Waitemata District Health Board v Sisters of Mercy

Court of Appeal Wellington CA 21/02
19 September; 7 October 2002
Keith, Blanchard and McGrath JJ

Public works – Offer-back to former owner – Whether provisions of Health Sector (Transfers) Amendment Act 2000 precluded claim for offer-back of land – Whether relevant provisions of retrospective effect – Health Sector (Transfers) Act 1993, First Schedule, cl 3 – Public Works Act 1981, s 40 – Interpretation Act 1999, ss 7 and 17(1)(b).

Statutes – Interpretation – Whether provisions of Health Sector (Transfers) Amendment Act 2000 precluded claim for offer-back of land to original owner – Whether relevant provisions of retrospective effect – Health Sector (Transfers) Act 1993, First Schedule, cl 3 – Public Works Act 1981, s 40 – Interpretation Act 1999, ss 7 and 17(1)(b).

In 1956, land was acquired from the Sisters of Mercy (Roman Catholic Diocese of Auckland Trust Board) (the trust board) for the purposes of the North Shore Hospital. The Auckland Hospital Board initially held the land. The Auckland area health board (the AHB) succeeded it. In 1993, the AHB was abolished and on 1 July 1993, the land was transferred to Waitemata Health Ltd (WHL), a Crown Health Enterprise (CHE). On 1 January 2001, WHL was dissolved and its property vested in the Waitemata District Health Board (the DHB).

The trust board filed a statement of claim alleging that the AHB breached its obligation under s 40 of the Public Works Act 1981 to offer the land back to it no later than 31 May 1993 and that, alternatively, WHL was in breach of its obligation to make such an offer no later than 14 May 1996 or 18 December 1997. It was alleged that at those times the land was no longer required for the purpose for which it was taken. Further causes of action sought damages for negligence and breach of statutory duty.

The DHB applied to strike out the parts of the statement of claim seeking the offer-back. The DHB contended that s 40 of the Public Works Act did not apply to the land between 1993 and 2000. The DHB sought to rely on cl 3 in the First Schedule to the Health Sector (Transfers) Amendment Act 2000 (the 2000 provision) as precluding any claim by the trust board so long as the DHB continued to hold the land for its purposes. Clause 3 as it stood and as amended by the 2000 provision is set out in full at para [7] of the judgment. The trust board contended that if s 40 had been triggered before 1 January 2001, the trust board's right to offer-back of the land under s 40 had come into existence and that there was nothing in the 2000 provision to take away that existing right.

The High Court rejected the strike-out application, holding that the 2000 provision did not prevent the claim being brought in respect of facts occurring before 1 January 2001 that had allegedly triggered the obligation under s 40 at those earlier times. The DHB appealed to the Court of Appeal.

Held: Clause 3 of the First Schedule to the Health Sector (Transfers) Act 1993 as amended in 2000 did not override any rights under s 40 of the Public Works Act 1981 that arose prior to its amendment. The use of the present tense in the main operative subclause, the limitation of application to DHBs and the exclusion of CHEs, and the operational character of the provision indicated that the provision did not override pre-existing rights. The non-retrospective effect of the provision was also supported by the existence of earlier enactments that provided comparable protection against the application of the Public Works Act 1981, the terms of the immediately following provisions of the Health Sector (Transfers) Amendment Act 2000 and the principle against retrospectivity (see para [17]).

Appeal dismissed.

Observation: If there were any suggestion of retrospective application, there would be a good argument that the presumption in s 7 of the Interpretation Act 1999 against retrospective effect and the specific terms of s 17(1)(b) of that Act would protect the existing right applied (see para [21]).

Cases mentioned in judgment

Attorney-General v Hull [2000] 3 NZLR 63 (CA).

Counties Manukau Health Ltd v Dilworth Trust Board [1999] 3 NZLR 537 (CA).

Dilworth Trust Board v Counties Manukau Health Ltd [2002] 1 NZLR 433 (PC).

