IN THE HIGH COURT OF NEW ZEALAND
ADMINISTRATIVE DIVISION
DUNEDIN

No. CP111/90

IN THE MATTER of the Public Works Act 1981

A N D

474

IN THE MATTER of a claim to compensation under section 63 of that Act

NOT RECOMMENDED

BETWEEN HENRY JOHN O'REILLY

Applicant

A N D THE MINISTER OF WORKS AND DEVELOPMENT

Respondent

Hearing: 20 March 1991

Counsel: R.J. Somerville for Applicant
J.A.L. Oliver for Respondent

Judgment: Delivered 4.4.91
Deputy Registrar

JUDGMENT OF HOLLAND, J.

On 20 March 1989 the claimant gave notice requiring his claim for compensation of $101,936 to be heard by the Land Valuation Tribunal. On 21 August 1990 he applied that the claim be transferred to the Administrative Division of this Court. An order was made to this effect by consent on 4 October 1990. There is now before the Court, with the consent of the parties, a preliminary application

as to liability. The issue as to liability is substantially a question of law only, but in any event the parties have consented to this preliminary determination being heard by Judge alone without the benefit of an assessor.

The claim is pursuant to s.63 of the Public Works Act 1981 for injurious affection to land and for damage to fruit crops. It arises out of operations of the respondent in the erection of the Clutha Dam and associated works. For the purpose of determining this preliminary point of law, it is common ground that I should assume that the applicant is able to establish facts which would entitle him to compensation under s.63 of the Act. Counsel for the respondent made it clear that in the event of the claim proceeding that issue will be strenuously opposed, but this preliminary point is quite independent of the proof of injurious affection or damage within the meaning of the section.

For a number of years prior to 1979 the applicant and his brother operated an apricot orchard in the Cromwell Gorge. On 4 September 1979, by memorandum of agreement, the Crown purchased the land for $74,287. The purchase was stated to be "subject to the conditions set out in notes (a) and (c) endorsed on the reverse hereof". Note (a) on the reverse was entirely struck out, but note (c) referred to conditions special to this transaction set out in a document headed "A" comprising 15 paragraphs described as "Conditions of Lease".

There followed some 20 months later, on 4 May 1981, a memorandum of agreement signed by the applicant and the duly authorised agent of the Crown providing for a lease for a term of six years from 10 October 1979 and thereafter at the pleasure of the lessor at a rental of $5,400 per annum for the first three years, and thereafter "as hereinafter provided".

Clause 8 of that agreement provided as follows:-

> "THAT the rental shall be reviewed as at 10th October 1982 to a rental agreed upon between the parties hereto or failing agreement to be settled by Arbitration in accordance with the Arbitration Act 1948 PROVIDED that the Lessee may have the rental reviewed if and when the Lessor rendor (sic) part or parts of the said land incapable of being utilised for horticultural purposes."

On 17 May 1983 a variation of agreement was entered into providing that the rental for the year commencing on 10 October 1982 should be $3,740 and that the rental for the two years commencing on 10 October 1983 should be $5,400 with a proviso that:-

> "the Lessee may have the rental reviewed to a rental agreed upon between the parties hereto or failing agreement to be settled by arbitration in accordance with the provisions of the Arbitration Act 1908 if and when the activities of the Lessor pursuant to clause 4 of the said agreement result in part or parts of the said land becoming in capable of being utilised for horticultural purposes."

The said agreement was earlier defined as being the Memorandum of Agreement dated 4 May 1981. Clause 4 of that agreement provided as follows:-

"4. TO permit the Lessor or her agents to enter upon the said land and to carry out work for purposes associated with hydro-development provided reasonable prior notice is given."

Clause 9 of the same agreement of 4 May 1981 provides as follows:-

"9. THAT the Lessee acknowledges that the land is liable to damage by the Lessor's operations in accordance with Clause 4 hereof and accepts that the Lessee shall have no claim whatsoever against the Lessor for damage to the land or any improvements thereon caused by the Lessors operations save and except the right of rental review as provided in Clause 8 above."

