IN THE COURT OF APPEAL OF NEW ZEALAND

CA440/2008
[2009] NZCA 621

BETWEEN	MICHAEL SHANE MCELROY & OTHERS Appellants
AND	AUCKLAND INTERNATIONAL AIRPORT LIMITED Respondent

Hearing: 22 and 23 September 2009

Court: Chambers, Robertson and Ellen France JJ

Counsel: C R Carruthers QC, B H Dickey and T M Molloy for Appellants
A R Galbraith QC, S J Katz and L A Macfarlane for Respondent

Judgment: 23 December 2009 at 11.30 a.m.

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The cross-appeal is dismissed, save that the declarations contained in order A of the High Court judgment are varied as follows:

(a) A declaration is made that the land formerly owned by the appellants is held for a public work in terms of the Public Works Act 1981;

(b) A declaration is made that that land is still required for a public work, namely the Auckland International Airport.

C The appellants must pay the respondent costs for a complex appeal on a band B basis, plus usual disbursements. We certify for:

(a) a uplift of 50 per cent in terms of r 53C(1)(b) of the Court of Appeal (Civil) Rules 2005; and

(b) second counsel.

D We make no order for costs on the cross-appeal.

REASONS OF THE COURT

(Given by Robertson J)

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Introduction

[1] The respondent ("AIAL") owns approximately 1,100 hectares of land at Mangere. The appellants, who are trustees of the Craigie Trust, formerly owned 36.626 hectares of that land. It was lawfully acquired by the Crown in 1975.

[2] In a proceeding heard in 2008 by Hugh Williams J at the High Court in Auckland, the Craigie Trust sought a declaration that AIAL was under an obligation pursuant to s 40 of the Public Works Act 1981 ("PWA 1981") to offer the trust land, at its assessed value, back to the Craigie Trust on 1 February 1982 (or within a

reasonable time thereafter), because it was no longer required for the public work purpose of an "aerodrome" for which it was taken and held. In the alternative, if the land had been disposed of in circumstances that it could not be offered back, the Craigie Trust sought damages from AIAL for breach of statutory duty in disposing of the land without complying with s 40 of the PWA 1981.

[3] Hugh Williams J dismissed Craigie Trust's claim: HC AK CIV 2006-404-5980 27 June 2008 (reported in part at [2008] 3 NZLR 262). His formal judgment read as follows:

> A (1) all the plaintiffs' claims against the defendant fail
>
> (2) though Auckland International Airport Ltd is subject to the obligations in s 40 of the Public Works Act 1981
>
> (3) but the land formerly owned by the plaintiffs and held for the public work of an "aerodrome" is and will continue to be required for that public work or that, it no longer being required for that public work, it remains held for the public work of an "airport".
>
> B Had it been necessary so to do, the Court would have concluded that it would not have been impracticable but it would have been unreasonable or unfair to require Auckland International Airport Limited to offer the land back to the plaintiffs and that there had been a significant change in the character of the land for the purposes of or connected with the public work for which the land is held.
>
> C Costs are to be dealt with as in para [231] of this judgment.
>
> [For convenience, we have broken order A into 3 parts.]

[4] The Craigie Trust appeals against orders A(1), A(3) and B. AIAL cross-appeals against order A(2). AIAL also seeks to uphold the judgment on other grounds. In particular, AIAL argues that, even if the appellants establish that the trust land was held for a public work but was no longer required for that public work, offering the land back to the Craigie Trust is not only unreasonable and unfair, but also impracticable.

[5] Five issues arise on appeal:

(a) When the PWA 1981 came into force on 1 February 1982, did s 40 of that Act apply to the trust land, such that the trust land was held in accordance with that section and subject to its offer-back requirements?

(b) If not, did the trust land nonetheless become subject to s 40 at a later date?

(c) If the trust land is held for a public work within s 40 of the PWA 1981, what is the scope of the relevant public work?

(d) If s 40 does apply to the trust land, is the land no longer required for the public work for which it was held?

(e) If the land is no longer required, would it be impracticable, unreasonable or unfair to require AIAL to offer the land back to the Craigie Trust?

Background

The beginnings of an international airport

[6] Shortly after the Second World War, the Government began investigating a new major international airport for Auckland. Following advice, it considered a model of a "joint venture" airport.

[7] In 1955 the Government determined that the airport should be situated at the present day Mangere site and by 1959 the Crown had acquired most of the land it needed.

[8] In September 1960, the Crown and the Auckland City Council entered into an agreement to develop Auckland Airport as a joint venture. There was an initial deed, dated 24 September 1960, which applied s 31 of the Finance Act (No. 3) 1944 ("Finance Act") to the "purchase or acquisition of the land required for development of the International Airport and carrying out of present and future works". The 1960

deed was superseded by a second deed, ("the principal deed") signed on 25 November 1963 but deemed operative from 24 September 1960. The principal deed stated that the construction of the airport was to be "a work of both national and local importance" in terms of s 31 of the Finance Act, and that its development was to be funded jointly by the Crown and the Auckland City Council/Auckland Regional Authority.

[9] The principal deed was amended on 13 April 1966. The amendment ("the supplementary deed") provided that land for the airport was to be acquired by the Crown and then vested in the Auckland Regional Authority under s 19 of the Reserves and Domains Act 1953. (The Auckland Regional Authority Act 1963 had come into force on 25 October 1963 and had provided for the Auckland Regional Authority to assume liability for those functions, assets and liabilities of the Auckland City Council connected with the airport.)

[10] The appellants' land was first officially considered by a Gazette Notice of 30 January 1975 which read as follows:

> Pursuant to section 32 of the Public Works Act 1928, the Minister of Works and Development hereby declares that that a sufficient settlement to that effect having been entered into, the land described in the Schedule hereto is hereby taken for an aerodrome from and after the 30th day of January 1975.

[11] At the time, it was contemplated that a second runway would cross the land. There is not, therefore, any challenge to the lawfulness of the initial acquisition.

Land is acquired from the Craigie Trust

[12] By Gazette notice of 1 December 1977 it was declared:

> Pursuant to section 35 of the Public Works Act 1928, the Minister of Works and Development hereby declares the land described in the Schedule hereto to be Crown Land subject to the Land Act 1948, as from the 1st day of December 1977.

[13] Then, by Gazette notice of 12 October 1978 it was declared:

> Pursuant to the Land Act 1948, the Minister of Lands hereby sets apart the land, described in the Schedule hereto, as reserves for local purpose (aerodrome), and further, pursuant to the Reserves Act 1977, vests the said

> reserves in the Auckland Regional Authority, in trust for that purpose subject to the deed between the Crown and the Auckland City Council, dated 25 November 1963 and the deed between the Crown and the Auckland Regional Authority, dated 14 April 1966.

The legislative framework

[14] The Public Works Act 1928 ("PWA 1928") was in force at the time the Craigie trust land was acquired. When the PWA 1928 was enacted, it made no express reference to civil aviation, or to aerodromes, although s 2(1) of the Public Works Amendment Act 1935 empowered the Governor-General or a local authority "to take or otherwise acquire under the provisions of the principal Act any area of land required for the purposes of an aerodrome". "Aerodrome" was not defined until 1956, when the PWA 1928 was amended a second time. Section 7(1) of the Public Works Amendment Act 1956 provided that:

> For the purposes of the principal Act the term "aerodrome" means an aerodrome or proposed aerodrome that is owned or controlled by the Crown or a local authority.

[15] Section 35 of the PWA 1928 provided, relevantly, as follows:

> **35 Land taken for public work and not wanted may be sold, etc.—**
>
> (1) If it is found that any land held, taken, purchased, or acquired at any time under this or any other Act or Provincial Ordinance, or otherwise howsoever, for any public work is not required for that public work, the Governor-General may, by an Order in Council publicly notified and gazetted, cause the land to be sold under the following conditions:
>
> (a) A recommendation or memorial, as the case may be, as provided by section 23 of this Act shall be laid before the Governor-General by the Minister or local authority at whose instance the land was taken describing so much of the said land as is not required for the public work...:
>
> (b) The Minister of the local authority, as the case may be, shall cause the land to be sold either by private contract to the owner of any adjacent lands, at a price fixed by a competent valuer, or by public auction or by public tender...:
>
> ...
>
> Provided also that in the case of any land so held, taken, purchased, or acquired for a Government work, if the land is not required for that purpose, or if for any other reason the Minister considers it expedient to do so, he may at any time without complying with any other requirements of this section,

> by notice in the *Gazette*, declare the land to be or to have been Crown land subject to the Land Act 1948 as from a date to be specified in the notice which date may be the date of the notice or any date before or after the date of the notice; and as from the date so specified the land shall be or be deemed to have been Crown land subject to the Land Act 1948:
>
> Provided further that in the case of any land so held, taken, purchased or acquired for a local work, if the land is not required by the local authority for that purpose or if for any other reason the Minister and the local authority agree that it is expedient to do so, the Governor-General may, on the recommendation of the Minister and without complying with any other requirements of this section, by Proclamation declare the land to be Crown Land subject to the Land Act 1948, and thereupon the land shall vest in the Crown as Crown land subject to that Act and may be administered and disposed of under that Act accordingly.
>
> ...

[16] The effect of the two provisos in s 35 was to permit, upon agreement between the Minister and the relevant local authority, land previously taken under the PWA 1928 to be vested in the Crown and thereafter subject to the Land Act 1948 ("Land Act"). By this mechanism land not required for the purpose for which it was taken became Crown land in terms of the Land Act.

[17] From 1 December 1977 the trust land became subject to the Land Act and from 12 October 1978 the trust land was set apart as a reserve under s 167(1) of the Land Act and, pursuant to the Reserves Act 1977 ("Reserves Act"), vested in the Auckland Regional Authority in trust for the local purpose of an "aerodrome".

[18] In relevant part, s 167 of the Land Act provides:

> **167 Land may be set apart as reserves**
>
> (1) The Minister of Conservation may from time to time, with the prior consent in writing of the Minister of Lands, by notice in the *Gazette*, set apart as a reserve any Crown Land for any purpose in which in his or her opinion is desirable in the public interest. Every such notice shall take effect from the date thereof or from such later date as is specified in the notice.
>
> ...
>
> (2) Upon the notice aforesaid being published in the *Gazette*, the land described therein shall be and be deemed to be dedicated to the purpose for which it was reserved, and may at any time thereafter be granted for that purpose in fee simple, subject to the condition that it shall be held in trust for that purpose unless and until that purpose is lawfully changed.

...

> (4) Where any Crown land is set apart as a reserve under this section for any public purpose which is a "Government work" within the meaning of the Public Works Act 1928, the land so set apart shall be deemed to be subject to that Act, save that section 35 of that Act, other than the second and third provisos to that section, shall have no application thereto.

[19] The effect of s 167(4) was to make the sell-back provisions of s 35 of the PWA 1928 inapplicable to the trust land.

[20] Having declared the trust land set apart as a reserve under the Land Act, the Gazette notice of 12 October 1978 then invoked the Reserves Act, pursuant to which the trust land was vested in the Auckland Regional Authority ("ARA"). The ARA was to hold the land in trust, for the declared local purpose of an aerodrome, subject to the establishing deeds.

[21] In relevant part, s 26 of the Reserves Act provides:

> **26 Vesting of reserves**
>
> (1) For the better carrying out of the purposes of any reserve (not being a Government purpose reserve) vested in the Crown, the Minister may, by notice in the *Gazette*, vest the reserve in any local authority or in any trustees empowered by or under any Act or any other lawful authority, as the case may be, to hold and administer the land and expend money thereon for the particular purpose for which the reserve is classified.
>
> (2) All land so vested shall be held in trust for such purposes as aforesaid and subject to such special conditions and restrictions as may be specified in the said notice.

[22] In *Dunbar v Hurunui District Council* HC CHCH CIV 2004-409-000171 5 August 2004, Panckhurst J stated that land held (under the predecessor of s 26 of the Reserves Act) as a "public reserve" was not subject to the PWA 1981. The discussion in that case is not, however, germane to the present case because the trust land was held for a public work (aerodrome), whereas in *Dunbar* the reserve was not a public work.

[23] Finally, by Gazette notice of 30 October 1980, the trust land was reclassified as a reserve under the Reserves Act, in the following terms:

> Pursuant to the Reserves Act 1977, and to a delegation from the Minister of Lands, the Assistant Commissioner of Crown Lands hereby declares the reserve, described in the Schedule hereto, to be classified as a reserve for local purpose (site for aerodrome), subject to the provisions of the said Act.

[24] From 12 October 1978, the trust land was vested in the ARA and held on trust for the local purpose of an aerodrome, and subject to the establishing deeds.

The Public Works Act 1981

[25] The PWA 1981 came into force on 1 February 1982. Part 3 of the Act, of which s 40 was a part, was entitled "Dealing with land held for public works". Section 40, in its current form, provides as follows:

> **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 essential work;
>
> (c) Is not required for any exchange under section 105 of this Act—
>
> the Commissioner of Works 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 Commissioner or local authority shall, unless he or it considers that it would be impractical, unreasonable, or unfair to do so, offer to sell the land by private contract to the person from whom the land was acquired or to the successor of that person, at a price fixed by a registered valuer, or, if the parties so agree, at a price to be determined by the Land Valuation Tribunal.
>
> (3) Subsection (2) of this section shall only apply in respect of land that was acquired or taken—
>
> (a) Before the commencement of this Part of this Act; or
>
> (b) For an essential work after the commencement of this Part of this Act.
>
> (4) Where the Commissioner 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 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.

[26] Mr Carruthers submitted, and Hugh Williams J accepted, that the trust land became subject to s 40 on 1 February 1982. Mr Carruthers submitted that, as by that date the trust land was no longer required for the public work for which it had been acquired, namely an aerodrome, the value of the land should be fixed as at 1 February 1982. We are satisfied that, regardless of whether the trust land was "no longer required for [the] public work" at that time, AIAL could not be required now to offer the land back at its 1982 valuation. There are possibly two reasons why that is so.

[27] First, the public work fell within s 224 of the PWA 1981. The relevant parts of the section provided:

> **224 Government and local authority may combine in works of both national and local importance**
>
> (1) Notwithstanding anything to the contrary in any Act or rule of law, where in the opinion of the Minister of Finance and the Minister of Works and Development any undertaking, whether a public work within the meaning of this Act or not, is of both national and local importance, the Minister of Works and Development and any local authority or local authorities may enter into and carry out such agreement for the acquisition, execution, control and management of the undertaking as may to them seem most suited to the circumstances.
>
> ...
>
> (19) Notwithstanding anything to the contrary in this Act, any land taken, acquired or used for any undertaking in respect of which an agreement has been made under this section may be transferred or leased to any party to the agreement, or sold or otherwise disposed of, and the proceeds thereof shared or distributed, in accordance with the provisions of the agreement.

[28] Section 224 was, in the PWA 1981, the corresponding provision to s 31 of the Finance Act. By virtue of s 20A of the Acts Interpretation Act 1924, the joint venture deeds, which had been entered into pursuant to s 31 of the Finance Act, were now to be treated as if they had been made under s 224.

[29] The probable effect of s 224(19) was that the joint venture deeds, in so far as they provided for the matters specified in subs (19), trumped s 40.

[30] Secondly, AIAL was not in existence in 1982. Even if the joint venture had become potentially subject to s 40, its liability to the Craigie Trust would not pass to AIAL unless such was subsequently agreed by AIAL. As we shall show, this was never agreed. Mr Carruthers never clearly articulated how any potential obligation on the Crown or the joint venture could have become an obligation of AIAL.

[31] Neither of these reasons appears not to have been advanced and certainly not emphasised before Hugh Williams J. Had they been, we suspect he would have come to the same conclusion we have.

The 1980s: Auckland Airport is privatised

[32] In 1987 the Auckland Airport Act 1987 ("Auckland Airport Act") was enacted. Its long title stated that it was:

> An Act to provide for the incorporation of a company to own and operate Auckland International Airport, for the transfer of airport assets and liabilities of the Crown, the Auckland Regional Authority, and certain local authorities to that company, for the payment to the Crown and those local authorities of the existing reserves of the airport...

[33] Section 7 provided as follows:

> **7 Additional provisions relating to vesting of airport assets and airport liabilities in company:**
>
> ...
>
> (4) The provisions of this Act vesting any assets or liabilities in the company shall have effect notwithstanding any enactment, rule of law or agreement, and, in particular, but without limitation, the provisions of this Act vesting any land in the company shall have effect notwithstanding any provision contained in the Land Act 1948, the Reserves Act 1977, or the Public Works Act 1981 or in any other Act relating to land.

[34] Pursuant to the Auckland Airport Act, the Auckland Airport (Vesting) Order 1988 was made. Section 3 of the Order vested airport assets and liabilities in the newly incorporated AIAL on 1 April 1988.

[35] Section 9 of the Auckland Airport Act dissolved the joint venture deeds and by s 4(6) AIAL was deemed to be an airport company within the meaning and for the purposes of the Airport Authorities Act 1966 ("Airport Authorities Act"). AIAL was, by s 3D of the Airport Authorities Act, deemed to be a "Government work" for the purposes of the PWA 1981. A new definition of "public work" was introduced to the PWA 1981 by s 2(5) of the Public Works Amendment Act (No 2) 1987 which came into force on 31 March 1987. The new definition provided that "Government works" are "public works". This, as Hugh Williams J noted (at [103]), confirmed that the airport, now incorporated as AIAL, was a public work.

[36] The effect of these statutory changes was that, from 1 April 1988, AIAL could be subject to the s 40 regime if the requirements of that section were triggered.

[37] The other reason for the trust land's previous exemption from the s 40 regime disappeared: see [28] above. The land was no longer held by a joint venture, with the consequence that s 224(19) was not available to AIAL.

[38] We are satisfied that from 1 April 1988 AIAL was subject to the s 40 regime. It did not take on, however, any potential Crown liability under s 40. In that respect, we differ from the conclusion reached by Hugh Williams J.

[39] The joint venture was not subject to the s 40 regime while it remained in existence. There was no potential liability to be passed on in any event.

[40] Moreover, we consider that s 7(4) of the Auckland Airport Act vested the assets in AIAL free from any potential liability under the PWA 1981.

[41] Further, s 7(1)(c) of the Auckland Airport Act provided further protection to the Crown. It provided that nothing effected or authorised by the Act should be regarded as placing the Crown, the ARA, any constituent authority or any other person in breach of any enactment, which would include the PWA 1981.

[42] Finally, the Auckland Airport Act provided for all the assets and liabilities of the joint venture to be listed, with values attributed to each asset and liability: see s 6. Those assets and liabilities were then specified in an Order in Council (s 6(3)) and

then transferred to AIAL. The obvious intent of this statutory provision was that AIAL should acquire a clean balance sheet, with all its assets and liabilities correctly valued and approved by Order in Council. No potential liabilities under s 40 with respect to the trust land or any other airport land were mentioned in the statutory list.

[43] The Auckland Airport Act was further amended by the Civil Aviation Amendment Act 1992. Section 39 of that Act added new subs (4A) to s 7. The new subs (4A) provided that, where land had been transferred under the Auckland Airport Act, ss 40 and 41 of the PWA 1981 applied to the land "as if the company were the Crown and the land had not been transferred under this Act".

[44] This interpretation explains why the enactment of subs (4A) attracted little attention in the debates and submissions on the Civil Aviation Amendment Bill. Subsection (4A) was not applying ss 40 and 41 to AIAL for the first time, because those sections had been in effect from 1 April 1988. It clarified to whom an offer back would be made if airport land became surplus.

[45] Our conclusion is consistent with the observations of this Court in *Port Gisborne Ltd v Smiler* [1999] 2 NZLR 695. That case involved consideration of the Port Companies Act 1988, s 26 of which provided that when land was transferred to port companies, s 40 of the PWA 1981 did not apply to the transfer, but that after the transfer s 40 applied as if a port company were a Harbour Board and the land had not been transferred. The Court in *Smiler* held that the purpose of s 26 was twofold: first, to avoid argument that transferring land to a port company triggered s 40, and secondly, to make plain that the transfer did not deprive a person having the right given by s 40 in respect of Harbour Board land of that right.

[46] The answer to the second question on appeal must, therefore, be yes. When the airport was vested in AIAL, the joint venture deeds were dissolved and the exemption from the s 40 offer-back regime conferred by s 224(19) of the PWA 1981 ceased to apply to AIAL. The critical date was 1 April 1988. It was on that date that AIAL became subject to s 40 of the PWA 1981, and the mechanics of that position were clarified by s 7(4A) of the Civil Aviation Amendment Act 1992.

Scope of the public work

[47] As cases under s 40 of the PWA 1981 go, the present one is unusual in that it does not involve land having been acquired for some future activity which has not come to fruition or where, over the course of time, there has been a diminution of the activity and land at the periphery is no longer necessary. Indeed, under s 40 the original purpose for which land was acquired is only one part of the issue. Section 40 is directed to land "held for a public work". The focus must be on why it is held rather than simply on the purpose for which it was acquired.

[48] We accept AIAL's submission that the inquiry as to why the land is now held is not limited to the specific words which were used in the documents that effected the initial acquisition. Rather, there must be an overall assessment of what was contemplated in terms of the land's development and use, and what continues to be contemplated in those respects.

[49] The historical development of Auckland Airport leaves no room for debate that the entire area of over 1,000 hectares was acquired so that the grand vision of New Zealand's primary international airport could be implemented. From the project's outset, it was the intention of government (and subsequently of local authorities) to create a major gateway airport that would include not merely an airstrip and adjoining terminal, but both air-side and land-side functions, ancillary commercial activity and land available for expansion and development. All the contemporary evidence, and particularly the establishment deeds, reflect a commitment to a major national activity which inevitably would involve ongoing development and in respect of which flexibility and adaptability to advances in aviation technology and requirements had to be hallmarks.

[50] In light of this practical reality, it is unduly semantic to read down this complex inquiry by technical dissection of the word "aerodrome" which appeared in the first Gazette Notice.

[51] The PWA 1981 defined "aerodrome" in the following way:

> Aerodrome means any defined area of land or water intended or designated to be used either wholly or partly for the landing, departure, movement, and servicing of aircraft; and includes any buildings, installations, roads, and equipment on or adjacent to any such area used in connection with the aerodrome or its administration; and also includes any defined air space required for the safe operation of aircraft using the aerodrome; and also includes a military airfield.

[52] The more modern word, "airport", is defined in the Airport Authorities Act 1966 in a manner which resonates with the earlier provision:

> Airport means any defined area of land or water intended or designated to be used either wholly or partly for the landing, departure, movement, or servicing of aircraft; and includes any other area declared by the Minister to be part of the airport; and also includes any buildings, installations, and equipment on or adjacent to any such area used in connection with the airport or its administration.

[53] As Mr Carruthers realistically accepted in his submissions:

> What is said to be "used in connection with the aerodrome" will always be a matter of fact and degree in the context of the 1981 Act, however under the statutory definition it will always have to be connected to the core aerodrome activities. How "connected" any given use is with the aerodrome, will exist on a spectrum.

[54] Two reports preceded the development of Auckland Airport, both of which support AIAL's submission that airport development and planning is a dynamic and long-term exercise. The first of those reports was the Tymms Report, which was commissioned by the Crown in 1948 and prepared under Sir Frederick Tymms (leader of the United Kingdom Civil Aviation Mission) on the organisation, administration and control of civil aviation in New Zealand. The second was the Fisher Report, which was commissioned by the Crown and Auckland mayors and prepared by airport planning company Leigh, Fisher and Associates, on probable future airport developments. Those two reports, and, even more expressly, the principal and supplementary deeds, make abundantly clear that the development of Auckland Airport was not a short-term endeavour. Nothing which occurred in the subsequent privatisation of AIAL altered that.

