

Oakley Moran

BARRISTERS & SOLICITORS

1ST FLOOR
LEADERS BUILDING
15 BRANDON STREET
WELLINGTON
NEW ZEALAND

P.O. BOX 241

PH (04) 472 3055

FAX (04) 472 6657

DX SP20003

EMAIL

email@oakleymoran.co.nz

JWT:BJM

Ref:

17 June, 2002

Greg Schollum
Chief Financial Officer
Wellington Regional Council
P.O. Box 11 646
WELLINGTON

Dear Greg,

SHELLY BAY – LOCAL GOVERNMENT COMMISSION DETERMINATION

FILE REF. -V1	
CP / 17 / 02 / 01	
Doc No. 202/02	
Referred to	Date/Int
G. Schollum	

1. This opinion is to enable Council to determine what steps, if any, it wishes to take with regard to the determination by the Local Government Commission (**LGC**) of 22 May 2002 that the Wellington City Council (**WCC**) is entitled to succeed to the rights of the former Wellington Harbour Board (**WHB**) under an agreement between the WHB and the Crown in December 1983 (**1983 Agreement**) entitling WHB to have reclaimed land at Shelly Bay revested in it in the event the Crown no longer required the reclaimed land for defence purposes.
2. The Commissioners held:
 - 2.1. The rights were personal property of the WHB (paragraph 22 of its determination);
 - 2.2. That property was disposed of under clause 194 of the Local Government (Wellington Region) Reorganisation Order 1989 (**Reorganisation Order**) (paragraph 23 of the determination);
 - 2.3. That property was property under clause 194(3) of the Reorganisation Order – i.e. it was property adjacent to the harbour (paragraphs 28 to 33 of the determination); and
 - 2.4. That property was vested in WCC.
3. Is the decision correct in law and, if not, what remedies (if any) do WRC have?
 - 3.1. The determination by the LGC was made under clause 194(4) of the Reorganisation Order.

- 3.2. There is no right of appeal under either the Reorganisation Order itself or any provision in the Local Government Act 1974 (**LGA**) against any determination made by the LGC.
 - 3.3. The LGC made its determination under clause 194(4) of the Reorganisation Order and in so doing, determined that the rights of the WHB under the 1993 agreement with the Crown were “*property . . . vested in the WHB as at the 31st day of October 1989*” as set out in clause 194(1) of the Reorganisation Order and therefore that whole clause was applicable to the property in question.
 - 3.4. In making its determination, the LGC was exercising a statutory power of decision. Any statutory power of decision is subject to judicial review by the High Court under s.4 of the Judicature Amendment Act 1972.
 - 3.5. The grounds which may be relevant to any judicial review of the LGC’s determination are the LGC failed to take into account relevant considerations, the LGC took into account irrelevant considerations, the LGC made an error in law relevant to its determination or the LGC made a decision which was not one reasonably open to it. Only error of law and failing to take into account relevant factors are arguable in this instance.
 - 3.6. The High Court’s powers on judicial review are discretionary. Its powers are supervisory only. It cannot itself make any final decision. It is the responsibility of the statutory decision-maker to make any decision or determination as required by the statute and the Court can only direct the statutory decision-maker to do so in accordance with law. Accordingly, if the LGC failed to take into account relevant considerations, all the Court could do is to remit the matter to the LGC for re-determination in accordance with the Court’s directions on matters of law. The Court has power to quash any error of law but it is rare that the correct application of the law will necessitate only one outcome. If the decision is otherwise defensible, despite any error of law, the Court may decline to require a reconsideration of the issue.
4. Failure to consider relevant material.
 - 4.1. It is arguable that the LGC failed to consider relevant material with regard to the 1983 Agreement in respect of which the rights in dispute arise.
 - 4.2. The 1983 Agreement proceeded on the basis that WCC would legalise the formed road and would stop those parts of the legal road which did not form part of the formed road and then vest stopped road in the Crown. That never occurred. Had that occurred, the Crown would have held land on both the seaward and inland sides of the formed (new public) road.
 - 4.3. The 1983 Agreement provided for WHB to acquire back from the Crown the reclaimed land subject to certain conditions. WHB had the option of purchasing at market value the whole of the reclaimed land together with the buildings on or encroaching onto the reclaimed land. Alternatively if the reclaimed land could be subdivided, WHB could take a transfer of that part of the reclaimed land