The only other relevant clauses of the agreement of 4 May 1981 appear to be clauses 10, 14 and 15 as follows:-

"10. THAT neither the Lessor nor the Lessee shall be responsible to keep or maintain any buildings or improvements on the said land in a habitable or working condition and neither party shall be called upon to repair or replace any building that may be destroyed or damaged by fire, earthquake or other natural disaster.

14. THAT the Lessee may terminate this agreement at any time provided three months prior written notice is given to the Lessor.

15. THAT in the event of the land being required by the Lessor for any purpose this agreement may be terminated by the provision of 12 months written notice, such notice to coincide as near as possible to end of a fruit growing season and no compensation shall be payable to the Lessee."

Although it is apparent that the agreement dated 4 May 1981 followed the conditions marked "A" attached

to the agreement whereby the Crown purchased the land, those clauses were not exactly adopted in the agreement of 4 May 1981. Nevertheless Clause 4 of the conditions marked "A" which provided:-

> "The Lessee reserves the right to have the annual rental reviewed if and when the action of the Lessor renders part or parts of the said land incapable of being utilized for horticultural purposes."

appears to have been incorporated in the proviso to Clause 8 of the agreement of 4 May 1981.

On the other hand, Clause 6 of the conditions of lease marked "A" is in somewhat different terms from Clause 9 of the agreement for lease of 4 May 1981.

Mr Somerville submitted that as the parties had, following the agreement for sale and purchase which included "conditions of lease", entered into a formal agreement for lease dated 4 May 1981 and varied by a further agreement dated 17 May 1983, the contractual arrangements between the applicant and the Crown must be construed having reference solely to those formal documents and without regard to the conditions of lease attached to the agreement for sale and purchase. In support of that submission he relied on the observations of Cooke J. in Moreton v Montrose Ltd (1986) 2 N.Z.L.R. 476 where, after referring to a passage from the judgment of Brightman J. in Heron Garage Properties Ltd v Moss (1974) 1 All E.R. 421, 427, he said, at p503:-

> "In cases where the contract is completely contained in a formal written document, I respectfully agree with that passage and am fortified by noting that in the New Zealand High Court Somers J and Cook J have also agreed with it: see Crofts v GUS Properties Ltd (1981) 1 NZCPR 332, 338-340 and the reference there to the unreported judgment in Orr v AB Consolidated Holdings Ltd (Christchurch, A352/76, 18 April 1978).
>
> In such cases on ordinary principles evidence of the claimed intentions of the respective parties, or of what was said or written in negotiations, is inadmissible: see the speech of Lord Wilberforce in the House of Lords in Prenn v Simmonds (1971) 3 All ER 237. The wisdom of the rule is brought out by the unimpressive and conflicting assertions by the parties in evidence here as to what was the true purpose of cl 22."

The problem that arises is what is meant in clause 9 of the agreement dated 4 May 1981 by the phrase "the lessor's operations in accordance with clause 4 hereof". Clause 4 permits the Crown, notwithstanding the agreement to lease, to enter upon the land and carry out work for purposes associated with hydro-development. It is common ground that what is claimed by the applicant is damage or injurious affection not caused by an entry upon the land leased to the applicant but was caused by the works of the Crown on adjoining or nearby land for purposes associated with hydro-development.

No evidence was called by either party as to the surrounding matrix of facts. The question for determination by the Court is required to be determined on the facts earlier stated in this judgment and the accompanying documents. In this regard it is helpful to

consider a passage from the opinion of Lord Wilberforce in Prenn v Simmonds (1971) 3 All E.R. 237 where he said at p239:-

> "In order for the agreement of 6th July 1960 to be understood, it must be placed in its context. The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations. There is no need to appeal here to any modern, anti-literal, tendencies, for Lord Blackburn's well-known judgment in River Wear Comrs v Adamson provides ample warrant for a liberal approach. We must, as he said, enquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view. Moreover, at any rate since 1859 (Macdonald v Longbottom) it has been clear enough that evidence of mutually known facts may be admitted to identify the meaning of a descriptive term.
>
> Counsel for Dr Simmonds, however, contended for even greater extension of the court's interpretative power. They argued that later authorities have gone further and allow prior negotiations to be looked at in aid of the construction of a written document. In my opinion, they did not make good their contention. A modern authority in this House, which counsel for Dr Simmonds invoked, is Hvalfangerselskapet Polaris Aktieselskap v Unilever Ltd where it was necessary to interpret the words 'entire production'. There, as here, there was a claim for rectification in the alternative so that a great deal of evidence of matters prior to the contract was called. But the speeches give no support for a contention that negotiations leading up to the contract can be taken into account; at most they support the admission of evidence to establish a trade or technical meeting (not in question here) and, of course, they recognise the admissibility of evidence of surrounding circumstances. But they contain little to encourage, and much to discourage, evidence of negotiation or of the parties' subjective intentions."