Appeal

This was an appeal by the DHB, the appellant, from the judgment of Randerson J (High Court, Auckland, CP 219/99, 14 December 2001) rejecting the DHB's application for striking out of the claim brought by the trust board, the first respondent, alleging that the DHB's predecessors, the AHB and WHL, had breached their obligation under s 40 of the Public Works Act 1981 by failing to offer land back to the trust board when it was no longer required for the purpose for which it was taken. The Attorney-General and the Residual Health Management Unit appeared as second respondents.

D L Schnauer for the DHB.
D E Wackrow for the trust board.
I C Carter for the Attorney-General.

Cur adv vult

The judgment of the Court was delivered by
KEITH J.

The course of the proceedings and the result

[1] Parliament in 1981, when enacting the Public Works Act (the 1981 Act), placed an obligation on public bodies which had taken land for a public work under that Act or any other Act or in any other manner, and which no longer

required the land for that work, to offer it back to the original owner or its successor. The Act places some limits on that obligation (stated in s 40) and establishes procedures to be followed but in this case we need not be concerned with that detail.

[2] As various parts of the state administration have been restructured since 1981 Parliament has understandably been concerned to see that the transfer of public work land to a new body and changes in the purposes for which the land was held over the years should not trigger the offer-back provisions of the 1981 Act. Legislative responses to that concern appeared for instance: in 1986 in the original legislation setting up state-owned enterprises; in 1988 when port companies were established; in 1989 in legislation relating to Crown forest assets; in 1990 in legislation concerning educational institutions and irrigation; in 1992 as part of the local government and housing reforms and in the legislation establishing Crown research institutes and energy companies; and importantly for this case, in 1993, in relation to health. This appeal is concerned with the legislation which replaced that last provision from 1 January 2001, the Health Sector (Transfers) Amendment Act 2000.

[3] The land in question was acquired from the Sisters of Mercy (Roman Catholic Diocese of Auckland Trust Board) (the trust board) in 1956 for the purposes of the North Shore Hospital. It was initially held by the Auckland Hospital board and then by the Auckland area health board. Under the 1993 reform area health boards were abolished and the land was transferred, as from 1 July 1993, to Waitemata Health Ltd (WHL), a Crown Health Enterprise (CHE). On 1 January 2001 the CHE was dissolved and its property vested in the Waitemata District Health Board (the DHB), the present appellant.

[4] In its second amended statement of claim the plaintiff trust board says that the area health board breached its obligation under s 40 of the 1981 Act to offer the land back to it no later than 31 May 1993 and that, alternatively, the CHE was in breach of the obligation to make such an offer no later than 14 May 1996 or 18 December 1997. The allegation is that at those times the land was no longer required for the purpose for which it was taken. Further causes of action seek damages for negligence and breach of statutory duty.

[5] The DHB has applied to strike out the parts of the second amended statement of claim seeking the offer back. It has conceded for the purposes of this proceeding that the damages action may be able to be brought separately from the action seeking declarations that there must be an offer-back. We must say that we find difficult the resulting division between the causes of action. The damages actions, like the declaratory ones, are based on alleged breaches of s 40. If that provision did not apply to the land between 1993 and 2000, as the DHB contends, it is difficult to see how the damages claims could be sustained. There is a related point, which would have gone to the exercise of the Court's discretion whether to make an order for a strike-out, that the length of the trial would probably scarcely have been reduced by the partial strike-out which is sought.

[6] Randerson J rejected the strike-out application, holding that the 2000 provision did not prevent the claim being brought in respect of facts occurring before 1 January 2001 which had allegedly triggered the obligation under s 40 at those earlier times. We agree with his conclusion and the appeal is accordingly dismissed.

