IN THE COURT OF APPEAL OF NEW ZEALAND

CA251/2014
[2015] NZCA 479

BETWEEN	CHARLES WILLIAM WILLIAMS, JEAN ELIZABETH MORLEY, INEZ BEVERLEY FLAVELL, LESLEY ANNE HENSLEIGH, THE ROYAL NEW ZEALAND FOUNDATION OF THE BLIND, DONALD ALEXANDER MACKINTOSH, LYNDA ANNE RYAN, JANICE AILEEN ROBERTSON, GILLIAN MADGE CLARK, ROSALIE HILDA MAILAND, DONALD MICHAEL STEWART, PATRICIA DORA MARY SPENCER-WOOD, SOPHIA MARIA HUNT AND DAVID JOHN MCCORMICK Appellants
AND	AUCKLAND COUNCIL Respondent

Hearing:	12 and 13 August 2015
Court:	Harrison, French and Mallon JJ
Counsel:	C R Carruthers QC, W L Aldred and P M Cassin for Appellants M E Casey QC and G W Hall for Respondent
Judgment:	9 October 2015 at 10 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The cross-appeal is dismissed.

C There is no order as to costs.

REASONS OF THE COURT

(Given by Harrison J)

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Introduction

[1] In 1949 the then Auckland Harbour Board acting under statutory authority notified the owners of seven separate properties at Te Atatu that their rural land was within an area designated for the construction and development of port facilities in the upper Waitemata Harbour (the Te Atatu land). Over the next few years the Board acquired over 75 hectares of land from those owners. By the late 1970s, however, it became apparent that the port proposal would not proceed at the designated site. The Te Atatu land was progressively rezoned and used for other purposes. Some of the land is now a residential subdivision. However, most is within a public park and its potential value for housing is very substantial.

[2] On 1 February 1982 the Public Works Act 1981 (the PWA 1981) came into force. Its provisions obliged local authorities to offer land held for a public work, but no longer required for that purpose, for sale back to its original owners or testamentary successors at its then current market value. Successors of the seven original owners claim that on 1 February 1982 the Board held but no longer required the Te Atatu land for the purpose of a public work; and that the Board and its successors, currently the Auckland Council,[1] have since breached their duty to offer to sell the land back to them. In 2005 the owners' successors, whom we shall describe collectively as the owners, applied to the High Court for declaratory relief to that effect against the Council.

[3] The Council raised many defences in denying liability. In *Waitakere City Council v Bennett* this Court dismissed the Council's appeal against the High Court's refusal to strike out the owners' proceeding before trial.[2] In a comprehensive judgment delivered after trial Fogarty J upheld all the owners' substantive claims except on a discrete point of statutory interpretation which he decided in the Council's favour.[3] As a result, the owners' claims failed.

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1 The Board went out of legal existence in 1989. Successive owners of the land were the Waitakere City Council and then from 1995 Waitakere Properties Ltd. Auckland Council acquired the land on its statutory formation in 2010.

2 *Waitakere City Council v Bennett* [2008] NZCA 428, [2009] NZRMA 76.

3 *Robertson v Auckland Council* [2014] NZHC 765 [High Court judgment].

[4] The owners appeal against Fogarty J's judgment. The Council cross-appeals against the Judge's dismissal of its various defences (in legal terms, it supports the judgment on additional grounds). As will become apparent, we disagree with the Judge's conclusion on the point of statutory interpretation which proved decisive for the Council. But otherwise we agree with his dismissal of the Council's defences other than on the standing of three owners to sue. As a result, four of the seven owners have satisfied the legal elements for their claims.

[5] The final and ultimately decisive question will be whether we should exercise our discretion to grant the owners' applications for declaratory relief. In this respect the factors of delay and the nature of the owners' interests in the Te Atatu land will assume particular importance.

[6] We note that, although there are seven separate owners with seven separate claims, counsel treated them in argument before us as one group. Distinctions between individual owners were only drawn on the issues of compulsion, standing and, to a lesser extent, relief. We propose to address the claims in the same way.

The PWA 1981

[7] Section 40 of the PWA 1981, which lies at the heart of this case, 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 other public work; and
>
> (c) is not required for any exchange under section 105—
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> 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), if that subsection is applicable to that land.
>
> (2) Except as provided in subsection (4), the chief executive of the department within the meaning of section 2 of the Survey Act 1986 or local authority, unless—

(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), the parties may agree that the price be determined by the Land Valuation Tribunal.

(3) Subsection (2) shall not apply to land acquired after 31 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.

(4) 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.

(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.

Issues

[8] Counsel have identified numerous issues on this appeal, principally arising from the Council's cross-appeal, which we have recast and refined into a chronological sequence. By this means we are able to undertake a logical consideration of the Council's defences, some of which have more obvious merit than others.

[9] Our approach identifies three main issues. The first or threshold issue is whether the Board assumed a duty pursuant to s 40 of the PWA 1981 to offer to sell the Te Atatu land back to the owners, requiring our answers to the following questions:

(a) whether the Board acquired or held the land for a public work;

(b) if so, whether the Board still held and required the land for a public work on 1 February 1982;

(c) if so, whether the owners must prove the Board compulsorily acquired the land;

(d) if not, or if the owners are required to prove compulsion and are able to do so, whether the Council as the Board's successor lawfully exercised a discretionary power in 1996 in resolving not to offer some of the land back to owners;

(e) if not, whether all owners fell within the statutory definition of a "successor".

[10] The second issue is whether the Auckland Harbour Board and Waitemata City Council (Te Atatu) Empowering Act 1983 (the Empowering Act 1983) had the effect of extinguishing the Board's duty.

[11] The third issue, assuming the Board owed and breached its duty to offer to sell the Te Atatu land back to the owners, is whether we should exercise our discretion to grant declaratory relief.

Factual background

[12] We shall first outline briefly the relevant and uncontested facts relating to the Board's acquisition of the Te Atatu land in order to give context to the three main issues. We shall refer to particular facts in more detail where appropriate when addressing each separate issue.

[13] Sometime in 1949 the Board adopted a proposal to accommodate a long-term expansion of the Port of Auckland in the area of the upper Waitemata Harbour between Te Atatu Peninsula and Point Chevalier. The Auckland Harbour Development Act 1949 vested the harbour bed in this vicinity in the Board.

[14] On 10 November 1949 the Board issued a gazette notice relating to the Te Atatu land (also referred to as the stay order) in these terms:

> Pursuant to subsection 2 of section 29 of the Finance Act, (No. 3) 1944, the Auckland Harbour Board hereby gives notice of the nature of the work intended in the scheme of development and construction described in the First Schedule hereto and that the approximate boundaries of the area hereby affected are as described in the Second, Third, Fourth, and Fifth Schedules hereto, such being hereafter referred to as the area. This notice shall remain in force until the 25th day of October, 1964.

[15] Section 29(2) of the Finance Act (No 3) 1944, by which the Board acted, provided:

> (2) In the case of a comprehensive public work or scheme of development or reconstruction, the Minister or a local authority shall by notice gazetted and publicly notified state the nature of the works included in the comprehensive public work or scheme and the approximate boundaries of the area affected thereby. The notice shall remain in force for such period as may be specified therein, *and for the purpose of any compensation claim arising during that period in respect of any work included in the comprehensive public work or scheme the specified date for the purposes of the last preceding subsection shall be the date of the first publication of the notice*. While any notice remains in force as aforesaid the Minister or the local authority may from time to time by a further notice gazetted and publicly notified extend the operation of the notice for such further period as he or it thinks fit. For the purposes of this section a Government work or a local work may form part of a more comprehensive public work or of a scheme of development and reconstruction which includes both Government works and local works, and any notice under this subsection may include works commenced before the date of the notice, and whether before or after the passing of this Act.
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> (The emphasised words were deleted from the Finance Act on 6 December 1951.)

[16] The First Schedule to the gazette notice stated:

> The development of the area for the purposes of providing port facilities, land for shipping, industrial and commercial purposes, and access thereto including in particular–
>
> 1. The reclamation of tidal lands.

2. Construction of breastworks, wharves, docks, and other harbour works.

3. The subdivision or resubdivision of lands, laying out and construction of roads, streets, and other means of access.

4. Dredging of channels and basins.

5. Provision of areas for industrial works.

6. Provision of areas and facilities for ship repairing.

7. Provision of areas for oil tanks and storage.

8. All harbour and other works necessary for the carrying into effect of the general object.

[17] On 11 November 1949 the Board wrote to the seven Te Atatu land owners as follows:

Upper Harbour Development

By Gazette Notice dated 10th November, 1949, the Auckland Harbour Board *has given notice of the work intended to be carried out in connection with the development of the Upper Harbour.*

By the same Notice the Board has defined the area which will be affected by such works. As the registered owner of the land described at foot hereof you are notified that such land is included in the area mentioned.

The Board wishes you to understand:

(a) The Gazette Notice mentioned does not purport to take any land;

(b) *That if the Board at any time, within the period of 15 years from 25th October, 1949, wishes to acquire for harbour works any of the land included in the area* then the compensation to be paid by the Board shall not be enhanced by reason of such works.

Yours faithfully,

Chief Executive Officer
& Secretary

(Emphasis added.)

[18] On 19 December 1950 the Board passed this resolution:

> **7. LAND FOR UPPER HAROUR DEVELOPMENT.**
>
> **Te Atatu area.**
>
> That, as this area is required for the Board's purposes, the Board proceed with the acquisition of the Te Atatu lands which are *(illegible)* to the 'Stay Order' and for that purpose the Chairman be authorised to open negotiation with the owners forthwith and *(illegible)* valuation options and take such other action as may be necessary subject to the actual purchase of any lands being submitted to the Board for approval.

