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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

AP 404/151/00

IN THE MATTER of the Public Works Act 1981 and the Resource Management Act 1991

A N D

01/873

IN THE MATTER of an appeal pursuant to s 299 of the Resource Management Act against decision No.A110/2000 of the Environment Court

BETWEEN **MURIEL KATHLEEN KETT**
Appellant

A N D **THE MINISTER FOR LAND INFORMATION**
Respondent

M 404/1974/00

IN THE MATTER of the Judicature Amendment Act 1972

BETWEEN **GLENN SHANNON-KETT**
Plaintiff

A N D **THE ENVIRONMENT COURT**
First Defendant

A N D **THE MINISTER FOR LAND INFORMATION**
Second Defendant

Hearing: 9, 10 and 11 April 2001

Counsel: P H Thorp and P Kapua for Plaintiff and Appellant
No appearance by first defendant
R J Beech, A Ross (M404/1974/00), and M McIndoe for Respondent and Second Defendant

Judgment: 28 June 2001

RESERVED JUDGMENT OF PATERSON J

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Introduction

[1] There are two discrete but related proceedings before the Court. They both relate to the intention of the Crown to take, for the purposes of the State Highway 1 Albany to Puhoi realignment, a piece of land near Waiwera containing 4.1227 hectares (the land). The land, which is in the path of the Orewa to Puhoi section of the proposed motorway (sector 2B), is owned as tenants in common in equal shares by Mrs Kett and her son Mr Shannon-Kett.

[2] Mrs Kett appeals the report prepared by the Environment Court (the Court) pursuant to s 24 of the Public Works Act 1981 (the Act) on her objection to the taking of the land. The Court in its report to the Minister (the report) found no reason why the Crown should not proceed with the taking of the land.

[3] Mr Shannon-Kett seeks judicial review of the Court's decision recorded in the report. He alleges that the statutory procedure which is a pre-requisite to the compulsory taking of the land has not been followed. Consequently, he alleges that the Minister for Land Information (the Minister) is not entitled to take the land by proclamation, and seeks both an order quashing the report and a declaration that the Minister is not entitled to take the land by proclamation.

General Background

[4] Proposals to realign State Highway 1 and extend the Northern Motorway north of Auckland have been on foot for several years. There were discussions between the parties prior to 1996 but events prior to that year are not relevant to either proceeding.

[5] Transit New Zealand (Transit) is a Crown entity established under the provisions of the Transit New Zealand Act 1989 (the Transit Act). For the purposes of the Resource Management Act 1991 (the RMA), it was the requiring authority responsible for the designation of the section of the realigned section of the Highway between Albany and Puhoi.

[6] The Property Group Ltd (the Property Group) is the Crown entity responsible for the implementation of the statutory land acquisition procedure under the Act for acquiring land necessary to effect the realignment of sector 2B. Its predecessors DOSLI, LINZ and Terralink were previously involved in some of the relevant transactions in this matter.

[7] Consultation with the community on the proposed realignment and the environmental impact of the proposal began as early as January 1992. The evidence suggested that there was extensive consultation prior to Transit making an application for designation under Part VIII of the RMA.

[8] In May 1994, Transit gave notice to the Rodney District Council (the Council), the relevant territorial authority, in accordance with s 168 of the RMA of its requirement for a designation of the chosen route for the motorway realignment. The notification of the Council's decision was given in December 1994. Several appeals against this decision were lodged with the Court, including appeals by the Department of Conservation (DOC) and the Auckland Conservation Board.

[9] Many of the appeals were lodged because of a concern over the scope and extent of the measures proposed by Transit to mitigate the adverse ecological effects of a sector of the designation. The land is within this sector. On 14 February 1997, the Court endorsed a consent order which resolved many of the concerns held by the appellants.

[10] One of the conditions of the consent order was:

> "Where the roadway passes through native bush areas, careful detailed alignment and design of the roadway shall be undertaken to minimise habitat loss, wildlife isolation effects, and construction impacts. Transit NZ shall consult with the Department of Conservation on these matters. Where during the process of completing final design, it appears that minor alterations to the designations will:
>
> (a) better achieve the objectives of this condition without additional construction costs or adverse impacts on the efficiency of the proposed State highway; or

(b) will reduce construction costs or improved traffic efficiency without adversely impacting on the development of the objectives of this condition, then Transit NZ shall give full and proper consideration, in consultation with the Department of Conservation and any owner or occupier of land directly affected by the proposed alteration, to the lodging of an application to alter the designation pursuant to section 181 Resource Management Act. For the avoidance of doubt, Transit shall be at liberty to withdraw the application to alter the designation if the territorial authority declines to alter the designation pursuant to section 181(3) Resource Management Act. The native cover through these areas must be kept as close as practicable to the carriageway, and the carriageway maintained at a minimum width having regard to operational and capacity requirements."