[55] In his extensive judgment, Hugh Williams J (from [115] to [206]) undertook a painstaking analysis of the evidence which had been given by the opposing aviation experts: Mr Morris Garfinkle (who was an attorney, former part-owner of

an airline and experienced aviation consultant of 20 years), called by the Craigie Trust, and Mr Peter Smith (an engineer specialising in airport planning and development for more than 35 years), called by AIAL.

[56] The Judge also analysed evidence from other witnesses including Mr Donald Huse (who had been the airport's Chief Executive Officer), Mr Wayne McDonald (an engineer with the airport for eight years) and Mr Anthony Gollin (who had initially worked for the Ministry of Transport and subsequently in various roles for AIAL). He also heard evidence from Mr Gregory Fordham. Mr Fordham was the Managing Director of Airbiz Aviation Strategies Pty Ltd, a company which had been involved in airport planning for 28 years. He was also directly involved in preparing the Auckland Airport 1988 and 1990 development plans, the 2005 master plan and the 2007 draft freight master plan.

[57] The issue before Hugh Williams J, in light of the competing expert and historical material, was whether, for the purposes of determining whether land was held for a public work in terms of s 40, a cohesive approach to characterising the land was required or whether there could be a patchwork assessment of specific parcels of land within the total area which was loosely called "the airport".

[58] He undertook an analysis of the use of the word "aerodrome". He was bound to do so, since the word had featured so heavily in much of the evidence and submissions. However we consider that focus on that word is misplaced and unhelpful.

[59] This Court recently has considered the ambulatory interpretation to be accorded to words which have fallen out of common usage: see *Big River Paradise v Congreve* [2008] 2 NZLR 402. Like Hugh Williams J, we are satisfied that an ambulatory approach to the word "aerodrome" and what is encompassed if such a concept has changed significantly over time, should be adopted in this case.

[60] We endorse Hugh Williams J's conclusion that:

> [200] An ambulatory interpretation of the word "aerodrome" can therefore properly be held to encompass the facilities commonly found at airports –

> Auckland International in particular – and changing over time to what was and is now available.

[61] There can be no question that, on 1 January 1988, the entire 1,000 hectares were held for a public work, namely, the provision, expansion and development of a modern airport, with all its connected and associated operational, administrative and commercial activities.

[62] An important element of the appellants' argument before us was that some of the trust land was used for activities which could be viewed as purely commercial, rather than strictly necessary for the functioning of the airport. Mr Carruthers drew our attention to a number of commercial facilities developed on the land. These included:

- NZ Post (operating since 1979);
- Service stations (operating since 1993);
- Flyways (operating since 1995);
- Retail banking services (operating since 1997);
- Car rental facility (operating since 1997);
- Office space – leased to companies unrelated to the operation of Auckland Airport and marketed accordingly (operating since 2000);
- Koru Club Car Care – providing parking and valet service for elite customers (operating since 2000);
- Toyota car dealership (operating since 2000);
- Fast food restaurants – including McDonalds, Dunkin Donuts, Subway and St Pierre's Sushi (operating since 2001);

- Warehouse Stationery – providing low-priced office and stationery products (operating since 2001);

- Foodtown – a large-scale supermarket (operating since 2001);

- Fedex (operating since 2001);

- Priority Fresh (operating since 2002);

- Butterfly Creek – offering a playground with a train circulating the wetlands with a new crocodile attraction, a petting zoo, a bar and cafe and wedding facilities marketed across the city (operating since 2003); and

- Treasure Island Adventure Golf – offering children's attractions such as mini golf and a large pirate ship (operating since 2003).

It was also noted that the much of the land acquired from the appellants remained undeveloped.

[63] The appellants also stressed that, in the 30 years since the land was acquired, there have been only three occasions on which strictly "airport" facilities have been even proposed for the land. None of these proposals came to fruition.

[64] The appellants argue that the High Court Judge adopted a fallacious approach by assuming that because it was desirable or convenient to have land available for activities adjacent to the public work, the criteria for retention were met.

[65] Mr Carruthers strenuously argued that the appellants' land would never have met the test for compulsory acquisition on the basis of the purposes for which it is now being used. He realistically accepted that the public work for which the land was held included more than simply the runway (and land for future runway development) and associated terminals. But he submitted that the purely commercial arm of AIAL's activities could never fulfil the necessary requirements for retention.

He acknowledged that there were grey areas in respect of cargo sheds, customs facilities, and the like, which were harder to classify.

[66] Whatever argument may be sustainable about land at the perimeter of the total airport complex, we are unable to see how Mr Carruthers's submission can succeed in respect of a parcel of land which lies at the very core of the airport precinct. Some of the trust land has been used for major arteries into the existing terminals. Such land was clearly held for a public work. That conclusion is reinforced when regard is had to the fact that a second runway near to the other side of the land under consideration is already in contemplation.

[67] The appellants' entitlement to compensation was not finally settled for a substantial period of time after the land was acquired. An initial payment was made, and then, mostly at the request of the appellants, there was a delay before matters were finally disposed of.

[68] After a lengthy hearing before the Land Valuation Tribunal, an additional award of compensation of $258,000 was made as against a claim for $434,000.

[69] This award was made after the PWA 1981 came into force. At no time while the compensation claim was in train was it suggested that the land was not being held or used for aerodrome or airport purposes. The compensation claim was predicated on the current and likely ancillary commercial uses, which the Craigie Trust acknowledged were occurring.

[70] That apart, on the land acquired from the Craigie Trust, there has been developed:

- Air New Zealand flight catering kitchens;
- the realignment of George Bolt Drive;
- the construction of Tom Pearce Drive;

- the AFFCA Building which provided facilities for freight forwarders operating from Auckland Airport;

- provision for various utility activities; and

- the construction of the Aviation Turbine Fuel Pipeline ("AVTUR pipeline").

[71] Since AIAL's incorporation, there has been an increase in commercial activity on land which has otherwise not been utilised. All of this has been done on the basis of short-term development. AIAL has always been able to ensure that, in the medium to long-term, any direct aviation functions would not be compromised by other activity.

[72] It is instructive to note that, at one point, a second runway would have included the trust land and other taxiways and land-side aviation support, as well as an access road. In a further development plan, there was a possibility of the land being used as part of a passenger terminal and commercial support services. None of these projects are in and of themselves decisive of the issue before us, but they demonstrate the flexibility which is essential in a public work such as a modern airport. Assessing the nature of the airport as a whole, regard must be had to the needs for parking, shopping, and ancillary service requirements. Such services are necessary when there is not only an ever-increasing number of tourists using the airport, but an ever-increasing number of staff permanently supporting its operation, and who work in a somewhat isolated area where there is a need for everyday commerce.

[73] Mr Carruthers relied heavily on publications issued by AIAL which show a distinction between aeronautical and non-aeronautical activities. Particular emphasis was placed on Board papers and development plans throughout the last decade, which demonstrated that there was concentrated attention to the commercial property portfolio and the possibility of exploiting more effectively the value of the land by undertaking commercial activities, which were not necessarily an adjunct to the core activity of running an international airport.

[74] We are satisfied that the entire area of land described in the Auckland Airport Act continues to be held by AIAL for airport purposes.

[75] The evidence does not demonstrate that there are, on a realistically discrete basis, segments of land within that whole which are no longer held for that airport purpose. We accept that some segments may be being used for other purposes in the meantime and some areas have not been developed. However, that is the very nature of a modern international airport precinct. To hold that those segments ought to be cleaved off from the whole and offered back, would be quite unworkable.

[76] The contention that the appellants' land could be carved out so that one was left with a patchwork of land held by the respondent interspersed with, and splintered by, land belonging to private owners, is unrealistic. If the appellants' former land could be treated in this fractured way just because parts of it are not currently in use, the same standard would have to apply to the land of other former owners. Such an outcome would wholly frustrate the flexibility that is necessary for planning, co-ordination, development and responding to changing demands for a modern international airport.

[77] The particular circumstances which may be shown to exist in a particular segment of land in the AIAL precinct are not the issue. We are satisfied that Hugh Williams J was correct to conclude that the land acquired from the appellants is integral to the operation and activities of the respondent, and continues to be held and used for the purposes for which it was acquired.

[78] Although we are satisfied that, as at 1 April 1988, AIAL became subject to s 40 of the PWA 1981, the use to which AIAL has put and is putting the relevant land is within the scope of the public work for which the land is held, and for which it is still required.

"Impracticable, unreasonable or unfair" and the "character" of the land

[79] We agree with Hugh Williams J that the onus would be on AIAL, if the land was no longer required for a public work, to demonstrate either that it would be

"impracticable, unreasonable or unfair" to require it to be offered back to the appellants, or that the character of the land had changed such that AIAL was exempted, by s 40(2)(b), from offering it back. The issue does not arise, but for completeness we refer briefly to the point.

[80] Hugh Williams J said that had it been necessary to so decide, he would have concluded that it would not have been impracticable to require the whole of the Craigie Trust land to be offered back, but Mr Carruthers had a fall-back position in the High Court which attracted the Judge.

[81] At our request, counsel offered a preliminary view as to the sort of order the Court should consider if the issue of buy-back arose.

> 1 Pursuant to s 40(2) of the 1981 Act the respondent shall offer to sell the land (allotment 508) Parish of Manurewa, and comprised in certificate of title 78D/195, North Auckland Land Registry), excluding all formed roads which includes George Bolt Memorial Drive and Tom Pearce Drive and the flight kitchen on Tom Pearce Drive, to the appellants at the current market value of the land as at 1 April 1988 or some later date.
>
> 2 On conditions that the appellants grant in favour of the respondent the following matters in relation to Areas A, B, C and D of the Land, as identified on the plan attached to this judgment.
>
> **Area A**
>
> (a) Easements as necessary to protect the Avtur Pipeline and any other services; and
>
> (b) A licence or ground lease for the power station at nominal rental, or, a separate title to be granted for the land required for that power station; and
>
> (c) A boundary realignment to exclude the shopping centre at the North Western aspect of the land; and
>
> (d) A ground lease at current market rental and on reasonable terms for those buildings and associated improvements already on the land.
>
> **Area B**
>
> (e) A ground lease at current market rental and on reasonable terms and for those buildings and associated improvements already on the land.

Area C

(f) A ground lease at current market rental and on reasonable terms and for those buildings and associated improvements already on the land.

Area D

(g) A ground lease at current market rental and on reasonable terms for those buildings and associated improvements already on the land.

3 Any issues as to the practical implementation of these orders are to be determined at a separate remedy hearing before the trial Judge (including but not limited to the current market rent for the ground leases).

[82] Hugh Williams J concluded that, although there would be practical difficulties in requiring the whole of the land to be returned, they would not be insuperable. The Judge envisaged the type of arrangement outlined in Mr Carruthers's suggested order.

[83] Nonetheless, the Judge held that if necessary he would have concluded that it would have been unreasonable or unfair to require AIAL to offer back the land, as the Auckland International Airport was "an infrastructural asset of critical importance to the New Zealand economy" (at [214]).

[84] Having spoken about its important and contemporary role as the major international airport in the country, the Judge said:

> [216] In part, Auckland International's success in fulfilling that role has resulted from its ability to plan, install facilities and react to evolving aviation and users' requirements unconstrained by lack of land or the need to take the interests of other landowners within its present boundary into account. It has, sensibly, dealt with land use by users in a way which maintains maximum flexibility to accommodate future changes.

[85] The Judge also found that, in terms of s 40(2)(b), there had been a significant change in the character of the land formerly owned by the appellants.

[86] We disagree with the Judge that it would not have been impracticable for AIAL to offer back the land to the appellants, but we endorse his view that it would have been unreasonable and unfair, and with his conclusion that there had been a significant change in the character of the land so that AIAL was exempted from offering it back. In light of the passage of time and the radical alteration of the entire

area of the airport precinct, offering back parts of the land could not be appropriate on any basis.

Conclusion

[87] As a result, the judgment should be explained. First, by order A, we dismiss the Craigie Trust's appeal. Their claim to have the land transferred back rightly failed.

[88] Secondly, AIAL's cross-appeal is also essentially dismissed. We have changed the wording of the two declarations contained in Hugh Williams J's order A. His order A(2) was a declaration that AIAL was subject to the obligations in s 40 of the PWA 1981. That is not the position. Although the Craigie Trust land is held for a public work in terms of the PWA 1981, AIAL is not subject to the obligations in s 40 as nothing has happened to trigger the obligations set out in that section.

[89] Thirdly, Hugh Williams J's second declaration, in order A(3), is also no longer appropriate in light of our discussion. We see no significance in the particular phraseology of "aerodrome" and "airport". We prefer a simpler declaration to the effect that the Craigie Trust land is "still required for a public work, namely the Auckland International Airport".

[90] Fourthly, we do not consider Hugh Williams J's order B was truly an order. It expressed the Judge's view in the event that he was wrong on what he otherwise held. What would or should have happened in the event of a finding that the land was no longer required for a public work does not arise on our view of the case either. Like Hugh Williams J, we have expressed an opinion on the matter, but, again like his comments, our comments are not decisive. The Judge's order B was not an order at all. For that reason, we have not quashed it – there is nothing to quash – even though our view on this matter is slightly different from the Judge's.

[91] The Craigie Trust must pay AIAL costs on the appeal. This appeal comes within the definition of a "complex appeal". It justified the retention of senior QCs

on both sides, and for that reason we have provided for an uplift of 50 per cent in terms of r 53C(1)(b) of the Court of Appeal (Civil) Rules 2005. The appeal should be treated as having taken the full two days of the hearing.

[92] Although AIAL had some success on its cross-appeal, we hold that the fair result is that costs should lie where they fall with respect to that. This means AIAL should not recover for its preparation costs on the cross-appeal.

Solicitors:
Meredith Connell, Auckland, for Appellants
Russell McVeagh, Auckland, for Respondent

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV.2006 404 005980

BETWEEN	MICHAEL SHANE MCELROY JOHN WARWICK LAMBIE and HUGH DRUMMOND LAMBIE AS TRUSTEES OF THE CRAIGIE TRUST Plaintiffs
AND	AUCKLAND INTERNATIONAL AIRPORT LIMITED Defendant

Hearing: 10-14, 17-19 March 2008

Counsel: Colin R Carruthers QC, Brian Dickey and Kate Bannister for Plaintiffs
Alan R Galbraith QC, Sarah Katz and Anna Harris for Defendant

Judgment: 27 June 2008

JUDGMENT OF WILLIAMS J

This judgment was delivered by
The Hon. Justice Williams
on
27 June 2008 at 2:00pm
pursuant to R 540(5) of the High Court Rules

……..
Registrar/Deputy Registrar

A. All the plaintiffs' claims against the defendant fail though Auckland International Airport Ltd is subject to the obligations in s 40 of the Public Works Act 1981 but the land formerly owned by the plaintiffs and held for the public work of an "aerodrome" is and will continue to be required for that public work or that, it no longer being required for that public work, it remains held for the public work of an "airport".

B. Had it been necessary so to do, the Court would have concluded that it would not have been impracticable but it would have been unreasonable or unfair to require Auckland International Airport Limited to offer the land back to the plaintiffs and that there had been a significant change in the character of the land for the purposes of or connected with the public work for which the land is held.

C. Costs are to be dealt with as in para [231**] of this judgment.**

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Introduction

[1] The plaintiffs are the current Trustees of the Craigie Trust following resettlement on 18 July 1968 of the H D Lambie Trust.

[2] The defendant is the publicly listed company which, as its name implies, owns and operates Auckland International Airport.

[3] The airport company (or "AIAL") is the owner of 36.4260ha (all CT 78D/195 North Auckland Land Registry) taken from the Craigie Trust under the Public Works Act 1928 ("the 1928 Act"). [1]

[4] In this proceeding the Craigie Trust asserts that when the Public Works Act 1981 ("the 1981 Act") came into force on 1 February 1982, and since, the Crown was under an obligation under s 40 of the 1981 Act to offer the land back to the Trust at its value on 1 February 1982 or within a reasonable time, 18-24 months, thereafter, and the airport company has succeeded to the Crown's s 40 obligations. The Trust accordingly seeks a declaration requiring the airport company to offer the land back to the plaintiffs at the price applicable at 1 February 1982 or up to 24 months thereafter as the land is no longer required for the public work purpose of an "aerodrome" for which it was taken and held.

[5] The airport company raises a number of defences. It asserts the Trust land is still being used as an "aerodrome" or is still required for the "public work" or "essential work" for which it was acquired or for another "public work", namely an

[1] Throughout this judgment, it is convenient to refer to the land so taken from the Craigie Trust as the "Craigie Trust land" or the "Trust land" despite the Trust not having owned it for over 30 years. It is to be hoped the plaintiffs take no offence from that shorthand description.

"airport". It asserts the Trust has no rights against it under the 1928 Act or the 1981 Act, s 3(3D) of the Airport Authorities Act 1966 (the "Authorities Act"), or s 7(4A) of the Auckland Airport Act 1987 (the "Airport Act"). It further asserts that, even if it is subject to an obligation under s 40, it would be impracticable, unreasonable or unfair to require it to offer to sell the land to the Craigie Trust or the land has undergone a significant change of character, all for reasons which will be discussed in the course of this judgment.

[6] The Craigie Trust land and its present development is shown on the aerial photograph attached as **Annexe "A**" and its location within the airport company's land, including the second runway now under construction, appears on the further aerial photograph **Annexe "B"**.

Section 40

[7] To set the scene, it is appropriate to recount the terms of s 40. In its present form it relevantly reads:

> **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—
>
> (b) Is not required for any other public work; and [2]
>
> (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—

[2] As observed in *Bennett v Waitakere City Council* (HC AK Civ.2005-404-7348 14 May 2007) (under appeal) to avoid repetitiousness, references to the criteria in s 40(1)(a)(b), unless expressed otherwise, are to be deemed to include the less frequent exchange for which s 40(1)(c) provides and since the Cadastral Survey Act 2002 repealed the Survey Act 1986 the references in s 40 are presumably now intended to refer to the Chief Executive or the Surveyor-General though the statutory amendments do not appear as yet to say as much.

(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. 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. [3]

[3] Section 40(1)(b) originally also spoke of the land being acquired for any "essential work" as defined in s 2. However, from 31 March 1987 the Public Works Amendment Act (No.2) 1987 omitted the definition of "essential work" and the words "essential work" from s 40(1)(b) and substituted the phrase "other public work". It was not suggested these amendments were material to this claim and "essential work" is accordingly not separately discussed.

The taking of the Craigie Trust land

(1) Brief background

[8] Since the late 1920s aircraft have landed and taken off from the Mangere land on which Auckland International Airport stands. In 1928 Charles Kingsford Smith and Charles Ulm landed there, then the home of the Auckland Aero Club. Jean Batten landed there after her famous solo flight from England in October 1936. But it was not, for many years, the only, or indeed the principal, airport in the Auckland region. That was Whenuapai then used jointly by RNZAF and civilian aircraft.

[9] After World War II a number of studies were undertaken to settle on the site for a major civil airport in the Auckland region servicing both internal and international flights. That followed receipt in 1948 of a report by Sir Frederick Tymms on the future of civil aviation in this country.

[10] In November 1955, Cabinet approved the Mangere site for a future international airport and by 1959 the Crown owned most of the land required.

[11] The Crown and the Mayors of the many local bodies in Auckland jointly instructed an experienced airport planner, Leigh Fisher & Associates, to advise on the requirements for a new Auckland international airport. In a comprehensive report dated 11 May 1959, Mr Fisher presciently covered developments in aviation in recent years and likely developments in international traffic, aircraft types and domestic and international air traffic over the years to come. Of present interest, the report was sufficiently far sighted to recommend provision be made for two runways additional to the present east-west runway, one of which was to run parallel with the existing runway and would, if built where recommended, have crossed the Craigie Trust land.

[12] Mr Fisher agreed with the Mangere choice and urged its expeditious development. His recommendations for buildings included hangars, cargo buildings, fuel storage, rental car accommodation, parking areas, an “inn or hotel” plus a

"filling station and car service garage", though he said that "in an industry as subject to technological obsolescence as aviation, no buildings should be designed for a useful life in excess of 30 years".

(2) Establishment deeds

[13] The plethora of local bodies in the Auckland region at the time hampered progress but on 24 September 1960 the Crown and Auckland City Council as lead local body entered into an agreement for sharing the cost of development and airport operations. The deed said:

> … he intention of the parties hereto is that the Airport shall at all times be capable of serving all present and future air traffic whether internal or international permitted by the Government to operate in and out of New Zealand and that any extension and/or strengthening of the runway, the construction of additional runways and the construction of buildings and other works necessary for the efficient and economical operation of the airport as an international airport that may be necessary to achieve such intention … shall be constructed from time to time

[14] The provisions of s 31 of the Finance (No. 3) Act 1944 (the "1944 Act") were applied by the deed to the "purchase or acquisition of the land required for the development of the International Airport and the carrying out of the present and future works". That section provided that "notwithstanding anything to the contrary in any Act or rule of law" and in relation to land "whether a public work within the meaning of the [1928] Act or not", where the Ministers of Finance and Works decided any work was of both national and local importance – as Auckland International was declared to be by notice in the "New Zealand Gazette" (24 November 1960, p 1846) – then the Minister of Works and any local authority could enter into agreements for the "acquisition, execution, control and management of the work or scheme as may to them seem most suited to the circumstances". Subsection (2) provided for possible provisions in such agreements and subsection (3) provided:

> Notwithstanding anything to the contrary in the principal Act, any land required for any work or scheme in respect of which an agreement has been made under this section may be taken or acquired as for a public work under the [1928] Act either by the Minister or by any local authority which is a party to the agreement.

[15] The deed defined "airways facilities" as safety systems and all other "buildings, accommodation and other services and facilities as the Minister in Charge of Civil Aviation thinks necessary for the purpose of providing for the safety and efficient operation of aircraft engaged in civil aviation".

[16] Any land acquired for future works was to be vested in the Crown and if "used for the International Airport or ancillary aviation purposes shall be under the control and management of the Council". Land "no longer required for airways or other ancillary aviation facilities", including buildings, passed to Council for "use in connection with the general purposes of the International Airport".

[17] The Council was to apply for a "Public Aerodrome Licence" for the airport.

[18] The parties had full rights at their own expense to construct, alter and remove any buildings and the deed debarred any building or construction which might "affect the future development of the International Airport … within the boundaries" without the parties' consent, though Council had power to grant leases or licences to occupy any land within the airport boundaries and "also develop additional amenities or facilities".

[19] Council had a similar power to let concessions for a list of facilities and "for such other amenities of any kind whatsoever as do not interfere with the efficient administration" of the airport.

[20] That deed was supplanted during airport construction by a further deed dated 25 November 1963 (though deemed operative from 24 September 1960). Its recitals repeated that the airport should "at all times be capable of serving all present and future air traffic whether internal or international" and provided for the construction of "additional runways and buildings and other works necessary for the efficient and economical operation of the airport as an international airport". The deed also provided :

> Should at any time the whole or any part of the Airport as from time to time extended cease to be required for the Airport, then so much as is not required therefor shall be disposed of as the parties to this deed may agree …

[21] The deed obliged the Minister to arrange to buy or acquire the land shown in an attached plan. It included the Craigie Trust land. Once the parties agreed on the nature of future construction, the Minister was to have those works completed.

[22] A subsequent deed bound all the other Auckland local bodies in existence at the time to the terms of those establishment deeds.