Mr Oliver submits that the plain words of clause 9 exclude any claim for compensation under the Public Works Act in respect of work carried out by the Crown associated with hydro-development. Mr Somerville on the other hand submits that clause 9 only prevents a claim for compensation where that work has been carried out pursuant to an entry on the land the subject of the lease.

I do not regard the existence of the agreement for sale and purchase, with the conditions of lease marked "A" attached to it, as being evidence of negotiation or of the parties' subjective intentions. It is evidence of what the parties agreed. It may well be that when such an agreement is intended to be followed by a formal document the parties will not be entitled to refer to an earlier agreement to defeat the clear wording of the later formal document. That is not the case here. There is an ambiguity arising from the words used in clause 9 of the document and I am satisfied that clause 9 does not apply only to damage caused by the operations of the Crown following an entry on the leased land, but applies as is stated in the latter part of clause 9 so as to prevent any claim against the Crown "for damage to the land or any improvements thereon caused by the lessor's operations".

I reach that conclusion because of the clear wording of clause 6 of the conditions of lease marked "A" attached to the agreement for sale and purchase. I am also supported in reaching that conclusion by the provision in the conditions of lease marked "A" for reduction in rental

contemplated under clause 4 of the conditions of lease marked "A" and reflected in the variation of the agreement dated 17 May 1983 which reduces the rental for a particular year during the currency of the lease.

There was no evidence as to the matter, but counsel for the respondent has said in his submissions and without objection by counsel for the applicant:-

> "It should be noted that no claim was made for reduction in rental under clause 8 as amended in respect of the 1983/84 season when it is alleged the damage occurred."

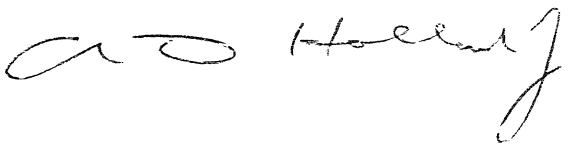
I take it that I am to assume from that that although there was provision for a rental review for the years 1983/84, when the damage is alleged to have occurred, no such application was made. I do not place any reliance on that factor because if the interpretation relied on by counsel for the applicant is correct the rental review provision provided in the memorandum of variation dated 17 May 1983 would not have been applicable.

I am satisfied that when the applicant transferred the land to the Crown and negotiated a lease it was negotiated for a rental of $5,400 per annum on land of a value, according to the agreement for sale and purchase, of $74,287. Counsel for the respondent submitted that the rental represented 3% of market value. That does not appear to me to be in accordance with the figures placed before me, but nevertheless the lease was at a low rental without any great security of tenure because there was a right to the

lessee to terminate on three months' notice and a right to the lessor to terminate on 12 months' notice. I am satisfied that included in the whole transaction was the provision that the only remedy that the applicant would have for damage arising from the operations of the Crown in the area was either to withdraw from the lease or to endeavour to negotiate a lower rental. I do not consider that the agreement of 4 May 1981, or the variation of that agreement on 17 May 1983, was intended to alter that general contractual arrangement reached on 4 September 1979. Nor has it in fact done so.

It follows that the claim of the applicant cannot succeed. It is dismissed. Although it was submitted that if this preliminary point should not be decisive costs should be reserved, there was no argument that costs should not follow the event if, as has occurred, the claim is dismissed. Substantial costs have no doubt been avoided as a result of this preliminary application.

There will be an order dismissing the applicant's claim, together with an order that the applicant do pay the Crown costs of $1,000 together with disbursements and other necessary payments, but not including any travel or accommodation costs of counsel, to be fixed by the Registrar.



Solicitors:

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Crown Law Office, Wellington, for Respondent