[11] Since the Court decision of 14 February 1997, the proposed route has been further evaluated and in Transit's view, has been significantly improved. Some of these alterations will require alterations to the designation before they can proceed. The two main reasons for the re-evaluation and alteration to the route are the designation condition referred to in paragraph 10 above and the ongoing development of Transit's broader strategic requirements for the route, having regard to the projected traffic growth and proposed improvements to State Highway 1 further north of sector 2B.

[12] Transit's position is that it wishes to use the design build approach for the major structures on this realignment. The proposed Waiwera bridge within sector 2B is one such structure. Transit sees significant benefits in employing this process and estimates it may reduce the time for completion by up to 30% compared with the more traditional approach of completing final designs of the structures before tendering. It is the policy of Transfund, upon which Transit relies for all of its funding, that design built contracts cannot be let until all land required for work in relation to those contracts is in Crown ownership. The land is required for structures on sector 2B and there is thus a particular urgency to acquire it. A further reason for wishing to acquire the land is the need to have access to the land to better understand the works required, before tender documents can be prepared.

[13] Another important reason for wishing to acquire the land is the need to amend the designation to accommodate the alterations made to the route. Transit's advice is that if it owns all land which is affected by the proposed changes, which

includes the land, it should be able to obtain the alterations to the designation on a non-notified basis. This will lead to considerable saving of time.

[14] Transit wishes to complete sector 2B by December 2003. An important reason for this desire is a condition included in the consent order of the Court made on 14 February 1997. That condition referred to the present link road between the point where the Northern Motorway presently terminates, and Orewa. The condition reads:

> "shall only be used as a link between the motorway and State Highway 1 until 31st December 2003 unless the rest of the motorway from Bankside Road to Titfords Bridge has been opened by that date or an application for an extension time beyond that date has been granted by the Environment Court, on the ground that circumstances beyond the control of Transit New Zealand have prevented the completion and opening of the motorway extension to Titfords Bridge by then."

Transit does not believe that the time objective referred to in the condition can be met if alterations to the current designation are required to proceed on a notified basis. It is optimistic that acquisition of the land will avoid the need to notify the proposed alterations to the designation. Another reason for the desire to complete by December 2003 is the effect that delays are having and will have on the ultimate cost of the motorway.

[15] LINZ, one of the Property Group's predecessors, began in early 1996 to negotiate with Mrs Kett and Mr Shannon-Kett for the purchase of the land. Initially, only a portion of the land was covered by the designation and it was proposed to acquire only that portion of the land. Mrs Kett's evidence was that in about October 1998, she was advised that all the land may be required because of the batter requirements of the motorway. She was asked in early 1999 to consent to an application to alter the designation for this purpose, but declined to do so.

[16] By May 1999, it was clear to the Property Group that Mrs Kett and Mr Shannon-Kett would neither agree to sell the land nor consent to the proposed alteration of designation. It therefore recommended to Transit that the statutory procedures for acquiring the land be initiated.

[17] In accordance with the provisions of s 18(1) of the Act, a notice of desire to acquire the land for public work dated 17 June 1999 was issued by the Minister for Food, Fibre, Biosecurity and Border Control (the notice of desire). The notice was addressed to Mrs Kett and Mr Shannon-Kett care of Ian Cowper, Bell Gully, Barristers and Solicitors, P O Box 4199, Auckland. Only one copy of the notice was served by forwarding it to Mr Cowper on 28 June 1999.

[18] A reasonable period of negotiation, during which it became clear that Mrs Kett and Mr Shannon-Kett would not sell the land, preceded the sending of the notice of desire. In accordance with the statutory requirements, further negotiations took place after the notice was served. The Property Group wrote letters to Mr Cowper but these were not replied to. On 1 September 1999, it addressed a letter to Mrs Kett and Mr Shannon-Kett at 2/245 Jervois Road, Herne Bay enquiring whether they were prepared to accept the offer made for the land. Mrs Kett replied on 24 September 1999 advising that the offer was unacceptable.

[19] On 17 December 1999, the Property Group, as required by s 23 of the Act, forwarded a notice of intention to take land for road (the notice to take). Notwithstanding that the land was owned as tenants in common only one notice was sent. It was addressed to Mrs Kett and Mr Shannon-Kett, 245 Jervois Road, Herne Bay, Auckland. Mrs Kett lives at the Herne Bay address and received the notice on or about 21 December 1999.