[23] Following the passing of the Auckland Regional Authority Act 1963, the ARA assumed liability for the functions previously assumed by the councils and in a deed dated 14 April 1966 the Crown and the ARA agreed:

> … that the Principal Deed shall be varied so as to provide that all land now or hereafter acquired for the Airport or for ancillary aviation purposes shall pursuant to section 19 of the Reserves and Domains Act 1953 be vested in the Authority to be held in Trust for aerodrome purposes

as defined in the principal deed.

[24] Auckland International Airport officially opened on 29 January 1966 with the interim terminal building housing necessary facilities but intended ultimately for cargo.

(3) Acquisition of Craigie Trust land

[25] The Crown acquired the Craigie Trust land over a period.

[26] In 1971 it gave notice it intended to acquire 23 acres of the Craigie Trust land to the south of what is now Tom Pearce Drive. After objection by Mr J W Lambie, son of the settlor who was farming the land at the time, and negotiations over the Crown's requirements, it was agreed in about April 1971 that only seven acres would then be acquired, compulsorily if agreement as to access and compensation could not be reached, with the balance being acquired later.

[27] Though counsel's submissions as to the formal process by which the Crown implemented its intention showed the process to be somewhat unclear, perhaps even contradictory , the following are relevant:

a) By “Gazette” notice of 29 March 1974 published on 4 April 1974 (p 613) the Crown gave notice under the 1928 Act of its intention to take 33.6260ha of the Trust’s land for an “aerodrome” and use it to realign George Bolt Drive and erect a cargo shed.

b) By “Gazette” notice dated 23 January 1975 published on 30 January 1975 (p 141) “agreement to that effect having been entered into”, 90 acres 1.7 perches was taken under the 1928 Act for an “aerodrome” from 30 January 1975. That included the whole of the Craigie Trust land. The Trust consented in an agreement dated 3 October 1974 to the taking of the land with compensation deferred pending resolution of zoning issues and lease-back arrangements.

c) By “Gazette” notice dated 11 November 1977 published on 1 December 1977 (p 3145) the 90 acres 1.7 perches (and other land) was declared Crown land subject to the Land Act 1948 from 1 December 1977.

d) By “Gazette” notice dated 2 October 1978 published on 12 October 1978 (p 2768) the land, now again described in decimal terms but as 36.4260ha was “under the Land Act 1948, set aside as reserves for local purpose (‘aerodrome’)” and pursuant to the Reserves Act 1977 vested in the ARA in trust for that purpose and under the deeds of 25 November 1963 and 14 April 1966.

e) Declaring land acquired under the 1928 Act to be Crown land subject to the Land Act 1948 and then setting it aside as a reserve for local purposes under, first, the Reserves and Domains Act 1953 and, later, after repeal of that statute, under the Reserves Act 1977 was said by Mr Carruthers QC, senior counsel for the Trust, to have been standard for the acquisition of land at the time. Counsel submitted it may have been a device designed to avoid triggering the offer back provisions under the 1928 Act which directed that land no longer required for the

public work purpose for which it had been acquired to be offered back, not to former owners or their descendants, but to neighbours.

[28] The trail leading to the Craigie Trust land now being owned by the airport company continues:

a) By "Gazette" notice dated 30 October 1980 published on 13 November 1980 (p 3326) the "reserve" comprising the airport land was declared under the Reserves Act 1977 to be classified as a "reserve for local purposes (site for aerodrome)"

b) For some unexplained reason, an essentially identical "Gazette" notice, this time dated 10 June 1982 and published on 22 July 1982, (p 2431) again classified the airport land as a "reserve for local purpose (site for an aerodrome)" under the Reserves Act 1977. The 1981 Act was in force when this notice was published.

c) Then, following public discussion in June 1985 as to possible corporatization of airports the Airport Act 1987 was passed on 16 December 1987. Auckland International Airport Limited was incorporated as a public company on 20 January 1988 and the Craigie Trust and its other land was vested in it by the Auckland Airport (Vesting) Order 1988 (SR1988/71) from 29 March 1988. The land was vested "together with all planning rights, designations, water rights and clean air licences, relating to it or to the operations and activities of the airport".

Questions for resolution

[29] Rendered down to their essence, the questions for resolution in this case are:

(a) Does s 40 of the 1981 Act apply to the airport company or, as it would have it, does it hold its land pursuant to the 1944 Act, the Land Act 1948 and the Reserves Act 1977?

(b) If the answer to (a) is that s 40 of the 1981 Act applies to the airport company, does it still hold the Craigie Trust land for "any public work" and is the land "no longer required for that public work" (nor for any other public work nor for exchange) or is it required for another public work? Resolution of that question involves deciding whether the Craigie Trust land was and is held for a "public work" either of an "aerodrome" or an "airport" which necessarily involves deciding what is comprised in either at 1 February 1982 when the 1981 Act came into force (or within a reasonable time thereafter), or at 29 March 1988 when the Vesting Order was made or as at the present time?

(c) If the Craigie Trust is not held for a "public work" would it be impracticable, unreasonable or unfair to require the airport company to offer it back to the plaintiffs?

(d) If the Craigie Trust land is not held for a "public work", has there 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 held" and thus the airport company is not obliged to offer it back to the plaintiffs?

Does s 40 of the 1981 Act apply to the airport company or, as it would have it, does it hold its land pursuant to the Finance (No.3) Act 1944, the Land Act 1948 and the Reserves Act 1977?

(1) Statutory Definitions

[30] Unsurprisingly, the 1928 Act did not define "aerodrome" or "airport".

[31] The Civil Aviation Act 1964 – in force when the Craigie Trust land was taken – defined "aerodrome" as:

> "Aerodrome" means any defined area of land or water intended or designed to be used either wholly or partly for the landing, departure, movement, and servicing of aircraft; and includes any buildings, installations, and equipment on or adjacent to any such area used in connection with the aerodrome or its administration:

[32] Interestingly, the Authorities Act – passed only two years later - contains no definition of "aerodrome" but defines "airport" as:

> "Airport" means any defined area of land or water intended or designed to be used either wholly or partly for the landing, departure, movement, or servicing of aircraft; and includes any other area declared by the Minister to be part of the airport; and also includes any buildings, installations, and equipment on or adjacent to any such area used in connection with the airport or its administration.

[33] The 1981 Act contains no definition of "airport" but repeats the definition of "aerodrome" from the Civil Aviation Act 1964 and adds:

> And also includes any defined air space required for the safe operation of aircraft using the aerodrome; and also includes a military airfield.

[34] The Civil Aviation Act 1990 contains no definition of "airport" and repeats the 1964 definition of "aerodrome", though dividing it at the semi-colon into sub-paragraphs.

[35] Section 3 of the Authorities Act empowers airport authorities to establish and carry on airports. That was amended by the Airport Authorities Amendment Act 1986 to define an "airport company" and, of relevance to this claim, with effect from 18 December 1986 enacted s 3D of the Authorities Act which, in the form current from 1991, reads:

> 3D. An airport operated or managed by an airport authority which is not a local authority shall – …
>
> (b) For the purposes of the Public Works Act 1981, be deemed to be a Government work.

[36] For completeness, it needs to be noted that the Airport Act simply defines "airport" as the "Auckland International Airport at Mangere … being an area of approximately 1100ha which includes a runway, an international terminal and a domestic terminal and other buildings, installations and facilities" but, of present relevance, s 7(4A), in force since 10 August 1992 (Civil Aviation Amendment Act 1992 s 1(2)) reads:

> (4A) Where land has been transferred to the company under this Act, sections 40 and 41 of the Public Works 1981 shall, after that transfer, apply

> to the land as if the company were the Crown and the land had not been transferred under this Act.

(2) Joint Venture Airports

[37] For many years prior to corporatization Government policy was that New Zealand airports be owned and operated as joint ventures between Government and local bodies. Auckland International was one. A Civil Aviation administration manual on "*Principles and Procedures*" for such airports published on 1 August 1961 described what was envisaged:

> 3. World-wide acceptance of the inevitability of subsidised initial development costs for air transport acknowledges that potential air traffic and ancillary airport revenues should increasingly contribute towards recouping past costs and meeting those of future development, the main aim being the development of a satisfactory aviation service capable, in time, of meeting the justifying present capital expenditure. The "user who pays" and the community are entitled to the assurance that effective promotion and commercial development, associated with efficient maintenance and operation, will show some prospects of airports eventually becoming self-supporting if not self-liquidating. Both the aeronautical user and the airport management should have a common interest in the development of non-flight airport revenue sources. In this endeavour, rents and charges to non-aeronautical users should seek the maximum returns from consumer business and commercial and industrial tenants.
>
> …
>
> 6. It must be recognised that airport "operations" (the movement of air traffic) have a corollary in airport "commerce", demanding prompt appraisal and decision on local business opportunities and promotion. This broad division of the airport into two major components materially assisted the development of airport policy within the concept now accepted in New Zealand.

[38] The same document broadly placed responsibility for the operation of joint venture airports on the Crown and the management of the airport and ancillary facilities on the local body.

[39] Since New Zealand is a party, that policy was required to mesh with the 1944 Convention on International Civil Aviation which was said by Mr Garfinkle, an international aviation consultant, to define "aerodrome" in Annex 14 as:

> A defined area on land or water (including any buildings, installations and equipment, intended to be used either wholly or in part for the arrival, departure and surface movement of aircraft.

[40] It was the implementation of those policies in Auckland which led to the establishment deeds.

[41] The policy largely remained in place until the corporatization and divestment of assets wholly or partly in public ownership which occurred in New Zealand in the mid to late 1980s.

(3) Submissions and Authorities

[42] For the plaintiffs, Mr Carruthers QC said the basic thrust of the claim was that the Crown and the ARA were bound by the 1981 Act to have offered the Craig Trust land back to the plaintiffs on 1 February 1982 or within a reasonable time, 18-24 months thereafter, as it was no longer held for an "aerodrome", the public work for which it was taken. And the airport company inherited that obligation when the land was vested in it pursuant to the Vesting Order with the obligation being to offer the land back as at its date or shortly thereafter.

[43] Summarising the history, Mr Carruthers accepted Auckland International was developed as a joint venture under the establishment deeds which made clear airport land was under the "management and control of the Council for such time as it is used for … airport and ancillary aviation purposes". He detailed the Crown's acquisition of the Craig Trust land earlier set out noting it was consistently taken for an "aerodrome" or similar.

[44] As earlier noted, he submitted the setting aside of the land as a reserve under the Land Act and vesting it under the current Reserves Act was standard at the time. He submitted that the plaintiffs' rights endured through the airport privatization and corporatization process.

[45] Whichever route was adopted, he suggested that applying the 1981 Act to compulsory acquisition of land now held for commercial purposes by a commercial

entity such as the airport company is entirely consistent with the policy of the 1981 Act described in *Deane v Attorney-General* [1997] 2 NZLR 180, 191:

> It is convenient to set out here what I apprehend to be the appropriate approach to s 40, and buy-back offers in particular. The power of the Crown to compulsorily acquire land derives from the ancient notion of eminent domain. It is today a draconian – but necessary power – in a complex, and collective society. But to the extent that the Crown's powers are a direct interference with individual property rights, our Courts – in company with Courts elsewhere in the British Commonwealth – have insisted that, always bearing in mind the purpose of any given powers (*Chilton v Telford Development Corporation* [1987] 1 WLR 872, at p 878 per Purchas LJ), powers of this kind are strictly construed; must be exercised in good faith (*Manukau City v Attorney-General ex relatione Burns* [1973] 1 NZLR 25 (CA), at p 32); and even-handedly. That last consideration has (with respect) never been better expressed than by Lord Upjohn (as he later became) in delivering a judgment of the Court of Appeal in *Simpsons Motor Sales (London) Ltd v Hendon Corporation* [1963] Ch 57, at pp 82 – 83:
>
> > "The underlying assumption of Parliament is that in conferring compulsory powers upon statutory authorities for public purposes, the acquiring authority will act reasonably in the public interest, that is, not only in the interests of their own ratepayers or shareholders, as the case may be, *but with due regard to the interests of the person being dispossessed*." (Emphasis added)

(As Mr Carruthers said, the decision in *Deane* was reversed by the Court of Appeal - *Horton v Attorney-General* CA 43/97, 3 December 1997 - and that reversal was upheld by the Privy Council - *Attorney-General v Horton* [1999] 2 NZLR 257 - but neither judgment commented adversely on the passage cited.)

[46] Mr Carruthers submitted the land remained held for a "public work" because the defendant operated an "aerodrome". But the Craigie Trust land was not "required" to be used for that public work. However desirable the airport company may regard its retention, its commercial use, both present and forecast, was unnecessary for operation of an "airport", still less an "aerodrome", particularly when the Airport Act expressly terminated the establishment deeds and thus made the airport company's land holding wholly subject to statute. It was impermissible, he submitted, to hold the land on a "just in case" basis for future development, noting Mr Garfinkle's evidence later detailed that such an approach could easily mean no compulsorily acquired land would ever need to be offered back. Not only was such an approach contrary to the anti-land banking principles for which s 40 of the 1981 Act was, at least in part, enacted, it was also contrary to the observations of

the Privy Council in *Horton* (at 261-262) where their Lordships said of the nature of the offer back right:

> This right has sometimes been described as a right of pre-emption, although Their Lordships think it bears a closer resemblance to an option: the purchaser's right is not dependent upon the vendor choosing to sell but arises as soon as the land is no longer required. Hammond J described it as an inchoate right which an owner of land taken by the Crown preserved throughout the latter's ownership and which came to fruition when the land was no longer required. It has been said in a number of cases to be the expression of a strong legislative policy to preserve the rights of an owner subject only to the continuing needs of the state.
>
> Nevertheless, as a right in private law analogous to an option, it has some curious features. It is subject to defeasance by the exercise of the discretionary power conferred by s 40(2)(a). Furthermore, the existence of the right may well remain unknown to the owner for some considerable time. Since a decision that land is no longer required will usually be internal to the government department or state-owned enterprise, the owner may learn only much later, by use of the Official Information Act 1982 or accidental discovery, that his right to buy had accrued. By the time he claims to exercise it, policy may have changed and the land be once more required for public use. Subject to the question of reconsideration, the Crown would have to use its compulsory powers afresh and purchase at the later valuation. This may of course be a necessary consequence of the legislative policy of protecting the original owners.
>
> …
>
> The Court of Appeal … said that once conditions (a) and (b) and possibly (c) of s 40(1) were satisfied, the Chief Executive of the Lands Department came under a mandatory obligation to sell. There was ``no further role for the department or agency responsible for the public work for which the land was held" and ``no room for reconsideration of the earlier conclusion that the land was not required for a public work." The right to an offer vests, subject only to being defeated by the exercise of the discretion conferred by s 40(2)(a) or by the state of facts described in s 40(2)(b). There is no provision for the right being divested simply by a change of mind on the part of the government department or state-owned enterprise.
>
> Their Lordships respectfully consider that the reasoning of the Court of Appeal is correct. If s 40 confers an enforceable right to buy, then Their Lordships consider that when the conditions upon which it comes into existence have been satisfied, it must vest subject only to those grounds of defeasibility expressly stated in the statute

[47] Mr Carruthers submitted it was incorrect for the airport company to focus more on whether the land was subject to the 1928 Act prior to transfer than whether it was subject to the 1981 Act. He submitted the wording of s 40 makes 1 February 1982 and thereafter the critical period, not what occurred before that date. He

pointed to the breadth of the terms of s 40 and the lack of reference in it to land held under the 1928 or other Acts.

[48] Mr Carruthers also argued that s 40 of the 1981 Act is not primarily concerned with the disposal of land: its prime focus is whether land held for a public work continues to be required for such. If land has been held by a public body, or a series of public bodies, for a continuous public work purpose, then s 40 applies.

[49] Even were that wrong, Mr Carruthers submitted there was a consistency of public work purposes demonstrated by the "Gazette" notices in their repetition of "aerodrome" with only minor variation. He submitted the words "in any other manner for any public work" in s 40 also focused attention not so much on the way in which the body holding the land acquired it, but whether the various public entities which had held the land did so for a public work purpose relying on *Port Gisborne Ltd v Smiler* [1999] 2 NZLR 695, 706. There the Court of Appeal, in construing s 40 in relation to land which had passed from original Maori owners to the Crown and then to Port Gisborne and its antecedents, held:

> [39] … 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. As Laurenson J said, that depends on the factual and legal nexus surrounding the acquisition of the land and the manner of its holding by the intermediate public owner. In *Auckland Regional Council v Attorney-General* [HC AK CP.583/88 24 September 1990] Gault J commented at p 10:
>
> > "A construction excluding [as offerees] former owners that held the land for a public work would seem consistent with the intention of the section of providing a prior right to a private person to reacquire land taken or acquired from him for public use."
>
> [40] 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. The intent of the section cannot, however, extend to bypassing an intervening public owner where that owner neither acquired nor held the land for a public work. In the situation that the land was held throughout for a public work, there is merely a preservation of rights that the original owner would have enjoyed under s 40 had there not been a change of public owner. Where, however, the land was acquired and held by the first public owner for something other than a public work, there are no rights to preserve and it is not possible, given the wording of subs (2), to find that those rights accrue when ownership changes.

> [41] What has been described as the inchoate right given by subs (2), arises and can only arise at the time when the land first becomes subject to the possible application of s 40, crystallising if and when the land is no longer required. A change of ownership while a public work purpose for holding the land continues does not affect the inchoate right, and there is no justification for reading the section as bringing it to an end. The land remains required for a public work, and s 40 does not come into play. Subsection (2) does not stipulate the offeree as being the person from whom the present holder of the land acquired it.

[50] Section 40 applies if the land is not needed for a public work or is no longer so needed (*Kerr-Taylor v Attorney-General* [2004] 3 NZLR 104, 114). Mr Carruthers submitted the airport company was unable to demonstrate it had a need or "required" the Craigie Trust land (apart from the Trust's concessions later outlined) for a public work. The question was whether the particular piece of land had been shown to have been acquired or held for a specific public work (*Hood v Attorney-General* CA 16/04 2 March 2005, para [27]). The airport company could not show that the commercial uses to which the Craigie Trust land has been, and is forecast to be, put were "required" to be on the Craigie Trust land.

[51] One of the purposes of the enactment of s 40 was to prevent public bodies continuing to hold land acquired for public works purposes with no specific public work purpose in view and with the land simply held as a "land bank" (*Bennett* pp 19-20, para [43]). Even brief intervals of land not being required for public work purposes between it being required for such purposes trigger the offer back obligation (*Horton* at 257, 262 (PC)).

[52] Mr Carruthers submitted the Airport Company's approach was erroneous in suggesting its land was not subject to s 40 because it had been taken for a public work, an "aerodrome", under the 1928 Act then declared Crown land held as a reserve under the 1944 Act and the establishment deeds. The land had never been disposed of under s 35 of the 1928 Act nor disposed of under cl 21 of the initial establishment deed. In any event, the point became moot when the trust and deeds were dissolved by the Airport Act with the land thereafter to be dealt with under s 7(4A).

[53] Mr Carruthers argued s 31 of the 1944 Act permitted the acquisition of both public and general works under the 1928 Act. He noted s 28 of that Act provided

that Part IV (which included s 31) was deemed to be part of the 1928 Act. Mr Carruthers also noted s 31 dealt with acquisitions not disposals and accordingly, he submitted, s 35 of the 1928 Act continued to apply in that latter regard. The "Gazette" notices of 1974, 1975 and 1977 taking the land were all expressed to be pursuant to the 1928 Act. Accordingly, he submitted, the Craigie Trust land was acquired for a "public work" even though the notices do not use that term and, throughout, the Crown and the ARA regarded the Craigie Trust land as held for a public work.

[54] Mr Carruthers also argued there was no statutory or other basis for AIAL's contention that once the Craigie Trust land had been set aside as "reserves for local purpose (aerodrome)" and vested in the ARA, it could no longer be land held for a "Government work" or "local work" under the 1928 Act or a "public work" under the 1981 Act. There was no reason, he submitted, why the land could not be held on trust as a reserve under the establishment deeds and also held under the 1928 and 1981 Acts. Such would conform with s 3D of the Authorities Act.

[55] There was no basis, Mr Carruthers submitted, for the defendant's contention that Crown land cannot be held for a public work without some formal step altering its legal status. Section 13 of the 1928 Act and s 52 of the 1981 Act do no more than create powers to set land aside as Crown land or for Government works. The decisive provision, Mr Carruthers submitted, is s 167 of the Land Act 1948 which reads:

> **167 Land may be set apart as reserves**
>
> (1) The Minister of Conservation may from time to time, with the prior consent in writing of the Minister of Lands, by notice in the *Gazette*, set apart as a reserve any Crown land for any purpose which in his or her opinion is desirable in the public interest. Every such notice shall take effect from the date thereof or from such later date as is specified in the notice.
>
> …
>
> (2) Upon the notice aforesaid being published in the *Gazette*, the land described therein shall be and be deemed to be dedicated to the purpose for which it was reserved, and may at any time thereafter be granted for that purpose in fee-simple, subject to the condition that it shall be held in Trust for that purpose unless and until that purpose is lawfully changed.

[56] The procedure in s 167 applied in this case, he suggested. The Minister had set apart Crown land as a reserve for a public interest purpose, an "aerodrome", and upon the "Gazette" notice being published the land was deemed set aside for that reserves purpose and was then vested in the ARA on trust for the same purpose. But s 167(4) makes clear the land was subject to the 1981 Act. It reads:

> (4) Where any Crown land is set apart as a reserve under this section for any public purpose which is a Government work within the meaning of the Public Works Act 1981, the land so set apart shall be deemed to be subject to that Act, save that section 35 of that Act, other than the second and third provisos to that section, shall have no application thereto.

(the 1981 Act substituted the reference to it for reference to the 1928 Act)

[57] "Government work" is defined in the 1981 Act as:

> **Government work** means a work or an intended work that is to be constructed, undertaken, established, managed, operated, or maintained by or under the control of the Crown or any Minister of the Crown for any public purpose; …

[58] The Craigie Trust argued the Crown retained control over the land in terms of the establishment deeds. The airport land was acquired for a "Government work", an "aerodrome", and has continued to be held for such. Accordingly s 167(4) applies and the land, including the Craigie Trust land, is subject to the 1981 Act. That, too, conforms with s 3D of the Authorities Act and s 7(4A) of the Airport Act.

[59] Mr Carruthers submitted the statutory régime by which the airport company was established and the land vested was a code. Section 7(4) of the Airport Act vested the land notwithstanding the 1981 Act with the reach of the latter being clarified by the enactment of s 7(4A). That clearly made the land vested in AIAL under the Vesting Order subject to s 40 "as if" it were the Crown and with the final phrase - "and the land had not been transferred under this Act" – intended to avoid the transfer or vesting triggering s 40 rights (*Dilworth Trust Board v Counties Manukau Health Ltd* [2002] 1 NZLR 433, 448, paras [31] and [32], *Horton* CA43/97 p 8). In *Horton*, in relation to similar words found in s 24(4) of the State-Owned Enterprises Act 1986, the Court of Appeal observed:

> If the grant or other transaction is not a "transfer" of land to the SOE then s 24(4) has no application and s 40 continues to apply to the Crown. If the grant or transaction is a "transfer", then in terms of s 24(4), thereafter s 40 applies to the grant as if the SOE were the Crown and the land had not been transferred pursuant to the State-Owned Enterprises Act.

And in the unreported portion of *Deane*, Hammond J observed (at 42) that "Parliament did not intend that the Public Works Act rights of former owners should be diminished in the course of privatisation".