[19] Of significance also is the Board's letter sent to the owners (proof of receipt was established for all except the Speechlays and the Williams) on 19 January 1951, stating:

> Upper Harbour Development
>
> The Board by Resolution dated 19th December, 1950, *decided to proceed with the acquisition of your land*, which in common with other lands at Te Atatu, is the subject of the stay order.
>
> The Board is anxious to avoid the expense which would be incurred by both parties *if the land were taken under the Public Works Act*.
>
> Mr. Stace Bennett, therefore, has been instructed to call upon you with a view to an amicable agreement being arrived at as to price.
>
> It is acknowledged that any purchase shall not be subject to the jurisdiction of [the] Land Valuation Court.
>
> (Emphasis added.)

[20] The Board progressively reached agreement with the seven owners to buy the Te Atatu land as follows:

(a) In April 1951, 3.5523 hectares from the Kindersleys (now represented by Patricia Spencer-Wood) for £5,500.

(b) In June 1951, 28.124 hectares from the Speechlays (now represented by Inez Flavell and Leslie Hensleigh) for £20,000.

(c) In June 1951, 4.5293 hectares from the Clares (now represented by Donald Mackintosh, Lynda Ryan and the Royal New Zealand

Foundation of the Blind (the RNZFB)) for £4,000.

(d) In September 1951, 6.5788 hectares from the Smiths (now represented by Janice Robertson, Gillian Clark and Rosalie Hilda Mailand) for £15,000.

(e) In December 1951, 20.6355 hectares from the McCormicks (now represented by David McCormick) for an unknown amount.

(f) In December 1951, 1.9231 hectares from the Stewarts (now represented by Donald Stewart) for £6,000.

(g) In October 1956, 11.0339 hectares from the Williams (now represented by Charles Williams and Jean Morley) for £18,000.[4]

First issue: was the Board under a duty to offer the land back?

(a) Did the Board acquire or hold the land for a public work?

(i) Council's defence

[21] The Council's first defence to the owners' claim is a denial that the Board ever acquired or held all the land for a public work.

[22] In challenging Fogarty J's dismissal of this defence,[5] Mr Casey QC for the Council submitted that:

(a) While some of the work referred to in the first schedule to the gazette notice fell within the definition of a public work – in particular, the reclamation work, construction of wharves, dredging and unspecified harbour and other works – it does not follow that the associated work referred to in the schedule fell into the same category. The Board's descriptive reference to "industrial and commercial purposes" showed

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4 Appended to this judgment is a diagram of the land taken with references to its current use.
5 At [58]–[68].

the land identified in its items 3, 5, 6 and 7[6] was not acquired for a public work. The total area was acquired for a mixture of public and non-public purposes.

(b) As the owners collectively and individually have been unable to identify which parts of the Te Atatu land were to be used for the public work of a port and which parts for industrial or commercial purposes under the scheme of development, their claims must fail for want of proof.

(c) A number of statutory provisions[7] read in combination established the Board's power to acquire land by negotiation, neither compulsorily nor under the PWA, other than for a public work and insofar as the scheme for the land included "industrial and commercial purposes" that land was not required for a public work.

(ii) Decision

[23] We reject Mr Casey's submission. The answer is, as Mr Carruthers QC submitted, straightforward. The Public Works Act 1928 (PWA 1928) was in force throughout the acquisition period commencing in November 1949. A "public work" was then defined as "every work which … any local authority is authorised to undertake under this or any other Act" including a "harbour".[8] Moreover, as this Court emphasised in *Bennett*, the Harbours Act 1950 was operative when the Board acquired all the land.[9] Section 140(1)(a) empowered a harbour board to:

> Acquire by purchase, lease, or otherwise, or take under the provisions of the Public Works Act 1928, any lands, buildings, or easements, or any interest therein required for *the purpose of obtaining access to or a frontage to* a public road for any foreshore or other land vested in it, or for *or in connection with any undertaking* which the Board is authorized to carry out:
>
> (Emphasis added.)

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6 At [16] above.

7 Harbours Act 1950, ss 140 and 173; Auckland Harbour Board Loan and Empowering Acts of 1946 (s 5) and 1951; Local Government Act 1974, s 572; Public Works Act 1928, ss 11, 22–23 and 32; Public Works Amendment Act 1948, s 17; and Finance Act (No 3) 1944, ss 29 and 31.

8 Public Works Act 1928, s 2.

9 *Bennett*, above n 2, at [84].

[24] It is artificial in this statutory context to restrict the meaning of "harbour" and thus a "public work" to its immediate physical configuration of a place where vessels anchor or dock.[10] The area acquired for the harbour itself – the seabed, reclaimed tidal land and land for breastwork, docks and wharves etc – would be of limited practical utility as a working port unless physically adjacent land was also set aside to service it. The wider power of acquisition vested by s 140(1)(a) of the Harbours Act recognised that a harbour cannot function efficiently or effectively without the provision of ancillary services. The Board's gazette notice was issued accordingly, to acquire land "for or in connection with" development of the harbour. Contiguous land was designated for "industrial and commercial purposes" – the areas for industrial works, ship repairing and oil tanks and storage.

[25] The gazette notice also recited the Board's reliance upon the authority vested by s 29(2) of the Finance Act (No 3) 1944.[11] This section provided "in the case of a comprehensive public work or scheme of development or reconstruction" the local authority by gazette notice was bound to state "the nature of the works included [in that public work or scheme] and the approximate boundaries of the area affected thereby." Section 29(2) was deemed to be part of the PWA 1928:[12] its terms did not empower local authorities to acquire land at fixed values for works which were not public works. The Board only had authority to acquire land for a public work and acted accordingly.

[26] Mr Casey advanced two associated submissions. First, he submitted the gazette notice did not purport to be for a "comprehensive public work" but for a "scheme of development or construction". We reject this distinction. In our judgment the phrases "comprehensive public work" and a "comprehensive scheme of development" were used synonymously in the PWA 1928. Both the notice and the PWA 1928 described a statutory public work.

[27] Second, in reliance on s 17 of the Public Works Amendment Act 1948, the Board's approach to land subject to the Empowering Act 1983 and *Bennett*, Mr Casey submitted that the absence of a compensation certificate, proclamation,

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10 For a similar approach, see *Attorney-General v Hull* [2000] 3 NZLR 63 (CA) at [27]–[30].
11 At [15] above.
12 Finance Act (No 3) 1944, s 28.

memorial or special note on the relevant titles was evidence the Te Atatu land was not acquired for a public purpose.

[28] However, Mr Casey properly acknowledged that the 1948 Amendment Act merely enabled the Board to provide a certificate: s 17(1) did not require such a step to be taken. Its absence cannot therefore amount to evidence the land was not acquired for a public work. Nor is it sensible to place weight on the Board's approach to certificates and other documents taken decades later under different legislation.

[29] Mr Casey's submission also misconstrues *Bennett*. In dismissing the Council's appeal against the High Court's refusal to strike out the proceedings, this Court was referring to the type of evidence possibly available to determine a factual question about acquisition of the land "in the light of objective circumstances."[13] The Court was not saying evidence of the nature referred to by Mr Casey was always required, expressly disclaiming "any view on the substantive merits of the case".[14]

[30] The objective evidence about the Board's acquisitions is found in the relevant legislation and contemporaneous documents. A proclamation was mandatory if the taking procedure under ss 22 and 23 of the PWA 1928 were invoked.[15] However, s 32 of the PWA 1928 authorised the local authority to "enter into agreements [to acquire land] … required for public works" without going through the formal acquisition process mandated by ss 22–23. Where land was acquired by agreement under s 32 it was nonetheless deemed to have been taken under the PWA 1928.[16] Fogarty J was correct to conclude that proclamations did not have to be entered on titles.[17]

[31] In summary, we agree with Mr Carruthers that the Council has not identified any legislative authority extant at the relevant times for the Board to take land for a discrete purpose such as commercial or industrial development which was not for a

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13 *Bennett*, above n 2, at [42].
14 At [96].
15 Public Works Act 1928, s 23(d) provides that if the Governor-General thinks fit to declare the lands taken for a public work, he must do so "by Proclamation".
16 Section 32(6).
17 High Court judgment, above n 3, at [82].

public work. In our judgment the Board took all the Te Atatu land for the public work of a harbour including associated or ancillary services. And we do not accept that empowering legislation, which simply authorised the Board to act at various times, determines the separate factual question of whether the Board acquired the land for a public work.

(b) Was the land still held or required for a public work on 1 February 1982?

(i) Council's defence

[32] The obligation imposed by s 40 of the PWA 1981 arose if the Board held the Te Atatu land "for any public work" but no longer required it "for that public work" or for "any other public work". No issue arose before us about whether the land was required for an "essential work", the test prior to 1987. As Fogarty J noted,[18] it was common ground between the parties that by the mid-1970s the land was no longer required for a public work. But on appeal Mr Casey appeared to challenge this finding, or contend at least that it did not fully address the issue of whether the land was held for a public work at 1 February 1982.

[33] In particular Mr Casey challenged this finding:

> [84] The concept of land being "held" is a common law property law concept. There are no absolute property rights at common law. All property rights are by way of character of tenure, coming of course from the French "to hold". With this concept in mind, it makes perfect sense for Parliament to envisage that land may be held as an authorised acquisition and authorised use for a particular purpose, but no longer in fact required for that purpose. In the long run this would normally generate another local act, or exercise of a statutory power, authorising the change of purpose to ensure that funds were not voted by Parliament for one purpose, but used for another.

[34] In support Mr Casey submitted that as all the Te Atatu land was not purchased for a public work it was not held for that purpose on 1 February 1982. He referred to a range of Board documents showing that from about 1976 onwards the Te Atatu land was being held for development and leasing as an industrial estate. By 1979 the Board had decided at least part of the land would no longer be reserved for future port development. Some reports proposed the creation and development of industrial lots. In Mr Casey's submission, the Board had decided by 1982 that all the

[18] At [70]–[77].

Te Atatu land would only be used for purposes complementary to a port which may be constructed elsewhere in the upper Waitemata Harbour. It was, he said, no longer held for a public work.