[20] On 7 February 2000, Mrs Kett lodged with the Court an objection under s 23 of the Act to the taking of the land. Her objection sought that the taking be disallowed, or sent back for consideration of the tunnel proposal, and raised questions about alterations to a designation under the RMA for the highway realignment. The report noted that the main grounds of objection were that the Crown proposed to take all of the land but the highway realignment designation effected only part of it and it was not necessary to take the rest; the land and house were the only home of Mrs Kett's son, the other tenant in common; the land was the site of Mrs Kett's proposed retirement home; environmental effects; cultural and spiritual effects; and the advantages of a tunnel.

[21] The Minister applied for a priority fixture to hear Mrs Kett's objection and that application was considered by the Court in April 2000. At the conclusion of the hearing of this application, the Judge reserved to the Minister leave to file a memorandum and/or an affidavit concerning service of the notice to take on Mr Shannon-Kett and to make written submissions on this aspect. The Court, after receiving an affidavit, determined there be a priority fixture and that it was not necessary to decide whether the notice to take had been served on Mr Shannon-Kett. The Judge noted it was sufficient to notice that on the face of the affidavit filed, the notice to take was served on Mr Shannon-Kett on 21 December 1999. Therefore there was no basis for declining a fixture for the hearing of Mrs Kett's objection pending expiry of the period for Mr Shannon-Kett to lodge an objection.

[22] At the hearing in September 2000, Mrs Kett adduced evidence and was represented. The report addressed both to the Minister and Mrs Kett, was issued by the Court on 15 September 2000.

[23] The operative portion of the report reads:

> "[108] Therefore the Environment Court reports-
>
> (a) That it has inquired into the objection by Mrs Kett to the intention by the Crown to take the land described in paragraph [1], and for that purpose it conducted a public hearing at Auckland on 4 and 5 September 2000;
>
> (b) That it has ascertained that the objectives of the Minister of Land Information are to enable Transit New Zealand to give effect to the proposal to construct and operate the Realignment of State Highway 1 between Orewa and Puhoi generally in accordance with the designation for it in the Rodney district plan as part of a safe and efficient highway system:
>
> (c) That it has enquired into the adequacy of the consideration given to alternative sites, routes, or other methods of achieving the Minister's objectives, and has found that adequate consideration was given to them:
>
> (d) That in the Court's opinion it would be fair, sound, and reasonably necessary for achieving the Minister's objective for that land to be taken: and
>
> (e) That it has found no reason why the Crown should not proceed with the taking of the land.

[24] Mrs Kett appeals to this Court under the provisions of s299 of the RMA. She has the right to so appeal on a point of law.

[25] Mr Shannon-Kett seeks judicial review of the report on the ground that the notice of desire was defective in form and the notice to take was not served on him.

MRS KETT'S APPEAL

Alleged Errors of Law

[26] Mrs Kett in her notice of appeal alleged that the Court made errors of law by:

> (a) Determining and reporting that adequate consideration had been given to alternative routes and methods of achieving the objective of the Minister; and
>
> (b) Determining and reporting that the taking of the land was fair, sound, and reasonably necessary for achieving the objectives of the Minister; and
>
> (c) Making its report when the notice of desire had not been served on either Mrs Kett or Mr Shannon-Kett and when the notice to take had not been served on Mr Shannon-Kett; and
>
> (d) Determining and reporting that adequate consideration had been given to alternatives, and that it was fair, sound, and reasonably necessary to take the portion of land not directly required for the motorway.

The Court's Statutory Obligations

[27] In considering Mrs Kett's objection, the Court was required, by the provisions of s 24(7) of the Act, to enquire into certain matters and report its findings to the Minister. The relevant portion of s 24(7) states:

> The Court shall -
>
> (a) Ascertain the objectives of the Minister or local authority, as the case may require:

(b) Enquire into the adequacy of the consideration given to alternative sites, routes, or other methods of achieving those objectives:

(c) In its discretion, send the matter back to the Minister or local authority for further consideration in the light of any directions given by the Court:

(d) Decide whether, in its opinion, it would be fair, sound, and reasonably necessary for achieving the objectives of the Minister or local authority, as the case may require, for the land of the objector to be taken.

Alternative Routes

[28] It was alleged that the Court made two separate errors of law when it determined the Minister had given adequate consideration to alternative routes. The alleged errors were:

(a) It applied the wrong test to its inquiry under s 24(7)(b) of the Act; and

(b) The finding of adequate consideration of alternatives by the Minister was not reasonably open to the Court on the evidence.

