> 70. That approach is consistent with the overall purpose of s 54. The objective is to exempt a person from having to compete for the land on the open market and possibly miss out on purchasing it. The objective is not, however, to exempt a person from paying a reasonable price.

[60] The Commissioner submitted, and I accept, that the price and the terms and conditions on which a property may be offered to a successful applicant are secondary considerations which ordinarily would only come into play if the applicant can satisfy the criteria of s 54(1)(f). However, the Hansen Report concluded that any sale of Vogel House for $415,000, being the equivalent of a sale of the property for nil value exclusive of its improvements, would effectively amount to a gifting of the property. The application was considered on the basis that this was the applicant's proposal for being allocated the property without competition under s 54(1)(f).

[61] The report determined that s 54 of the Act does not permit the Commissioner to gift land and/or sell it at a nominal price, and that to sell Vogel House for $415,000 would constitute a gift and be unlawful. It was acknowledged that the Commissioner has flexibility when setting a price, but that this does not extend to there effectively being no price at all. The Commissioner must act reasonably in setting a price.

[62] The applicants submitted that subject to the requirements of administrative law, the Commissioner has a discretion under s 54(1) to, at the very least, sell the land at a nominal price. It was emphasised that s 54(1) provides for the alienation of Crown land "*at such price* or rent and subject to such terms and conditions *as the [Commissioner] may determine* ...". The applicants submitted a requirement that the price be reasonable "placed a gloss on s 54(1)" which went beyond the plain meaning of the words of the section which did not require that a sale be at "market value" or "for proper consideration".

[63] In support of that argument, the applicants submitted the statutory purpose of s 54 was to create a set of exceptions to the ordinary public process provided by s 53 of the Act. The question was posed as to what advantage an applicant would obtain who fits the requirements of one of the exceptions but must, in any event, meet the market price. Reliance was placed on s 54(1)(a) which provides for the alienation of Crown land without public notice to servicemen. It was submitted there would be no policy benefit to such an applicant if the only advantage obtained from the exercise of the Commissioner's discretion under s 54(1) was the avoidance of a public process.

[64] There is some force in that submission, but I do not accept that it necessarily follows that, where the statutory conditions are met justifying the Commissioner to alienate land without notice, the alienation will be at a reduced price. The circumstances which give rise to the meeting of the requirements of one of the exceptional s 54(1) categories may also be a reason for the Crown to reduce the price of that land, but the objective of s 54 is primarily to provide a person with the opportunity to obtain land ahead of the public because of their particular interest or circumstances.

[65] The applicants also sought to rely upon the statutory definition of "alienation", which includes "an absolute disposal by sale *or otherwise*".[18] However, s 54 expressly restricts the method of alienation under that section to sale, or lease, or license. As noted in the Hansen Report, the Act does not refer to a situation where land has been gifted to the Crown, nor does it deal with the return of gifted land. The observation is made that if there was an intention that gifted land should be preferentially allocated in the form of a gift or for only nominal value, then a specific provision to allow that course would have been included in the Act.

[66] In support of their position, the applicants referred to s 52(2) and (7), which provide for the disposal of land, including by way of public tender, at a *minimum price*. This was to be compared with s 54 which does not impose any minimum price requirement to alienate Crown land without public notice. However, I consider the setting of a minimum price for the purposes of a public tender simply reflects one of the methods of sale and the competitive public process provided by s 52, rather than being indicative of the permissible approach to price under s 54. Inevitably, if a case is established under that section to alienate Crown land without competition, the terms of sale will be limited to one of direct negotiation with the applicant.

[67] Much of the applicants' argument was premised on references in the Hansen Report to a "reasonable price" as being akin to market value. I do not consider that premise is correct. The Hansen Report specifically observed there was no express requirement to set a market value, but that the Commissioner must act reasonably in

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[18] Land Act 1948, s 2.

setting a price. While that price must be reasonable, the Commissioner has flexibility in setting the price, for example, to ameliorate hardship under s 54(1)(f). However, such flexibility cannot extend to there being effectively no price for the land at all. In particular, that the Commissioner cannot effectively gift land.

[68] Support for the report's conclusion that s 54 does not permit Crown land to be gifted is derived from an analysis of the Act, which led the author to conclude that specific statutory authorisation is required to permit a reduction in price and that any discretion to substantially modify the price must be expressly authorised.