[60] Mr Carruthers submitted that if the defendant's construction of s 7(4A) were adopted – that the position prior to vesting of the land in AIAL was the trigger point – the unintended result would be that s 40 applied from 1 February 1982 and AIAL would then be responsible for offering back the land as at a date, 1 February 1982 or up to 18-24 months later, when it had not then been incorporated – indeed corporatization was not then being considered – and the land had not been vested in it. That, Mr Carruthers said, was an absurd result which could never have been in Parliament's contemplation.

[61] The Craigie Trust's interpretation accorded with the plain words of s 7(4A) and with s 3D of the Authorities Act deeming an "airport" to be a Government work for the purposes of the 1981 Act. AIAL was deemed to be an "airport company" under s 4(6) of the Airport Act and therefore an "airport authority" under s 2 of the Authorities Act 1966.

[62] By contrast with s 7(4A), some similar statutory provisions enacted at much the same time and for much the same purpose expressly applied their provisions only to land subject to s 40 of the 1981 Act (e.g. Health Sector (Transfers) Act 1993, s 11F cl 3 of the First Schedule).

[63] *Auckland City Council v Man O' War Station* [1996] 3 NZLR 460 on which the defendant relied was distinguishable on its facts since in that case the land had ceased to be held for the Government work for which it was acquired and was not used for a different Government work. Accordingly s 167(4) was inapplicable.

[64] To conclude, Mr Carruthers relied on the following passage from *Port Gisborne*:

> [35] Section 40, which comes under Part III of the Act and is headed "Dealing With Land Held for Public Works", is in the context of legislation which is directed to public works, and in particular to the acquisition of land *for public works* (s 16). It is not, and has no reason to be, concerned with land which has been acquired for other purposes. … The Act clearly has no application to land which has been acquired, and is currently being used, for purposes other than public work. … 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 land should so far as practicable revert to the previous or equivalent private ownership.
>
> [36] In the light of that background, it would appear contrary to the statutory intention to apply s 40 to land which has been acquired for other than public work purposes. What justification could there be for requiring an offer back to be made where land has been acquired for a commercial purpose on an arm's length transaction, but years later used for a short term for some form of public work but is then no longer required for that work? At the time of acquisition, the vendor has no existing right which needs preservation. … The framework, and the history, of the legislation all point to s 40(2) being directed to land which has been acquired for a public work, and to give an option to the person from whom it was so acquired. The fact that the present owner of the land was not the particular body which originally acquired the land for that purpose is irrelevant where a public work use has continued, with the need for any offer back not arising.

[65] For the airport company, Mr Galbraith QC, its senior counsel, submitted the defendant was not statutorily bound to offer the Craigie Trust land back to the plaintiffs. The airport company was not bound by the 1981 Act upon proper analysis being undertaken of the various statutes and deeds affecting the airport.

[66] Summarizing AIAL's stance, he said the present airport was a joint venture under the establishment deeds with their statutory basis in s 31 of the 1944 Act. The land having been transferred to the ARA to be held on trust under the Reserves and Domains Act 1953 for the joint venture meant it was that Act and its successor, the Reserves Act 1977, which, together with the establishment deeds, governed the status of the airport land. It was thus not subject to the 1981 Act.

[67] He submitted that whether s 40 applied to the defendant was a construction exercise to be determined against the factual and legal matrix with views on that topic offered by various persons at various times of little assistance. That must be correct. The 1981 Act applies or it does not. Views expressed outside this case on that topic by consultants, lawyers and others are of little, if any, assistance.

[68] The statutory foundation for joint venture airports was s 31 of the 1944 Act, probably passed to enable hydro-electric and other major public works to proceed. Within the statutory guidelines, s 31 gave wide powers to the Crown and local authorities to agree on development of works of local and national importance, even if they did not qualify as a "public work" under the 1928 Act. That, Mr Galbraith submitted, was demonstrated by s 31(3) enabling land to be acquired "as for a public work".

[69] Similar powers of entering into agreements most suited to the circumstances appeared in s 12(3) of the Civil Aviation Act 1964 with permissible categories of such agreements particularised and subs (6) providing that agreements for the "development or reconstruction of an aerodrome" under s 31 of the 1944 Act might include such provisions.

[70] Mr Galbraith noted the provisions concerning land in the principal deed included the Ministerial obligation to acquire the land scheduled, including the Craigie Trust land, and provided that s 31 of the 1944 Act should apply to such.

[71] Mr Galbraith submitted that the land was initially acquired for a "Government work" or a "public work" and essentially continues to be held for such purposes.

[72] The 1975 "Gazette" notice declared all the airport land to be "taken for an aerodrome" under s 32 of the 1928 Act which meant it was held "as for a public work" under s 31 of the 1944 Act. All the airport land was then declared to be Crown land under s 35 of the 1928 Act pursuant to the 1977 "Gazette" notice.

[73] The next step in Mr Galbraith's submissions was that, from as early as the supplementary deed of 14 April 1966, all the airport land was vested in the ARA and held "in trust for aerodrome purposes" for the purposes of the principal deed under s 19 of the Reserves and Domains Act 1953. Section 19 empowered the Minister by "Gazette" notice to vest land in local authorities on trust "for the particular purpose for which the public reserve is reserved or set apart". Then s 5(2)(b) of the Reserves Act 1977 specifically provides that the Act is to be read subject to the "provisions of any … deed or other instrument creating the Trusts upon which the reserve is held".

[74] Then, by the 1980 and 1982 "Gazette" notices the airport land was re-classified under the Reserves Act 1977 as a "reserve for local purpose site for aerodrome" subject to the Act.

[75] The result, Mr Galbraith submitted, was that from at least the 1978 "Gazette" notice until corporatization in 1988, all the airport land was held as a local purpose reserve "aerodrome" or "site for aerodrome" and held in trust by the ARA for that purpose subject to the establishment deeds with those deeds having primacy over the provisions of the Reserves Act 1977 by dint of s 5(2)(b) of that Act, and s 40 which obliged bodies administering reserves to do so "to ensure the use … development, maintenance, protection and preservation … of the reserve for the purpose for which it is classified". Accordingly, the 1981 Act did not apply to any part of the airport land including the Craigie Trust land.

[76] A variant leading to the conclusion that all the airport land was outside the provisions of both the 1928 and 1981 Acts was that, under the Land Act 1948, it was that Act which thereafter governed the Crown's obligations. The land was held in trust for the joint venture for the purposes set out in the establishment deeds and subject to the requirements of the Land Act 1948 and, since 1977, of the Reserves Act.

[77] He supported that submission by reference to observations to that effect in a Land Information New Zealand discussion paper "*Review of the Public Works Act: Issues and Options*" (November 2000, p 41, para 5.4.2) and another LINZ publication, "*Statutory Right of Repurchase*" (1 July 2002, s 12, p 17), which said

"Crown land held under the Land Act 1948 is not land 'held for public work' [and] the statutory offer requirements of s 40 of the PW Act do not apply". He also submitted because all the airport land was disposed of by the Crown as required by the 1928 Act by vesting it in itself under the Land Act 1948, well before enactment of the 1981 Act, the Crown owed no obligation to offer the land back to previous owners once the 1981 Act came into force as enactment of s 40 of that statute did not create new rights for those whose former land was no longer held under the 1928 Act despite the contrary observations in *Bennett* (p 33, para [88]).

[78] Mr Galbraith submitted the plaintiffs were in error in suggesting the mechanism just described was a stratagem utilised at the time to avoid offering the land to neighbouring owners under s 35 of the 1928 Act and because that Act contained no equivalent to s 50 of the 1981 Act allowing transfers between public bodies without triggering the offer back requirement. The 1928 Act included a provision comparable with s 50: s 35 of the Finance (No.2) Act 1945 made such transfers subject to s 31 of the 1944 Act.

[79] In light of that, Mr Galbraith submitted it must be concluded that the method chosen to vest the airport land in the ARA was a deliberate one, not one to circumvent the 1928 Act.

[80] Mr Galbraith submitted that airport company's approach was recognised by the Authorities Act. He noted s 2 largely repeats the earlier definitions of "aerodrome" in its definition of "airport" but adds "any other area declared by the Minister to be part of the airport". He also relied on s 5 which effectively repeats s 31(1)(2) of the 1944 Act and subs (3) which from 1988 read:

> (3) Where in the opinion of the Minister of Finance and the Minister any work or scheme of development or reconstruction to be executed or carried out at or in connection with any airport in accordance with an agreement entered into under this section is of both national and local importance, that agreement shall be deemed to be an agreement entered into under section 224 of the Public Works Act 1981, and the provisions of that section, as far as they are applicable and with the necessary modifications, shall apply accordingly.

(The reference to s 224 of the 1981 Act was originally a reference to s 31 of the 1944 Act).

[81] In response to the Craigie Trust's reliance on s 3D of the Authorities Act to argue the 1981 Act applies, Mr Galbraith noted the section only came into force on 18 December 1986, some years after the claimed offer back obligation became operative.

[82] Mr Galbraith submitted s 3D did not affect the airport company or its land because it was not held under the 1981 Act and the section was not intended to create rights retrospectively. Even were that submission not accepted, he submitted it did not follow the Craigie Trust land was held as an "aerodrome" as defined in the 1981 Act. It would either have been held for the purposes of an international airport under the joint venture and the establishing deeds, though as a "public work", or s 3D would only apply to that part of the airport land which fell within the narrow definition of "aerodrome" for which the plaintiffs contend.

[83] Further, he submitted, that if the Craigie Trust's interpretation of s 3D were accepted, the consequence would be that any airport corporatized after that provision was enacted in 1986 would have to offer back all land, however acquired, that was not being used for the plaintiffs' narrow interpretation of an "aerodrome" or "airport", a nonsensical result. Section 3D could only apply to land which comes within the narrow definitions of "aerodrome" in the 1981 Act and "airport" in the Authorities Act, not the whole of the airport company's land, and s 7(4A) of the Airport Act simply preserved, from 1992, any Crown obligation which the airport company may have inherited.

[84] Mr Galbraith also relied on the whole of the Airport Act. He especially relied on its definition of "airport", one markedly different from other definitions of the term, or "aerodrome". After empowering the vesting of each "asset" as defined in the State-Owned Enterprises Act 1986 and liability in the company, s 7 (4) reads:

> (4) Any provisions of this Act vesting any assets or liabilities in the company shall have effect notwithstanding any enactment, rule of law or agreement and, in particular, but without limitation, the provisions of this Act vesting any land in the company shall have effect notwithstanding any provision contained in the Land Act 1948, the Reserves Act 1977, or the Public Works Act 1981 or in any other Act relating to land.

[85] Mr Galbraith noted that provisions similar to s 7(4A) were inserted into the Authorities Act (s 3A(6A)) and the Wellington Airport Act 1990 (s 8(4A)) and in a number of other statutes facilitating corporatization of State-Owned Enterprises. However, although the legal effect of those provisions had been considered by the Courts on a number of occasions, including cases under the 1981 Act, none have held the subsection created a new offer back right where none previously existed. Thus, he submitted, the effect of subs (4A) was simply to preserve, post-corporatization, any offer back rights which formerly existed, not to create new rights to that effect.

[86] That position was confirmed in *Jackson v Attorney-General* (HC WN CP 149/95 30 June 1995) where an injunction was sought to prevent the transfer of Paraparaumu airport to an airport company under the Authorities Act 1966. The transfer was challenged on the basis that such a transfer would defeat the plaintiffs' claimed offer back rights under s 40 of the 1981 Act. Sections 3A and 6A of the Authorities Act provide that nothing in s 40 should apply to transfers of land to airport companies but s 40 should continue to apply to the land "as if the airport company were the Crown and the land had not been transferred". The injunction application was dismissed, Neazor J holding (at 7):

> It is in my view perfectly clear that the plaintiffs' interest in being able to repurchase the land (if they are entitled to do so) is protected by that subsection once the land is transferred, as is proposed to be, to the second defendant. If the second defendant tries to dispose of it, or if in the hands of the second defendant events occur which would trigger the entitlement under s 40 if the land was still held by the Crown, the plaintiffs' rights would be unchanged. Whatever rights they have today they would have then; whatever right they have today in respect of the valuation on the basis of which the land would be offered for sale would be (in terms of legal entitlement) the same, as it would continue to enure to them under the same statutory terms. Whether in practical terms it would produce a different result is in my view a consequence of law not of any statutory power of decision.

[87] Mr Galbraith submitted the passage from *Deane* as to the effect of s 24(4) of the State-Owned Enterprises Act, was in fact authority supportive of the airport company since, if s 7(4A) of the Airport Act had the meaning for which the plaintiffs contend, it would apply to all the land vested in the airport company under the Act, even land bought as a result of ordinary commercial negotiations.

[88] In summary, he said the Craigie Trust had no offer back rights prior to s 7(4A) being enacted because the land had been transferred out of the Public Works Act regime in 1977.

[89] Finally, on this aspect of the case, Mr Galbraith submitted the land could not be held concurrently both for a "local purpose reserve (site for aerodrome)" and a public work when the 1981 Act came into force, relying on *Man O' War Station* (at 464).

[90] In that case an historic reserve at the eastern end of Waiheke Island had been taken in about 1942 under the 1928 Act for defence purposes and in 1965 was declared by a Minister as being taken for such purposes. In 1968 it was declared to be Crown land subject to the Land Act 1948 and, in 1983, was set aside as an historic reserve together with appurtenant easements. Negotiations between the Crown and the owner to create public walkways in substitution for an access easement led to claims the easement had become a "reserve" under the Reserves Act 1977 and revocation needed to accord with that Act, including rights of objection. The owner submitted the easement was not "land" and accordingly the Reserves Act did not apply and since the land had originally been taken under the 1928 Act for defence purposes, it could not be a "reserve" under the Reserves Act 1977.

[91] Holding the setting aside of an easement appurtenant to a reserve to be a reservation of the land as a reserve, Anderson J held (at 464):

> It was submitted that the "defence purposes" for which the land was taken under the Public Works Act 1928, as declared in the *Gazette* notice of 4 November 1965, is a purpose which is not specified in para (i) which specifies purposes of a reserve, recreation ground, pleasure ground, agricultural show ground, or tourist and health resort. If the quality or nature of the Stony Batter reserve had not changed since 4 November 1965 this submission would have prevailed. However, as the earlier part of this judgment records, the Stony Batter land became Crown land on 4 March 1968 and subsequently, by virtue of the December 1983 ministerial decision, it became land set aside as a historic reserve. It surely could not have been the legislative intention to preclude in perpetuity from the Reserves Act land which at any time in the past had been acquired under a Public Works Act notwithstanding that such land may later have been translated into Crown land with a different purpose or even private land, and had subsequently been purchased and set apart with the intention of creating a reserve. Reason and the provisions of s 5(j) of the Acts Interpretation Act 1924 compel me to find that the participial connotation in s 2(1) of the Reserves Act is current

> status, not superseded historical dealings. I therefore reject the submission that the Stony Batter historic reserve is excluded from the definition of "reserve" in the Reserves Act 1977 by virtue of s 2(1)(j).
>
> I also cannot accept the submission that the land is excluded by virtue of s 2(1)(k). That paragraph excludes any land to which s 167(4) of the Land Act 1948 applies. Section 167(4) of the Land Act 1948 refers to Crown land set apart as a reserve under s 167 "for any public purpose which is a government work within the meaning of the Public Works Act 1981". The Stony Batter historic reserve was plainly not set apart for a public purpose which is a government work within the meaning of the Public Works Act. It is land which in 1983 was set apart as a historic reserve, this being a purpose clearly within the scope of s 167(1) of the Land Act 1948 which authorises the Minister to set apart land for any purpose which in the Minister's opinion is desirable in the public interest. In terms of s 2(2) of the Reserves Act 1977 the particular setting apart was a setting apart for the use, benefit and enjoyment of the people of New Zealand and the inhabitants of the district and locality and was therefore a setting apart for a public purpose, but it was plainly not a setting apart for a "Government work", which means "a work constructed or intended to be constructed by or under the control of" the Crown. Even if the original acquisition in 1965 or earlier, pursuant to the Public Works Act 1928, had been for an intended "Government work" the later ministerial decisions which have been recorded in this decision were concerned with the creation of a historic reserve and not with the performance of a government work. Accordingly the Spencer defendants' first main argument fails.

[92] A similar conclusion was reached on the status of Narrow Neck in *The Tamaki Reserve Protection Trust Inc v Minister of Conservation* (HC AKL CP 600/97 M 1915/97 12 March 1997, p 18-19) where, citing the above passage from *Man O'War Station*, Anderson J held:

> As mentioned earlier in this judgment, a Departmental memorandum of 2 September 1886 suggested that only about five acres of the 28 were to be retained and the balance was to be sold. Counsel for the North Shore City Council submits that the mixed purposes means that the land was not acquired for public works. I think, however, that the whole was *required* even if not *acquired* for public works. Requirement is the criterion under s 22 of the Public Works Act 1882. I accept for the purposes of this proceeding that the whole of the land was acquired under a Public Works Act as the defendants submit. This does not mean, however, that the land is excluded from the definition of "public reserve" in the Reserves and Domains Acts of 1953 and 1928.

[93] On the basis of those decisions, Mr Galbraith submitted that if the ARA were found not to have been using its land for aerodrome purposes when the 1981 Act came into force, remedies for the breach of trust its actions would constitute would be those in the Reserves Act 1977, not those under the 1981 Act.

(4) Discussion and Decision

[94] The first aspect of resolving the question with which this part of the judgment is concerned is deciding whether the Craigie Trust land was, on 1 February 1982, "held under this or any other Act or in any other manner for any public work" or whether the 1981 Act applies to the airport company and its land at all, having regard to the history both before and since 1 February 1982 so carefully detailed by Mr Galbraith.

[95] Section 40 makes the question whether the Craigie Trust land was "held under this or any other Act or in any other manner for any public work" the pivotal question. The reference to "any other Act" makes clear that, irrespective of the Act under which land is held, the focus is on whether it is held for a public work.

[96] Initially "public work" was defined as:

> "Public work" and "work" mean every work which the Crown or any local authority is authorised to construct, undertake, establish, operate, or maintain, and every use of land which the Crown or any local authority is authorised to establish and continue, by or under this or any other Act; and includes any thing required directly or indirectly for any such work or use:

but, from 31 March 1987 [4], "public work" was re-defined to mean :

> " 'Public work' and 'work' mean –
>
> (a) Every Government work or local work that the Crown or any local authority is authorised to construct, undertake, establish, manage, operate, or maintain, and every use of land for any Government work or local work which the Crown or any local authority is authorised to construct, undertake, establish, manage, operate, or maintain by or under this or any other Act; and include anything required directly or indirectly for any such Government work or local work or use:

[97] There can be no doubt that the airport land, including the Craigie Trust land, was a "public work" both at 1 February 1982 and since 31 March 1987 being a "work" which the Crown, the ARA and the various local authorities were authorised

[4] See footnote [3].

to "construct, undertake, establish, manage, operate or maintain". That is supported by the fact that the definition of "aerodrome" in the 1981 Act clearly fits within the definition of "public work" in the same statute.

[98] The 1981 Act was passed, at least in part, to curb "land banking" by the Crown and local authorities under the 1928 Act. In the 1981 Parliamentary debates on the Public Works Bill (e.g. 440 NZPD 3165, 3180) the measure was also said to enhance the position of former property owners. Both the then Minister of Works and Development and the former Minister summarized what is now s 40 without qualification (440 NZPD 3165, 3167). The Minister also spoke (440 NZPD 3181) of:

> "… the special protection that is being given to a person whose property is taken compulsorily and who then finds that the land is not required for the purpose for which it was taken. Under the Bill such landowners will have the chance to get their land back, which is something that has not happened before …"

[99] As noted in *Bennett* (paras [37] and [43]) Parliament appears to have felt there had perhaps been a too ready resort to the expropriatory powers vested in the Crown and local authorities by s 35 of the 1928 Act, coupled with the inherent unfairness that, once land expropriated for a public work purpose was no longer required for such purpose, owners and their descendants had no means of regaining it – but might see their neighbours given that opportunity.

[100] It is a singular facet of the phrasing of s 40 that it contains no suggestion it did not apply to all land held for public works immediately the 1981 Act came into force. It contains no exceptions and no qualifications. It exempts from its reach no land then held for a public work. It specifically includes, rather than excludes as AIAL would wish, land held under "any other Act … for any public work". Given Parliament's intent to remedy what it saw as deficiencies and unfairness in the way the 1928 Act had operated, were significant items of infrastructure – such as Auckland International airport – then held for public works to be entirely exempt from its ambit, it is highly improbable no mention would have been made of that very significant exception during the Bill's passage through Parliament. As the Minister's speech made plain, former landowners were to "have the chance to get

their land back … something that has not happened before". All of that is particularly notable when it must be the case that numerous parcels of land throughout the country taken for public works had been divested by the Crown through the Land Act/Reserves Act stratagem or otherwise. If the defendant's contention is correct, they were thereby to be wholly beyond the 1981 Act's reach, but Parliament and the 1981 Act said nothing to that effect.

[101] Were the exception for which AIAL contends to exist, it also seems surprising that, despite s 40 being a much-litigated provision, the suggested exception does not ever seem to have been the subject of litigation over the past 26 years and is not the subject of comment in the texts or commentaries on the subject (eg McVeagh's *Local Government Law in New Zealand* Vol. II para PW40.04 p 12-24(b), para PW40.08 p 12-26(a)-(b); Davies *"The Obligation to Offer Back Land Held For Public Works"* (1991) 6 BCB 1, 3).

[102] It is not to be overlooked that the Craigie Trust land was initially taken under the 1928 Act, later declared to be Crown land under the Land Act 1948, and then set aside under that Act and the Reserves Act 1977 when it was vested in the ARA in trust subject to the establishment deeds.

[103] But as the citation from s 167 of the Land Act 1948 says, upon being set aside the land was "deemed to be dedicated for the purpose for which it was reserved" and, under s 167(4) if the setting aside as a reserve was for "any public purpose which is a Government work within the meaning of the Public Works Act 1981" the land was "deemed to be subject to that Act". Auckland International airport is a "Government work" under the 1981 Act (confirmed by s 3D of the Authorities Act). Accordingly, on 1 February 1982 it must follow that all AIAL's land, including the Craigie Trust land, was deemed to be subject to the 1981 Act by that Act substituting reference to itself in s 167(4) of the Land Act 1948. Therefore, it must also follow that the 1981 Act applies to the airport land, with the condition only that, at least up until the vesting of the land in the Airport Company on 29 March 1988, the land must have been held conformably with the establishment deeds and, of course, the Land Act 1948 and the Reserves Act 1977.

[104] A further point in favour of the present interpretation is that the applicability of s 40 is expressly extended to land held under "any other Act or in any other manner for any public work". That clearly supports the view the airport company's land, including the Craigie Trust land, being land held subject to the terms of the establishment deeds, the Land Act 1948 and the Reserves Act 1977, was land held under "any other Act or in any other manner" for a public work,

[105] The next question must accordingly be whether that conclusion as to the applicability of the 1981 Act is disturbed by later events.

[106] During the move to privatisation and corporatization of significant infrastructural assets in this country in the mid-1980s, care was taken by Parliament to ensure existing rights were preserved. The State-Owned Enterprises Act 1986 is a significant example.

[107] More germane to the present case are the amendments to the Authorities Act and, more particularly still, the provisions of the Airport Act.