[29] The test applied by the Court was that its function was to consider the adequacy of the consideration given by the Minister to alternative routes and methods of achieving the Minister's objective. It was not for the Court to substitute its own judgment about which of the alternatives it considered preferable. It found helpful the test applied in *Waimari District Council v Christchurch City Council & ors* (Planning Tribunal decision C30/82, 13 July 1982). In *Waimari* the Tribunal, when applying a similar statutory provision under the Town and Country Planning Act, determined it was required to have regard to the extent to which adequate consideration has been given and was not required to be satisfied there are no alternative sites, routes or methods. It was not the task of the Tribunal to determine that the chosen site was the only suitable site or the most suitable site, but to ensure that the relevant authority had not acted arbitrarily nor given only cursory consideration to alternatives.

[30] Mr Thorp submitted the Court erred by applying the *Waimari* test. Specifically, he said that in making its inquiries under s 24(7)(b) of the Act, it was necessary for the Court to interpret the sub-section in a manner "that puts the Minister strictly to proof that there is no alternative to the option that requires the compulsory acquisition of land to which the landowner has objected." (underlining added) This submission cannot, in my view, be correct. Sub-section 24(7)(b) refers to "consideration given to alternative sites" which infers that there are likely to be alternative routes or sites for many of the propositions considered by the Court. The legislature could not have intended that a public work could be prevented by every owner in the vicinity of the proposed work objecting and putting the Minister to the proof that there is no alternative to the option chosen. This is an untenable proposition.

[31] A further submission on this point was that the Court's obligations in considering whether adequate consideration had been given to alternative routes changed when s 24(7)(b) of the Act came into force on 31 March 1987. It replaced a section which required the Court to "inquire into the extent to which adequate consideration has been given to alternative sites, routes or other methods of achieving the objectives of the Minister." It was submitted that the substitution of the words "the adequacy of the consideration" for the words "the extent to which adequate consideration has been given" altered the nature of the Court's obligations under s24(7)(b). Mr Thorp referred to a comment in *Hansard* which noted "the expanded criteria that the Planning Tribunal can now consider, represents the Government attempt to give its citizens an even stronger protection against the prospects of compulsory acquisition under the provisions of the Public Works Act." However, this was a general reference and in the same commentary the then Minister of Works and Developments in moving the introduction of the Public Works Amendment Bill, made a particular reference to sub-section 24(7)(a) which empowers the Tribunal to ascertain the objectives of the Minister and then said:

> "Sub-sections 7(b), (c), (d), (e) and (f) restate the existing criteria and duties of the Tribunal."

The Minister of Works did not appear to see the distinction which counsel now seeks to make between the previous wording and the present wording of s 24(7)(b) of the Act.

[32] The Court under s 24(7)(b) is required to enquire into "the adequacy of the consideration." If this phrase is given its normal plain and dictionary meaning, the Court was required to consider whether the Minister sufficiently and with due regard, chose the route, after taking into account circumstances which were reasonably relevant relating to that route and alternative routes. I see no reason, from the context of the Act or the statements made when the Bill was introduced, to give the term any other meaning. Nor do I see that the difference in wording between the present and former statutory provision alters the meaning. The Court was not itself required to determine whether the route was the most suitable of the available alternatives. Its role was to ensure that the Minister had carefully considered the possibilities, taken into account relevant matters and come to a reasoned decision. In my view, the Court did not err in applying the *Waimari* principle.

[33] Before considering whether the Court's finding that adequate consideration had been given to alternatives of achieving "those objectives" was reasonably open to the Court, it is necessary to consider the relevance of the words "those objectives". This is because an important part of Mrs Kett's case, both before the Court and this Court on appeal, was that the Minister had not given adequate consideration to a tunnel alternative. The tunnel advocated by Mrs Kett and her advisors was some distance from the proposed route. A separate designation would be required for it as it is not within the designation obtained. The Court had found in accordance with its obligations under s 24(7)(a) of the Act that the Minister's objectives "are to enable Transit to give effect to the proposal to construct and operate the realignment of State Highway 1 between Orewa and Puhoi generally in accordance with the designation for it in the District Plan as part of a safe and efficient highway system." Mrs Kett did not, on appeal, challenge the Court's findings of the Minister's objectives. It was therefore submitted, on behalf of the Minister, that it was not open to Mrs Kett on appeal to challenge the adequacy of the tunnel consideration when she had not appealed the finding on the Minister's objection. As Mrs Kett's tunnel

option could not be achieved "generally in accordance with the designation obtained" it was not an alternative to achieving the Minister's objective.