(ii) Decision

[35] In rejecting this submission we add our agreement with Fogarty J that, while the Te Atatu land was not *required* for a public work,[19] it was still *held* for that purpose on 1 February 1982. These are two separate elements with distinctly separate consequences.[20] Section 40 recognises a local authority's continual right to retain land held for a public work only for that or another public work: it does not empower a local authority to avoid its statutory duty by asserting a right to continue to hold and use that land instead for a non-public work. As this Court pointed out in *Bennett*,[21] s 20 of the Public Works Amendment Act 1952 allowed a local authority to change the purpose for which land was required to another authorised purpose but only by following a formal process of gazetting and proclamation. The Board's decision to use the Te Atatu land for another purpose without taking these formal steps did not change its existing legal status.

[36] Mr Casey submitted alternatively that either (a) if the industrial and commercial purpose for which the land was acquired were a public work, then as a matter of fact the land was still held and required for that purpose on 1 February 1982; or (b) if the land was purchased for a port or other harbour works that is a public work, then as a matter of fact it was no longer held nor required for that purpose on 1 February 1982.

[37] These alternatives appear to contradict what Fogarty J recorded was common ground in the High Court. In any event, they are factually irreconcilable as they would require us to make contrary findings based on the same subject matter; and neither alternative can be sustained in light of our conclusion that by 1 February 1982 the land was still held though not required for a public work.

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19 At [70]–[77].
20 See *Bennett*, above n 2, at [45].
21 At [24].

(c) Were the owners required to prove that the Board compulsorily acquired the land?

(i) Council's defence: law

[38] The Council's third substantive defence is that the owners were required to prove as a pre-requisite to the application of s 40(2) that the Board acquired the Te Atatu land compulsorily. On appeal it challenged Fogarty J's findings that, first, the owners were not required to prove the land was compulsorily acquired;[22] and second, if proof of compulsion was required, it was satisfied in every case.[23]

[39] Mr Casey's essential proposition was that the owners' agreements to sell the land to the Board negated the essential element of compulsion. While accepting s 40(2) does not specify a requirement of compulsion, Mr Casey submitted:

(a) Such a requirement must nevertheless be read into s 40(2) because the purpose of the remedial offer-back obligation is to create an entitlement to the return of land where it is taken by a local authority against the owner's will but not used for the original purpose. The PWA 1981 recognises the unfairness caused to the former owner if the public body either banked or sold the land to a third party.

(b) Conversely, where the vendor was willing and received true value, any unfairness would be cured. While there is no bright line for determining whether the land was required compulsorily, the owners must prove an element of compulsion.

(c) It followed that, as all of the owners entered voluntarily into agreements to sell the land, they had failed to discharge their evidential burden.

[40] In Mr Casey's submission the authorities have generally held that s 40 does not apply if the land was not acquired under compulsion or at least an element of it.

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22 At [86]–[102].
23 At [103]–[148].

In support he referred to the Privy Council's statements in *McLennan v Attorney-General* that:[24]

> [2] Sections 40 and 42 of the 1981 Act as amended provide for steps which can or must be taken when land *compulsorily acquired* is not required for public works.
>
> (Emphasis added.)

And:

> [34] … the basic structure of section 40 … is clear. (a) Where land is no longer required for the purpose for which it was *compulsorily acquired* the chief executive must endeavour to sell the land in accordance with subsection 40(2).
>
> (Emphasis added.)

[41] To the same or similar effect is this Court's observation in *Port Gisborne Ltd v Smiler* that:[25]

> [35] 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.
>
> (Emphasis added.)

(ii) Decision: law

[42] In common with Fogarty J we are satisfied that Mr Casey has overstated the effect of the leading authorities. The jurisdictional prerequisite for invoking the s 40 duty is that land is "held" under the PWA 1981 or the PWA 1928 "for any public work". The Board acquired the Te Atatu land for a public work by following the provisions of the PWA 1928. *McLennan* and *Port Gisborne* were simply referring to compulsory acquisition in this context as a shorthand or omnibus description of the two prescribed modes of holding, taking, purchasing or acquiring land[26] under the PWA 1928 – that is, by proclamation[27] or agreement.[28] The only element of

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24 *McLennan v Attorney-General* [2003] UKPC 25.
25 *Port Gisborne Ltd v Smiler* [1999] 2 NZLR 695 (CA); adopted in *Bennett*, above n 2, at [33].
26 Public Works Act 1928, s 35.
27 Sections 22–23.
28 Section 32.

compulsion that might need to be established is that which is axiomatic wherever a local authority's acquisition of land followed its statutory notice of a requirement for or an intention to take land for a public work. As Tipping J observed in *Bowler Investments Ltd v Attorney-General*, the prospect of a public work communicated formally in a gazette notice itself has the effect of compelling the owner to sell to the local authority by making sale on the open market "difficult if not impossible".[29]

[43] A survey of the relevant provisions of the PWA 1928 confirms this analysis. If a local authority decided land should be taken by proclamation, these steps were required:

(a) The local authority had to make a survey and a plan containing details about the land;[30] and to deposit a copy of that plan in the road district.[31]

(b) The local authority then had to gazette a notice with a general description of the land to be taken and of the general purposes for which it was to be used, and to twice publicly notify the place where the plan was open for inspection.[32] There were also service requirements.[33]

(c) The public had a right to object in writing (and to appear in support) within 40 days from the publication of the notice;[34] if no objection was made or upheld, or if following consideration of all objections the local authority was of the opinion that it was expedient for the proposed works to be executed, and that due compensation could provide for any injury resulting from those works, the local authority was entitled to take the land by proclamation.[35]

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29 *Bowler Investments Ltd v Attorney-General* [1987] 7 NZAR 73 (HC) at 80.
30 Section 22(1)(a).
31 Section 22(1)(b).
32 Section 22(1)(c).
33 Section 22(1)(e).
34 Section 22(1)(d) and (f).
35 Section 23.

(d) It was then for the Governor-General to accept the required memorial and declaration, which he would do if satisfied the local authority could meet any award of compensation,[36] and in his discretion by proclamation declaring the land taken for the public work.[37]

[44] However, as earlier noted, s 32 authorised the local authority to acquire land by a second or alternative method. That was by "enter[ing] into agreements to take the estate and interest of any person in *any land required for public works*" without complying with the notice or objection provisions; or by "purchas[ing] any such estate or interest upon such terms as [the authority] thinks fit".[38] Where the Minister was satisfied with the sufficiency of the agreement, he was able to issue a declaration as to taking, which had the effect of a proclamation.[39] Of particular importance, s 32(6) provided:

> An estate or interest purchased and conveyed or surrendered hereunder *shall be deemed land taken* under the authority of this Act, *but the provisions of this Act respecting compensation shall not be applicable in any such case except as specifically provided*.
>
> (Emphasis added.)

[45] By this means Parliament allowed owners the option of negotiating a sale where a local body required the land for a public work. This requirement was the statutory prerequisite to acquisition, whether by proclamation or agreement, and the PWA 1928 vested in the local authority all the coercive powers necessary to carry it into effect. An agreement on terms, particularly price, would have obvious benefits in sparing both parties the prospect of a protracted dispute about compensation and other terms. The Board's 19 January 1951 letter to owners made this very point in proposing an amicable agreement.

[46] The law drew no distinction between a mutual or unilateral process of acquisition providing the trigger was the local authority's requirement for land for a public work. Whichever method was adopted, the result was that the land was "deemed … taken" under the PWA 1928. It was irrelevant that an owner chose to

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36 Section 24.
37 Section 23(c)–(d).
38 Section 32(1).
39 Section 32(4).

participate voluntarily where a failure to cooperate would lead inevitably to the local authority's enforcement of its powers of compulsion. The element of compulsion, if not its application, was present immediately after the authority gave notice that it required the land. It follows, in our judgment, that the owners did not lose their s 40 rights because they entered into agreements with the Board.

(iii) Council's defence: facts

[47] Nevertheless, in the High Court the Council pursued a defence that all the agreements were entered into voluntarily and were unaffected by the prospect of the Board taking the land.[40] To meet this defence each owner called evidence relating to the circumstances of acquisition. After examining the documentary material and hearing from witnesses, the Judge concluded the acquisitions were subject to an element of compulsion.[41]

[48] Mr Casey submitted that Fogarty J was wrong to find that once the Board gave notice all subsequent acquisitions were subject to an element of compulsion,[42] and attempted to explain away the otherwise incontrovertibly coercive effect of the notice as being no more than an expression of interest in buying the land. In common with Tipping J in *Bowler*, Fogarty J was of the view that a formal notice of intention to take land removes the competitive market for the notice's duration; for all practical purposes, the local authority is the only buyer.[43] As noted, a local authority was not required to issue a gazette notice where it adopted the agreement option. In this case the Board had issued a gazette notice as the first step in the process towards forced acquisition of the land.

(iv) Decision: facts

[49] We agree with Fogarty J that as a matter of fact the gazette notice effectively froze both the market and the price. The owners were advised that their properties

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40 At [109].

41 At [110]–[148]. The Judge did not make any findings particular to the Kindersley land, possibly because no evidence was given by Mrs Spencer-Wood about the circumstances surrounding its acquisition. Nonetheless, what we say at [51] below applies with equal force to this claim.

42 At [102].

43 At [93]–[99].

were subject to a 15 year designation for harbour works and of the Board's intention to develop the Te Atatu land for that purpose. The only available inference was that the owners were not free to sell to anybody other than the Board during the 15 year period. And, consistently with the notice, a little over a year later the Board confirmed it had resolved to acquire the land and invited the owners to treat rather than submit to compulsion.

[50] It is unnecessary for us to determine the Council's challenge to each of the Judge's factual findings given our satisfaction that he was correct that the gazette notice amounted to the necessary element of compulsion or threat of compulsion for all owners. However, for the purpose of illustrating our conclusion we note Mr Casey's emphasis on approaches to the Board by some owners between receipt of the gazette notice and its 19 January 1951 letter. He gave as examples correspondence from the Clares' solicitor to the Board in July 1950 advising of their wish to sell and their indifference about the buyer's identity; and Mr Speechlay's approach to the Board in August 1950 (there was no affirmative evidence that he did in fact later receive the 19 January 1951 letter) expressing his wish to sell his property and inquiring of the Board's intentions.