[69] Reference is made to s 62, which provides for the tenures on which land may be acquired. Crown land, other than pastoral land, may be taken on renewable lease or purchased for cash or on deferred payments. This was considered to indicate that reasonable consideration was required. It was noted that while neither ss 52 nor 53 refer to the setting of a market value for land when offered to the public, those provisions referred to a "price" or an "upset price" or "public tender at a minimum price". This was held to be a clear indication that the process of calling for public applications or public tenders was for the purpose of selling the land at a reasonable price. The reference to minimum price was considered to be a reference to a reasonable price, it being noted that it was not a reference to a "minimal" price.

[70] Other provisions in the Act which confer some discretion on the Commissioner when setting rental values were also referred to. An example provided was s 63(3) which specifies the rental payable under a renewable lease as 4.5 per cent of the rental value of the land for the first 11 years, and for the next two 11 year periods the rent is determined under s 132A. Section 63(5) permits the Commissioner to consider a different basis for the rent where the lease is granted to a serviceman who has been granted a loan to facilitate his settlement on the land. The Commissioner is able to decide that special circumstances may make it equitable to base the rent on some other rental value.

[71] Specific mention was made of pt 10, which provides for assistance to servicemen. These provisions include the ability to apply for a reduction in rental payments, and that any such reduction in rent ceased to operate if the lease was

transferred to a person who was not a discharged serviceman.[19] It was noted that pt 10 contains the only reference to "market value" in the Act. In s 164A, the Commissioner, when selling farmland to a serviceman, could "in order to prevent the land... being used for speculative purposes" require a mortgage over the land to secure the difference between the purchase price (which would be based on the 1942 basic value of land) and the current market value at the date of purchase.

[72] The report emphasised, as I have already observed, that the Act makes no specific reference to the gifting of land. The statute does not refer to the circumstance where land has been gifted to the Crown, or deal with the return of gifted land. This leads to the conclusion in the report that if there was an intention that such land should be preferentially allocated at effectively nil value, then a specific provision to achieve this would have been included in the Act.

[73] I accept the purpose and policy of the Act, as submitted by the Commissioner, requires him to act in the interests of the Crown in leasing or licensing Crown land, and to obtain value when selling that land. I also accept that, other than as provided for in the Act, that will require the Commissioner to seek value for the alienation of Crown land which will ordinarily require such land to be sold according to its market value. However, that is not an absolute. For example, the circumstances provided for by s 54 may include the disposal of Crown land which is of little, or no, value to anyone other than the applicant, or in respect of which there is a wider public interest to be advanced.

[74] In such situations, the land may be sold for a much reduced price or for a nominal sum that reflects the lack of any market for such land and the preference of the Crown to divest itself of responsibility for the land, or to achieve social objectives. Arguably, in the former situation the price agreed for the land, token or otherwise, will reflect the lack of a market, but in the latter category of case the reduction will represent a deliberate discount. There would, however, be nothing unreasonable in the Commissioner agreeing to such a price in such circumstances.

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19 Land Act 1948, ss 153 and 153A.

[75] It was submitted on behalf of the applicants that if it is accepted that the Commissioner is able to be flexible when setting the price of land and has the ability to reduce the price, for example, to ameliorate any hardship under s 54(1), such a reduction must be held to include an element of gift. The approach taken in the report, that specific authorisation is required under the Act to permit a reduction in price, yet there is flexibility to set a reduced price which if below the market value must, it is submitted, equate to an element of gift, is argued by the applicants as being inconsistent, if not contradictory.

[76] As I have acknowledged, the Commissioner does have the ability under s 54 to sell Crown land at less than its market price. I consider the Hansen Report recognised that discretion when it referred to the flexibility available to the Commissioner regarding the price to be accepted for Crown land in the circumstances of s 54. However, I do not consider that recognition is irreconcilable with the report's conclusion that the Act does not allow the Commissioner to give effect to the GLP in the present circumstances by using s 54(1)(f) to effectively gift Vogel House to one of the beneficially entitled persons under the donors' wills.

[77] More pertinently in regard to the applicants' argument, I do not consider the ability of the Commissioner to reduce the price, in order to give effect to an allocation permitted by way of an allotment of Crown land without competition under s 54(1), can extend to the type of proposal on which I understand the applicants rely in making their application. Namely, that the Commissioner effectively alienate the property to them at nil value, excluding the $415,000 spent by the Crown on improvements. I agree that would effectively amount, in the circumstances, to an impermissible gift.

