1998 WL 35434369

DC Otahuhu NP453/98, 13 November 1998
District Court, Otahuhu

Pengelly's Marketing Ltd v Attorney-General

N.P. No 453/98
Hearing: 24 September 1998
Decision: 13 November 1998
Judge Field

Classifications (1)

[1] **Property** Valuation

Legislation Considered
New Zealand Bill of Rights Act 1990 (NZ) s 6, s 21
Official Information Act 1982 (NZ)
Public Works Act 1912 (NSW)
Public Works Act 1981 (NZ) s 110, s 111, s 111(1), s 111(2), s 111(3), s 111(4), s 111(5)

Party Names
Pengelly's Marketing Limited *(First Applicant)*, Pengelly's Limited *(Second Applicant)*, The Attorney-General *(Respondent)*

Legal Representatives
Dr R.E. Harrison QC for applicants; *Mr M.T. Parker* and *Ms M.L.F. Townsley* for respondent; *Greig Bourke* P O Box 5121, Auckland, for applicants; *Crown Law Office*, P O Box 5012, Wellington, for plaintiff

Judgment

RESERVED JUDGMENT OF JUDGE C.J. FIELD

C.J. Field Judge

In this matter, the first and second applicants object to a notice issued pursuant to s 111 of the Public Works Act 1981. The notice is dated 30 April 1998. Briefly, the events leading up to the issue of the notice and the present application are as follows.

Late in 1996, the Ministry of Education commissioned a study from consultants to assess the need for an additional primary school to serve the Otahuhu area. The report concluded that a new primary school would be needed in Otahuhu. A number of different site options were investigated, and the present land became the preferred option for reasons set out in the affidavit of Mr Keith Hogarth.

Negotiations were commenced to purchase the site originally through Port Glen Consultancy Limited, and subsequently by Mr Trevor Canty as to terms, conditions and purchase price. A complicating factor was that the property had been previously used for an abattoir operated by a tannery company. This raised the issue of potential contamination of the site which could render it unsuitable for use as a school.

Clearly use as a school could not occur if the site could not be made safe or healthy for the students. Public perception that the site poses no threat to the health or safety of students is said to be paramount if the school were to attract sufficient student numbers for it to be viable.

Negotiations unfortunately stalled. The parties were unable to reach agreement as to price and other conditions which might attach to a sale. Pengelly's were particularly concerned that if the site were found to be contaminated, this could have a marked effect on its value if the findings became publicly known.

It was against this background that the Ministry served the notice which is the subject of these proceedings. Notice of objection has been duly given pursuant to s 111(4) of the Public Works Act 1981 (the Act).

Section 111 (5) provides as follows:-

> "5. If it appears to the Court that the proposed survey or investigation is unreasonable or unnecessary the Court may -
>
> (a) Order that the survey or investigation shall not be undertaken or shall not be undertaken in the manner proposed; or
>
> (b) Direct that the survey or investigation be undertaken in such manner and subject to such limitations and restrictions as the Court thinks fit."

Two notices were in fact issued. I am concerned with the notice dated 30 April 1 998.

The applicants put forward the following grounds of objection:-

> "4.1 The notice is invalid by reason of its failure to authorise any particular person to enter the land and to exercise the powers thereby purportedly conferred (hereafter, for short, 'the power of entry');
>
> 4.2 The proposed entry on the subject lands and the proposed investigations are not for the purpose of carrying out any public work or any proposed public work in terms of s 111(1) of the Act.
>
> 4.3 If there is a public work or a proposed public work within the contemplation of the Minister (which is denied), it is not a public work or a proposed public work on or in relation to the subject lands;
>
> 4.4 The notice of entry is invalid by reason of its failure to identify the specific powers intended to be exercised by those entering, as required by s 111(2)(b) of the Act. This point is now limited to the absence of the annexure B detail dealing with the proposed 'second stage' investigations;
>
> 4.5 The manner, extent and duration of the proposed entry on the subject lands and the proposed investigations the subject of the notice of entry constitute an unreasonable interference with the rights and interests of the owner and the occupiers of the subject land;"

The objection is therefore on two broad grounds:-

1. Legal invalidity.
2. Factual grounds, that is to say that the entry is unnecessary or unreasonable in the terms presently proposed.