which contained no buildings with the balance being retained by the Crown subject to compensation to WHB for the land value of the reclaimed land retained by the Crown. If neither of these options was possible, the Crown was then entitled to sell the whole of the reclaimed land (including the buildings on it) and account to the WHB for the value of the reclaimed land only. In paragraph 3 of its determination, the LGC did not describe these limitations on the rights of the WHB. These limitations are important because it required the WHB to make an election as to whether or not it acquired the whole of the reclaimed land (including the buildings), sought a subdivision or would receive only payment for the value of the reclaimed land (because WHB either elected not to choose or was unable to choose either of the preceding options).

- 4.4. On the basis that WRC was the successor in title to WHB, from 1996 the Crown negotiated with WRC on vesting the reclaimed land in WRC in terms of the 1983 Agreement. The fact of those negotiations was known to WCC which, until December 2000, asserted no claim to be the successor in title of WHB and therefore entitled to exercise WHB's rights in regard to the reclaimed land.
 - 4.5. An argument could be raised that, by reason of its conduct in allowing WRC to negotiate with the Crown (and to incur considerable expenditure in so doing) on the basis that WRC was the successor in title to the WHB, WCC should be estopped from asserting it is in fact the successor of the WHB under the 1983 Agreement and entitled to the reclaimed land. The difficulty with this argument is that it is a requirement of an estoppel that the person who is to be estopped must be aware of his, her or its rights and have a duty to assert these so as not to mislead the person who acts (and expends money) in the mistaken belief that he, she or it has such rights. The Reorganisation Order is a public document, and WCC must therefore be taken to have known its content and effect. It appears WCC had a copy of the 1983 Agreement by early 1996 when it was provided by Mr O'Brien at a meeting with the Ministry of Defence and WCC. WCC must therefore have known its content shortly thereafter. In July 1997, WCC asked its then solicitors, Phillips Fox, to advise on WRC's powers to acquire and hold the reclaimed land but is evident from its advice that Phillips Fox did not know the basis whereby WRC acquired any right to acquire the reclaimed land. On 13 February 1998, Mr. O'Brien sent to Phillips Fox (at its request) a copy of the 1983 Agreement. Thereafter, WCC must be taken as having known the basis upon which WRC claimed to have succeeded to WHB's rights under the 1983 Agreement, yet WCC made no claim to those rights until December 2000.
 - 4.6. The principal difficulty which arises with a claim of this nature is that any remedy is discretionary. If, in fact, the correct successor in title to the WHB under the 1983 Agreement is WCC and not WRC, then the remedy for WRC's having acted under a mistaken assumption may well be simply a requirement that WCC reimburse WRC for the moneys WRC expended in its mistaken belief.
5. Error of law.