[51] Mr Casey's focus on an owner's reaction to the gazette notice, whether it was positive or negative, is misplaced. We repeat that an owner's willingness to negotiate with the Board after receipt of a notice freezing his or her ability to sell for an extended period does not negate the element of compulsion or its threat inherent in the notice itself. And, as Mr Carruthers pointed out, the approaches from the Clares and the Speechlays were made before s 29(2) of the Finance Act 1944 was amended to remove the price freeze on the land. Both owners were left with no viable economic option except to sell promptly after receipt of the notice.

[52] Mr Casey also devoted attention to the Board's acquisition of the Williams' land. This transaction did not proceed until some years after the other acquisitions. Initially Mr Williams did not wish to sell and the Board did not pursue him. In June 1954 Mr Williams approached the Board with an offer to sell. However, Mr Williams' change of his mind after prolonged resistance does not assist the

Board. What matters is that the relevant events occurred against the backdrop of the gazette notice and its freezing effect on the market.

[53] We are satisfied that all the owners have established the element of compulsion inherent in the requirement that on 1 February 1982 the Board held the land for a public work within the meaning of s 40 of the PWA 1981.

(d) Did the Council as the Board's successor lawfully exercise a discretionary power when resolving in 1996 not to offer some of the land back to owners?

(i) Council's defence

[54] The Council's fourth and partial defence, based on s 40(2)(a) of the PWA 1981, is that in 1996 it concluded it would be impracticable, unreasonable or unfair to offer some of the Te Atatu land back to the owners. Fogarty J addressed this issue in the context of exercising his discretion to grant relief.[44] However, for reasons to be explained, we are satisfied that it must be determined within the threshold inquiry.[45]

[55] The Council's defence was based on its resolution dated 24 April 1996, passed well after the Board had ceased to exist and relating to all except the Speechlay and Williams land (a total of over 37 hectares, just under half the land at issue), that:

> … in the event that S. 40 Public Works Act 1981 be deemed at any time to have any application to the lands concerned, that Council considers on the information available to it that it would be impractical [sic], unreasonable or unfair to offer to sell the land to any person from whom it was acquired or any successor of that person, and further, that there has been a significant change in the character of the land for the purposes of the public work for which it was acquired.

[56] In support of the Council's defence, Mr Casey relied on dicta from this Court in *Hood v Attorney-General*;[46]and in the High Court[47] and in this Court[48] in *Mark v Attorney-General*. However, in *Mark* s 40(2)(a) arose for consideration within the

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44 At [249]–[263].
45 *Attorney-General v Hull*, above n 10, at [51].
46 *Hood v Attorney-General* CA16/04, 2 March 2005.
47 *Mark v Attorney-General* HC Wellington CIV-2002-485-799, 27 October 2009.
48 *Mark v Attorney-General* [2011] NZCA 176, [2011] NZLR 538.

sphere of declaratory relief; and this Court noted the difficulty, even in that context, of addressing the issue where many years had elapsed between the dates of a decision that land was not required and when rights were determined by the Court.[49] And when refusing leave to appeal in *Hood*, the Supreme Court appeared to question the approach adopted by the High Court and Court of Appeal to s 40(2)(a).[50]

(ii) Decision

[57] We agree with Mr Carruthers that the Council's resolution does not absolve the Board from performance of its offer-back obligation under s 40(2)(c). Our starting point is Mr Casey's acceptance that a local authority is bound to perform the obligation in a timely fashion.[51] He did not dispute the owners' assertion that a reasonable time to comply was 18 months from the date when the obligation arose – that is, by 1 August 1983.

[58] We have found that in terms of s 40(1) the Te Atatu land was held and no longer required for a public work on 1 February 1982. On this date, in terms of s 40(2), the owners' rights vested subject only to defeasance by the Board's decision to exercise its statutory discretion.[52] The Board was bound to "offer to sell the land [back to the owners]" "*unless* … it consider[ed] that it would be impracticable, unreasonable, or unfair to do so". Consideration of its power of exemption must logically precede performance of the default obligation to offer the land back. A local authority intending to exercise its discretion on the statutory grounds must act affirmatively within the agreed reasonable period of 18 months. Otherwise the power to exercise the discretion is lost.

[59] This particular issue has not previously been considered at appellate level. However, in the High Court in *Edmonds* Miller J was of the view that:[53]

> [148] It would seem to follow from *Hull* and *Morrison* that when the landholding agency invokes s40(1)(b) or s40(2)(a) in litigation, the first

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49 At [90].

50 *Hood v Attorney-General* [2005] NZSC 53 at [7].

51 *Attorney-General v Edmonds* CA97/05, 28 June 2006 at [55] and [60]. See also *McLennan*, above n 24, at [46]; and *Attorney-General v Morrison* [2002] 3 NZLR 373 (CA) at [22].

52 *McLennan*, above n 24, at [34] and [46]; *Horton* [1999] 2 NZLR 257 (PC) at 262.

53 *Edmonds v The Attorney-General* HC Wellington CIV-2000-485-695, 3 May 2005. An appeal against this decision was allowed in part but not on this finding: *Edmonds*, above n 51.

> question for the Court is whether it considered the relevant subsection at the time it decided the land was no longer required for the designated work, and reached a decision within a reasonable time. If the agency did not invoke the relevant subsection to justify a decision to retain the land at the time, it is difficult to see why the Court ought to reach a decision on its behalf, in litigation brought after any reasonable time needed to reach a decision has long passed.

[60] We agree with Miller J's view which was, as he noted, supported by this Court's decision in *Hull*.[54] His construction not only conforms to the plain wording of s 40 but it is, as Mr Carruthers submitted, consistent with the policy underlying that provision. Allowing the Council to rely on circumstances which have arisen in the 13 years between the Board's failure to address s 40(2)(c) in a timely way and the Council's resolution would undermine its remedial purpose and enable the Council to benefit from its predecessor's default. And we add that the Council's reliance in its resolution on the s 40(2)(b) factor – of a significant change in the character of the land for the purpose of the public work for which it was held – could not be sustained where no steps had been taken before 1 August 1983 to develop the land for a harbour.

[61] We accept, of course, that the s 40(2)(a) factors of impracticability, unreasonableness and unfairness, and the s 40(2)(b) factor of a significant change in the character of the land may be relevant when a Court exercises its discretion to grant declaratory relief. But this is not the question here.

(e) Did all the owners fall within the statutory definition of a "successor"?

(i) Council's defence

[62] The Council's fifth defence is that some of the owners did not have standing to sue. It accepts the standing of the Williams, Flavell and Robertson interests (respectively representing the Williams, Speechlay and Smith land): it challenges the rights of four parties, the Spencer-Wood, McCormick, Stewart and RNZFB interests (respectively representing the Kindersley, McCormick, Stewart and Clare land).

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[54] *Hull*, above n 10, at [43]–[44].

[63] Section 40(2) obliges the Board to offer the land back "to the person from whom it was acquired or to the successor of that person". As noted, s 40(5) states:

> For the purposes of this section, the term **successor**, in relation to any person, means a 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.
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> (Emphasis added.)

[64] The Council's defence is that each of the four owners would not have been entitled to the subject land within the meaning of s 40(5). Mr Casey submits that the PWA 1981 limits the right to claim to an immediate successor to the original owner, whereas Fogarty J construed this Court's decision in *Port Gisborne* as authority for creating a more remote class of immediate beneficiaries further down the inheritance chain.[55] By applying what he described as a liberal approach, the Judge treated the term "successor" as "the persons benefiting under the will of the former owner or on his or her intestacy".[56] He accepted that beneficiaries of those beneficiaries were excluded from this category.

(ii) Section 40(5) approach

[65] We agree with Mr Casey that Fogarty J erred. His formulation of the s 40(5) criteria created a significantly wider class of claimant than authorised by the statute. The s 40(5) test is plainly formulated, even though its application may prove problematic in a particular case – it is whether a person would have been entitled to the land under the will or intestacy of the person who owned the land at the time of acquisition had that person owned it at the date of his or her death. There is an assumption that ownership of the land has not changed between the dates of acquisition and the owner's death,[57] meaning, as Mr Casey submitted, that Parliament intended only one level of succession.

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55 *Port Gisborne*, above n 25, at [45]; High Court judgment, above n 3, at [208].
56 At [209].
57 *Mark* (HC), above n 47, at [168].

[66] However, identification of the Judge's error is not decisive of all four disputed claims because different factual considerations apply to each. We must examine them against the statutory test.

(iii) Owners:

RNZFB, Mackintosh and Ryan

[67] First, the RNZFB, Mr Mackintosh and Ms Ryan are residual beneficiaries. The land was owned by the late Charles Clare who died on 17 September 1972. His will provided for a series of life interests in the income from his estate, successively to his daughter-in-law who died in 1976, his granddaughter who died in 1994 and his great-grandchildren, Donald Mackintosh and Lynda Ryan. Mr Clare's residual estate was left to the RNZFB.

[68] On this claim the Judge found:

> [216] Mr Mackintosh and Ms Ryan are "immediate beneficiaries" as I have understood the phrase in *[Port Gisborne Ltd v] Smiler*. *It is completely hypothetical to assume that if the land had not been acquired by the AHB, it would not have been left to the owners' grandchildren.* They were clearly contemplated by him as immediate beneficiaries and *he might have left the land to them*.
>
> [217] I do not think any great difficulty arises in accepting the plaintiff's argument that all three of them are successors in terms of s 40(5), being persons who would have been entitled to estates of interest in any real property under the will or intestacy of the person from whom the land was taken, had he owned the land at the date of his death. By the terms of the will of which we have only an extract, the life interest is expressed as an entitlement to the net income arising from the whole of the residuary estate.
>
> (Emphasis added, footnote omitted.)