[34] A related submission on behalf of the Minister was that Mrs Kett, both before the Court and on this appeal, had in fact approached the matter as an objection to the designation. Mrs Kett was not represented at the designation hearing. Her reasons for this may be perfectly legitimate but a challenge to the adequacy to the consideration given to alternative routes cannot amount to a challenge to the underlying designation. The designation has been fixed in accordance with the statutory provisions. While Transit can, if it so wishes, initiate procedures to alter the present route, it would be required in respect of the alternative tunnel route, to initiate what, in effect, would be an application for a new designation. On the Court's finding of the Minister's objective, which has not been challenged, the Minister was not required to consider the tunnel alternative.

[35] Mr Thorp submitted that this construction materially reduces an objector's rights of objection under the provisions of the Act. This conclusion does not necessarily follow because if the Court has erred in finding what the Minister's objectives were, the objector has a right of appeal to this Court on a point of law. In this case, the Court did consider the tunnel alternative. It did not need to do so and arguably should not have done so. In my view, even if the Minister was required to consider alternative routes which were not generally in accordance with the designation, Mrs Kett cannot succeed on this appeal point. For reasons which will be given, I am of the view that the Court was entitled to conclude as it did that the Minister had given adequate consideration to alternative routes. Its determination was valid even if, contrary to my findings, the Minister had a wider obligation to consider alternatives other than those which were generally in accordance with the existing designation.

[36] The second alleged error of law was that the finding that the Minister had given adequate consideration to alternative routes was not reasonably open to the Minister. This challenge is based on factual findings and can only become a question of law if there was no evidence upon the basis of which the Court could properly have made the finding.

[37] The Court in the report went into the factual position in some detail. Evidence on this aspect came mainly from Mr Brown, the Regional State Highway Manager of Transit. The Court noted that alternative routes for the Highway realignment were considered over a period of some years up until the time of the designation, and refinements to the route designated in the District Plan had been considered since then leading to the current need to alter the boundaries of the designation. There had been an earlier attempt in 1989 to confirm an existing designation for the realignment of the highway terminating at Hadfields Bay. The new alignment resulted from investigation carried out as a result of appeals against that route. Consequently, nineteen possible routes were identified and six of these were given further study separately by principal consultants, consent authorities, and community representatives. The findings of the studies were published in a draft Environmental Impact Assessment which underwent rigorous review by the community, the consultancy study team and relevant consent authorities. The final Environmental Impact Assessment published in 1993 identified and evaluated adverse effects and recommended the route that was considered to best serve the requirements of the National Strategic Road Network, affect the fewest people and incur the least environmental impact. Transit initially considered seven possible routes for Sector B2 and, for various reasons, rejected them. Two further routes had then been developed, one of which was subject to the eventual designation on the District Plan following the objection procedure earlier referred to. Newsletters had been sent to the residents affected and Mrs Kett would have received copies of these.

[38] The Court dealt specifically with tunnel options. Mrs Kett's proposed tunnel would go through Johnson's Hill. Mr Brown's evidence was that two distinct tunnelling possibilities had been considered, the first on the alignment of the current designation and the second on the M7 route which was favoured by Mrs Kett's witness, Mr Riley. The report noted, as it was entitled to from the evidence, that adequate consideration was given to tunnelling on the designation alignment and that no consideration of a tunnel was necessary on another alignment. It is correct that the options explored by Transit since the designation order was made in 1997 have been limited in the sense that options which would require Transit to seek an alteration to the designation on a notified basis had not been considered. The desire to deliver a bypass through to Puhoi by December 2003, which would not be

possible on the alternative route, has been a consideration but, in my view, a valid one, particularly in view of the financial implications. Further, the evidence suggested that the M7 route may involve a number of problems related to safety and environment impacts which would require further consideration and time delay without the certainty that the route would be satisfactory. Mr Brown's evidence was that the tunnel route proposed by Mrs Kett would take two to three years longer to achieve for reasons which included geo-technical investigations, additional surveys, preliminary designs, assessment of environmental effects, land acquisition requirements and designation requirements.

[39] This is not a case where the Court came to a conclusion, which on the evidence, it could not have reasonably come to. The Court is a specialist Court and in matters within its speciality this Court will not likely come to the conclusion that the Court erred in law when there was before it the amount of evidence that there was in this case. I am satisfied there was ample evidence before the Court upon which it was entitled to conclude adequate consideration had been given to alternative routes. This is a conclusion which I come to both on the basis of consideration of adequate alternatives generally within the existing generation and consideration of adequate alternatives which would require new designations. This appeal point cannot succeed.