The main legislative provisions

[7] The 2000 provision is a new cl 3 in the First Schedule to the Health Sector (Transfers) Act 1993 (the 1993 Act), substituted for the earlier version of the clause enacted in 1993. It reads as follows:

> **3. Modification of provisions of Public Works Act 1981 –** (1) In this clause, **public work land** means any land or interest in land owned by a transferee that –
>
> (a) on 10 May 1993 was subject to sections 40 to 42 of the Public Works Act 1981; and
>
> (b) has on 1 or more occasions been transferred by or under this Act.
>
> (2) Sections 40 to 42 of the Public Works Act 1981 do not apply to any public work land so long as the land –
>
> (a) is held by a transferee (regardless of whether or not those purposes are the purposes for which the land was acquired under the Public Works Act 1981 or under any corresponding former Act) –
>
> (i) for the purposes of the transferee; or
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> (ii) to enable the transferee to prepare for the disposal of the land; or
>
> (iii) to enable the transferee to determine whether to transfer or hold the land for any purpose referred to in this subclause; or
>
> (b) is transferred under this Act to enable another transferee to hold the land for any of the purposes specified in paragraph (a); or
>
> (c) is held under a lease or licence granted by a transferee to any person other than a transferee for health-related purposes or, with the consent of the Minister, for any other purpose.
>
> (3) If any public work land is not held or transferred in accordance with subclause (2), sections 40 and 41 of the Public Works Act 1981 apply as if the land were owned by the Crown. However, the proceeds of any sale of the land must nevertheless be applied for the purposes of the transferee that, immediately before the sale, owned the land.
>
> (4) When subclause (3) applies to any public work land, the transferee that owns the land may, subject to subclause (5), sell or otherwise dispose of the land to any person on any terms or conditions it thinks fit if, –
>
> (a) within 40 working days following an offer made, under section 40(2) of the Public Works Act 1981 (or such further period as the transferee allows), the parties have neither agreed on a price for the land nor agreed that the price be determined by the Land Valuation Tribunal; or
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> (b) an offer under section 40 of that Act in respect of the land is not required.
>
> (5) A transferee and a person who is entitled, or may become entitled, to receive an offer under section 40(2) of the Public Works Act 1981 in respect of any public work land may agree that the sale of the land is to be subject to any terms and conditions, including, for example, a term or condition entitling the transferee to lease the land.

(6) An agreement under subclause (5), in relation to any public work land with a person who is entitled, or may become entitled, to receive an offer under section 40(2) of the Public Works Act 1981 in respect of that land, extinguishes the person's entitlement or prospective entitlement under that section in respect of the land.

[8] It is convenient to set out at this stage the 1993 provision which the 2000 provision replaced:

3. Modification of provisions of Public Works Act 1981 – (1) This clause applies to the transfer to a transferee under this Act or by another transferee of land or an interest in land that at the date on which this Schedule comes into force [11 May 1993] is subject to sections 40 to 42 of the Public Works Act 1981.

(2) Nothing in sections 40 to 42 of the Public Works Act 1981 shall apply to the transfer of land or an interest in land to a transferee (being a transfer to which this clause applies) so long as the land or interest in land continues to be used for the purposes of the transferee, but, if all or any part of the land or interest in land is no longer required for such purposes, sections 40 and 41 of that Act shall apply to the land or interest no longer required as if the transferee were the Crown and the transfer of that land to that transferee were not a transfer to which this clause applies.

(3) If, in relation to land or an interest in land that has been transferred to a transferee (being a transfer to which this clause applies), an offer made under subsection (2) of section 40 of the Public Works Act 1981 is not accepted –

(a) Within 40 working days after the making of the offer or such further period as the chief executive of the Department of Survey and Land Information considers reasonable; or

(b) If an application has been made under subsection (2A) of that section to the Land Valuation Tribunal, within 20 working days after the determination of the Tribunal, –

whichever is later, and the parties have not agreed on other terms for the sale of the land or interest, the transferee may sell or otherwise dispose of the land or interest to any person on such terms and conditions as it thinks fit.

(4) For the purposes of subclause (3) of this clause, the term "working day" has the same meaning as it has in section 2 of the Public Works Act 1981.