[69] The Judge's approach does not correspond with the statutory requirement. As Mr Casey submitted, the Judge was wrong to adopt hypothetical reasoning. Mr Clare's contemplation of Mr Mackintosh and Ms Ryan as immediate beneficiaries to whom "he might have left the land" cannot be sustained. The test is a purely factual one, to be determined by examining the terms of Mr Clare's will. On that approach, if the land had remained in Mr Clare's estate, Mr Mackintosh and Ms Ryan were not entitled to it at the date of his death but only to a contingent life

interest in the net income. And the RNZFB's entitlement was limited to the proceeds of sale.

[70] Mr Carruthers sought to support the Judge's finding on the basis that nothing in s 40(5) precludes standing on the part of beneficiaries whose interest might be postponed. They need only to have been "entitled to the land under the will" – the statute should not be read as having added "immediately upon the testator's death entitled to the land". This submission cannot stand, however, where as a matter of fact the claimants were not entitled to Mr Clare's land at the date of his death in 1972.

McCormick

[71] Second, John McCormick died on 14 May 1948. Joseph McCormick as trustee and executor of John McCormick's estate was the legal owner of the property at the date of its transfer in December 1951. He held the land on trust for various beneficiaries including John McCormick's grandson David McCormick, whose interest was contingent on obtaining 21 years of age. The will directed Joseph McCormick to sell the residuary estate including the land and divide the proceeds between the beneficiaries. However, as Mr Carruthers pointed out, the will also contained a very broad power of postponement, entitling the trustee at his sole discretion to elect to hold the land indefinitely.

[72] In summary, the Judge found Mr McCormick fell within the immediate beneficiary test because:

(a) There was a presumption the original owner of the land, John McCormick, had no intention of disposing his capital to the disadvantage of his children and others. He still owned the land when he died in 1948. He would have expected its benefits or proceeds to be divided among his children. In this sense they remained as successors of his estate.[58]

[58] At [223].

(b) David McCormick was a contingent beneficial owner of the land at the date it was sold, requiring Joseph McCormick's "nominal" ownership of the land to be ignored for s 40(5) purposes.[59]

(c) The PWA 1981 should be given a purposive construction, especially in view of s 40's important limit on the government's power to acquire private land for one public purpose and then use it for another purpose.[60]

[73] In support of the Judge's approach Mr Carruthers emphasised that John McCormick was not the original owner because he died some years before the land was sold to the Board. Instead, he submitted the Judge was correct to treat the reality as being that the beneficial owners were the original owners for the purpose of s 40.[61]

[74] In challenging this finding Mr Casey submitted the focus must be on John McCormick. His will specifically directed sale of the land. Thus the beneficiaries were deprived of any interest in the land to which they might otherwise have been entitled. David McCormick's entitlement was only ever to a share in the proceeds of sale.

[75] In our judgment, Mr Casey is correct that David McCormick has no standing. Joseph McCormick, not John McCormick, was "the person from whom [the land] was acquired". However, David McCormick was not his successor for the purposes of s 40(5) because he would not have been entitled to the land under Joseph's will at the date of the latter's death. His entitlement was limited to a share in the proceeds of sale of the land under John's will. We are satisfied his financial interest was beyond Parliament's contemplation. His claim fails.

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59 At [224].
60 At [227].
61 At [225].

Spencer-Wood

[76] Third, Mr Kindersley by his will made in 1979 left his entire estate to his wife. His daughter, Patricia Spencer-Wood, was to benefit if her mother predeceased her father. Mr Kindersley died on 9 July 1984. Mrs Kindersley died on 14 March 1998. As Mr Kindersley had predeceased her, the estate went to Mrs Spencer-Wood only upon Mrs Kindersley's death.

[77] Fogarty J found that Mrs Spencer-Wood was a contingent beneficiary under the will. Accordingly, she was in the contemplation of the owner, her father, who sold to the Board and she was an immediate, if contingent, beneficiary for s 40(5) purposes.[62]

[78] Mr Carruthers supports this conclusion on two alternative bases. One is that, if the Board is correct, s 40(5) would operate arbitrarily because had Mrs Kindersley predeceased her husband, Mrs Spencer-Wood would have been clearly within s 40(5). She would have inherited her father's estate if her mother had died first. The Judge's approach, recognising Mrs Spencer-Wood as an immediate even if contingent beneficiary, is preferable because it avoids an arbitrary result.

[79] In our judgment the decisive factor is that Mrs Spencer-Wood would not have been entitled to her father's land at the date of his death. Only her mother would have been entitled. Her interest was, as Mr Carruthers recognised, only of a contingent nature. Whether Mrs Spencer-Wood's interest would have qualified if her mother had predeceased her father is not the point. Moreover if the result seems arbitrary it is because Mr Kindersley chose to leave his daughter only a contingent interest in his estate.

[80] Alternatively, Mr Carruthers argued, until the time of her death in 1998 Mrs Kindersley was entitled to receive an offer back under s 40(2). On Mrs Kindersley's death her right to an offer, in the absence of a contrary statutory indication, must pass to her personal representative. He was an English solicitor who has since died. As a matter of fairness, while the representative might have

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62 At [230].

been a proper party to the proceeding, the Court should not find against Mrs Spencer-Wood for want of a proper party.

[81] Fogarty J noted but did not address the submission.[63] In our judgment it is irrelevant that Mrs Kindersley's personal representative was entitled to bring a claim; and that Mrs Spencer-Wood should be treated de facto as acting in this capacity. This is not a case where the proceeding might fail for want of parties.[64] In our judgment Mrs Spencer-Wood has no standing and cannot be treated as a surrogate for her mother's personal representative. Mrs Spencer-Wood's claim fails also.

Stewart

[82] Fourth, Donald Erskine Stewart, the original owner, left all his estate to his son, Donald Michael Stewart, by his last will dated 4 March 1971. Donald senior died on 30 August 1985, sometime after the date when the Board's duty crystallised. The Council's defence to Donald Michael Stewart's claim was that he lacks standing because his father was alive when the Board's obligation crystallised on 1 August 1983. As the obligation was personal to him, it lapsed on his death. The statutory wording should not be extended simply because those entitled under the section did not bring a timely claim.

[83] The Judge found:

> [235] The purpose of the Act should not be defeated by a lapse of time in which the person who should have received an offer back dies. On this view, Councils could all simply refuse to make offers back, wait until the current owner or their first successor as the case may be if the owner has died, and then be relieved of any responsibility under the law to make the offer back. It is hard to imagine a more hostile interpretation of a statute. The plaintiff is an immediate beneficiary on the [*Port Gisborne Ltd v*] *Smiler* test.

[84] Mr Casey pursued the same argument on appeal but we reject it both for the reason given by Fogarty J and as a matter of statutory construction. When his father died in 1985, Donald Michael Stewart would have been entitled to the land and thus became a successor within s 40(5). Mr Casey does not contend otherwise.

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63 At [231]–[232].

64 *Taylor v McDougall* [1963] NZLR 694 (SC) at 695.

[85] Nor, contrary to Mr Casey's submission, can s 40(2) be construed as though it provides that the duty is owed to the successor only if the original owner was not still alive at the date the offer-back right crystallised. This is not what s 40 provides. The duty owed under s 40(2) was to the original owner "or" his successor. And even if "or" is used disjunctively in this phrase, it means only that Parliament intended one class of person be owed a duty at any given time. It does not mean a person who becomes a s 40(5) "successor", albeit after the duty has crystallised, loses their right. It is therefore irrelevant that Donald Erskine Stewart was alive on 1 August 1983; what is relevant is that by virtue of his statutory status as his father's successor Donald Michael Stewart has standing.

Second issue: did the Empowering Act 1983 extinguish the Board's existing duty under the PWA 1981?

(a) Council's defence

[86] We have concluded the Board was under a duty from 1 August 1983 to offer back the Williams, Flavell, Robertson and Stewart land. The next issue for our determination is whether, as the Council contended, the Empowering Act 1983 which came into effect on 2 December 1983, nearly two years after the PWA 1981, extinguished this duty.

[87] Fogarty J agreed with the Council on this decisive point. As he saw it, the question for determination was whether the Empowering Act 1983 enabled the Board to hold the land for purposes which were not public works. In reliance on earlier authority in this Court,[65] the Judge based his conclusion on the premise that, where two statutory provisions applying to a set of facts are in conflict, the statutory provision later in time will prevail.[66] He concluded thus:

> [177] In summary, this Empowering Act is consistent with enabling the AHB to continue to hold the land, and allowing both the AHB and the Waitemata City Council to consider development and schemes over the land. There is no limit imposed as to the purposes for which the land can be used. The power is rather expressed to include "any actual or proposed development of the land".
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> (Footnote omitted.)

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65 *Auckland Gas Co Ltd v Auckland City Council* [1990] 2 NZLR 420 (CA).

66 At [166].

(b) Empowering Act 1983

[88] Before addressing the owners' grounds of challenge to this finding we note the Empowering Act 1983's long title recited that it was:

> An Act *to grant powers* to the Auckland Harbour Board and the Waitemata City Council in relation to the development of certain land at Te Atatu.
>
> (Emphasis added.)

[89] The operative provisions were as follows:

> **3. Power of Board to grant investigation licences**—(1) The Board may grant to the Council or any other person a licence or licences to permit the land to be used and occupied for the purposes of investigating its development.
>
> (2) Any such licence may include an option for the licensee or a nominee or nominees of the licensee to take a lease of the land from the Board in terms authorised by this Act.
>
> **4. Power of Board to grant leases—**(1) The Board may lease, or grant one or more options to lease, the land in such manner and on such terms and conditions as it thinks fit.
>
> (2) Sections 7, 8, 9, 17, 18, and 19 of the Public Bodies Leases Act 1969 shall not apply to or in respect of any lease or option to lease under this section.
>
> **5. Powers of Council—**Subject to the Local Government Act 1974, the Council is hereby empowered to promote the development, subdivision, and leasing of the land and may in connection with any actual or proposed development of the land, in addition to all other powers exercisable by it:
>
> (a) Prepare, carry out, approve, or publish any plan, development, scheme, survey, or investigation;
>
> (b) Take any licence or lease or option for lease granted by the Board under s 3 or s 4 of this Act and, if appropriate under the terms thereof, transfer or assign the same or nominate the lessee thereunder.
>
> **6. Application of existing Acts—**Except as otherwise provided in this Act, nothing in this Act shall be construed as limiting the application of the Harbours Act 1950, the Local Government Act 1974, the Rating Act 1967, the Town and Country Planning Act 1977, or the Public Bodies Leases Act 1969.