[78] I accept that the flexibility available to the Commissioner to set the price for the sale of Crown land may extend to the ability to include a reduction to reflect the circumstances relating to the sale. So long as the price fixed can be considered reasonable in the circumstances, that reduction may extend to the setting of a nominal price. However, I do not accept, having regard to the responsibilities and duties of the Commissioner under the Act, that would extend to transferring Crown land valued at between $5-6 million for the cost of its improvements ($415,000). In those

circumstances, I agree with the finding of the report that the Commissioner would be acting beyond the discretion available to him under the Act.

Second ground for judicial review: Taking irrelevant factors into account

[79] Because I have already accepted a material error of law was made in the interpretation of the term hardship, it is not strictly necessary for me to consider the two additional grounds relied upon by the applicants in support of their application for judicial review. However, in deference to the parties' submissions and because the Commissioner will need to reconsider the s 54(1)(f) application, I address their arguments.

Applicable principles

[80] The approach to be taken to the issue of relevant and irrelevant considerations upon an application for review are not in dispute. The decision-maker is required to exercise his or her statutory power for a proper purpose, and, in so doing, to consider relevant matters and disregard irrelevant matters.[20] When assessing adherence to those requirements, it is necessary that any such review be calibrated to the character and context of the statutory power at issue, which in this case involves the application of s 54(1)(f) of the Act.

[81] In assessing a complaint of a failure to take into account relevant considerations or the inclusion of irrelevant considerations, the reviewing Court must distinguish between mandatory relevant considerations, which a decision-maker is obliged to take into account, from permissible relevant considerations which decision-makers may take into account in the exercise of their discretion. It is only where a statute "expressly or impliedly identifies considerations required to be taken into account" that the Court is able to hold a decision invalid for failure to consider such matters.[21] Mandatory relevant considerations are factors which are "so plainly relevant" when assessed against the purpose of the legislation that Parliament would have intended them to have been taken into account by a reasonable decision-maker.[22]

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20 *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA) at 229.
21 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 183.
22 *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129 (CA) at 140.

[82] A failure to consider permissible relevant considerations, being those considerations that "may properly be taken into account... which many people, including the Court itself, would have taken into account if they had to make the decision" cannot render a decision invalid.[23]

[83] Provided a mandatory relevant consideration is given "genuine attention and thought", matters of weight remain for the decision-maker.[24] Subject to compliance with the aim or purpose of the Act in question, decision-makers are permitted to base their decision on the factors they select as relevant and give each of those factors the weight they consider appropriate.[25]

[84] Similar considerations apply when assessing the question of whether irrelevant matters have been taken into account by the decision-maker. Mandatory irrelevant considerations, they being those which cannot lawfully be considered when exercising a power of decision, are also matters which are either identified expressly or impliedly from the governing statute.[26] Considerations that fall outside the purposes of the Act and the empowering provision, or which "cut right across" those purposes, may be assessed as irrelevant or illegitimate considerations.[27]

Alleged irrelevant considerations

[85] The applicants maintained irrelevant considerations were taken into account when arriving at the conclusion that they had not been able to establish hardship, namely:

(a) The absence of an "offer-back" provision in the Act;

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23 *CREEDNZ Inc v Governor-General*, above n 21, at 183.

24 *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 552.

25 *Air New Zealand Ltd v Wellington International Airport Ltd* [2009] NZAR 138 (HC) at [40].

26 *Stirling Bloodstock Ltd v New Zealand Thoroughbred Racing Inc* [2017] NZHC 464, [2017] NZAR 547 at [51]; *Serco New Zealand Ltd v Chief Inspector of Corrections* [2016] NZHC 1859, [2016] NZAR 1280 at [95].

27 *Genesis Power Ltd v Greenpeace New Zealand Inc* [2007] NZCA 569, [2008] 1 NZLR 803 at [43](a); *Buller Electricity Ltd v Attorney-General* [1995] 3 NZLR 344 (HC) at 352.

(b) That Vogel House had been gifted unconditionally and without the imposition of a requirement that it be returned to the family should it become surplus to Crown requirements;

(c) The applicants had no "statutory entitlement to a preferential offer" and no "reasonable, legitimate expectation of a preferential offer" from the Crown; and

(d) The Crown had facilitated the original gift by exempting it from the burden of any stamp, gift or estate duties.

No "offer-back" provision

[86] The applicants submitted the absence from the statute of an "offer-back" provision akin to that provided for in the Public Works Act 1981 was an irrelevant consideration when assessing hardship because such a factor was inconsistent with the statutory scheme of the Act and could not therefore be properly implied as a relevant consideration.