[108] The former was amended to enact s 3D earlier cited. That specifically provides that airports operated by airport authorities which were not local authorities should be deemed Government works for the purposes of the 1981 Act. Since AIAL was not a local authority, it would have been outside the definition of "airport authority" in s 2 of the Authorities Act were it not for the fact that s 4(4) of the Airport Act expressly deems AIAL to be an "airport company within the meaning of the Airport Authorities Act" and s 2 of the Authorities Act defined "airport company" as a company "for the time being authorised ... to exercise the functions of a local authority". It must accordingly follow that s 3D applies to AIAL and Auckland International is "deemed to be a government work" for the purposes of the 1981 Act and a "public work" within s 40.

[109] Turning to the other provisions of the Airport Act, as mentioned that Act dissolved the establishment deeds thus freeing the airport and its land from any restrictions they contained. Similarly, the terms of the Vesting Order made clear the land was vested together with certain rights - but there was no saving provision for

any of the powers in the Land Act 1948 or the Reserves Act 1977 or its antecedents. On vesting, the Auckland Airport land must accordingly be regarded as having been also freed from any restrictions arising out of those statutes.

[110] Significantly important in the present context, is s 7(4A) of the Airport Act. Mr Galbraith argued the phrase "as if the company were the Crown" was specifically designed to ensure the defendant was not to be regarded as the Crown but, with respect, that argument is semantically indefensible. The combined effect of s 7(4) and (4A) is that the vesting of the airport land in AIAL was not of itself to trigger the offer back provisions of s 40 or any restrictions in the Land Act 1948 and the Reserves Act 1977 but thereafter s 40 would apply "as if the company were the Crown". That ensured AIAL inherited the Crown's obligations under s 40. That interpretation is consistent with s 7(4) which provides that vesting under the Airport Act is to have effect notwithstanding the 1981 Act, the Land Act 1948 and the Reserves Act 1977.

[111] The conclusion must be that, on the coming into force of the 1981 Act on 1 February 1982, Auckland International's land, including the Craigie Trust land, became subject to the 1981 Act as a matter of construction of that Act and s 167 of the Land Act 1948. The obligations of s 40 of the 1981 Act were transferred to AIAL as a result of the amendments earlier cited to the Authorities Act and the passing of the Airport Act, coupled with the terms of the Vesting Order. Auckland International's land, including the Craigie Trust land, accordingly remains subject to s 40 of the 1981 Act and AIAL is bound to honour its provisions unless exempted therefrom by what follows.

[112] That conclusion does not overlook the submission that *Man O' War Station* decided, in Mr Galbraith's submission, that land held under the Reserves Act could not also be held under the 1981 Act.

[113] *Man O'War* is distinguishable. There, although the land had been taken under the 1928 Act and later declared Crown land under the Land Act 1948, the question in issue in the case was, as posited by the Judge (at 462), whether the surrender of an access easement would revoke the reservation of the land under the

Reserves Act 1977. The decision is therefore inapplicable to the present question. Notably, the same Judge took the view in *Tamaki Trust* that land required for a public work was not excluded from also being a reserve under the Reserves and Domains Act.

[114] The next two questions can conveniently be considered together.

Section 40 of the 1981 Act applying to the airport company, does it still hold the Craigie Trust land for "any public work" and is the land "no longer required for that or any other public work" and what is the appropriate definition of the status of the land, "aerodrome" or something else?

(1) Aviation Experts

[115] The major evidence on this aspect of the claim came from the parties' opposing aviation experts.

[116] The principal expert for the Craigie Trust was Mr Garfinkle, attorney, former part-owner of an airline, and an aviation consultant for about 20 years. His company was deeply involved in the successful efforts of Airport Amsterdam Schiphol to lease a terminal at JFK International in New York and acquire Brisbane International. He has been involved in other airport privatizations, including in China, and over the years has acted for numerous airlines and airports.

[117] Mr Garfinkle posed the principal question in this part of the case as whether the Craigie Trust land has been and is being used as an "aerodrome".

[118] He began his consideration by referring to New Zealand and overseas statutory definitions, including the Chicago Convention.

[119] Mr Garfinkle then set those definitions against the context of the origins of the aviation industry and the evolution of facilities from "aerodromes" to "airports".

[120] His historical conspectus began from the end of World War II when "aerodromes" were places where only basic facilities were provided for aircraft landing and departing. By the 1960s air travel had expanded significantly and

facilities at aerodromes provided basic traveller convenience in terminals and the carriage of mail. By the mid-1970s business and leisure was more prevalent and terminals became more spacious and provided additional facilities for increasing numbers of travellers. Governments realized profits could be generated from such facilities to off-set the cost of aviation services. Deregulation of airlines began in 1978 in the United States and spread to other countries, including Australasia, with resulting dramatic increases in facilities provided to accommodate significant passenger and freight growth. Food outlets and retail shopping appeared in terminals. Further facilities were provided to capitalize on airport "dwell time" of passengers and "meeters and greeters". Airline competition forced airports to reduce aeronautical charges which, in its turn, led to increased pressure on operators to maximize other revenue. One stream was to permit activities associated with aviation such as freight forwarders to relocate to airport land. All of that, Mr Garfinkle said, by the mid 1980s led to the advent of the modern airport: "places where people shop and occasionally planes land", the reverse of what previously obtained.

[121] In many countries, those developments also led to corporatization of airports free of Government ownership mandated to engage in commerce and be profitable. Some were given significant land for that purpose. That led airports in Europe, Asia and China to call themselves "airport cities". Dial's description in its 2006 annual report of Auckland International as a "city within a city" echoed that concept.

[122] World-wide, however, in Mr. Garfinkle's view, evolution in airports has not changed the essential character of an aerodrome and its functions. Commercial activities including land use developments remain separate from core functions of an aerodrome with, habitually, separate management, a view he supported by reference to the management structure of several airports, including Christchurch. AIAL, he said, reflected the same managerial arrangements with separate managers for retail, property and aeronautical services: the airport company's 2007 report describes "aeronautical and non-aeronautical activities" as being the "two broad types of company operations in terms of revenue and expenses". The view was reflected in other airport company documents he particularized. He described the "almost universal litmus test" of whether an activity is an "aerodrome" activity being

whether it is leased or out-sourced to third parties. Airport companies usually operate "aerodrome" activities. Other entities provide everything else.

[123] Throughout, Mr Garfinkle adhered to his view that essential facilities for an "aerodrome" remain as they historically were, despite industry growth and commercial activities, namely what is required to service and provide for flight operations. Those facilities include runways, taxi-ways, aprons, hangars, navigation facilities, control towers, passenger terminals and areas for freight, usually on tarmac. However convenient it may be, not even freight forwarders are essential facilities on an "aerodrome". He made the point that rental car companies, car dealerships, food facilities outside terminals, postal centres, duty free warehousing, airport offices, commercial offices and freight forwarders – all at Auckland International and some on the Craigie Trust land - are very often found, internationally, "off airport". Acknowledging it was more convenient and efficient for facilities such as the International Mail Centre, an expedited courier service or a freight forwarder of perishable goods to have facilities "on airport", he nonetheless knew of no other airport which included a car dealership and repair facility "on airport".

[124] Mr Garfinkle's view was that even in 1977, three years after the Trust land was taken, given its then passenger throughput Auckland International's discussion of a second runway was no more than a dream 30 years or more into the future. In 1983, shortly after the 1981 Act came into force, Auckland's annual passenger throughput was only 2.6 m, well below passenger numbers produced overseas by deregulation so, again, talk of a second runway was "more aspirational than actual" and still well beyond the 20 year horizon he said was common in airport planning. The same was true in 1987, the year before corporatization and the vesting of the land in the airport company. Passenger traffic then totalled 4.4 m. Even as late as 1997 the airport company's planners were projecting the second runway was unneeded within the next 10 to 15 years. The forecast proved accurate: the second – short – runway now under construction will not come into operation until 2010-2011.

[125] All of that led Mr Garfinkle to the view that there was no "aerodrome purpose" for the Craigie Trust land throughout the period under review or in the foreseeable future. The only times Auckland International has posited a use of the Craigie Trust land for "aerodrome purposes" under his definition was for six years from 1981 when part was proposed for use as staff carparking and a brief period in 1985/1986 when the land was proposed for use for a new domestic terminal. Both were short-term. Neither eventuated. Virtually every airport company document since 1988 spoke only of the Craigie Trust land being used or projected to be used commercially. The airport company's proposed use of the Craigie Trust land in its 2005 Master Plan was almost wholly commercial. No actual or projected usage came within his definition of "aerodrome".

[126] He suggested that, even had the Craigie Trust land been returned to the plaintiffs earlier, that did not mean Auckland International's development would have been hampered. A private entity may have developed the land more intensively than has occurred to date. Similar facilities as now exist may have been provided. Return of the land to the Craigie Trust would not have affected the airport company's aviation operations as the land was "never part of the aerodrome and was not and is not needed by AIAL for aerodrome purposes", an assertion he supported by reference to a number of airports, both in and out of New Zealand, which function adequately as airports but do not provide facilities such as those on or proposed for the Craigie Trust land. He particularly pointed to a number in China, in the United States and Narita in Tokyo.

[127] He was especially critical of AIAL's defence alleging this claim should fail because the Craigie Trust land was needed for future aerodrome purposes, pointing to the lengthy history of lack of development and the current planning for use of the Craigie Trust land for such purposes. He said "were the assertion to be accepted, no land owned by the airport company would ever be returned to its original owners because some day, well into the future, it might be required for such purposes irrespective of what its planning documents had said over the years". Airport "land banking" was only legitimate when an airport knows with a high degree of certainty it would need to build further "aerodrome" facilities - under his definition - within a five year time span. His experience was that airports do not acquire land for an

aerodrome activity that might happen decades into the future. He supported that "take only what you need when you need it" approach by reference to the third runway at Frankfurt International.

[128] Mr Garfinkle said airport Master Plans are "not real yet" because they are all dependent on external factors over which the airport does not have direct control and are affected by factors which they know might not happen.

[129] Mr Garfinkle said the distinction between what was part of the "aerodrome" and what was not might be what was on each side of security facilities, though he acknowledged that as somewhat simplistic giving it would transect Auckland's terminals, and some facilities he regarded as part of an "aerodrome" - radar installations, fuel facilities and piping, control towers, and the like - were outside the security fence.

[130] Mr Garfinkle accepted that the term "aerodrome" was seldom used in documents relating to international airports around the world because:

> It is not a term which laymen would use … We would call that patch of land where planes land as an airport. But in legal parlance, it is like a term of art. It means something. It is not just interchangeable with 'airport'. If Los Angeles was calling its airport "airport" in 1941, the Chicago Convention in 1944 said "aerodrome". We have this document [Joint Venture Airports: Principles & Procedures] just referred me to which uses the words aerodrome and airport, and it says for the aerodrome that it was going to have the definition of aerodrome as in … the CAA Act of 1948, … And when 1981 came around we certainly weren't calling airports probably in any part of the world, commercial airports, aerodrome, but they [Parliament in s 2 of the 1981 Act] chose to use the word "aerodrome".

[131] The airport company's aviation expert was a Mr Smith, an engineer who has specialized in airport planning and development for more than 35 years, working for the British Airports Authority and ICAO on airports in Britain, Greece, the Middle East and, later, on a large number of others around the world.

[132] Mr Smith said harmonizing the broad range of interests in an airport and endeavouring to reconcile the wide environmental impact of airports requires extensive long-range planning from national strategies through regional plans down to planning by individual airports in association with regulatory authorities. Major

infrastructure development of facilities takes 5-10 years. Strategic planning must accordingly look much further ahead to enable such developments to occur whilst accommodating changes such as passenger and freight growth and aircraft types.

[133] Mr Smith noted that in the four decades since Auckland International was founded, aircraft technology and usage has changed unrecognizably with increases in international trade and tourism driving rapid expansion. Deregulation, privatization and corporatization have all effected huge changes in airport services with the consequence that in many cases future demand has been under-estimated. Thus, he said, dynamic changes inherent in aviation mean airport plans can neither be rigidly predetermined nor fixed for the long term.

[134] He drew attention to IATA's "*Airport Development Manual*" which defines airport land use plans as desirably including:

- Airside infrastructure, including runways …
- Landside infrastructure including … terminals … hotels … primary and secondary access roads … vehicle fuelling stations
- Airport support infrastructure including …
- Areas reserved for aviation related revenue producing development such as industrial areas, duty free zones, etc.
- Non-aviation related property and land with the current status and uses specified

[135] Mr Smith noted that land use plans prepared for the airport company largely reflected that categorisation into airside, airside frontage and landside categories, the last including roading, aviation support not requiring direct airside access, utilities and commercial support and service functions.

[136] While acknowledging the term "aerodrome" was used for any airfield and facilities in the early days of aviation, Mr Smith said the common terminology since the 1960s has been "airport". "Airport" now applies to sites with sophisticated facilities. "Aerodrome" is nowadays used for small airfields, usually for private aviation. International bodies have, to an extent, altered their terminology similarly. ICAO used "aerodrome" in the 1940s but "airport" from the 1960s in its manuals.

The 2006 "*Airport Economics Manual*" includes guidance on the role of commercial development on and around airports. That led Mr Smith to conclude:

> In my experience, the term "aerodrome" is not in normal usage for modern sophisticated and integrated airports (such as Auckland Airport). Nor is it normal usage to speak of an aerodrome within an airport. What may be distinguished for specific purposes are airside operations as against landside. "Airport" is a term which embraces the entire site and facilities of an integrated operation. Apart from continuing administrative documents, "aerodrome" is not a term which is now applied to or within an airport.
>
> The reality is that yesterday's aerodrome has become today's airport and a more sophisticated and diverse business providing a wide range of supporting facilities and services.

[137] New Zealand has changed similarly between the 1961 "Joint Venture Airports" manual through the establishment deeds to the Authorities and Airport Acts, all of which he said "urge and authorize a commercial approach to airport development". The problems of New Zealand aviation and Auckland International in particular were echoed in a number of countries and airports around the world. In the result, he said:

> The Government gave Auckland Airport a commercial mandate to ensure that it was efficiently managed to provide the capacity and levels of service expected at an international airport, without subsidy.
>
> (a) In the short-term this involves effective use of existing assets to deliver high service standards to airport users while realising a year on year return on capital employed.
>
> (b) In the medium-term this involves new capital investment in infrastructure and facilities to refurbish old and build new capacity to maintain and enhance levels of service.
>
> (c) In the long-term it means planning and safeguarding the ability to meet future requirements as they arise in an effective and efficient manner.

[138] Supporting his view that commercialisation is an integral part of a modern international airport, Mr Smith pointed to Anne Graham "*Managing Airports, an International Perspective*" (p 140-5) where the author observes:

> A key development in the evolution of the airport industry has been the increase in the dependence on non-aeronautical or commercial revenues.
>
> There have been a number of factors which have contributed to the growth in dependence on non-aeronautical revenues. First, moves towards

> commercialization and privitization within the industry have given airports greater freedom to develop their commercial policies and diversity into new areas. …
>
> Moreover, the airlines have been exerting increasing pressure on the airport industry to control the level of aeronautical fees which are being levied. …
>
> Most of the airport commercial facilities historically were provided for passengers. Many airports, however, have now recognised the commercial opportunities which exist with other consumer groups which use the airport and have introduced facilities wholly or partially for their needs. The airports have thus exploited their commercial potential of being business or commercial centres which generate, employ and attract a large number of visits rather than just providing facilities for passengers who choose to use the airport. For example, staff employed by the airport operators and by the airlines, handling agents, concessionaires, and government agencies may wish to use airport commercial facilities, particularly as they may not be able to combine a visit to their local shops and their working life at the airport. Workers from nearby office complexes, or from airport industrial estates, may find the airport facilities useful. Popular services include supermarkets, banking services, hairdressers, chemists, and dry-cleaners. Some of these services may be used by arriving passengers – another potential market sub-segment which is generally considered to have significant spending potential but has only more recently been recognized by most airports.
>
> Visitors may also be attracted to airports if leisure facilities are provided. …
>
> For the business community, conferences and meeting facilities can be provided. Most major airports offer these. … Many airports have also expanded beyond the boundaries of the traditional airport business by using neighbouring land for hotels, office complexes, light industries, freight warehousing, distribution centres, and business parks.

[139] Mr Smith's opinion was that such trends will continue. ICAO's "*Airport Economics Manual*" says (para 6.14) that:

> The "Airport City" concept acknowledges the notion that large airports take the characteristics of a real city. They develop non-aeronautical services far beyond the core business of providing a location for passengers. Airports have not only become catalysts for employment and economic growth, but they have attracted a full range of businesses to the airport vicinity … Modern airports are becoming meeting places and indeed a destination in their own right, with corporations scheduling meetings at or near airports to maximize the valuable time of their managers. Many hotel chains report that airport hotels are among their most profitable properties, … a situation which may entail different treatment in terms of revenue for the airport operator.

Furthermore, the leading academic on the topic, Professor Kasarda of the University of North Carolina's Kenan-Flagler Business School, the person who coined the term "aerotropolis" for the modern airport, opines:

> Airports will shape business locations and urban development in this century as much as highways did in the 20th, railroads in the 19th and seaports in the 18th centuries.
>
> "Aerotropolis" attract industries related to time-sensitive manufacturing, e-commerce fulfillment, telecommunications and logistics; hotels, retail outlets, entertainment complexes and exhibition centers; and offices for business people who travel frequently by air or engage in global commerce. Clusters of business parks, logistics parks, industrial parks, distribution centers, information technology complexes and wholesale merchandise marts locate around the airport and along the transportation corridors radiating from them.

[140] Mr Smith said that, as an airport planner:

> All of the on-airport land use categories other than 'commercial support and services' are considered direct aviation uses that are essential to the function of an airport.

and that, at Auckland International:

> Many of the existing and planned commercial land uses are airport related and well sited for the convenience of the airport community … including food outlets, supermarkets and banks, which are viable due to the distance to alternative services. … As landside aviation support functions such as the airport and airline offices and training facilities lead into this zone, the demand for these employee support services will increase. Airport hotels, conference facilities and recreational services reflect the nature of airports as temporary destinations. These facilities have become a common practice at international airports for several decades.

[141] He concluded:

> Airport land use is determined by a profound hierarchy of considerations. The site constraints and predominant wind direction largely determine the runway alignment. The space required for airfield areas are governed by international standards for the category of aircraft use. Direct aviation frontage categories of passenger and cargo terminals, and airside aviation support functions take priority over landside aviation support functions. The configuration of road access, circulation and utilities depend on external interfaces and internal links between the major functions.
>
> The "commercial support and services" functions are located in the remaining land, usually along road corridors.
>
> The airport planners try to balance all of these categories to work together to achieve an operationally efficient and financially viable airport complex.

[142] Mr Smith detailed Auckland International's planning history with reference to increased passenger and freight throughput with particular reference to alterations

in land use through the various Master and Development Plans. He particularly noted developments in road access and internal roading from the 1974 exploratory plan onwards. By the 1985 Master Plan, the 20 year forecast proposed a second runway by 1995 with 12 million passengers predicted by 2004 (reached in 2006). The second runway and terminal requirements implied further changes to access which would cross the Craigie Trust land. That trend continued through the 1990 Land Use Development Plan. The 2005 Master Plan reflected the Manukau District Council's reduction in the second runway length from 3000m to 2150m. He was firmly of the view that sufficient land should be retained to enable the second runway to be of sufficient length for long haul use. A photo from the 2005 Master Plan showed airside and direct landside aviation uses over about 72% of total land area with commercial support and service facilities occupying about 12%.

[143] With specific reference to the Trust land, in the short to medium term Mr Smith said it was closest to airport access and thus the best available location for support and service functions. The 1959 Master Plan showed expansion into the southern portion including airfield infrastructure and aviation uses, something constant from the Fisher & Associates' report. The 1968 Master Plan showed expansion of cargo and maintenance zones across the claimed land. The 1975 Exploratory Development Plan included a mix of aviation uses and roading along the southern edge of the claimed land with airport access running through it and part encroached on by a second or expanded terminal. The 1985 Master Plan showed domestic terminals and cargo extending eastwards into the claimed land, again with access through it. The 1990 Master Plan also showed domestic terminal development across the northern part of the claimed land with the southern portion dominated by cargo and access roads. Long term, as shown in the 2005 Master Plan, the Craigie Trust and other land east of George Bolt Memorial Drive will remain as commercial support and services ancillary to the more directly airside functions but with a multi-lane highway and possible rail access also installed. Land uses primarily commercial in nature will gradually be displaced by expanded facilities requiring space near terminals or terminals themselves. All of that, he said, showed the claimed land was "critical to the long-term safeguarding of primary direct aviation functions and airport access".

[144] Mr Smith summarized his perspective by saying Auckland International will continue as the principal international airport of New Zealand serving, in 40-50 years time, perhaps thrice present levels of passengers and freight. Both national and local Governments had combined to ensure the airport's land and its uses safeguarded Auckland International's position and served long-term economic and social interests. Long-term, the service requirements of direct aviation functions were likely to use all the land contiguous to the airside frontage with the rest occupied by infrastructure and support and service facilities. Airport land use planning requires maximum flexibility to respond to unknown future requirements with aviation functions progressively displacing lower priority functions on the airport land, including the Craigie Trust land. Control of the airport's future will most effectively be achieved through continued ownership of all land presently held. Return of the Craigie Trust land to the plaintiffs would cause conflicts between the airport company and other developers and ultimately constrain airport activity.

(2) Other Evidence

[145] Additional evidence, largely from domestic sources, was called on each side of that divide between experts. Some lapped over into succeeding questions dealt with in this judgment.

[146] A high level view of the development of the airport and its land, both past and future, was given by Mr Huse, from mid-2003 until recently the airport's Chief Executive Officer. He said that, as with many other major international airports, Auckland International undertakes quinquennial assessments of its economic impact. The most recent, prepared in May 2007, described Auckland International as a critical part of New Zealand's economic infrastructure generating $19b of value to the New Zealand economy and impacting directly or indirectly on 283,000 jobs nationally. Its value to the Auckland economy is $10.7b annually and about 154,000 jobs. Over 70% of tourists – the country's largest export earner – arrive or depart through Auckland International. It is the second equal most important freight port. Domestically, 76% of all aircraft movements are through Auckland International. Nearly 12.4m passenger movements occurred at Auckland International in 2007. They are projected to rise to 24m by 2025. Airport employment will rise from

14,000 in 2005 to 33,000 by 2015.Mr Huse's view was that Auckland International is:

> A vital piece of infrastructure. It has a significant responsibility to ensure New Zealand is able to effectively communicate in trade both internally within the country and externally with the outside world.

a role which has increased since privatisation in 1998. Mr Huse's view was that:

> The airport is a powerful example of how the Public Works Act can, through far-sighted application over many years, reserve for the public interest a public facility or work that serves the entire nation.

[147] Mr Huse and other witnesses placed significant emphasis on the airport company's development strategies outlined in its 2007 annual report and in its "Auckland Airport Master Plan: 2025 and beyond" issued in March 2006. The latter, he said, is the airport company's base planning instrument setting out, at a high level, its projected development over a 20 year plus horizon. Mr Huse made the point that, unlike overseas airports, the airport company has a major advantage through owning all the land required for development over that horizon.

[148] Since the 2005 Master Plan the airport company has undertaken a large capital expenditure programme, including commencement of the northern runway in October 2007 for local operators. Proposed development includes an aviation campus in the precinct north of Tom Pearce Drive and south of John Goulter Drive on the Trust land which would include offices for airport company staff and Air New Zealand and a large learning centre for the latter.