(c) Decision

[90] In support of the owners' appeal, Mr Carruthers raised a number of grounds. Included among them were that the issue was res judicata in light of this Court's decision in *Bennett*; that the PWA prevails because it is a constitutional statute; and

that the Interpretation Act 1999 mandates a different result. It is unnecessary for us to explain why we do not accept these propositions. That is because, contrary to Fogarty J, we are not satisfied that the effect of the Empowering Act 1983 was antithetical to and inconsistent with the offer-back obligation under s 40 of the PWA 1981.

[91] The short point is that in merely empowering the Board to use the Te Atatu land in certain ways, free from some of the restrictions formerly placed on it by the Public Bodies Leases Act 1969,[67] the Empowering Act 1983 did not authorise the Board to sell the land or to use it for a purpose other than a public work. An express power to this effect would, we accept, have been inconsistent with s 40 of the PWA 1981.

[92] Nor do we accept Mr Casey's submission that an inconsistency arises because, while s 40 does not entitle the Board to retain the land, the Empowering Act 1983 expressly authorises retention of the land for non-public work purposes. Authority to retain land is an unhelpfully abstract criterion by which to compare s 40 with the plain terms of the Empowering Act 1983, which simply enabled the Board to lease,[68] licence[69] or promote the use of[70] the Te Atatu land. The Empowering Act 1983 did not authorise the Board to deal with the land in any manner which would have been inconsistent with or antithetical to s 40. Powers to promote the land's development or to issue licences are not proprietary, and a local authority can still offer land which is subject to a lease or licence back to the owner in accordance with s 40.

[93] Section 6 of the Empowering Act 1983 does not change this analysis. It provides that nothing within the statute shall be construed as limiting the application of the Harbours Act 1950 (among other enactments). In 1977 that statute was

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67 By s 4(2) of the Empowering Act 1983, the following provisions of the Public Bodies Leases Act 1969 no longer applied: s 7, which limits leases to 99 years without renewal, or 21 years with perpetual right of renewal, in various forms; s 8, which requires leases to be sold by auction; s 9, which empowers the leasing authority to set the rent; s 17, which prescribes a process for determining public applications for leases; s 18, which requires leases to commence within six months of being granted; and s 19, which requires a rack rent to be reserved.

68 Section 4.

69 Section 3.

70 Section 5.

amended to allow harbour boards to subdivide or sell land vested in them, but subject to ministerial approval. By s 143A(1)(b) of that Act, harbour boards are prohibited from dealing with land taken or acquired under the PWA 1928 otherwise than in accordance with its provisions.

[94] However, s 143A does not assist the Council for a number of reasons. First, s 6 only stipulates the Empowering Act 1983 does not limit the Harbours Act – in this case it extends its reach by empowering the Board to issue licenses or leases to use the land. Second, the Harbours Act provision relates solely to sale while the Empowering Act 1983 only to licences and leases. Third, and decisively, even if the two provisions affected each other, by its own opening words s 6 of the Empowering Act 1983 prevails over the Harbours Act.

[95] The owners have established that Fogarty J erred in finding the Empowering Act 1983 excused the Board from compliance with its s 40 duty.

Third issue: are the owners entitled to declaratory relief?

(a) Declaratory relief

[96] As a result of our answers to the first two issues, four of the seven owners have established the Council's breach of its duty to offer the Te Atatu land for sale back to them by 1 August 1983. Thus the third and remaining issue is whether we should exercise our discretion to grant the owners a declaration of breach. In addressing this issue we shall assume all owners have standing, against the contingency that we may have erred in finding against the RNZFB, McCormick and Spencer-Wood interests.

[97] Fogarty J did not determine the question of whether a declaration should be granted. He thought the exercise would be of hypothetical value only.[71] Instead he treated the owners' failure based on the prevalence of the Empowering Act 1983 as decisive.[72] We note the Judge's dismissal of what he treated as a discrete defence of

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71 At [266].
72 At [268].

laches or delay,[73] although the context in which the issue arose is unclear. In any event, his observations on the issue are obiter.

[98] In the absence of a finding at first instance we must consider the issue of relief afresh. Mr Casey asserts the existence of numerous factors disqualifying the owners from relief – many are makeweights and overlap. The only relevant factors are (a) delay and its effect on third parties when weighed against (b) the nature and extent of the owners' interest in the land. We address each separately.

(b) Principles

[99] Before addressing delay we refer to two principles which are particularly material to our inquiry. First, while we retain a residual discretion to refuse relief, it must be exercised according to principled limits within the statutory framework. In the judicial review context a plaintiff who has proved a breach of his or her rights is entitled to the vindication of a declaration unless there are special considerations to the contrary or extremely strong reasons for refusal.[74] This Court has approved of the same approach when considering claims for declaratory relief under the PWA 1981.[75]

[100] Second, as we have earlier noted, s 40 of the PWA 1981 was remedial. Its purpose was to address the consequences of a decision by government or a local authority to take land for a proposed public work which did not proceed. Land in rural areas which had a personal or intrinsic value to the original owners beyond its economic worth often fell into this category. Fairness required that those owners or their immediate successors should be given the opportunity to buy the land back. By this means also the legislature effected its intention to provide greater protection to the rights of private property owners.[76]

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73 At [238]–[248].

74 See *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [60]–[61]; *Survey Nelson Ltd v Maritime New Zealand* [2010] NZCA 629 at [52]; *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603 (HL) at 608 and 616.

75 See *Mark* (CA), above n 48, at [91].

76 *Horton*, above n 52, at 261; *Mark* (CA), above n 48, at [63]; *Bennett*, above n 2, at [29]; *Edmonds*, above n 51, at [60]; *Hood*, above n 46, at [18]–[19].

[101] However, the offer-back provision was plainly introduced to compensate for the loss of a personal rather than an economic interest. It was essentially restorative in nature, underpinned by the assumption that the land was originally acquired for fair value. Correspondingly, the owner or successor's right to buy the land back was also fixed at the current market value. This purpose of compensation by restoration, not by a financial adjustment to the original price or by conferring an economic benefit on the owner or his or her immediate successor, is significant.

(c) Delay

[102] Our primary focus must be on delay which as a factor disqualifying relief has been the subject of a good deal of appellate attention. The test for its application to any particular claim has been variously described. But what is ultimately required is a balancing of competing rights and equities.

[103] The question is whether with knowledge of the facts giving rise to a right of action the owners have by their inactivity placed the Council in a position where it would be inequitable or unreasonable if the remedy were later asserted.[77] As Mr Carruthers emphasised, and we accept, the Council must have an equity which on balance outweighs the owners' rights.[78] Relevant considerations include the length of delay and the nature of any acts done during the interval which might affect the balancing process.[79] Delay of itself is not enough to bar relief. But nor must the Council show material prejudice or detriment, although its absence may make it difficult to show the defendant's equity outweighs the plaintiff's right.[80]

[104] Mr Carruthers sought to impose a gloss on this test, with important practical consequences. As we shall explain, the difference between Mr Carruthers' approach and the one we favour accounts for about ten years of the owners' delay. He

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77 *Eastern Services Ltd v No 68 Ltd* [2006] NZSC 42, [2006] 3 NZLR 335 at [34], citing *Lindsay Petroleum Co v Hurd* (1874) 5 PC 221 at 239–240, affirming this Court's decision in *No. 68 Ltd v Eastern Services Ltd* [2006] 2 NZLR 43 (CA).

78 *No. 68 Ltd* (CA), above n 77, at [48] and [54]; *O'Connor v Hart* [1983] NZLR 280 (CA) at 292, citing *Nwakobi v Nzekwu* [1964] 1 WLR 1019 (HL) at 1026. See also *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [221].

79 *No. 68 Ltd* (CA), above n 77, at [50], citing *Neylon v Dickens* [1987] 1 NZLR 402 (CA) at 407; *Wellington City Council v New Zealand Law Society* [1990] 2 NZLR 22 (CA) at 26.

80 *No. 68 Ltd* (CA), above n 77, at [54]; and *Wakatu*, above n 78, at [195] (absence or otherwise of prejudice is relevant to whether laches applies).

submitted that we should adopt as the chronological starting point for our inquiry into delay the date or dates upon which the owners learned of both (a) the facts giving rise to their rights to sue and (b) the legal consequences of those facts. It appears undisputed that the owners did not learn of the Board's breach of its s 40 obligation until they were approached by representatives of their litigation funder, S 40 Ltd, in the early 2000s. The two parties who were earlier aware of their rights, Mr McCormick and Ms Williams, were both met by the Board's absolute denial of any obligation or by silence.

[105] Mr Carruthers relied on three earlier authorities. The first was *Allcard v Skinner*, where the English Court of Appeal held that, because she was subject to undue influence, Miss Allcard would have been entitled to recover what was left of her property which she had earlier bequeathed to a third party. However, her claim was barred by her laches and acquiescence. Cotton LJ's dissenting proposition, upon which Mr Carruthers relied, that "delay in asserting rights cannot be in equity a defence unless the plaintiff were aware of her rights"[81] was answered by Lindley LJ in these terms:[82]

> … if the Plaintiff did not know her rights, her ignorance was simply the result of her own resolution not to inquire into them. She knew all the facts … she preferred not to trouble about it. Under these circumstances it would, in my opinion, be wrong and contrary to sound principle to give her relief on the ground that she did not know what her rights were. Ignorance which is the result of deliberate choice is no … answer to an equitable defence based on laches and acquiescence.

