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