[149] He said the airport would be "heavily compromised" if the claimed land returned to the plaintiffs. The airport company could not control land usage through planning and the Trust land, situated as it is at the centre of the airport, would, if returned to private ownership, confine the airport's development in a way similar to that experienced by other overseas international airports.

[150] Much was made during the hearing of the diagrams for future development shown in development plans and other planning documents, especially those in the 2005 Master Plan showing commercial development. The Trust land was central to

all those depictions. Mr Huse described the Trust land as a "heartland airport" site central to the airport's development and currently containing several aviation-related facilities. He said it is "an integral part of the airport's long term plan and provides crucial flexibility for the airport need to meet projected growth over the longer term". In the Master Plan, Mr Huse noted proposed terminal expansions by 2025 will, of necessity, extend eastwards onto the Trust land ultimately displacing commercial and freight forwarding development on that land. Present commercial development on the Trust land has been principally directed towards providing services supporting the airport's core aeronautical functions but has also included substantial filling, earthworks and infrastructure in and on the Trust land. Further, as recently as 20 February 2008, the airport company was proposing creation of a passenger service vehicle holding area which could be on part of the Trust land about equidistant from the domestic and international terminals.

[151] In cross-examination, Mr Huse disagreed with the proposition that, while the Trust land has been in airport ownership for well over 30 years, there has been little commercial development on it throughout that time. He pointed to the trunk and secondary roads and construction of the various facilities shown in the photographs. Whilst perhaps only 15% of the Trust's land had been built on over that period, the use to which the land had been put, either underground or by above-ground facilities was, in his view, critical to the airport.

[152] The Craigie Trust notified its claim to the airport company in August 2006 and began this proceeding two months later. Mr Huse denied the company had advice subsequent to that time that it was advisable that some specific project such as the passenger service vehicle holding area should be put in place for the claimed land. This was despite references to a four-five star hotel and the holding area appearing in board papers of November 2007 and February 2008 respectively with reference in the latter that "development of the land for this 'aerodrome related' function is believed to be appropriate" being immediately followed by reference to this claim. He took the same stance in relation to a 2008 airport company website printout showing development of a business park, including offices, food and beverage outlets and call centres on the claimed land. He denied the Trust land

continued to be held in "just in case". It was needed for future development. Current plans for the land were conceptual only.

[153] Historical and specific evidence was given by Messrs McDonald and Gollin.

[154] Mr McDonald was an engineer with the airport for the 8 years to 1978, its manager 1979-1984 and director of transport 1985-1988.

[155] As manager, Mr McDonald reported to the Airport Committee, the meetings of which were attended by Ministry of Transport officials because of the Government's obligation to contribute to financing development. Persuading Government to contribute was often, Mr McDonald said, a tenuous process.

[156] He said those involved with planning Auckland International were always concerned to ensure it was able to develop as New Zealand's principal gateway to and from the world. Government's 60% contribution to capital works showed it shared the same vision. Initially the airport was an island of development in a rural environment but planning with a 20 year horizon ensured airport development was not constrained, unlike other international airports around the world.

[157] He and a number of other witnesses spoke of problems with designation and zoning restrictions at other airports. Designation and zoning restrictions on airport land do not provide sufficient control to ensure overall integration of private land into long-term plans. Provision of appropriate infrastructure such as water and sewage reticulation can be compromised by private ownership. Private owners have their own commercial interests and thus lack the resources and motivation necessary for such a major enterprise as Auckland International.

[158] Mr McDonald made the point that, even as far back as the establishment deeds, the joint venture permitted the airport to develop "such other amenities of any kind whatsoever as do not interfere with the efficient administration" of the airport whilst the 1961 joint venture manual emphasized the division between airside and landside activity with the latter charging commercial rents. That vision also accorded with the 1981 Vicinity Plan and the 1985 Master Plan. The latter had a 30

year horizon and recommended significant expansion at Auckland International including the second runway. Acquisition of sufficient land for that additional facility was a constant theme of reports over the years starting with the Fisher & Associates' report.

[159] Acquisition of the Craigie Trust land, including realignment and increasing the traffic capacity of George Bolt Memorial Drive and Tom Pearce Drive, was strategically necessary for the airport. Flight catering kitchens were constructed on the initial seven acre acquisition, followed by the freight forwarding building (the "cargo shed" in the 1974 and 1975 "Gazette" notices, and now the AFFCA building) to the south of Tom Pearce Drive. The perishable nature of a significant proportion of airfreight made proximity to airside operations important.

[160] Additional development on the Craigie Trust land during Mr McDonald's period as manager included installation of water and sewage reticulation and the aviation turbine ("Avtur") fuel pipeline and construction of the airport administration centre.

[161] Mr Gollin experienced both sides of the joint venture. After a decade with MOT, principally dealing with corporatization of joint venture airports, he was appointed commercial manager of the defendant in August 1988 and general manager the following year. He left in 1997, returning to the airport in 2004, first as general manager, corporate planning and strategy, and now general manager, aeronautical.

[162] He said the joint venture structure had deficiencies in lacking managerial autonomy, largely arising from Crown opposition to continuing capital expenditure. It was partly as a result that corporatization for efficiency was introduced with a Government position paper "Airports – A new partnership" in June 1985. Thereafter, airports were to be run as commercial businesses without State funding. The Airport Authorities Amendment Act 1997 was the vehicle.

[163] Mr Gollin said the ARA was strongly resistant to corporatization and it was necessary for the Airport Act to be passed to implement corporatization of the airport

company. He said the Government essentially sold the airport to the airport company as a going concern, with unfettered rights to use and generate revenue from the vested assets.

[164] Mr Gollin's view was also that airport company ownership of land was by far the best way to protect long-term development. It was not enough for an airport company to own only the airside and closely associated facilities and rely on acquiring additional land through purchase or compulsory acquisition.

[165] He made the point that Auckland International is often a visitor's first and last impression of New Zealand. It is important that the congeries of facilities tourists require – access to other transport (including rental cars and campervans) supermarkets and the like – adds to that impression. Without land ownership, provision of such facilities by the airport company was compromised.

[166] Land ownership was also, in Mr Gollin's view, essential for operational reasons, particularly to accommodate increased demand and changing requirements. He pointed to increased aircraft capacity, abrupt changes in security régimes since 9/11 and the necessity to accommodate smaller aircraft on the second runway as demonstrating the necessity for, and wisdom of, long-range development planning at the airport. He, and others, commented that acquisition of the area of land the airport company now holds means that, unlike a number of overseas international airports, it is curfew-free. Such may not be the case were there to be private development within the present airport boundaries which the airport company could not influence.

[167] Many of the airport development plans were prepared by Airbiz Aviation Strategies Pty Limited. Mr Fordham, its managing director, has been in airport planning for 28 years and involved with many airport studies throughout the world. Specifically, his company was involved in preparing the Auckland Airport 1988 and 1990 Development Plans, the 2005 Master Plan (and a 2007 draft Freight Master Plan).

[168] Mr Fordham said airport planning must start early and endeavour to provide for developments up to 30 years in the future. He said airports need to be able to

control usage on their core lands which, in the case of Auckland International is all the land between the two runways including the Trust land and significant land (and height restrictions) beyond the end of each runway.

[169] Drawing on international airport planning texts and his experience, Mr Fordham said he knew of no international or domestic airport in Australasia where there is land within the core airport area not owned or controlled by the airport.

[170] He, like other witnesses, stressed the present and likely future development of the Craigie Trust land, first, for agencies with strong links to aviation, such as Customs, MAF, and airline support organisations; secondly, for facilities required by "on airport" businesses and workers such as banks and retail outlets; and, thirdly, to service the needs of passengers and "meeters and greeters" such as car and campervan rental agencies, car servicing, travellers' accommodation and the supermarket.

[171] The 2005 Master Plan, Mr Fordham noted, took what he described as a medium term view - 20 years - and a long-term view - 50 years. Since 1990 all development envisaged by the Plan provides for terminal and other building developments to be sited between the two runways but with facilities more directly requiring space near runways – terminal increases, carparking and the like - possibly squeezing other facilities to the fringes as aircraft parking and terminals expand. Thus, the 2005 Master Plan envisaged usage of parts of the claimed land shifting from commercial development to development more directly associated with airside activity, including access. Returning the Trust land to the plaintiffs would disrupt such development with major roads and likely future rail access planned to pass through it.

[172] Mr Foster, Craigie Trust's planner, carefully rehearsed the planning history of the airport land including the claimed land, noting the 2002 Operative Manukau District Plan accords the airport planning protection but restricts land used in "areas designated but not used for activities necessary or associated" with the International Airport (policy 17.6.4.6). The plan permits a range of additional activities but, that

notwithstanding, Mr Foster's view remained that some of the uses to which the Craigie Trust land is being put can only be regarded as ancillary to the airport's operation if a wide interpretation is adopted. His view was they could be established on nearby land also owned by the airport company zoned Business 5 as some similar uses are now.

[173] In cross-examination, Mr Foster accepted the designation of sufficient land for a second runway had been upheld or recognized in District Schemes and designations approved by the Town and Country Planning Appeal Board continuously since the late 1970s. He had never experienced a designation for an airport being used for commercial purposes though he acknowledged uses such as freight forwarding and carparking associated with aviation, including the airport's employees are, arguably "ancillary to airport operations".

[174] Questioned as to the feasibility of subdivision were the Trust land to be returned excluding the principal roads and with its boundary transecting existing buildings, Mr Foster said it would be necessary to "settle on boundaries that are practical and achievable".

[175] Mr Foster's planning counterpart for the airport company was Mr Gysberts.

[176] His view, too, was that designations and zoning provide insufficient control mechanisms to preserve the airport's land for long term development.

[177] The protracted process of achieving designations and zoning (including all hearings and appeals) to preserve the possibility of future development at Auckland International would result in significant delays and uncertainty with all concerned, particularly AIAL, having little control over the ultimate outcome. In addition, designations and zonings only prevent incompatible development: they have no role in ensuring necessary or desirable development of airport land as the requiring authority has no right to use that land. Hence Mr Gysberts' opinion that planning controls were insufficient of themselves to facilitate future development of its land by the airport company. If some of the land required for airport development were in private ownership, such as by the Craigie Trust, then irrespective of the uses

permitted by designations and zoning, the airport company would be powerless to ensure developments were compatible with airport uses.

(3) Submissions

[178] A deal of Mr Carruthers' submissions on this topic have been summarised but, factually, he said the Trust land has been consistently linked with commercially focused facilities unnecessary for, and outside the definition of, an "aerodrome". In plan after plan, document after document, the Trust land has been described or shown as intended to be used for commercial premises, business parks, shopping centres, hotels and the like, a submission he supported with detailed reference to numerous documents from 1975 onwards. With the exception of George Bolt Memorial Drive, Tom Pearce Drive and the flight kitchen, Mr Carruthers submitted that none of the other developments which have occurred on the claimed land were for an "aerodrome" but were ordinary commercial uses designed to maximise airport company revenue. Naturally, he particularly relied on the 2005 Master Plan and Airport Company Board papers prepared since receipt of the letter of claim. The Board papers propose commercial development on the land serving areas well beyond the airport boundary.

[179] Decision on what amounts to an "aerodrome" in the present context is a question of fact to be judged objectively. The Court of Appeal said in *Attorney-General v Hull* [2000] 3 NZLR 63, 77, para [41]:

> The first, and usually determinative criterion in s 40 is satisfied when in terms of subs (1)(a) the land is no longer required for the purpose for which it was taken. Whether that is so is a question of fact involving an assessment of intention in the light of objective circumstances. Proof that the land is no longer required for the relevant public work may be achieved by demonstrating an affirmative decision to that effect. The point can also be established by examining the conduct of the body holding the land and, if appropriate, drawing an inference that the body has concluded that it no longer requires the land for that work. Alternatively, the evidence may establish that that was not the case and, for instance, that the landholding agency remained in a state of genuine indecision. But if any reasonable person would undoubtedly have concluded that in all the circumstances the land was no longer required for the relevant public work, the agency may well have difficulty asserting that it has not so concluded, and therefore had not come under any obligation to proceed in terms of the section.

[180] The bulk of Mr Galbraith's submissions on this aspect of the claim have also been summarized but his specific argument on this part of the claim was that the Craigie Trust land was acquired for a public works purpose, has been required for such a purpose throughout and is still so required.

[181] The terms "airport" and "aerodrome" were shown on the evidence to involve a much broader interpretation than that for which the plaintiffs contend. In contemporary terms, the evidence showed, he submitted, the Craigie Trust land remains required as a "site for aerodrome" or as a "local purpose reserve (site for aerodrome)" or any of the other formulations and has done so since acquisition.

[182] Mr Galbraith submitted the plaintiffs could not demonstrate that the Craigie Trust land was "no longer required" for its original use in terms of s 40 having regard to the following authorities:

a) *Sisters of Mercy v Attorney-General* (HC AKL CP 219/99 6 June 2001, para [65]) where it was held that "no longer required" is:

> … not the same as not being used. Land (or part of it) may not be used from time to time but that does not mean it is not 'required'. For example, land may be required for future expansion or for needs not yet specifically identified.

b) *Kerr-Taylor* at pp 114-115, para [53]:

> … I have concluded that the word "required" where it appears in … s 40 of the Act … does indeed have its primary meaning of need or necessity. The Act and its predecessors were enacted for the purpose of taking land compulsorily from landowners for uses required for the public benefit. It was always recognised by the legislature that to do so was a significant interference with private rights. Section 40 was a clear recognition of the magnitude of that inference. Hence, s 40 provided for the return of the land by repurchase when the public need no longer existed. To my mind, the cessation of the element of need or necessity is fundamental to the whole concept of the revesting by resale contained in s 40. If that right was to be determined on the basis of cessation of use as opposed to need, the rights envisaged by the section would be substantially diminished. That they are intended to be of very real worth has been made quite clear by the Courts over many years.

c) In *Attorney-General v Edmonds* (CA 97/05 28 June 2006 at para [29]) the Court of Appeal did not differ from Miller J's observation in this Court that "no longer required" does not mean "the authority must be able to point to a specific project or use for the land at any given time" and that:

> [30] The Judge saw the question as one of ascertaining the intention of the authority holding the land (*Attorney-General v Horton* [1999] 2 NZLR 257 at 262). The authority need not make a conscious decision that the land is surplus (*Attorney-General v Morrison* [2002] 3 NZLR 373 at [17] (CA); *Counties Manukau Health Limited v Dilworth Trust Board* [1999] 3 NZLR 537 at [25] (CA)). Instead, intention was to be assessed in light of the "objective circumstances" and the "unequivocal public acts" of the land holding authority.
>
> [31] Miller J took it for the purposes of s 40(1)(a) that the plaintiff had the burden of proving that the Crown had a change of intention.
>
> [32] Finally, the Judge found that it was necessary under s 40(1)(a) for the Crown to have a "degree of commitment".

[183] Mr Galbraith submitted the "Gazette" notices, seen against the factual and legal matrix including s 31 of the 1944 Act, the establishment deeds and the "Joint Venture Airports" manual showed it was intended that all land owned by the airport company should be used as an international airport to meet the present and future needs of travellers and those involved in freight plus ancillary aviation facilities. There was no suggestion in the documents of a distinction between "airport" and "aerodrome" unless express reference to airside facilities required such. That approach was also consistent with the Authorities Act giving authorities power to carry on "any subsidiary business or undertaking" in connection with an airport and requiring airports to be managed for commercial purposes. Defining "aerodrome" or "airport" consistently with commerciality and future development was also consonant with the Airport Act which did not limit use in its definition of "airport" and set AIAL on a normal corporate footing.

[184] Even if the definition of "aerodrome" in the 1981 Act applied, it was not limited to airside purposes only. Such an approach ignored "partly" in the statutory definition speaking of a "defined area" … used either wholly or partly … for the

landing … of aircraft", thus encompassing uses ancillary to the provision of services for passengers and freight.

[185] Mr Galbraith submitted that, even if not all the Craigie Trust land was being used "directly" for a "public work", it was being used "indirectly" relying on *Kett v Minister for Land Information* (HC AKL CP.404-151-00 28 June 2001) where Paterson J held that "indirectly" in s 40 must be interpreted within the phrase "directly or indirectly", thus meaning that the land is required for "some associated reason". And in *Hood* (CA 16/04 at para [68]) it was held that Play Centre land leased as a commercial car park was still being used for the Centre's purposes as it was "let only when the play centre does not need it and, in any event, the resulting funds are used for play centre purposes".

[186] In light of those authorities in combination with the airport company's planning documents, particularly the 2005 Master Plan and the evidence, Mr Galbraith submitted any portion of the Craigie Trust land was being used "partly" or if not "directly" for aviation purposes was being used "indirectly" for such.

(4) Discussion and Decision

[187] The Craigie Trust land was taken for an "aerodrome". The "Gazette" notices consistently use that term – or an immaterial variation of it – throughout.

[188] As it was not in contest that an "aerodrome" is and always has been a public work, the first question on this aspect of the case is whether what has occurred in relation to the Craigie Trust land and is forecast to occur means it has been shown that the Craigie Trust land is "no longer required" for the public work of an "aerodrome". That resolves into the meaning to be ascribed to the term "aerodrome".

[189] In that regard, the statutory definitions of "aerodrome" are of particular importance. They have been consistent over a lengthy period, at least since the Civil Aviation Act 1964. All centre around an "aerodrome" being land "intended or

designed to be used either wholly or partly" for aircraft movements plus buildings, roads and equipment, "on or adjacent to any such area used in connection with the aerodrome or its administration". That definition was essentially repeated in the Authorities Act but, of interest, by changing "aerodrome" to "airport".

[190] But while there has been significant uniformity of statutory definition of the term, there was a certain force in Mr Galbraith's submission that the establishment deeds were less consistent in their use of the terms "aerodrome" and "airport". They tended to use the words functionally somewhat along the lines of the airside/landside distinction.

[191] Further, because there is no contest that airside facilities are comprised within the "aerodrome" and because it was not in contest that the Craigie Trust land and the developments on it are physically "adjacent to" airside facilities, the question therefore becomes whether the uses to which the Craigie Trust land has been, and is forecast to be, put are "wholly or partly" buildings, installations and equipment used "in connection with the aerodrome or its administration".

[192] That essentially brings into focus the differences of view between Messrs Garfinkle and Smith seen in light of the other evidence.

[193] Mr Garfinkle regards "aerodrome" as still a term of art, essentially unchanged in meaning since the Chicago Convention of 1944, though accepting that in that sense "it is not a term which laymen would use". Mr Smith regards that definition as outmoded with the term "aerodrome" no longer being in "normal usage for modern sophisticated and integrated airports such as Auckland Airport". "Aerodrome" is now largely discarded in favour of "airport" (or airport city or aerotropoli) with airports around the world now consistently including a wide range of facilities, some not obviously connected directly to the arrival and departure of aircraft, their passengers, crew and freight and those involved in that activity, but with all such activity being focused on providing revenue to the airport operator to offset the losses inevitably derived from aircraft operations strictly so-called.

[194] Mr Garfinkle has in favour of his interpretation that the definition of "aerodrome" still remains in the 1981 Act and the other contemporary statutes. In terms of statutory definition, however, against adoption of Mr Garfinkle's "aerodrome" definition is the alteration to "airport" in the Authorities Act, enacted well before the 1981 Act and remaining unchanged since. It was therefore logical for the Craigie Trust land to be taken for an "aerodrome" when there was no statutory definition of "airport" and the only surprise is that the 1981 Act contained no change to "airport" in its definitions when, by the time of its enactment, "airport" had been defined in statute for 15 years.

[195] Consideration of the expert evidence strongly indicates that both the term "aerodrome" and interpretation of what is "wholly or partly … used in connection with the aerodrome or its administration" should be accorded the definition for which Mr Smith contended and that such should be regarded as having been the case at least since the 1981 Act came into force. By 1 February 1982 the nature of an "aerodrome" both in New Zealand and around the world had changed from the narrow definition espoused by Mr Garfinkle. "Aerodromes" and "airports" by that date offered a wide range of facilities which, in earlier times, might have been thought unconnected with the "aerodrome or its administration" but which had come to be as regarded as so connected by 1981 and increasingly so since. Evidence showed that, certainly in common parlance and perhaps by some aviation experts, by 1981 those who used the term "aerodrome" were likely to have been using it in its contemporary sense, the sense for which Mr Smith contended.

[196] Then, considering what facilities should be regarded as included in the phrase "wholly or partly … used in connection with the aerodrome or its administration", the appropriate conclusion should be that all facilities connected with the operation of airports and meeting the expectations of airport users – travellers, staff, security and border agents, travellers' services, "meeters and greeters" and general airport users – should be regarded as such. The facilities cited from the ICAO Airport Development Manual provide a handy compendium of what should be regarded as having been "used in connection with the aerodrome or its administration" since 1981, particularly in light of Auckland International's consistent planning over those

years for the provision of such facilities on, amongst other parts of its land, the Craigie Trust land.

[197] That is not to disregard Mr Carruthers' submission that over those years Auckland International's plans for the Craigie Trust land have varied significantly and that, even now, only a small portion of the land has actually been developed with facilities unarguably "used in connection with the aerodrome or its administration".

[198] However, that submission must be seen in light of the body of other evidence as to the impact on an "aerodrome or its administration" of a failure to plan sufficiently far ahead to meet the changes in aviation and to have sufficient land to be able to accommodate those changes.

[199] Interestingly, the Court of Appeal has recently discussed the ambulatory interpretation to be accorded to words which have fallen out of common usage. In *Big River Paradise Ltd v Congreve* ([2008] NZCA 78, CA135/07 9 April 2008), though dealing principally with the meaning to be ascribed to a covenant registered against land, the Court of Appeal observed:

> [25] The courts sometimes have to determine whether a particular word or phrase has a static or mobile meaning, see Bennion, *Statutory Interpretation* (4th ed 2002) at 1000 – 1004. This arises most commonly with statutory provisions which incorporate standards (eg "fit for habitation"), the practical implications of which are likely to evolve over time.
>
> [26] Similar issues can arise where changes (perhaps technological in nature) have affected the practical meaning of a word. Should a right of way for "carriages" in an easement created in the mid-nineteenth century be construed in a static way (ie by reference to the types of carriage then in use) or receive a mobile interpretation as including motor vehicles? This question arose in *Attorney-General v Hodgson* [1922] 2 Ch 429 (Ch), where the word was held to encompass a motor car. It is important to recognise, however, that the underlying question is still one of interpretation of the words as used in the instrument. In *Hodgson*, the interpretation issue was whether "carriage" was intended to be used broadly (ie as a vehicle used for carrying goods or people) or narrowly, by reference to the particular types of carriage in use when the easement was created.
>
> [27] A similar problem arose in *Texaco Antilles Ltd v Kernochan* [1973] AC 609 (PC), which concerned the phrase "public garage" in a restrictive covenant entered into in 1925 in the Bahamas. In issue was whether this phrase encompassed a service station, the primary function of which was the sale of petrol. Such an establishment was said to have been "probably unknown" in 1925. Although by 1973, a service station of this character

> could fairly be regarded as a "public garage", this was not a controlling consideration. Instead the issue was whether such a service station, if proposed in 1925, would have been seen then as properly described as a "public garage". In the end, what in a sense was a mobile interpretation (ie that the phrase encompassed the service station) was adopted, but it was still grounded in its intended 1925 meaning.
>
> [28] Where a court has a choice between a static or a mobile interpretation, the result of adopting a mobile interpretation is not to change the scope of the underlying contract. For instance, the conclusion in *Hodgson*, that the word "carriage" encompassed a motor car did not imply that the grantee of the easement was not entitled to drive a horse and cart along the carriageway in issue. And likewise, in *Texaco Antilles*, the conclusion that the phrase "public garage" included a service station did not, as a corollary, mean that the sort of public garage which was common in 1925 was no longer subject to the restrictive covenant.