[87] The Public Works Act contains an offer-back provision to allow former owners of land acquired by the Crown which is not utilised to re-acquire that land.[28] Sections 52-54 of the Act provide for the alienation of Crown land by lease, license, sale, or otherwise. The applicants submitted there is no particular reason why an ability to offer back land should have been included in the Act which proceeds on the basis the Crown is the unfettered owner of the land which the Commissioner may alienate. The applicants submit that in such a context the absence of an offer-back provision is irrelevant.

[88] I do not accept the applicants' submission. The reference to the absence of any offer-back provision in the legislation is an observation which is relevant to the nature of the applicants' claim. Namely, that if they are not allotted the land without competition hardship will be caused because of their association with the land arising

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[28] Public Works Act 1981, s 40.

from their forebears' former ownership, which, but for the gift to the Crown, would have passed to them.

[89] I accept the absence of an offer-back provision has no bearing on the availability of s 54(1)(f). However, the assessment of equitableness, particularly in the context of the applicants' claim, may include consideration of the fact that, contrary to other situations regulating the disposal of land surplus to the Crown's requirements, Parliament provided no mechanism by which the land could be returned preferentially on the basis of a person's association with the property.

[90] As the applicants acknowledge, the land under consideration is Crown land held without fetter or condition. No priority is given to any person to be offered the land ahead of anyone else, and recognition of that "baseline" was a relevant matter for the decision-maker to be cognisant of when assessing whether the hardship relied upon by the applicants would make it equitable to allot the land without competition.

The property had been gifted unconditionally

[91] Similar considerations apply to this factor. The applicants submitted the lack of any condition that the gifted land be returned is an irrelevant consideration "when determining hardship" because it is inconsistent with the statutory scheme and cannot be properly implied as a relevant consideration. The applicants submitted the section concerns the disposal of Crown land and not the return of gifted land, it being accepted that Vogel House is Crown land.

[92] I do not accept that submission. Firstly, it is inaccurate to premise the submission, as it was by the applicants, on the absence of any condition attaching to the gift being irrelevant "when determining hardship". The observation that the land was gifted unconditionally to the Crown was a factor taken into account when assessing whether it would cause them hardship such that it would be equitable to allot Vogel House to them. The observation that the land was gifted unconditionally was not exclusively, if at all, considered to determine hardship, but formed part of the wider assessment under s 54(1)(f) of the equitableness of allotting the land to the applicants without competition.

[93] In summary, the Hansen Report did not consider either the absence of an offer-back provision, similar to that contained in the Public Works Act, nor the unconditional nature of the gift, prevented the applicants from making their application or prevented them from succeeding in that application. As acknowledged by the Commissioner in his submissions, the lack of a legal right to a preferential offer does not preclude the Commissioner from making such an offer under the provision, and I do not consider the decision-maker proceeded on any different basis. The fact that neither the Act nor the Deed made provision for the type of claim now made by the applicants are legitimate considerations when assessing whether, based on the nature of the hardship claimed arising from the accepted special circumstances of the applicants, it would be equitable to make a preferential offer.

No statutory entitlement to a preferential offer, nor reasonable or legitimate expectation

[94] In assessing the "emotional hardship" put forward by the applicants in support of their application, the Hansen Report concludes:

> 104. ... I do not consider that a loss of an opportunity to own property where there is no statutory entitlement to a preferential offer, or disappointment or anger or distress arising from that lost opportunity, constitute hardship in the context of s 54(1)(f).

[95] I have already considered this passage of the report when assessing the issue of whether an unduly restrictive approach was taken to the concept of hardship in s 54(1)(f). As I have already observed, I consider the decision-maker is entitled to be cognisant of the fact that an applicant has no statutory entitlement to a preferential offer when assessing the equitableness of allotting land without competition. The applicants make the point that it is axiomatic from the statutory scheme and from s 54(1)(f) itself that the applicant does not have a statutory entitlement to a preferential offer. However, that ignores the basis upon which the applicants make their claims; that because of their family connections with the land and the circumstances by which the Crown was gifted Vogel House, it is equitable for them to be allotted the land without competition.