As to the legal validity of the notice the introductory paragraph reads as follows:-

> "Notice is hereby given that the Minister of Lands acting by and through the Ministry of Education and its agents under the provisions of s 111 of the Public Works Act 1981 intends to access, enter and re-enter the lands described below for the purpose of a site contamination investigation including removal of samples.

Specifically the investigation will involve -

(a) Entry and re-entry to the land at reasonable times with such staff, appliances, machinery and equipment as are reasonably necessary … and
(b) That the investigators dig and bore into the land and remove samples of it … ”

Legal Invalidity:

The respondent answers the submission that the notice is invalid because it fails to identify specific persons by saying that there is no express or implied requirement that the notice authorise any particular person to enter the land.

The authorisation given by the Minister in s 111(1) of the Act is separate from the notice in writing served on the owner and occupier. It is submitted that this is evident from subsection (3) which requires any person exercising any power under subsection (1) to have with him or her, and produce if required, evidence of his or her authority and identity. If the notice was required to specify the persons authorised to enter, there would be no need for subsection (3)(a). I accept this submission.

I do not think that the legislation envisaged a situation where the Minister was required to nominate a specific person to be named in the notice. Subsection (1) simply provides that the Minister or local authority as the case may require authorise any person to do certain things. Certainly the person exercising any power conferred by subsection (1) must produce evidence of authority and identity if required, but I do not read subsection (1) as requiring that such person should be named in the notice.

Further I am satisfied that the proposed entry and investigation is in fact for the purpose of carrying out public work or proposed public work in terms of s 111 of the Act. I am satisfied on perusing the affidavits that the work proposed is in fact public work within the meaning of the Act. In this regard I have been referred to ss 110 and 111 of the Act, and the similarity between those sections and the Public Works Act (NSW). It has been submitted that the Act is broadly enough worded to authorise inspections for the purpose of ascertaining the suitability of the site. The investigations as to suitability are permitted for the purposes of “carrying out” the establishment of the Otahuhu No. 2 Primary School. The investigations as to contamination and any remedial work must be completed before construction of the school can occur. In my view, this clearly forms a necessary part of the public work, a proper examination of the site and assessment of its suitability being a part of the operation.

It has been further submitted that the “public work” or proposed public work is not on or in relation to the subject lands. It is submitted that no decision has in fact been made that the public work in question will be carried out on or in relation to that land. Counsel for the objector calls in aid the New Zealand Bill of Rights Act 1990 ss 6 and 21 and s 111(5) of the Public Works Act.

Section 6 of the New Zealand Bill of Rights Act provides that:-

> “Whenever an enactment can be given a meaning that is consistent with the rights and freedoms contains in this Bill of Rights that meaning shall be preferred to any other meaning.”

Section 21 provides:-

> "Everyone has the right to be secure against unreasonable search or seizure whether of the person property or correspondence or otherwise."

What is proposed under the Public Works Act in this instance is, I accept, an invasive entry on to the land occupied by the applicant. Section 111(5) of the Public Works Act makes it clear that such entry is able to be challenged on the basis that it is unreasonable or unnecessary. This is in no way inconsistent with the New Zealand Bill of Rights Act, and indeed it seems to me that one reinforces the other. The test to be applied having regard to the provisions of both sections, is whether the entry on to the land in these circumstances is reasonable or necessary.

In this case as I understand it, the respondent's position is that the entry is both necessary for the purposes of the Public Works Act, and reasonable in terms of what is proposed. Dealing however, with the particular point raised on behalf of the objector, I do not find that the proposed exercise of the powers in the Public Works Act on the face of it conflicts with the rights of the applicant under s 21 having regard to the purposes of the entry already referred to.

Accordingly, I find that the notice is valid in law, and turn now to the alternative argument advanced on behalf of the applicant, namely, that the manner, extent and duration of the proposed entry and investigations constitute an unreasonable interference with the rights and interests of the owner and occupiers of the land, to the extent that the Court should find the proposed investigation to be unreasonable or unnecessary.

Reasonable or Necessary:

I have carefully considered the affidavits sworn on behalf of both applicant and respondent.

For the applicant, it is submitted that as the Ministry has disavowed any intention compulsorily to acquire the land, and given the failure of the parties to agree, and indeed the unlikelihood of any agreement, it cannot be said to be reasonable or necessary for the Ministry to proceed with the proposed investigation.