Fair, Sound, and Reasonably Necessary (s24(7)(d))

[40] In the notice of appeal, Mrs Kett alleged there were eight reasons why the Court erred in law in determining and reporting that the taking of land was fair, sound, and reasonably necessary for achieving the objectives of the Minister. Mr Thorp in his submissions added a ninth. Some of the reasons overlap and some are factual points rather than legal points. It is therefore convenient to consider some of the points together.

[41] The first alleged error of law under the provisions of s 24(7)(b) was that the Court could not reasonably make its report without the Minister having finalised the intended route and bridge and roadway design. This was, in effect, a submission that until Transit had finalised the route, the proposed structures on it and the design of

the proposed road, the Court could not determine whether it was reasonably necessary for the land to be taken to achieve the objectives of the Minister. There are, in my view, three related issues in this submission, namely:

(a) Can the Minister take land for road before the designation has been finalised?

(b) Is the Court legally entitled to consider whether the taking of the land is fair, sound, and reasonably necessary for achieving the objectives of the Minister if the final form of the proposed works has not been settled?

(c) If the Court was entitled to consider the matter in this case, did it err in law in determining that the taking of the land was reasonably necessary for achieving the objectives of the Minister?

[42] It was submitted that the decision in *Crimp v Invercargill City Council* (1991) 1 NZRMA 165 was wrongly distinguished by the Court. In *Crimp* the Planning Tribunal found that it would not be fair in the circumstances of the case for the City Council to take land for a flood retention dam without it being provided for in the District Scheme under the Town and Country Planning Act 1977 or by a planning consent under that Act. It was unfair even though the Council was authorised to install the dam under the provisions of the Soil Conservation and Rivers Control Act 1941. In his judgment Judge Skelton said he was not sure that the *Lamont v Hawkes Bay County Council* [1981] 2 NZLR 442 supported a proposition in a text which said:

> "As a rule, land should not be recommended for compulsory taking unless the work is also authorised under the District Planning Scheme."

I do not read *Crimp* as laying down an invariable rule that land cannot be taken for a public work until the necessary designations and resource consents are in place. If this was an immutable rule, many proposed public works could or would be frustrated by an alteration to the character of the land or the erection of buildings thereon during such periods as the taking authority seeks to obtain the necessary approvals. Further, the Crown or the local authority taking the land may be adversely affected financially if it is first necessary to obtain a designation before taking the land. If *Crimp* decided that a taking was not legally possible before the

obtaining of a designation, I decline to follow it. I am of the view, however, that the *Crimp* decision turns upon its own facts, particularly the submission of the local authority that it did not require consent or a provision of the District Scheme in order to construct its planned dam. There is no statutory restriction upon the Crown taking land prior to the obtaining of a designation and although in certain circumstances it may not be fair, sound, and reasonably necessary to take land before a designation is obtained, I see no reason in principle which would have required the Minister to have been satisfied that the designations were finally in place before moving to take the land.

[43] The provisions of s 24(7) contain no specific restriction which would prevent the Court from considering whether it would be fair, sound, and reasonably necessary for achieving the objectives of the Minister in a case such as the present where the final form of the designation and even the design have not been determined. The Court in each case is required to consider whether it is fair, sound, and reasonably necessary for achieving the objectives of the Minister for the land to be taken. The stage of planning reached as well as the designation and conditions attaching to it may well be relevant factors in such consideration. However, in my view, there is no legal restriction which would prevent the Minister taking land if the route, the proposed structures on it and the design of both the road and the structures have not been finalised. The Court in such circumstances would be charged with considering, on the facts as they existed at the time whether it was fair, sound, and reasonably necessary for achieving the objectives for the land to be taken.

[44] The real issue under the points on appeal referred to in paragraph 41 above is the point in sub-paragraph (c). In this case, the proposed alignment of the motorway had altered over time and these alterations led to different land requirements. This is illustrated by the fact that initially Transit only required a quarter of the land. The reasons for the adjustments to the alignments have already been referred to above. They were contemplated by the designation and the conditions imposed by consent in the Court order of 14 February 1997. Consultation with DOC has led to a realignment of the route near the proposed Waiwera Bridge. This proposed realignment provides for reverse 450 metre curves on the bridge and approaches, the widening of the bridge to maintain safe sight distances having regard to the solid

edge barrier on the bridge, and while requiring additional land will remain substantially within the present designation. For safety reasons, Transit asked its consultants to investigate increasing the radius of the reverse curve from 450 metres to 600 metres. Both the 450 metre and 600 metre curves will utilise essentially identical areas of land although the 600 metre curve passes further outside the designated corridor than does the 450 metre curve. The 600 metre curve is considered more desirable as it would result in the same level of service but a lower overall cost. Mr Brown's evidence was that on the basis of the detailed investigations undertaken, he was confident one of the two options will represent the final alignment and any change would fall in the envelope between the two.