- 5.1. I doubt that the LGC was erroneous in law in determining that the WHB's rights under the 1983 Agreement were personal property and were therefore subject to clause 194 of the Reorganisation Order.
 - 5.2. I am satisfied the LGC's conclusion that WHB's rights are "*property which is adjacent to the harbour*" is an error of law. Only physical items have a location. Intangibles do not. WHB's rights are intangible. The LGC's conclusion is therefore open to challenge.
6. Would the High Court give directions such that the LGC would be bound to arrive at a decision favourable to WRC?
- 6.1. There is clearly no point in challenging the LGC's determination unless the prospects of obtaining a determination favourable to WRC are high. In my view, they are not sufficiently high as to warrant a challenge (by way of judicial review). I set out my reasons for that view.
 - 6.2. Whilst the principal reason that the LGC gives for its conclusion (the WHB's rights under the 1983 Agreement are property adjacent to the harbour) is patently wrong, it does not follow the LGC's ultimate conclusion was wrong. It might be correct that WCC was the successor in title to WHB for the purposes of the 1983 Agreement for reasons different from that which the LGC gave and therefore, on any reconsideration, the LGC may make the same determination. If so, any challenge would be pointless.
 - 6.3. The LGC has clearly determined WCC should succeed to the WHB's rights under the 1983 Agreement. It is likely that conclusion will not have been the consequence simply of its erroneous view that WHB's rights under the 1983 Agreement were "*property adjacent to the harbour*".
 - 6.4. Two factors have probably influenced the LGC. The first is that the WHB's rights under the 1983 Agreement were not the subject of specific consideration when the formulae for vesting the WHB's property were first considered by the LGC prior to the promulgation of the Reorganisation Order. The second is a counterfactual. Had the Ministry of Defence determined the Shelly Bay land was surplus to requirements not in 1995 but in 1988 or 1989, the WHB's rights would have then been exercisable. Had the WHB elected to have the reclaimed land retransferred to it, that land would have been one parcel and it would have been adjacent to the harbour. The criteria which the Reorganisation Order set out for vesting WHB property in the new local authorities would have vested the reclaimed land in WCC because that land would have been adjacent to the harbour. The position may have been otherwise had there been a subdivision whereby there were two parcels of land, one to the seaward side of the formed road and the other to the landward side, both parcels being reclaimed land which WHB was entitled to have re-transferred to it in the event that the Crown no longer required that land for defence purposes. In that case WRC could have rightfully asserted the parcel of land to the landward side of the formed road would not have been adjacent to the harbour and that land would have vested in WRC under clause 194(5) of the Reorganisation Order.

Oakley Moran

Page 5

- 6.5. In its submissions to the LGC, the WCC requested the LGC to exercise its powers under s.37ZZZO of the LGA to amend the Reorganisation Order specifying that the WHB's rights under the 1983 Agreement vest in WCC "*to better enable the intention of the Reorganisation Scheme to be put into effect*". Even if the LGC had accepted that the WHB's rights under the 1983 Agreement were not "*property adjacent to the harbour*", it would still have been open to the LGC to have exercised its powers under s.37ZZZO of the LGA to ensure that the land in question was vested in WCC. The LGC could have done so on that basis that it was the clear intention of the Reorganisation Order that land adjacent to the harbour vest in the territorial authority within whose district the land is situate. It could not be said that it would have been unreasonable for the LGC to exercise its powers under s. 37ZZZO on that basis. Because the reclaimed land is in still in a single title, it is not possible for the LGC to vest different parts of the reclaimed land in different local authorities. Had there been a subdivision into two parcels (as outlined above), the position would have been different.
7. Summary. In my opinion:
- 7.1. The LGC was wrong in concluding the WHB's rights under the 1983 Agreement were "*property adjacent to the harbour*".
- 7.2. The clear intention of the Reorganisation Order was that land owned by the WHB adjacent to the harbour should vest in the territorial authority in whose district the land was situate and that all other land should vest in WRC.
- 7.3. There is no reason to distinguish between WHB's rights to have land re-transferred to it and land actually owned by WHB for the purposes of determining in which local authority the land should vest.
- 7.4. Because the WHB's rights under the 1983 Agreement relate to one parcel of land, and that parcel of land is adjacent to the harbour, if it is desirable to preserve consistency with the Reorganisation Order such land should vest in the WCC.
- 7.5. It is unlikely the High Court would quash the LGC's determination because the LGC could have determined WCC should succeed to the land even though the LGC did so for the wrong reasons.

Yours faithfully
OAKLEY MORAN


J.W. Tizard