The High Court judgment

[9] In his judgment of 14 December 2001 (High Court, Auckland, CP 219/99), Randerson J summarised the course of the proceedings. He had already, in June, given an interlocutory judgment in which, among other things, he dismissed an application by WHL to strike out the proceedings (High Court, Auckland, CP 219/99, 6 June 2001). WHL was however struck out as a defendant and the DHB was later joined in that capacity. The Judge highlighted relevant parts of the second amended statement of claim, set out the facts and statutory provisions, and referred to *Counties Manukau Health Ltd v Dilworth Trust Board* [1999] 3 NZLR 537 (CA) and *Dilworth Trust Board v Counties Manukau Health Ltd* [2002] 1 NZLR 433 (PC) in which the 1993 Act was considered. He summarised counsel's submissions and set out his reasoning

which led to the conclusion that the new cl 3(2) did not stand in the way of an argument that there may have been a triggering event under s 40 in the period from 10 May 1993 to 1 January 2001. The strike-out application accordingly failed.

The arguments in brief

[10] For the DHB, Mr Schnauer argued, as he had in the High Court, that the 2000 provision precluded the plaintiff's claim so long as the DHB continues to hold the land for its purposes – as all accept that it has since 1 January 2001. He supported that argument by reference to the terms of the 1993 and 2000 provisions and especially to various statements in the *Counties Manukau* case. Those statements were tentative and in any event related to the 1993 provision, the 2000 measure coming into force between argument and judgment in the Privy Council and being the subject of only passing comment there. Mr Wackrow, for the trust board, contended that if s 40 had been triggered before 1 January 2001 the board's right to the offer-back of the land under s 40 came into existence and that there was nothing in the 2000 provision to take away that existing right. In support of his argument, he stressed the principle against retrospective legislation.

[11] Mr Schnauer submitted, correctly, that the 2000 provision does provide wider protection against the offer-back provisions than the 1993 provision. Consider for instance the potential under subcl (2)(c) of the land being used for the time being, with the consent of the Minister, "for any other purpose" which is not health-related, while at the same time continuing to be held for a (future) health use. Consider also the more explicitly stated associated purposes in subcl (2)(a)(ii) and (iii). But that greater width is distinct from the questions whether the new clause has effect in respect of earlier events and in particular whether it defeats rights which had come into existence under s 40 before the 2000 provision came into force.

Does the 2000 provision preclude the claim in respect of existing offer-back rights?

[12] To answer that question we go directly to the provisions of the 2000 amendment and begin with its primary operative provision in subcl (2). The buy-back provisions of the 1981 Act do not apply to public work land so long as:

- it is held by a transferee (which the DHB is); and
- for its purposes (and the parties agree that it has been so held since 1 January 2001); and
- even if those purposes differ from those for which the land was acquired initially

or in certain other circumstances with which we are not directly concerned.

[13] According to subcl (1), "public work land" means land that:

- on 10 May 1993 (the day before the 1993 provision came into force) was subject to ss 40 – 42 of the 1981 Act;
- has been transferred by or under the Act on one or more occasions; and
- is owned by a transferee.

[14] No issue arises about the first and second matters. This land, held by the area health board until 1 July 1993, was subject to ss 40 – 42 of the Public Works Act on 10 May 1993, and on 1 July 1993 the land was transferred under

the 1993 Act from the area health board to the CHE. The third element, in temporal sequence, is that the land is owned by a transferee. We say "in temporal sequence", first, because of the use of the present tense ("is") which is to be contrasted with the past tenses in the other two elements and, secondly, because "transferee" has a new definition as from 1 January 2001 when the new version of cl 3 became part of the law. So far as the circumstances of this case are concerned, the transferee is the DHB, one of the publicly owned health and disability organisations, but CHEs do not come within the new definition. The position of CHEs had of course been protected by the 1993 provision so long as they existed and until it was repealed. The new provision is written in terms of the current definitions and current bodies for present and future purposes. On its face the subclause is simply not apt to apply to situations that arose before 1 January 2001.

[15] Subclause (1) defines a term, "public work land", for the purpose of the new version of the clause. As with definitions included in a particular enactment (as in the present case), or in a particular statute, or in the Interpretation Act 1999 itself it has, in terms of that Act (s 2(b)), the purpose of "shorten[ing] legislation". The consequence is that the following five subclauses of cl 3 need not repeat its terms, but can simply refer, as each does, to public work land. It is not a provision concerned with the temporal scope of those operative provisions. It does not say that it applies to events occurring before it was enacted (for instance by using one of the standard formulae for giving the provision retrospective effect). Further, the set of provisions establishes procedures which could not have operated in the past for the simple reason that they did not exist at that time. Consider for instance the agreement process which subcl (5) contemplates.