[45] The Court considered the evidence adduced on behalf of the Minister. It found that part of the highway realignment would occupy much of the land, the rest would in practice be inaccessible, and ownership by the Crown is necessary for construction and operation of the highway realignment. Although not specifically referred to in its actual finding, the Court referred in its narrative to Mr Brown's evidence that the land will be affected and is pivotal to construction of the viaduct no matter whichever alternative may ultimately be adopted. It is relevant to note the Court's task was to determine whether it was fair, sound, and reasonably necessary for achieving the objectives of the Minister, which was found to be to construct the motorway generally in accordance with the designation. The Court noted Transit had obtained the designation and resource consents required for the construction and operation on the designation. Alterations to the boundaries of the designation and further resource consents are required as a result of a refinement of the design. There was ample evidence upon which the Court was entitled to determine that it was fair, sound, and reasonably necessary for achieving the objectives of the Minister for the land to be taken. This is, in my view, a factual point but even if it were possible to convert it into a point of law, it could not succeed. It follows therefore that on the point of law referred to in paragraph 41 above, the appeal cannot succeed.

[46] The third alleged error of law under this statutory provision was that it cannot be fair, sound, or reasonably necessary for the Minister to abort the normal objection rights of a landowner by acquiring the land before seeking designation changes or

resource consents to which the landowner otherwise would be entitled to object. In this respect, the Court found the Minister's entitlement to take the land was not conditional on alterations to the designation and obtaining additional resource consents. It found nothing unfair in the Minister proceeding with taking the land prior to the procedures under the RMA being followed. This alleged error is related to the alleged error referred to in paragraph 41(a) above. For similar reasons, I am of the view that there was no error of law. There is no statutory requirement on the Crown to seek designations before it takes land for public work. Here, the Crown has a designation which covers most of the proposed route. Mrs Kett is protected if the designations are not obtained and it is necessary to abort the proposal. She then has the first right to reacquire the land under s 40 of the Act. The Crown in the meantime has given an assurance that she may remain on the property rent free until such time as construction is ready to commence. In the circumstances the Court did not make an error of law in determining that the taking of the land was fair, sound, and reasonably necessary for achieving the objectives of the Minister.

[47] Another alleged error of law was that the Court wrongly ascribed the phrase "intended work" to the definition of "public work" when it only applies to the definition of "Government work." The Court, when commenting on the submission that the land should not be taken prior to all necessary designations and resource consents being obtained, noted that the definition of "public work" in the Act expressly extends to an "intended work." The relevance of this observation was that the Minister may take land required for any public work and the Court was, in effect, saying that intended work is land required for a public work. There is nothing in this point. It is correct that the reference to "intended work" is part of the definition of "Government work." However, "Government work" is by definition part of "public work" and therefore, intended Government work is a public work. Further, even if this had been an error, it was not a material part of the reasoning which led to the decision.

[48] A further alleged error of law was that the Court wrongly interpreted the phrase "is authorised" in the definition of "public work." It was submitted the Minister, at the time he issued the notice to take, was not authorised to carry out the work on land which was not subject to the designation and in respect of which some

resource consents had not been obtained. If this submission is correct, the Minister must obtain all necessary approvals under the RMA before he can acquire any land for a public work. The Court held that the reference to "work that the Crown ... is authorised to construct, undertake ..." in the definition of "public work" is not directed to authority under planning legislation such as the RMA, but to the Crown's authority to carry out the work, subject to it obtaining all necessary planning and other approvals. The section does not allow the Crown to take land for a work which it has no statutory authority to undertake. In support of this proposition, it cited *Melanesian Mission Trust Board v Tamaki Road Board* [1925] NZLR 415 (CA).

[49] The effect of the decision in *Melanesian Mission Trust Board,* if applied to the facts of this case, means the Minister must have statutory authority to take land for roading purposes. The term "is authorised to construct, undertake ..." in the definition of "public work" refers to the primary source of the Minister's authority to carry out the work. It does not refer to any planning and other like approvals which may be required to carry out the work. Notwithstanding counsel's attempt to distinguish this case, I am of the view it does have application. The Minister was clearly authorised to take land for the purposes of a road. The fact resource consents or designations may be required do not, in my view, mean the Minister was not authorised to take the land for road.