[106] Second, Mr Carruthers relied on *Re Howlett*, where a father's equitable defence that his son had acquiesced in delays was rejected because his son did not know both "the facts but also the consequences".[83] Not only are the facts of that case far removed from those at issue here (they related to beneficial possession rights in a wharf), but the Court's statement of principle can also be called into question. The Court relied on a single authority, *Cockerell v Cholmeley*, which was decided in a different context, where ignorance "of the consequences in point of law" was

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81 *Allcard v Skinner* (1887) 36 Ch D 145 (CA) at 174 per Cotton LJ, dissenting.

82 At 188. See also at 192 per Bowen LJ.

83 *Re Howlett, Howlett v Howlett* [1949] 2 All ER 490 (Ch) at 492–493.

required to raise the equitable defence that a defect in title to land had been confirmed.[84]

[107] Third, Mr Carruthers relied on *Rees v De Bernardy*, which held that a person's right to rescind a contract is not lost "by delay in impeaching it, so long as [the plaintiff] remains in ignorance of his right and the position of the parties remains substantially the same."[85] It is unclear whether the Court's reference to ignorance of a "right" necessarily means ignorance of the legal consequences rather than merely the facts constituting the right. In any event *Rees* confirms that ignorance of the right would not be sufficient on its own: the position of the parties must remain substantially the same during the relevant period – a factor which does not favour the owners' claim here.

[108] In our judgment these authorities do not justify Mr Carruthers' submission that we should treat the starting point for determining delay as the time when S 40 Ltd advised the owners of their rights to sue. In New Zealand the law is settled by the Privy Council's decision in *Lindsay Petroleum Co v Hurd.*[86] Delay is to be measured by reference to the time when a party had sufficient knowledge of the facts giving rise to a right to claim.[87] As this Court explained in *No. 68 Ltd*, the public interest underlying this approach – which is the same as that behind limitation laws – is sound: people should be able to organise their affairs unconstrained by the threat of exercise against them of rights that have long remained dormant so that it has become inequitable to enforce them.[88] The threat of dormant rights arises as soon as the plaintiff has sufficient knowledge of the facts giving rise to them – a lapse of time before action.[89]

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84 *Cockerell v Cholmeley* (1830) 1 Russ & M 418 (Ch) at 425.

85 *Rees v De Bernardy* [1896] 2 Ch 437 at 445.

86 *Lindsay Petroleum*, above n 77, at 241; described in *No 68 Ltd* (SC), above n 77, at [34] as "the classic exposition of the doctrine"; and cited with approval in *Paki v Attorney-General* [2014] NZSC 118, [2015] 1 NZLR 67 at [307].

87 *Lindsay Petroleum*, above n 77, at 241; *Wellington City Council v New Zealand Law Society* [1988] 2 NZLR 614 (HC) at 627.

88 At [56].

89 *Orr v Ford* (1989) 167 CLR 316 at 339 per Deane J.

[109] We accept of course that there are other reasons for which delay will be excused. Lack of legal capacity or undue influence are good examples.[90] But neither of those related exceptions change the fact that delay is measured from the time a party knew or ought to have known the facts comprising the right.

[110] In the absence of findings of actual knowledge by Fogarty J, we must determine the date by which the owners ought to have known the Board no longer required the Te Atatu land for a public work.[91] Mr Casey referred to articles published in local and metropolitan newspapers about the Board's intention to use the land for a different purpose, starting in August 1980 and appearing regularly thereafter. For example, articles referred to the prospect of a convention centre, a tourism centre and a drive-in cinema on the land. Advertisements invited expressions of interest to lease and develop some of the sites. Public notices were also published.

[111] Significantly:

(a) In 1989 Ms Williams wrote to the Board. She had read that the land was to be transferred on dissolution of the Board to the Waitakere City Council. She proposed the land should instead be used as a site for caring for children at risk. Shortly afterwards, in March 1990, a New Zealand Herald report referred to a protest on the Te Atatu Peninsula against further proposed sales of the land;

(b) In November 1989 the land was vested in the Council pursuant to the Local Government (Auckland Region) Re-organisation Order 1989. As Fogarty J found,[92] there was no evidence the Order required the Council to hold the land for public works. We accept Mr Casey's submission that the Council understood, even if erroneously, that it was then entitled to use the land for other purposes and it proceeded on this premise in the absence of formal claims by the owners;

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90 *No. 68 Ltd* (CA), above n 77, at [55].

91 *Lindsay Petroleum*, above n 77, at 241–242 (rejecting on the evidence an argument that the company ought to have derived the requisite knowledge).

92 At [196].

(c) In 1995 Mr McCormick, after taking legal advice notified the Council of an intended claim. The Council rejected his claim which Mr McCormick did not pursue.

[112] Two subsequent events stand out:

(a) On 26 April 1995, after many years of preliminary consultation, the Council presented a development proposal. It recognised the land consisted of two distinct character zones. One was known as the northern neighbourhood zone with direct linkages to surrounding commercial and residential activity. The southern zone was seen to present wider and greater value opportunities for the future;

(b) On 3 October 1995, the Council resolved to proceed with development of the northern residential zone. Of the 65 hectares situated within it, 35 hectares were designated for residential purposes (approximately 450 homes) on the upper terrace. The remaining 30 hectares were designated for a public area within the public lowland area.

[113] We are satisfied that by October 1995 at the latest the owners ought to have known of the Council's intention to use the land for a purpose other than construction and development of a harbour or other public work. In the case of the McCormicks, they had actual knowledge by 1995; and the Williams had actual knowledge from 1989. This proceeding was not filed until 2005. In *Mark* this Court indicated that a delay of 16 years between the dates when the roading authority was said to have decided the land was no longer required for a public work and of filing proceedings was inordinate.[93] It would have rendered the granting of declaratory relief problematic – the same relief sought by the owners in these proceedings.

[114] The decision in *Mark* suggests the touchstone for exercising our discretion is 1 August 1983, being the date by which the land was no longer required for a public work and a timeous offer should have been made. This gives rise to a delay

[93] *Mark* (CA), above n 48, at [92].

of 22 years. However, in *Mark* the Court rejected the claim that the land was no longer required by December 1985, so it did not analyse this point in detail. But in either event – whether the owners' delay in bringing proceedings is 10 or 22 years – it is also relevant that the owners have been able to defeat the six year time bar on claiming damages by seeking the public law remedy of declaratory orders.[94] That is because, as we shall explain, the owners' ultimate remedy if they succeed will be of a monetary nature, either in the form of a payment from their litigation funder, S 40 Ltd, or the pro rata allocation of minority shares in a landowning company to be established by S 40 Ltd.

(d) Competing equities

[115] We repeat, however, that mere delay by the owners is not of itself enough. Its effect on the Council and others must be assessed. The evidence shows increasing recreational and residential demands since 1995 have significantly changed the character and use of the Te Atatu land as a single block.

[116] As a result of these steps taken by the Council:

(a) Parts of the Te Atatu land were subsequently transferred to a local authority trading company formed by the Council. It has now been fully developed for its designated purpose for housing, affecting to varying degrees the RNZFB, Robertson, Spencer-Wood, Stewart and McCormick land. Also about 3.506 hectares of this land was vested in the Crown as a coastal reserve.

(b) Other than the land already taken for housing, the RNZFB and Robertson land is now subject to formal designations under the Reserves Act 1977. While that status may be revoked by following the formal procedure under s 24, the process is complex and the result is problematic. The Council must first pass a resolution to revoke the land's reserve status[95] and the proposed revocation must be publicly

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94 Limitation Act 1950, s 4; *Mark* (CA), above n 48, at [92].

95 Section 24(1)(b).

notified with reasons.[96] There is a right of objection[97] and the Minister of Conservation can receive any submissions and make any inquiries she thinks fit.[98] The final decision on revocation is at the Minister's discretion.[99]

(c) The balance of the Te Atatu land, principally the Speechlay and Williams land and a large part of the McCormick land, is undeveloped. But, like all the other land, it is subject to the Harbour View – Orangihina Open Space Management Plan prepared for Recreation and Community Development under s 601 of the Local Government Act 1974. Mr Carruthers advised that some of this land is used by a local pony club. Mr Casey responded that walking tracks have been developed through parts and some areas have been developed as playing fields and parks. The lower terrace of the entire block remains undeveloped. It protected escarpment, much of it steep, consisting of low lying coastal flats and wetland areas also having significant ecological value.

(d) The Council imposed a special levy to develop the Harbour View – Orangihina Park which was partially funded by a uniform annual charge raised on all properties in Waitakere City for a period of five years from 1 July 2001.

[117] Mr Carruthers sought to counter the obvious difficulties the Council would now face in transferring the Te Atatu land to private interests and unwinding the formal changes to its legal status. He observed that if the owners bought the land back the Council would always be in a position to reacquire it.

[118] However, this submission serves to highlight an inequity which undermines the owners' claims. S 40 Ltd, the owners' litigation funder, would be the principal beneficiary of success. The company would acquire the Te Atatu land at 1983

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96 Section 24(2)(b).
97 Section 24(2)(c).
98 Section 24(2)(f).
99 Section 24(1).

prices, without any adjustment for the time value of money in the intervening 22 years. Inflation over this period, and the rapidly increased demand for land for residential purposes, mean its 1983 value is a fraction of its current market worth. On one estimate, the value of the Te Atatu land as a whole is about $50 million to $70 million. To allow the owners, or more particularly S 40 Ltd, to take at the Council's expense the benefit of windfall profits attributable solely to extraneous factors would be contrary to the policy underlying s 40.[100]

[119] In refusing leave to appeal in *Mark,* the Supreme Court noted adversely that the claim was brought for the principal benefit of a developer which had acquired the rights of the nominal plaintiffs.[101]

[120] We accept, of course, that the owners have established the Council's breaches of their rights; and that in the normal course they should be vindicated by declaratory relief. But, where the owners' delay has been prolonged and where the effect of allowing them to assert their rights now would be adverse to the Council and its ratepayers, the interests must be balanced.