[200] That approach can properly be adopted in this case. The evidence clearly showed that, for almost all users, interpretation of the word "aerodrome" and what was expected at such a facility changed significantly over time. By 1981 most persons asked to define "aerodrome" would have described the facilities then found at airports such as Auckland International. By 1987 their views may have changed to accommodate any increased facilities then expected to be available at airports. If required to define "aerodrome" now, such a person is likely again to revert to the present facilities at airports, particularly Auckland International. An ambulatory interpretation of the word "aerodrome" can therefore properly be held to encompass the facilities commonly found at airports – Auckland International in particular - and changing over time to what was and is now available.

[201] Then, as the authorities demonstrate, land can continue to be "required" for a public work even if it is not actually being used for such. As was said in *Sisters of Mercy*, land may continue to be "required" for the purposes of s 40 even if only held for future expansion. In that light, the Craigie Trust (and other) land has consistently been "required" for that purpose and the developments which have taken place in and on the Craigie Trust land to date and forecast, are shown all to have been "wholly or partly … used in connection with the aerodrome or its administration".

[202] Examples include the provision of banking facilities for the millions of travellers and thousands of staff at Auckland Airport and the rental car and campervan parking and the supermarket servicing airport users and inbound tourists.

Food outlets can be similarly regarded. Even Butterfly Creek, though primarily recreational, offers convention facilities, now an important facility at airports.

[203] Additional points supporting the interpretation adopted but with specific reference to AIAL is the strong commercial and developmental thrust of the Airport Act. Further, the Vesting Order vested the airport's land in the company together with rights and licences "relating to it or to the operations and activities of the airport". That formula indicates that defining an area "wholly or partly … used in connection with the aerodrome or its administration" should encompass land uses relating to the "operations and activities of the airport". That meshes with the corporatization and privatization adopted for New Zealand airports from the mid-1980s and fortifies the view that Mr Smith's evidence is to be preferred in deciding what comes within the definition of "aerodrome" (or "airport") and facilities "wholly or partly … used in connection with the aerodrome or its administration".

[204] An additional point supporting the views just reached is that s 40(1)(b) directs attention to whether the land held for public work "is not required for any other public work". By statute, AIAL's land is deemed to be a "Government work" and it also comes within the definition of "airport" in the Authorities Act for the reasons outlined. Consistently with s 40, AIAL's land, acquired for a public work, an "aerodrome", even if no longer required for that public work, could be regarded as "required for any other public work" namely the public work of an "airport" because the facilities it provides are "wholly or partly … connected with the airport or its administration" or used for the "operations and activities of the airport".

[205] For all those reasons the conclusion on this part of the case is accordingly that the Craigie Trust land was and is held for the public work of a modern day "aerodrome" or a modern day "airport". Alternatively, if it was no longer required for the public work of "aerodrome", it is required for another public work, namely an "airport".

[206] Findings to this point dispose of the case in favour of the defendant, but, lest the conclusions come for reconsideration, it is appropriate to give relatively brief consideration to the two aspects of the case not yet dealt with.

Had the Craigie Trust land been shown to be no longer required for a public work of an "aerodrome" or "airport", would it have been held that it would be impracticable, unreasonable or unfair to require it to be offered back to the plaintiffs?

[207] In relation to those disjunctive questions, what must be borne in mind is that the onus of demonstrating any of those matters lies on the airport company. And Mr Carruthers made the point that authority mandates a high threshold for AIAL to override former landowners' property rights. In *Hood* (at [97]) the Court of Appeal held that in assessing that defence the interests of former owners must be considered and there must be "good reason for these interests to be disregarded".

[208] Much of the evidence relevant to this aspect of the matter has already been reviewed but it is here pertinent to review the evidence of Mr Ansley who has been with the airport company since 1994 and is now its general manager, property. He said the airport company normally funds the building shell with tenants meeting the cost of internal fit-out and occupancy being by way of ground lease. Exceptions include McDonalds where it paid for the building and the land is leased or licensed to them; the power centre which was entirely constructed and paid for by the airport operator; Butterfly Creek which was constructed at the lessee's cost; Rockgas which is a ground lease where the company met the cost of the building; and the service station which was erected at Shell's cost. All the buildings south of Tom Pearce Drive were constructed at the cost of the airport operator except Sky Chef which was constructed at NAC's cost many years before AIAL was formed.

[209] Mr Ansley made the important point that all airport company leases contain a clause giving the lessor the right to relocate lessees "at any time during the term … if in the lessor's opinion such relocation is necessary for the purposes of … expansion or development at the airport". Relocation has occurred on occasions. Where relocation occurs the lessee is entitled to an equivalent facility elsewhere on airport land.

[210] While there would be obvious practical difficulties directing the whole of the Craigie Trust land be offered back to the plaintiffs, in closing submissions, without in the least resiling from the primary thrust of the claim, Mr Carruthers outlined a

"fallback" position. Essentially it was for a declaration that AIAL should be required to offer back to the plaintiffs that part of the Craigie Trust land not currently built on or utilised by roading.

[211] The Court would have held it would have been "impracticable" to require the whole of the Craigie Trust land to be offered back but, were Mr Carruthers' "fallback" position to be adopted, the conclusion would have been that it would not have been "impracticable" to require the balance to be offered back. The reasons would have included that, currently, most development of the Craigie Trust land has been on ground leases which could be transferred to the plaintiffs. Developments such as the Avtur pipeline and other subterranean infrastructure could be protected by easements. The exceptions outlined might have required individual consideration. While directing the whole of the Craigie Trust land be offered back would pose obvious problems with the boundary passing through various buildings, evidence showed the boundaries could be adjusted to avoid that result and the decision of the Court of Appeal in *McLennan v Attorney-General* (CA41/00, 7 December 2000 paras [36] [49]) indicates the Court has power so to order.

[212] Accordingly, though there may have been some practical difficulties in requiring the whole of the Craigie Trust land to be returned, they would not be insuperable –still less 'impracticable' to adopt the statutory term - particularly if the order for offer back was partial, limited or conditioned to avoid the problems just discussed.

[213] The opposite conclusion would, however, have been reached in relation to whether it would be "unreasonable or unfair" - in the context of this case those terms are to be regarded as effectively synonymous and to be assessed in the round – to require the Craigie Trust land to have been offered back to the plaintiffs.

[214] This is partly for the reasons earlier discussed but principally because Auckland International Airport is, as the evidence made plain, an infrastructural asset of critical importance to the New Zealand economy. The site was chosen and the facilities developed on international expert advice that Auckland International should be developed as New Zealand's gateway to and from the world and to and

from the country's largest conurbation. For the developed country further from its nearest neighbour than any other on the globe, that was pivotal to New Zealand's development.

[215] Auckland International filled that role in contemporary terms when it was opened. It has increasingly filled that role over the years since. And the evidence makes clear its importance to New Zealand's trade and economic future will not diminish. Evidence established it to be vital for New Zealand's future that Auckland International continues to be able to develop to meet the ever-changing demands of increasing international and national passenger and freight traffic over the years to come.

[216] In part, Auckland International's success in fulfilling that role has resulted from its ability to plan, install facilities and react to evolving aviation and users' requirements unconstrained by lack of land or the need to take the interests of other landowners within its present boundary into account. It has, sensibly, dealt with land use by users in a way which maintains maximum flexibility to accommodate future changes.

[217] There is a certain force in Mr Carruthers' submissions that, even now, direct aviation use of much of the Craigie Trust land is not forecast for a number of years to come. However, evidence made clear that it is of paramount importance to the development of this singular infrastructural asset that the airport company develops its land in accordance with the requirements of aviation and airport users and it would be severely hampered in that regard if it had to deal with the Craigie Trust's ownership of a large portion of land in the centre of the airport to achieve that aim. This is particularly the case with possible future developments which might impinge on or utilise parts of the Craigie Trust land. They include improved road access to the airport, possible rail access, terminal development, installation of additional freight precincts and other facilities amongst others.

[218] Put simply, the importance to New Zealand, the Auckland region and all those who use Auckland International in any capacity is such that the conclusion would have been that AIAL's continuing ability to use all the land it currently owns,

including the Craigie Trust land, in the way which best conduces to the interests of all the airport's users, was sufficient to outweigh what have been held to be the Craigie Trust's rights and was such as to make it "unreasonable or unfair" to direct the claimed land be offered back to the plaintiffs.

[219] In that regard, it is important to bear in mind that the Craigie Trust cannot have been unaware of developments at the airport since before it was opened and similarly cannot have been unaware of developments in and on its former land since it was acquired from them. Yet it has taken no step – other than planning objections –to oppose those developments. It is of note that the Craigie Trust has allowed over quarter of a century to pass without seeking to invoke its rights under the 1981 Act. It may well be the case, as Mr Carruthers urged, that the Craigie Trust would not have been aware of all the detail of each of the airport's proposed developments affecting its former land nor of changes in what was proposed, but, that notwithstanding, to stand by whilst obvious and very significant infrastructural developments were occurring and then seek to recover, at 1982-1984 value, land which will have become very much more valuable as a result of airport developments over the years, is of significance.

[220] And it is not as if the Craigie Trust has not been paid for the land compulsorily acquired from it. It was paid compensation of $332,000 for its land by agreement dated 3 October 1974 but challenged that compensation and when the amount paid to the Trust was finally concluded by an Auckland Land Valuation Tribunal decision delivered on 8 November 1984 – approximately the latest date for valuing the offer back sought by the plaintiffs - after its appeals and zoning objections had been concluded the Tribunal took the view the agreed compensation had been rendered inadequate by the passage of time and awarded the Trust significant additional interest. The Trust would thereby reap a windfall if successful in this litigation.

[221] Had the plaintiffs succeeded in this claim, a further possibility is that, the Craigie Trust land being seen as so centrally important to airport development, the airport company, which paid full value for the whole of its land on acquisition following vesting, may have felt the need to negotiate with the Trust to re-purchase

the claimed land from it at present value, a value significantly enhanced by the airport and, latterly, the airport company's capital expenditure. That possibility, too, might yield the Trust a windfall and is a further factor affecting unreasonableness or unfairness.

[222] Mr Lambie said the Trust would co-operate with the airport company. No doubt he would wish it so to do but that was a non-binding offer of co-operation, and his fellow or future trustees might have taken the view that such co-operation was not necessarily discharging their duty to act in the best interests of their beneficiaries. And without full and continuing co-operation from the Craigie Trust the airport company would have risked its future development being compromised - not fatally, as some of the witnesses accepted - but compromised nonetheless. If the Craigie Trust were not prepared to do essentially everything the airport company required of it in relation to its land, the airport would be powerless to compel compliance and its capacity to service the growing needs of all those using and involved with the airport would be correspondingly inhibited.

[223] All that, as the evidence plainly showed, would be detrimental to the New Zealand economy, air passengers, air freight and all those associated with the airport facilities. Quite apart from the millions of passengers, millions of airport users and thousands of employees, facilities such as exist at Auckland International and are proposed are appropriate for its population, one about the same as a moderately-sized New Zealand town, and it would have been unreasonable or unfair to imperil the development and usage of so important a facility as the airport.

[224] That would have led to the conclusion that it would have been unreasonable or unfair to require the airport company to offer the Craigie Trust land back to the plaintiffs.

Had the Craigie Trust land been shown to be no longer required for a public work would it have been held that there had been a significant change in the character of the land such that AIAL would not have been required to offer it back to the plaintiffs?

[225] Logically, the onus of demonstrating significant change in character, as with the exceptions in s 40(2)(a), should be on the defendant who asserts such. As to the relevant date, Mr Galbraith is correct that there seems to be nothing in precedent indicating the date at which change in character should be assessed but, logically, that, too, should be decided as at the date it is asserted. Points made elsewhere in this judgment, particularly in para [207], apply here as well.

[226] As counsel acknowledged, authority on construing what amounts to a "significant change in the character of land" under s 40(2)(b) is sparse. In submissions, Mr Galbraith relied on the LINZ report "*Statutory Right of Repurchase*". In chapter 20.5.1 (p 24) "significant change" is defined as being "where the character of the land has changed … to the point where the former owner would get back land which was substantially different in nature from that taken". Guideline 6 (p 70) in that report notes that in *Auckland City Council v Taubmans NZ Ltd* [1993] 3 NZLR 361, 366, Barker J held that demolition of buildings for carparking could amount to a significant change in land character. The LINZ report gives examples of significant changes by reference to scale, construction, condition, value and longevity of buildings and improvements, and includes land reclamation and major landscaping.

[227] On this part of the case, Mr Carruthers again stressed that the major portion of the Craigie Trust land remains in grass and, whatever developments might ultimately occur, most of the land is destined to remain in grass for many years to come.

[228] That may be true, but, against that, since the Craigie Trust land was acquired, parts have been built on, roads have been constructed on part, utilities such as the airport's electricity sub-station have been installed on another part, there are significant subterranean improvements on it such as the Avtur pipeline, drainage ponds have been constructed on another part, much of the grassed portion of the land

has been reclaimed and most of it re-contoured. It is now largely unrecognizable as the rural dairy farm it once was. For the Craigie Trust now to get the land back would mean it would be receiving land substantially different in nature from that taken.

[229] Also pertinent to this aspect of the decision is to recall that s 40(2)(b) speaks of there having been a "significant change in the character of the land" but ties that to the "purposes of, or in connection with, the public work for which it was acquired or is held". That re-directs attention to the public work purposes of acquisition and retention and, in this case, to the developments and proposed developments in and on the Craigie Trust land elsewhere discussed in this judgment. The effecting and proposed effecting of those public work purposes entitles the airport company to the exception in s 40(2)(b).

[230] In light of that, it must be the case that, largely for the reasons led the Court to conclude that the Craigie Trust land was still held for a public work and would have led to a finding that it would be unreasonable or unfair to require the airport company to offer the land back to the plaintiffs, it would have been held that, because of the developments which have occurred in and on the Craigie Trust land since it was acquired and which were for the purposes of or connected with the public work of an "aerodrome" or "airport", there has been a significant change in the character of the Craigie Trust land. The plaintiffs' claim would have similarly failed on that ground.

Conclusion

[231] For all the reasons set out in this judgment, the Court concludes that all the plaintiffs' claims against the defendant fail though -

a) Auckland International Airport Limited is subject to the obligations of s 40 of the Public Works Act 1981;

b) the land formerly owned by the plaintiffs and held for a public work of an "aerodrome" is and will continue to be required for that public

work or that, it no longer being required for that public work, it remains held for the public work of an "airport";

c) That, had it been necessary so to do, the Court would have concluded that it would not have been impracticable but would have been unreasonable or unfair to require Auckland International Airport Limited to offer all or part of the land back to the Craigie Trust and that there had been a significant change in the character of the land for the purposes of or connected with the public work for which the land was acquired and is held and accordingly the defendant was not obliged to offer it back to the plaintiffs.

d) As to costs, each of the parties having been successful to a significant degree, the Court's inclination is that costs should lie where they fall. If, however, either party wishes to seek costs then memoranda may be filed (maximum 10 pages) with that from the defendant being filed and served within 28 days of delivery of this judgment and that from the plaintiffs within 35 days of delivery and with counsel certifying, if they consider it appropriate so to do, that all issues of costs may be determined without further hearing.

……..
WILLIAMS J.

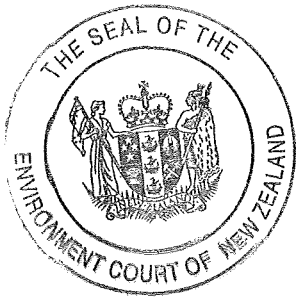
Attachments: ***Annexe 1***
Annexe 2

BEFORE THE ENVIRONMENT COURT

Decision No. [2015] NZEnvC 214

IN THE MATTER	of the Resource Management Act 1991
AND	of appeals pursuant to clause 14 of the First Schedule of the Act
BETWEEN	WELL SMART INVESTMENT HOLDING (NZQN) LIMITED (formerly REID INVESTMENT TRUST)
	(ENV-2015-CHC-0070)
	QUEENSTOWN GOLD LTD
	(ENV-2015-CHC-0071)
	MAN STREET PROPERTIES LTD
	(ENV-2015-CHC-0072)
	KELSO INVESTMENTS LTD AND CHENG'S CAPITAL INVESTMENTS LTD
	(ENV-2015-CHC-0073)
	Appellants
AND	QUEENSTOWN LAKES DISTRICT COUNCIL
	Respondent

Court:	Environment Judge J R Jackson (Sitting alone under section 279 of the Act)
Hearing:	In Chambers at Christchurch
Submissions:	G M Todd for the appellants J C Campbell/B A Watts for the respondent (Final submissions received 3 December 2015)



Date of Decision: 11 December 2015

Date of Issue: 11 December 2015

PROCEDURAL DECISION

A: The Environment Court rules under section 279(1)(a), (f) and section 279(4) of the Resource Management Act 1991 that the following parts of these appeals are not on the subject of plan change 50:

- Well Smart Investment Holdings (NZQN) Ltd: the part seeking deletion of the Town Centre Transition Zone and rezoning as Town Centre Zone and/or changes to the rules affecting its land;
- Queenstown Gold Ltd: the part seeking rezoning of its land on Brecon Street as Queenstown Town Centre Zone;
- Man Street Properties Ltd: the parts seeking removal of the Transitional zoning, substitution of a Queenstown Town Centre Zoning and changes to the relevant rules affecting its land;
- Kelso Investments Ltd and Cheng's Capital Investments Ltd: the part seeking rezoning of their land in the northeast quadrant of the Shotover/Stanley Streets intersection to Queenstown Town Centre Zone;

— and should be struck out.

B: Leave is reserved for any party to apply for more precise orders if the wording in Order A is incomplete or ambiguous.

C: Costs are reserved. Any application should be made by 29 January 2016 and any reply by 18 February 2016.

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

REASONS

Table of Contents

Introduction

The issues

[1] The questions to be decided in this procedural decision are whether the court has jurisdiction to hear parts of these four appeals. The Queenstown Lakes District Council says certain parts are not 'on' its plan change 50 and should be struck out.

PC50

[2] On 15 September 2014 the Council publicly notified Plan Change 50 ("PC50") to its operative district plan. The public notice delineated the plan change area ("the PC50 Area") which is shown on the attached proposed map 35 (annexed and marked "A") inside a black dashed line. The new Queenstown Town Centre Zone ("QTCZ") including the PC50 area is in pink on that plan.

[3] The stated purpose of the Plan Change is:

> To provide for an extension to the existing Queenstown Town Centre Zone through the rezoning of:

- The Council-owned Lakeview site;
- Some privately owned land adjoining the Lakeview site and bounded by Thompson and Glasgow Streets;
- 34 Brecon Street site;
- Two additional blocks bounded by Camp Street, Isle Street, Man Street, and Hay Street (the 'Isle Street blocks'); and
- The Lake Street/Beach Street/Hay Street/Man Street block (the 'Beach Street block').

It will be noted that one relatively unusual aspect of this plan change is that the Council has a direct financial interest in the outcome through the rezoning of its own land.

[4] The public notice explained that PC50 proposed to add one extra objective to the existing objectives[1] for the Queenstown Town Centre. It then described the (sub-) zonings proposed for the specified areas and stated that there would be accompanying changes to policies and rules.

[5] An evaluation under section 32 of the RMA was required[2] before notification. This evaluation was prepared by a firm called Mitchell Partnership and is dated 26 August 2014. Its analysis of other reasonably practicable options appears to be confined to alternative uses of the PC50 area. It did not directly address use of other land for achieving the objectives of the district plan. However, it is clear from Appendix A to the Section 32 Evaluation that the appellant's land was considered potentially suitable for rezoning to QTCZ early on. Curiously, at that stage the Council's Lakeview site was not included in the evaluation.

The challenged submissions

[6] The Trustees of the Reid Investment Trust ("Reid"), Man Street Properties Ltd ("MSPL"), Queenstown Gold Ltd ("QGL") and Kelso Investments Ltd and Cheng's Capital Investments Ltd ("Kelso/Cheng") own or owned various parcels of land next to or close by the PC50 area. Each made submissions on PC50. A copy of the Council's planning map 36 with the appellants' land identified by their counsel is annexed and marked "B". All the appellants' land falls outside the PC50 area (as shown on attachment "A").

1 Objectives (10.2.4)(1) to (4) [QLDP pp 10-15 to 10-17].
2 Clause 5(1)(a) Schedule 1, RMA.

[7] The Kelso/Cheng submission[3] sought — as part of the relief sought[4] — rezoning of their land[5] to QTCZ. The QGL submission[6] sought that its land on Brecon Street also be rezoned as QTCZ. I will call these two appeals the "further extension appeals"[7].

[8] The MSPL submission[8] sought removal of the Town Centre Transitional Zoning (shown on attachment "A" as the area inside the heavy black dashed line) on its land and changes to the rules to allow an increase in building height limits to (generally) 12 metres, maximum building coverage of 80%, and a maximum setback of 1.5m.

[9] The Reid Investment Trust, now Well Smart Investment Holdings (NZQN) Ltd ("Well Smart"), sought[9], as part of its relief, deletion of the Town Centre Transition Zone ("TCTZ"), para 10.2.2 (Values), and changes to rules in the TCTZ. I will call the MPSL and Well Smart (formerly Reid) appeals collectively "the amendment appeals".

[10] The Council's summary of submissions[10] referred to the submissions of each of the appellants in some detail. Any person with an interest greater than the public on any of those submissions then had the right[11] to lodge a further submission. I have not been informed whether any further submissions of relevance to these appeals were lodged other than by existing primary submitters and it is difficult to tell from the Hearing Commissioners' Decision and its Appendices.

[11] At the hearing before Commissioners appointed by the Council, the Council presented legal argument that there was no scope to accept parts of the submissions (on which these four appeals are based) because they were not submissions "on" PC50. The representatives of Reid, MSPL, Queenstown Gold and Kelso/Cheng argued the opposite.

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3 Under clause 6 of Schedule 1, RMA.
4 Kelso and Cheng submission dated 10 October 2014 at para 4.1.
5 And adjacent land along Gorge Road.
6 QGL submission dated 10 October 2014 para 2.11(1).
7 And name their land and submissions collectively in the same way.
8 MSPL submission dated 10 October 2014.
9 Reid (now Well Smart) submission dated 10 October 2014, Table 4.1.
10 Under clause 7 Schedule 1, RMA.
11 Clause 8 Schedule 1, RMA.

The first-instance report[12] sets out the legal authorities and concluded in the Council's favour on the jurisdictional issues.

[12] The appellants then lodged their appeals repeating the claims for relief as stated in their submissions. I should record that in addition to the relief which the Council has challenged, most of the appeals also sought (in effect) that PC50 be cancelled as alternative relief.

[13] The Council has requested that the issue of scope be determined as a preliminary issue. The Council submits that the parties to all the appeals will be greatly assisted by knowing, as early as possible, whether the relief sought is legally available. The question of scope is substantially a question of law alone, and the parties have confirmed that they are prepared for the issue to be determined on the papers. No submissions were lodged by any of the section 274 parties.

[14] I also record as part of the background facts to this decision that on 26 August 2015 the Council publicly notified the first stage of its proposed district plan ("the PDP"). The PDP proposes rezonings for these appellants' land that are generally consistent with the relief sought by their respective submissions and appeals. The PC50 Area is expressly excluded from the first stage of the PDP. The Council says that the proper proceeding in which to consider the substance of the submissions which are the subject of these appeals is the PDP, not appeals on PC50.