[96] As I have found earlier in this judgment, the distress caused from losing the opportunity to acquire Vogel House is a form of hardship which ought not to have been

excluded from the definition of hardship as that term is used in s 54(1)(f). However, in assessing whether such hardship and other related considerations would make it equitable to allot the land to them without competition, I consider that the decision-maker was entitled to take into account the statutory framework against which he made his decision. That framework makes no provision for persons in the applicants' position to be in any better position or have any greater entitlement than any other person seeking the preferential allotment of Crown land.

[97] Similar considerations apply to the reference made in the report to a lack of a "reasonable or legitimate expectation of a preferential offer". The report reads:

> 110. The claim that it can be inferred that the donors would have wanted the family to benefit if the gift failed needs to be considered in light of the actual terms of the gift. Statements made by Mrs Vogel many years after the gifting are not relevant. In that context, the Vogels have no reasonable or legitimate expectation of a preferential offer, nor do they have any other interest that requires the intervention of equity.

[98] Leaving to one side the language associated with the application of equitable principles, which I have already considered, I accept the Commissioner's submission that this observation was made in the context of the applicants' claim that their grandparents would have wanted the property returned to the family. It represents a response to an argument made by the applicants which is relevant to the assessment of both the emotional hardship which they maintain would be caused to them from the calling of public applications and whether it would be equitable for them to be allotted the property without competition.

Facilitation of the original gift by exempting it from duties

[99] The Crown facilitated the gift of Vogel House by exempting it from the burden of any stamp, gift or estate duties. The Hansen Report describes that as a significant concession at the time. It is said to be a matter that should "not be overlooked", and it is an observation made in the context of reiterating that the gift, while generous, was unconditional, and one to which no binding trusts apply regarding the use of the land by the Crown or its disposal.

[100] As I have found, when regard is had to the basis upon which the applicants make their application under s 54(1)(f), the terms of the gift are relevant to whether or not it would be equitable to allot the property without competition in the circumstances. However, I accept the exemption by the Crown of duties at the time the gift was made was part of the arrangements entered into by the donor and the Crown to facilitate the gift. The Hansen Report considers that would have been a significant concession at the time. While that step is a relevant part of the historical background, I do not consider it can be interpreted as any form of "consideration" for the gift, or could in any way impinge upon the generosity of the gift which is acknowledged in the report.

[101] I do not consider the arrangement regarding duties made at the time of the gift is relevant to the assessment of the applicants' claim under this section. I note, however, that the taking into account of this factor would not by itself have had the effect of invalidating the decision.

Failure to take into account relevant considerations

[102] The applicants submitted the Hansen Report failed to have regard to the following relevant considerations when assessing whether hardship had been established:

(a) The applicants would struggle to afford to purchase Vogel House at its current market valuation;

(b) The property would be purchased by persons with no familial or historical connections to it;

(c) Any such purchaser would have no obligation to use the property in a manner that reflected its significance to the applicants' family and their historical connection to it;

(d) The applicants' unique association with the property (and that of their families) would be permanently severed; and

(e) the expressed wishes of the applicants' grandparents as donors would not be respected (regardless of the legal status of those wishes).

[103] In large measure, this ground of review has been overtaken by my finding that the decision-maker erred when interpreting the term hardship for the purpose of s 54(1)(f). However, there are some matters which go beyond that issue.

The applicants would struggle to afford to purchase Vogel House

[104] The Hansen Report concludes that the applicants' claim they would struggle to afford to pay for the land at market value if they were to buy the property, and that it would leave them financially vulnerable, did not constitute financial hardship for the purposes of s 54(1)(f). In explanation of that finding, the report's author relies on the following proposition, which I have already set out at [40] but which I repeat for convenience:

> 103. ... The counterfactual against which the Vogels are measuring the hardship is that the land is effectively gifted to them for $415,000. I do not consider that not receiving a gift is a hardship for the purposes of the provision. Neither do I consider not being able to afford the land, if that is the case, is a hardship for the purposes of the statute. Purchasing the land at the market value cannot create a hardship if they were to exchange value for value.

[105] This reasoning is linked to the earlier conclusion in the report that a purchase of Vogel House for the cost of its improvements ($415,000) would be tantamount to a gift. Based upon that conclusion, it was held the receiving of a gift could not constitute hardship for the purposes of s 54(1)(f).

[106] That analysis compares the alleged hardship said to arise to the applicants should they be required to compete for the property on the open market with the assessed consequences of allowing them to acquire Vogel House for the value of the improvements. The latter consideration (if the premise is correct) can relevantly be taken into account in assessing whether it would be equitable to allot the land to the Vogels without competition. The contended for hardship, categorised in the report as a financial hardship, would be converted to a windfall.