[121] In undertaking this balancing exercise we repeat that the purpose of s 40 is remedial, designed to confer a personal, not an economic, benefit on those with an attachment to the land. The effect of the litigation funding arrangements is that, in the event of success, the owners will be bound to transfer the land immediately to S 40 Ltd. Precisely what they will receive in return was the subject of some disagreement between the parties at the hearing and in additional submissions filed afterward.

[122] The Council understands that the owners will receive payments in the range of 2.2 per cent – 4.4 per cent of the current land values (except for the RNZFB which is entitled to a larger sum and Mr McCormick who will receive a fixed sum of $2 million). On the other hand, as well as expressing disagreement with some of these calculations, Mr Carruthers emphasised alternative options for the owners under the agreements. Among them are settlement and acquiring shares of an

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100 See *Mark* (CA), above n 48, at [90] and [93].
101 *Mark v Attorney-General* [2011] NZSC 94 at [2].

equivalent value in a landholding company under S 40 Ltd's primary control. He also criticised the Council's valuation figures as misleading.

[123] These disputes are beside the point because even on Mr Carruthers' approach, which results in a higher proportion of the land's current market value going to the owners, the evidence establishes that S 40 Ltd has the predominant interest in this litigation and that it is solely of a financial nature. The company set about approaching the owners and buying their rights from about 2002 onwards. In reliance on *Waterhouse*, Mr Casey suggested S 40 Ltd had in fact purchased causes of action which is prohibited by New Zealand law.[102] It is unnecessary for us to decide this question because it has not been pleaded. Nor has the Council applied for a stay of the proceeding on the ground that the funding arrangement is an abuse of process.[103] But what the arrangements between the owners and S 40 Ltd disclose is the absolute control and benefit which the company has acquired in pursuing this litigation and the relatively minimal financial interests enjoyed by each owner in a successful result.

[124] Mr Carruthers recognised that this factor might not assist the owners' cause. In a memorandum filed after the hearing concluded, and against Mr Casey's opposition, he sought leave to submit:

(a) The Court could exercise its discretion to grant declaratory relief on an alternative basis, by imposing a condition within its discretionary power that the Council's offer to sell the land back at 2005 market values.

(b) This result would significantly increase the owners' rights of recovery under the litigation funding agreements; and the Council would recover the inflationary effect on the land's value in the intervening period.

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[102] *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91.
[103] *Waterhouse*, above n 102, at [29] and [56]–[57].

(c) The amended date was appropriate on the basis that the Council has known of the claims since then. Any subsequent adverse effect on its position has occurred because of its erroneous election to oppose.

[125] Even if, despite Mr Casey's opposition, we were to grant leave, Mr Carruthers' proposition would not change our analysis. If accepted, it would go some way to alleviating the obvious inequity in granting declaratory relief on the terms pleaded, by increasing the owners' proportionate recovery at S 40 Ltd's expense and relieving the Council of a considerable part of the financial impost from adopting 1982 or 1983 values. However, the change would ultimately be one of degree only. Critically, S 40 Ltd would still obtain a substantial windfall attributable to the relentless effects of inflation on land values in West Auckland since 2005. And the Council would remain both exposed to a corresponding financial burden and vulnerable to losing the amenity value of the Te Atatu land. These factors would remain decisive against the owners' amended position.

(d) Conclusion

[126] When the equities are balanced in this way, we are satisfied they favour the Council for these reasons:

(a) Large parts of the Clare, Smith, Kindersley and McCormick land have been developed for housing. Compounding these physical changes are formal designations of the balance of the Te Atatu land as reserves and rezoned public open space. While legal means exist for reversing the legal status of those designations, the process would be complex and the result problematic.

(b) It is now too late to require the Council to offer the Te Atatu land or part of it back to the owners. While the large balance not developed for housing still retains its original physical character, this area as a whole now has an obvious amenity value to the general public, to which local ratepayers have contributed by paying special levies. This value would be lost if the land reverted to private ownership and was later rezoned for development.

(c) By comparison, the owners would not lose the right which s 40(2) was designed to recognise – they have no personal interest or attachment to the land.[104] Their only interest, or more particularly that of their litigation funder, is financial in nature. The owners seek recovery of the land for a windfall profit at the Council's expense in circumstances where the law assumes they have already been fairly compensated for the loss of their land; and where a declaration would effectively grant them a financial remedy which would otherwise be time barred. The litigation funder would be in a real sense the ultimate beneficiary of the owners' success.

[127] Accordingly, we dismiss the owners' application for declaratory relief.

Result

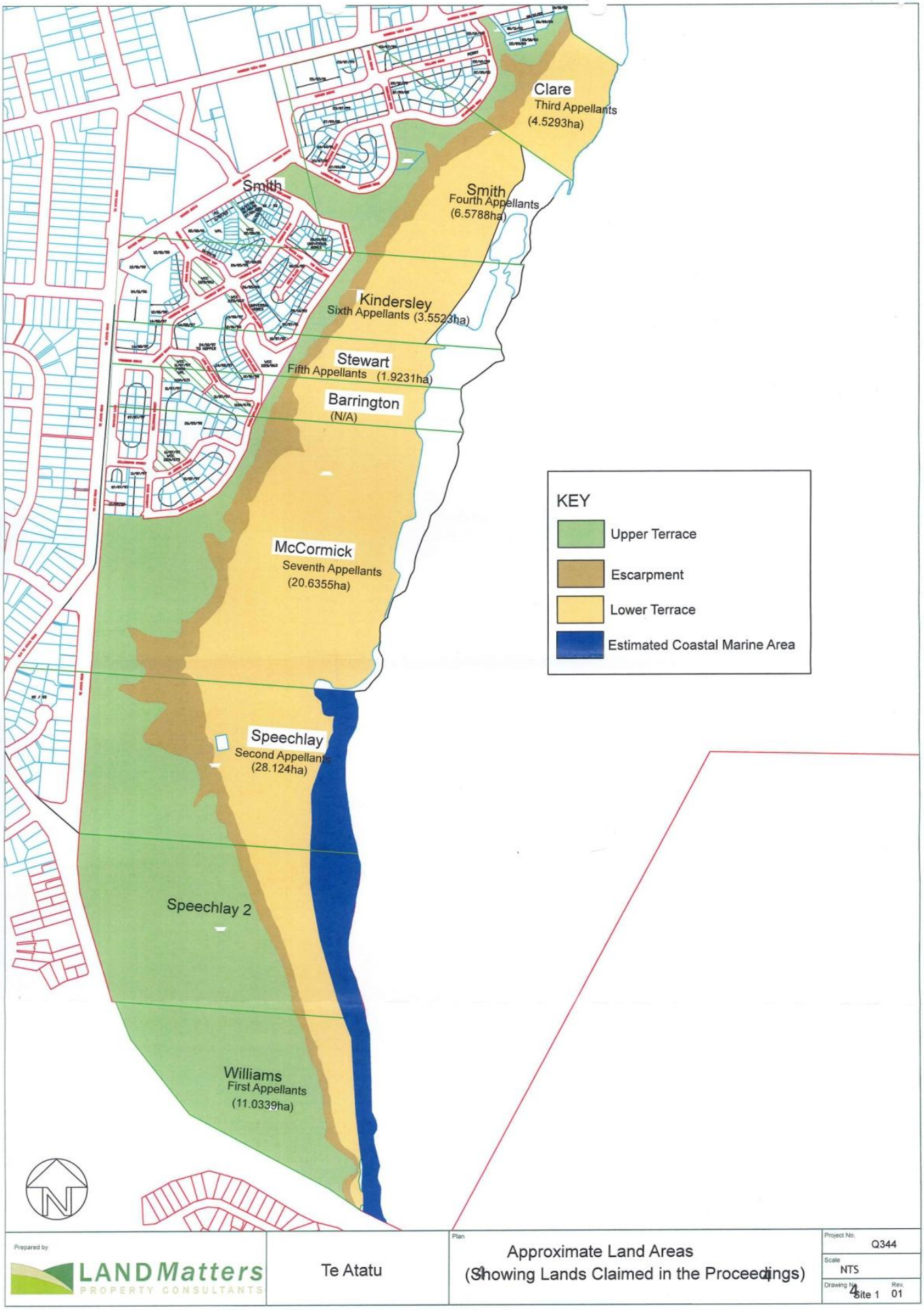
[128] In the result the appeal and the cross-appeal are dismissed.

[129] In the normal course costs would follow the event. However, both the appeal and the cross-appeal have been unsuccessful although our grounds differ in part from those adopted in the High Court. Moreover, much of our judgment has been directed towards addressing some defences raised by the Council which on an objective appraisal of the High Court judgment, and the previous judgments on its unsuccessful application to strike out, should not have been pursued on appeal. Accordingly, there will be no order for costs, which must lie where they fall.

Solicitors:
P M Cassin, Auckland for Appellants
Buddle Findlay, Auckland for Respondent

[104] *Hood* (SC leave), above n 50, at [5].

APPENDIX 1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Smith
Smith
Fourth Appellants
(6.5788ha)
Kindersley
Sixth Appellants (3.5523ha)
Stewart
Fifth Appellants (1.9231ha)
Barrington
(N/A)
McCormick
Seventh Appellants
(20.6355ha)
Speechlay
Second Appellants
(28.124ha)
Speechlay 2
Williams
First Appellants
(11.0339ha)
KEY
Upper Terrace
Escarpment
Lower Terrace
Estimated Coastal Marine Area
Prepared by
LANDMatters
PROPERTY CONSULTANTS
Te Atatu
Plan
Approximate Land Areas
(Showing Lands Claimed in the Proceedings)
Project No.
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NTS
Drawing No.
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Rev.
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