As to that the Ministry's position is that it could not undertake not to invoke the powers of compulsory acquisition. The respondent could not make an informed decision concerning this in any event, unless and until it was satisfied that the site was or was not suitable for the purpose proposed. As I understand it, the situation has been left open, and accordingly I cannot find on that basis that the proposed entry is unreasonable.

It has been further submitted that the proposed investigations will involve major disruption to business operations on site. I have been given detailed information of the likely effect that the drilling of the proposed test holes will have on the operation of the applicant's business. It does seem apparent on a consideration of the plan submitted in evidence together with the photographs, that there would to a greater or lesser degree be a disruption of the applicant's business if the test holes were drilled as proposed. It seems unlikely that some of the sites to the left hand side of the buildings shown would interfere with the business, but other sites do at least have that potential. I am advised that the total time engaged in the work would be in the region of 24 hours continuously. As I understand it, this is actual drilling time and does not take into account time involved in setting up or travelling around from place to place within the yard, which could be expected to add appreciably to this estimate if this were carried out during normal hours of operation of the applicant's business. I can readily appreciate that it would be unreasonably disruptive.

A further ground of unreasonableness has been advanced. This is to the effect that if the site after investigation is found to be contaminated to the extent that it is unsuitable for use as a school, and that if this finding became generally known, it would reduce the potential value of the applicant's land, any prospective purchaser needing only to read the report to be made aware of this. Further, it might be exposed as a result to a liability to remedy the contamination.

As to that latter point, the respondent submits that the applicant could not in any event seek to avoid liability for remedial work. The liability is already there if contamination exists. Further, it is submitted that the reasonableness of the investigations is confined to the actual investigations proposed, rather than the possible indirect consequences of the investigations. If the applicant were successful on this ground, any land owner who opposes an investigation could argue that the investigation had the potential to reveal unknown facts which could result in a duty to take certain steps. It is submitted, and I agree, that s 111 could not have been intended to extend that far.

As to confidentiality, a possible compromise would be to direct that the report be kept confidential to the Ministry and its agents. Such a clause has already been proposed in the correspondence between the parties to the effect that:-

> "The Ministry will take all reasonable steps to ensure that people doing the actual site investigations and reporting do not disclose to any other person outside the Ministry (including staff of and those connected with the owner) that they are doing the work for the Ministry of Education."

In addition to that, as I say, it may be that the report itself should be kept confidential.

For the applicant, it is submitted that the potential damage to the applicant's business and the inability to claim compensation for such damage, renders the proposed investigations unreasonable. That of course, depends on the extent of the disruption in the event that the investigations are permitted. It is pointed out that what is now proposed is very different from the rather limited investigations discussed in the early stages of negotiations. This certainly appears to be the case, but I am required to determine whether or not the present investigations are unreasonable or unnecessary as they are now proposed.

I have come to the conclusion that the notice served is legally valid. I find that entry on to the land of the applicant during the applicant's normal working hours would be unnecessarily disruptive to the applicant's business, and therefore unreasonable. It is to be remembered that with the possible exception of the land to the left of the main buildings, the applicant really requires access to all areas of its yard for the purposes of moving trucks and material in and out of the premises, and no doubt within the premises themselves.

I see no reason however, why with the advent of daylight saving, work could not be carried out after (say) 6.00 p.m. on normal work days, and perhaps late afternoon on Saturdays or on Sundays in terms of paragraph 20 of Mr Warren Pengelly's affidavit of 24 March 1998.

Provided the work can be undertaken on this basis, I do not think it could be considered unreasonable or unnecessary, and I find accordingly.

Rather than lay down specific conditions under which the investigations may be carried out, I encourage the parties to reach an agreement suitable to both of them in the light of this decision. The agreement should provide for the investigations to be carried out outside Pengelly's normal working hours. I accept that on the face of it this is expressed very widely, and that emergency situations might arise which involve the applicant working outside these hours. I do not think however, that a requirement that the work be carried out outside normal business hours is unreasonable having regard to daylight saving. Further, on the issue of confidentiality, I direct that the nature of the work be kept confidential in the terms already proposed, and further, that the report itself be kept confidential to the Ministry and its agents so far as is not inconsistent with the Official Information Act 1982.

I am prepared to spell out more particularly these conditions in the form of an order, but I wish to give the parties the opportunity of reaching an agreed compromise within the framework of this decision, and to submit a draft order for approval.

All Citations

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