The law

The authorities on whether submissions are "on" a plan change

[15] Clause 6 of the First Schedule to the RMA provides that:

> Once a proposed policy statement or plan[13] is publicly notified under clause 5, the persons described in subclauses (2) to (4) may make a submission on it to the relevant local authority. (emphasis added)

12 Report and Recommendations dated 16 June 2015.
13 'Plan' includes a 'plan change': section 43 AAC (1)(a) RMA.

If a submission is not *on* the plan change, there is no jurisdiction for relief to be granted by the local authority (or, on appeal, this court).

[16] The leading authorities in the High Court on this jurisdictional question — *Clearwater Resort Ltd v Christchurch City Council*[14] ("*Clearwater*") and *Palmerston North City Council v Motor Machinists Ltd*[15] ("*Motor Machinists*") — indicate that there is a two-stage test:

(1) is the relief sought in the challenged submission incidental to, consequential upon or (perhaps) directly connected[16] to the plan change (or variation)?

(2) have potential submitters been given fair and adequate notice of what is proposed in the submission or has their right to participate been removed?

Neither of the higher authorities suggest other than that each case must be determined on its own facts, and there is no clear line: whether there is jurisdiction is a matter of fact and degree.

[17] Before I turn to those questions I should briefly consider the relevant changes to the RMA since the High Court authorities were decided in case they alter the correct approach to the issue.

The changes to section 32

[18] Aspects of the statutory scheme applied by the High Court in *Motor Machinists*[17] have now been replaced. In particular, Section 32 RMA as replaced[18] in 2013, now requires the evaluation report now required by the First Schedule[19] to (inter alia):

...

14 *Clearwater Resort Ltd v Christchurch City Council* High Court, Christchurch AP34/02 William Young J dated 14 March 2003.

15 *Palmerston North City Council v Motor Machinists Ltd* [2014] NZRMA 519 (HC).

16 Being merely "connected" to the submission is inadequate: *Clearwater* footnote 14 above, at [65].

17 *Palmerston North City Council v Motor Machinists Ltd* [2014] NZRMA 519 (HC).

18 By section 70 Resource Management Amendment Act 2013. The new section 32 came into force on 3 December 2013.

19 Clause 5(1), Schedule 1 to the RMA.

(b) examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by—

(i) identifying other reasonably practicable options for achieving the objectives; and

(ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and

(iii) summarising the reasons for deciding on the provisions; …

Section 32(1) RMA now contains more detailed directions for assessing which provisions (including zone boundaries) are the most appropriate for achieving the relevant objectives. Those directions require the Section 32 Evaluation to[20] "identify … other reasonably practicable options for achieving the objectives".

[19] While none of the submissions specifically addressed these amendments to the RMA and how they might affect the *Clearwater* tests, I consider the amendments have merely reinforced and expressly stated the need for a comparative analysis which Kós J held in *Motor Machinists*[21] was inherent in section 32. He described a pre-2013 section 32 evaluation as "… a comparative evaluation of efficiency, effectiveness and appropriateness of options". Thus the 2013 changes have not substantially changed the law.

[20] The analysis of reasonably practicable alternatives for achieving the objectives may simply require the benefits and costs of a proposed rezoning to be compared with the benefits and costs of the operative zoning of the same area. But in many cases, depending on the objectives, it may also be necessary to compare the benefits and costs of using the plan change area to achieve the relevant objective versus the benefits and costs of another resource or area (which may or may not overlap with the first) to achieve the objectives.

[21] Ostensibly only the second task of the examination — assessing the efficiency and effectiveness of the provisions[22] — needs to be assessed and quantified under section 32(2): it refers to section 32(1)(b)(ii) but not to section 32(1)(b)(i). That seems

20 Section 32(1)(b)(i) RMA.

21 *Palmerston North City Council v Motor Machinists Ltd* [2014] NZRMA 519 (HC) at para [76].

22 Section 32(1)(b)(ii) RMA.

to be the position of the Hearing Commissioners who wrote[23] that "all that is required is that any other reasonably practicable options are identified". Against that, since assessing efficiency under section 32(1)(b)(ii) involves a comparison — it is not an absolute — the more plausible reading of the section is that the assessment under section 32(2) needs to compare the benefits and costs of the proposal with the benefits and costs of at least one of the other reasonably practicable options for achieving the objectives. I note that the recent New Zealand Treasury *Guide to Social Cost Benefit Analysis*[24] may help local authorities and others with this evaluation (despite the potentially confusing use of the word 'social' in the title).

[22] A new section 32(3) applies in the case of a plan change or a variation, or, it appears, to a submission seeking amendment of a plan change (see the definition of "proposal" in section 32(6)). Therefore a provision in a plan change (or submission) needs to be evaluated not only under, as one would expect, any objectives in the plan change (or submission) but also under the unchanged objectives of the operative district plan[25]:

> (b) … to the extent that those objectives —
>
> (i) are relevant to the objectives of the amending proposal; and
>
> (ii) would remain if the amending proposal were to take effect.

The relevant objectives in the district plan (or plan change or submission) are presumably any higher order or "equal"[26] objectives.

[23] A section 32 evaluation is usually prepared by the proposer of the plan change, so it has an interest in confining the plan change to the boundaries (and issues) it wants dealt with. Despite that it must comply with section 32(1) RMA. Indeed, if a section 32 evaluation fails to consider the consequences of some flexibility in the boundary location (because that flexibility might more appropriately achieve the relevant objectives) then that may be a failure in the section 32 evaluation. A sense of fair play

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23 Hearing Commissioners' Decision para 9.1.11 [p 48].

24 *Guide to Social Cost Benefit Analysis* New Zealand Treasury, July 2015.

25 Section 32(3) RMA.

26 By equal, I mean others in a suite such as existing objectives 10.2.4 (1)-(4) of the QLDP for the Queenstown Town Centre.

suggests it should not lead to jurisdictional consequences for a submitter who claims to have located a better boundary.

(1) Is the relief sought within scope?

[24] The Hearing Commissioners stated that the further extension land "… does not fall within the area of the district plan that is subject to the proposed plan change"[27] as if that by itself makes the submission out of scope. Indeed they later said as much[28]. I consider that is incorrect as a matter of law because in *Motor Machinists* Kós J expressly stated that zoning extensions by submission are "… not exclude[d] altogether"[29].

[25] I hold that all the submissions meet the first test — primarily because the Section 32 Evaluation includes an Appendix "A" ("the McDermott report") that shows the four pieces of land which are the subjects of these appeals are included as part of a proposed and much larger QTCZ. The real issue for this decision is the second question: whether fair and reasonable notice has been given to other persons who might be affected so that they had an opportunity to participate?

(2) Have potential further submitters been denied an effective response?

Submitters on the extension sites

[26] The purpose of *Clearwater's* second limb is to prevent procedural unfairness to persons who would be more affected by a submission than by the notified plan change. Kós J explained the reason for this in *Motor Machinists*[30]:

> It would be a remarkable proposition that a plan change might so morph that a person not directly affected at one stage (so as not to have received notification initially under clause 5(1A)) might then find themselves directly affected but speechless at a later stage by dint of a third party submission not directly notified as it would have been had it been included in the original instrument. It is that unfairness that militates the second limb of the *Clearwater* test.

The second limb prevents the interests of people and communities from being overridden "by a submissional sidewind"[31]. Kós J bore in mind the need to protect

27 Hearing Commissioners' Decision para 7.23.
28 Hearing Commissioners' Decision para 9.1.19.
29 *Palmerston North City Council v Motor Machinists Ltd* [2014] NZRMA 519 (HC) at para [81].
30 *Palmerston North City Council v Motor Machinists Ltd* [2014] NZRMA 519 (HC) at para [77].
31 *Palmerston North City Council v Motor Machinists Ltd* [2014] NZRMA 519 (HC) at para [82].

people from unforeseen "consequential" zoning extensions when he stated that they would only be permissible if no substantial further section 32 analysis was needed to inform affected persons[32].

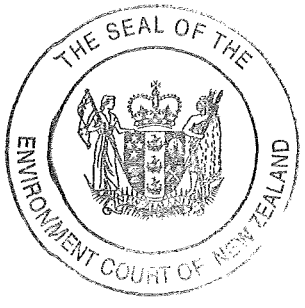
[27] Ms Campbell and Mr Watt submitted:

> It would be procedurally unfair to other persons, particularly the ... Appellants' neighbours, to allow the scope of PC50 to be enlarged by submissions. Such parties might have seen no need to lodge a submission on PC50 as they considered they were unaffected. The Council's s 32 analysis did not signal the possibility of changes to the zonings of the Extension Appellants' properties. Non-submitters would not have been served with a copy of the summary of submissions. Non-submitters would have no rights of appeal if they were dissatisfied with a decision accepting the Extension Appellants' submissions.

On one matter of fact that submission is wrong: in Appendix A to the Mitchell Report the possibility of changes to the zoning of these appellants' properties was clearly raised.

[28] The Council asks "How were the Appellants' neighbours to know that they needed to make a submission on PC50 if they had any concerns about land adjacent to them being zoned?"[33] If a neighbour lives one lot away from a road the far side of which is a zone boundary then they should probably lodge a primary submission[34] rather than wait for a summary of submissions. But, if they do wait for the notified summary and it contains details of a submission seeking rezoning of the intervening lot then that may be considered to be sufficient notice to them.

[29] However, that is not quite the situation before me, since the Kelso/Cheng land includes a number of lots so that the nearest potential affected neighbour to the northeast has a number if lots between them and the proposed zone boundary. As for QGL it is some distance (about 100 metres) from the existing QTCZ boundary: closer to part of the PC50 proposed zone boundary, but rather disconnected from the existing zone.



32 *Palmerston North City Council v Motor Machinists Ltd* [2014] NZRMA 519 (HC) at para [81].
33 J C Campbell and B A Watts, reply dated 3 December 2015, para 13.2.
34 Under clause 6, Schedule 1 of the RMA.

[30] While the Council's summaries of submissions gave some notice to neighbouring owners and other persons with an interest greater than the public generally, that the TC Zone boundaries might change to include the further extensions, particularly since Appendix A — the McDermott report — of the Section 32 Evaluation included their land, is that enough?

[31] In their submissions in reply counsel for the Council deplored the over-emphasis by Mr Todd on the McDermott report. They countered that the McDermott report provided[35]:

> ... only the economic rationale for providing additional commercial development opportunities to support the Queenstown town centre. Nobody reading the McDermott Miller study would have confused its Figure 5.1 with the actual PC50 proposal, especially when read alongside the various other reports that related specifically to the PC50 Area.

[32] That is of concern because without Appendix A the Section 32 Evaluation appears to be light on consideration of practicable options on other land (if that is required, and I do not decide that point here). In fact, as recorded earlier, the Council did not look at that aspect of the evaluation at all. Their counsel, Ms Campbell, submitted[36] that:

> The Council had no wish to reconsider the zoning of land outside of the PC50 Area as part of the PC50 process. It wished to confine the scope of the PC50 inquiry to the PC50 Area. The Council wished to do so in an orderly and efficient manner, so that the opportunities to be provided by PC50 could be realised as soon as possible.

It appears the Council deliberately restricted the analysis of alternatives.

[33] As a result it is only by looking at one of the many appendices to the Section 32 Evaluation that neighbouring landowners and occupiers would appreciate the appellants' land (amongst other parcels) might be rezoned if a submitter sought that. I consider that

35 J C Campbell and B A Watts, submissions dated 3 December 2015, para 11.1.
36 Submissions for QLDC dated 30 October 2015 at 1.9(b).

the total notice, including the notice that was given by the notified summary, was inadequate to fairly alert potential parties in relation to the further extension appeals.

Submitters on the amendment appeals

[34] Ms Campbell advised the court[37] that:

> The bulk, location and relative height of buildings in the vicinity of the Queenstown town centre have proved to be of keen interest to parties whose views could be affected.

She then submitted that:

> The deletion of the TCTZ might well have elicited submissions from affected parties on the issue, who could legitimately consider themselves prejudiced if the deletion occurred by way of a "submissional sidewind" as Kos J put it in *Motor Machinists*.

[35] The first question to ask in this unusual situation is "who might those potential submitters be?". As a result of the Commissioners' Decision the Transitional Zone is now surrounded by Town Centre Zone, not by a residential zone which the TCTZ was partly designed to protect. I consider that any persons who stood to benefit directly from the rezoning proposed by PC50 were on notice that neighbours might seek similar benefits by making submissions on joining the zone, especially where those neighbours would be surrounded by Town Centre Zoning.

[36] On the other hand, the TCTZ was also designed to protect the important amenities of the existing town centre. It is easy to imagine that building higher within the TCTZ might have undesirable effects on the town centre in respect of shading and being out-of-scale. Would businesses in the town centre be denied an effective response if I allowed the challenged parts of the amendment submissions to remain in? The answer is "yes" because adjacent lot owners or building occupiers in Shotover Street might lose sun and/or views.

[37] Submissions for QLDC dated 3 December 2015 para 13.3.

[37] While the relevant Appendix A — the McDermott Report — to the Section 32 Evaluation did give some notice to owners and businesses in the area of changes to the zoning of land near the TCTZ (and of consequential changes to the rules governing land) I hold that was insufficient. That is because while potential submitters should look at the Section 32 Evaluation, it is unfair to expect them to pore over the Appendices.

[38] The *Clearwater* approach as explained by *Motor Machinists* now creates the situation that if a local authority's section 32 evaluation is (potentially) inadequate, that may cut out the range of submissions that may be found to be 'on' the plan change. While that does not seem fair to the primary submitters, I must not overlook that it is the fairness to persons with an interest greater than the public generally in the matters raised in a primary submission which I must consider here. Simply because a local authority may have put forward what is possibly an inferior section 32 evaluation at the initial step does not mean that a further wrong should be done to interested persons by denying them the right to participate.

Summary

[39] In these unusual circumstances, I find (if barely) that the potential submitters on the appellants' submissions were not given sufficient notice by the combination of the Section 32 Evaluation, and the Council's summary of submissions. This has been a difficult decision to make and I am relieved that the appellants have apparently sought similar outcomes on the review of the district plan.

Result

[40] I hold that the affected parts of all four challenged appeals are not within jurisdiction and will make orders accordingly.

[41] It seems potentially unfair that the right of submitters to be heard about different resources should be strictly circumscribed by the proponent of a plan change if those resources possibly should be one of the other reasonably practicable options which should have been considered under section 32 RMA. That concern is strengthened

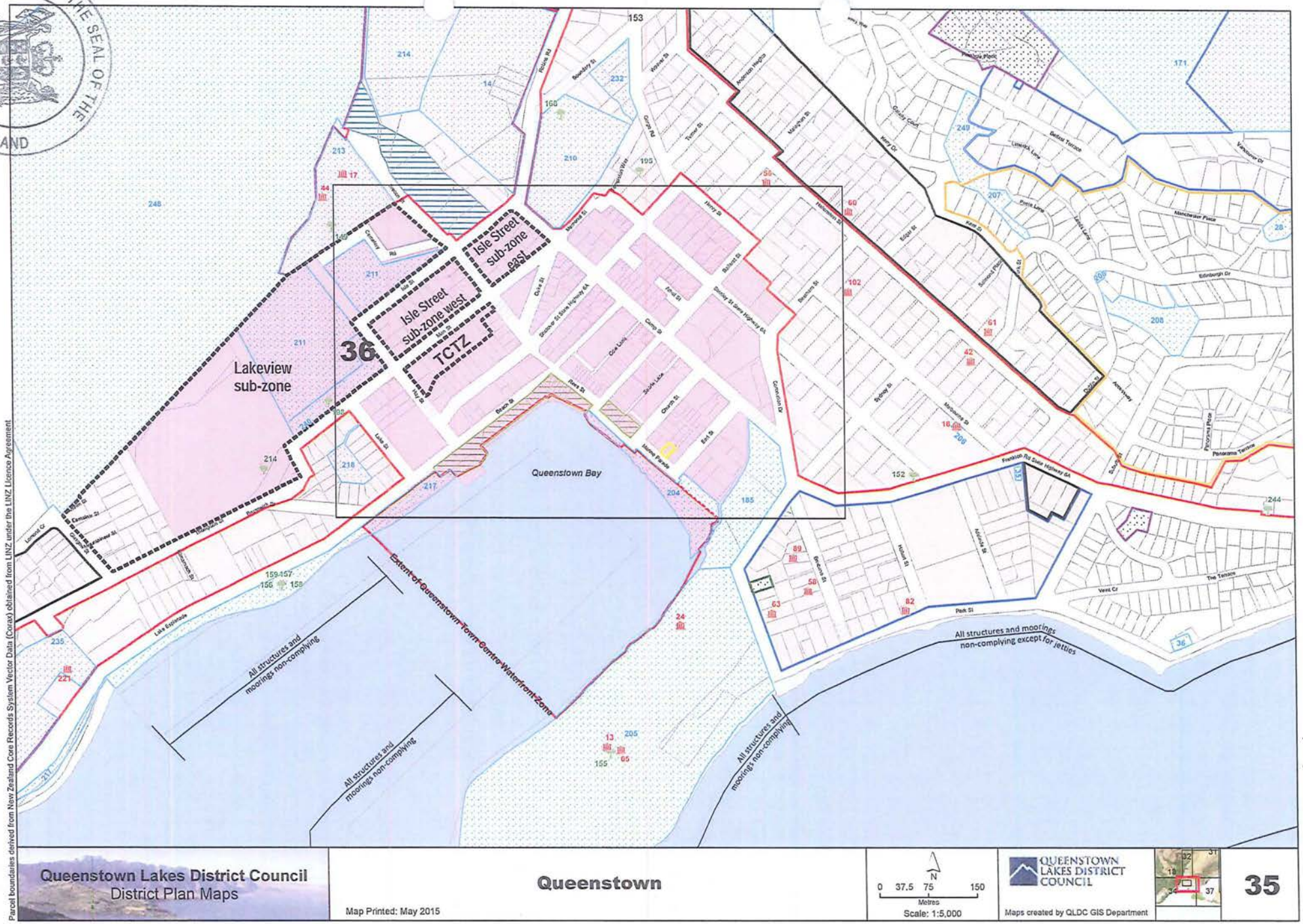
where (as here) the Council has a financial interest in the outcome. These matters may be relevant to costs.

J R Jackson
Environment Judge

ANNEXURES

A: Copy of map for PC50 as notified.

B: Copy of QLDC Map 36 with appellant's land identified.


Isle Street sub-zone east
Isle Street sub-zone west
TCTZ
36
Lakeview sub-zone
Queenstown Bay
Extent of Queenstown Town Centre Waterfront Zone
All structures and moorings non-complying
All structures and moorings non-complying except for jetties
Parcel boundaries derived from New Zealand Core Records System Vector Data (Corax) obtained from LINZ under the LINZ Licence Agreement
Queenstown Lakes District Council
District Plan Maps
Map Printed: May 2015
Queenstown
0 37.5 75 150
Metres
Scale: 1:5,000
QUEENSTOWN LAKES DISTRICT COUNCIL
Maps created by QLDC GIS Department
35

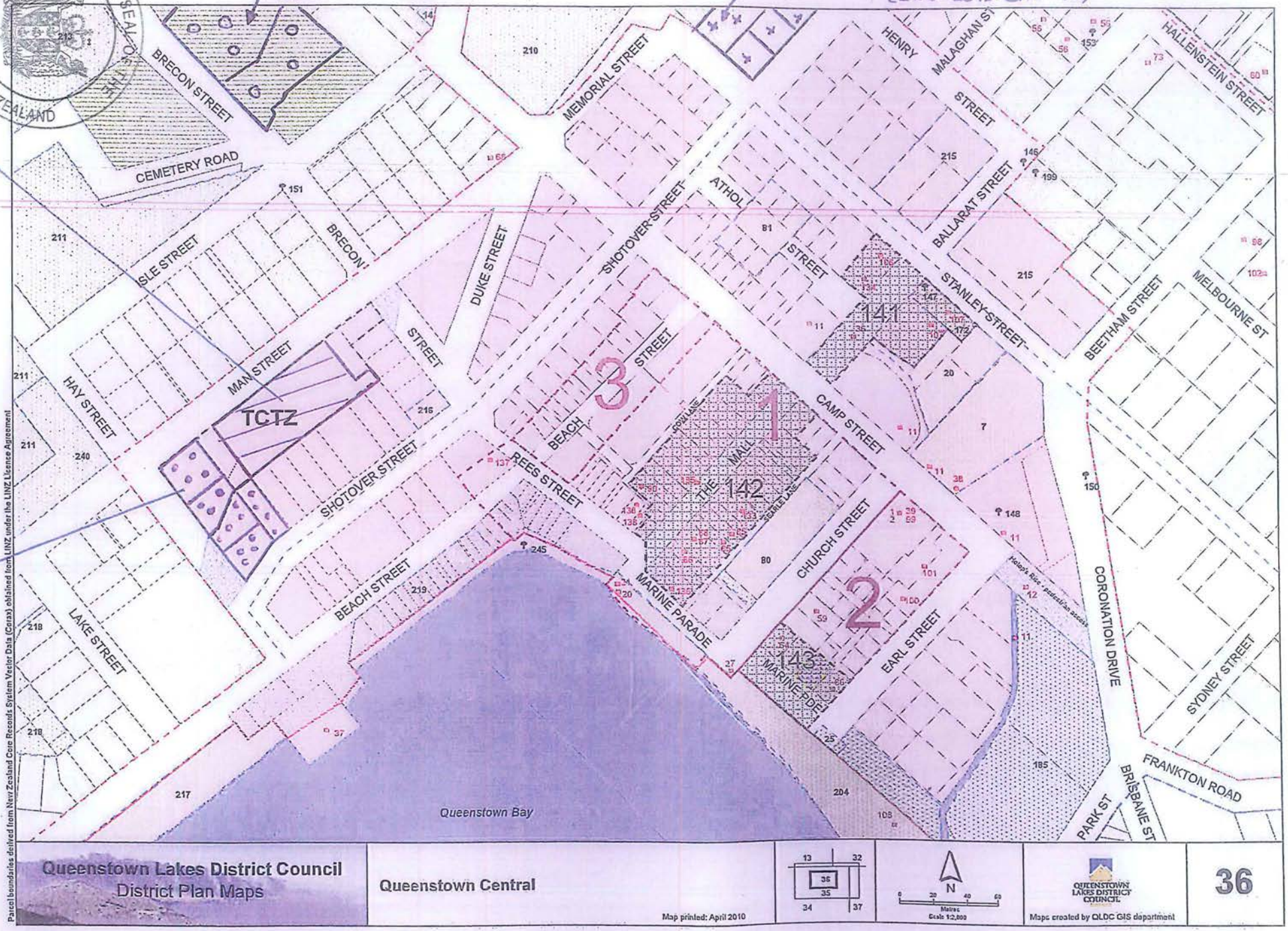
"A"

Queenstown Gold Limited (ENV-2015-CHC-71)

Kelso Investments Limited & Cheng's Capital Investments Limited (ENV-2015-CHC-73)

Well Smart Properties Limited (ENV-2015-CHC-72)

Well Smart Investment Holding (2020) Limited (ENV-2015-CHC-70)



Parcel boundaries derived from New Zealand Core Records System Vector Data (Corax) obtained from LINZ under the LINZ Licence Agreement

Queenstown Lakes District Council
District Plan Maps

Queenstown Central

Map printed: April 2010

Maps created by QLDC GIS department

36

B