[107] However, the applicants' ability to afford the land on the open market remains a relevant consideration for the decision-maker to weigh when assessing the preliminary question of hardship caused by following a competitive public process. I therefore accept that the applicants' stated position that they would struggle to afford to purchase the property at its current market valuation is a relevant consideration, which is also linked to the claimed emotional hardship arising from their family connections with the property. Whether that consideration would likely carry much weight is open to argument. As the Commissioner observed in his submissions, it is arguable that purchasing the property, and suffering financial vulnerability as a result, would not be caused by the calling for public applications, but the applicants' choice to purchase the property despite not having the financial means to do so.

The property would be purchased by a person with no familial or historical connections to it

[108] The applicants' contention that their special association with the land would be extinguished if the land was sold to another was not accepted as giving rise to hardship. It was noted that Vogel House had been in Crown ownership for more than 50 years, and that a refusal of their application and subsequent sale of the land would not change the applicants' present attachment or existing connection with the property; their historic association with the property would remain the same. That it is not entirely the same consideration as articulated in the applicants' submission, namely that the report failed to consider that the property would be purchased by a person with no familial or historical connection with it. However, it is substantially to the same effect. The report concluded that the property had not been owned by the family for a significant period, and its sale to a third party would not change their existing historical connection with the land. I consider this aspect was adequately taken into account.

Use by another purchaser

[109] The applicants submitted the report failed to take into account that another purchaser would have no obligation to use the property in a manner that reflected its significance to the applicants' family and their historical connection to it. I reject that submission. The report noted that the Commissioner and Heritage New Zealand Pouhere Taonga had entered into a heritage covenant in respect of the land and

buildings under the Heritage New Zealand Pouhere Taonga Act 2014. That covenant will bind purchasers and successors in perpetuity and impose significant restrictions on the use of the property as an historic place that is linked to the Vogel family. This includes restrictions on its subdivision.

The applicants' unique association with the property would be permanently severed

[110] The applicants' argument that the report failed to take into account that their "unique association with the property would be permanently severed" is in large measure a variation of the complaint relating to the failure to consider that the property would be purchased by a person with no familial connection to it, which I have already discussed. The report acknowledges the applicants' submission that their special association with the land will be extinguished if sold but does not accept that contention. The report concluded the applicants' association will remain unchanged.

The expressed wishes of the applicants' grandparents as donors

[111] The applicants submitted the decision-maker failed to take into account the expressed wishes of the applicants' grandparents who donated the property. I reject that submission. The Hansen Report specifically records the applicants' submission that the donors would have wanted the property to be returned to the family in the event it was no longer required. However, it was considered that the applicants' claim needed to be considered in light of the actual terms of the gift, which was absolute.

[112] The report's author did not consider the statements of the applicants' grandmother many years after the gifting to be relevant because, by themselves, they could not form the basis of any reasonable expectation of a preferential offer. Insofar as the approach to this aspect appeared to introduce equitable principles into the assessment, I have already considered that complaint. So far as the alleged failure to give effect to the expressed wishes of the applicants' grandparents contributed to their sense of anger and disappointment, I have accepted that is a factor capable of being taken into account by the decision-maker when considering the issue of hardship.

Relief

[113] I have found that the Hansen Report erred in its interpretation of hardship as that term is used in s 54(1)(f) of the Act. It follows that the decision of the Deputy Chief Executive, which was based upon the findings and recommendations of that report, was flawed.

[114] Relief is at the discretion of the Court.[29] However, where a decision-maker has made a fundamental reviewable error, a Court will usually grant relief by ordering a reconsideration of the decision on the correct basis.[30] If the error has led to substantial prejudice to the plaintiff, relief will only be refused where there are other extremely strong reasons to do so.[31] I am satisfied the identified material error of law has substantially prejudiced the plaintiffs' application and the appropriate outcome is to direct a reconsideration of the decision. The Commissioner accepted that should I find the Deputy Chief Executive proceeded on the basis of a material error of law that would be the appropriate course.

[115] There will be an order setting the decision aside and directing the Commissioner to reconsider the application. In light of the variable outcome of the proceeding, costs are reserved.

Solicitors:
General Counsel Ltd, Wellington
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29 Judicial Review Procedure Act 2016, ss 16-19.
30 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [112].
31 *Rees v Firth* [2011] NZCA 668, [2012] 1 NZLR 408 at [48].