[16] We return to the main operative provision of subcl (2). It prevents ss 40 – 42 applying so long as the land is held by the transferee – again including a district health board but not a CHE – for its purposes. Sections 40 and 41 can become applicable, however, if that land is no longer held for those purposes or the others stated more broadly (cl 3(3)). The subclause is written in the present and accordingly continues to apply into the future.

[17] We have already given three reasons why the provision does not override rights which have already arisen: the use of the present tense in subcl (2); the limit of application under both subcls (1) and (2) to district health boards with CHEs being excluded; and the operational character of the provisions. We now turn to three further reasons why the provision does not have retrospective effect: the existence before 2001 of the 1993 provision which provided comparable protection against the application of the 1981 Act; the terms of the immediately following provision of the 2000 Act; and the principle against retrospectivity.

[18] The 1993 provision made ss 40 – 42 of the 1981 Act inapplicable to the transfer of land to a transferee – here WHL (the CHE) – so long as the land continued to be "used" for its purposes. But if the land was no longer "required" during the time it was in force those provisions did become applicable. That is to say, protection against the offer-back provision was accorded under the 1993 provision, as it is accorded under the 2000 provision, if a public purpose was or is still being pursued (with a wider definition in the new provision). There is no obvious reason why the 2000 amendment should retrospectively provide greater protection than that that was available at the time the original 1993 provision was in force.

[19] Next, s 12 which introduces the new cl 3 in the 2000 Act is immediately followed by s 13 which is expressly retrospective. It validates certain past transactions. That contrast emphasises that the new cl 3 is simply prospective. So too does the fact that s 13 gives effect to just one part of the new clause, cl 3(2)(c), "as if [it] had been in force at the time of the use [for] other than health-related purposes; and . . . the Minister had consented, under that clause, to that use". The introduction of the fiction by the use of "as if" indicates that cl 3 would not otherwise be applicable to earlier events.

[20] Finally, if there were any doubt about the matter, the principle of non-retrospectivity would defeat the DHB's argument. Section 7 of the Interpretation Act states the presumption that "[a]n enactment does not have retrospective effect". That proposition is given greater precision in s 17(1)(b): "[t]he repeal of an enactment does not affect . . . [a]n existing right, interest, title, immunity, or duty."

[21] The High Court, this Court and the Privy Council have discussed the nature of the right of the original owner under s 40. We see no reason to add to that discussion, preferring once again to keep simply to the terms of s 40 (see *Attorney-General v Hull* [2000] 3 NZLR 63 at para [49]). There can be no doubt, and this was not really disputed before us, that an original owner has a right to the offer-back under s 40 when its terms are satisfied. That "right", accepting for the moment the allegations in the second amended statement of claim, "exist[ed]" at the point when the 2000 enactment was passed and, if there were any suggestion that that enactment might have retrospective application, there would be a good argument that the principle in s 7 and the specific terms of s 17(1)(b) would protect the "existing right" of the original owner. Given the clarity, as we see it, of the terms of the 2000 amendment we need not get near to that point. There is no possible argument that the terms of the 2000 amendment or the context require that it be given retrospective effect contrary to ss 7 and 17(1)(b) in any way.

Result

[22] It follows that the appeal is dismissed.

[23] The trust board, the first respondent, is entitled to an order for costs of $5000 against the appellant and reasonable disbursements, including travel and accommodation costs of counsel. No order is made in respect of the other respondents.

Appeal dismissed.

Solicitors for the DHB: *Schnauer & Co* (Auckland).
Solicitors for the trust board: *Wackrow Smith & Davies* (Auckland).
Solicitors for the Attorney-General: *Crown Law Office* (Wellington).

Reported by: Tania Richards, *Barrister*