[50] The next point on behalf of Mrs Kett, was that the Court wrongly applied the decision in *Lamont.* It was submitted that the Court erred in law, relying upon *Lamont,* when it considered that Mrs Kett could demand higher compensation for the taking of the land if the Minister was required first to obtain the necessary designation changes and/or resource consents. I do not accept that either the Court made the finding as alleged, or if it did, it was relevant to its ultimate decision. *Lamont* is relevant to the present circumstances but in a manner adverse to Mrs Kett. In that case, it was held that an obligation to use land taken in conformity with an operative District Scheme cannot prevent the land being purchased prior to the necessary designation being made under the District Scheme. While that case dealt with buying land, I see no reason why the principle does not also apply to the compulsory acquisition of land. If land is compulsorily acquired, the "fair, sound, and reasonably necessary" limitations referred to in s 24(7) apply. These

requirements make it necessary to consider whether the Minister has acted in a fair, sound, and reasonably necessary manner but they are not a complete barrier to him so acting. There was no error of law in respect of *Lamont* which can assist Mrs Kett.

[51] A further alleged error of law can be disposed of shortly. It was submitted the Court wrongly had regard to the compensation to which Mrs Kett would be entitled were the land to be acquired. The Court noted in its summary, that the owners would be entitled to compensation assessed according to law if the land were to be taken. On my reading of the report, this was not an essential factor taken into account in coming to the decision. If an error of law was committed it had no material effect on the decision.

[52] Then, it was submitted that the Court erred by wrongly having regard to a time limit imposed by the designation condition upon the use of a link road to Orewa (see paragraph 14 above). It was submitted that by its express terms, the condition is able to be extended by the Court. As a result the Court cannot ignore its express powers to extend the time limit so as to justify a finding that the taking of the land is reasonably necessary to avoid that time expiring before the motorway is completed.

[53] The Court noted that Transit hoped to acquire the land and to proceed with the process and the construction of the motorway to avoid the risk that delay would preclude completion of sector B2 in time to allow compliance with the designation condition. The condition was obviously a background fact referred to in the evidence and submissions. It does not, in my view, appear to have been a reason for making the substantive findings reported in paragraph 108 of the report (see paragraph 23 above). If it was taken into account, it was, in my view, a relevant consideration. The public interest issues of this road alignment and the costs of delay are considerable. The Minister is entitled, provided that the terms of the Act are complied with, to move to take the necessary land. The consequences of non-compliance with a designation condition are, in my view, relevant, particularly if they may lead to additional substantial cost to the public. The interests of both Mrs Kett and the public need to be balanced and this was an appropriate matter to be considered.

[54] Finally under the provisions of s 24(7)(d), it was submitted there was an error of law made by the Court by failing to pay proper regard to the relevant environmental, spiritual and cultural concerns of Mrs Kett. The Court did consider these matters and found the unsupported claims about cultural and spiritual connections with the land as not providing a basis for any finding by the Court that it would be unfair to take the land for the proposed highway realignment. It made a factual finding and there was, in my view, a basis for making its findings. This is not a point of law.

[55] In summary, I do not find that there was an error of law when the Court reported that in its opinion it would be fair, sound, and reasonably necessary for achieving the Minister's objectives for the land to be taken. Those points of appeal based on s 24(7)(d) of the Act can therefore not succeed.

Form of the Notices

[56] I do not consider the allegation that the notice under s 23(1)(c) of the Act was not served on Mr Shannon-Kett as being a ground upon which Mrs Kett can appeal. She was served with the notice and has exercised her right of objection. She obtained a fair hearing and is now exercising her right of appeal. There is no evidence that she was in any way prejudiced because the notice may not have been served on her co-tenant.

[57] The nature of tenancy in common also tells against Mrs Kett being able to take advantage of any failure to serve her co-tenant. Each tenant in common is entitled to the possession of the land, and yet, unlike a joint tenant, is entitled only to a distinct share thereof, a combination of concepts possible only because the physical boundaries of his or her share, called an undivided share, have not yet been determined. A tenant in common is, as to his or her own undivided share, precisely in the position of the owner of an entire and separate estate – see *Butterworths Land Law* Hinde McMorland and Sim, para 9.043. Mr Shannon-Kett is entitled to deal with his undivided share as he sees fit. He is entitled to possession of the whole of the land and if there was a failure to serve him, Mr Shannon-Kett will have his own

rights and remedies but this does not give Mrs Kett any right on her appeal to raise this issue.

[58] Another relevant provision is s 28(b)(1) of the Act. This section empowers the Minister to take any particular estate or interest in the land whether for the time subsisting separately or not. From a legal point of view there is no reason why the Minister cannot deal separately with a co-tenant and acquire that co-tenant's interest in the land.

[59] Contrary to what was stated in the points on appeal, it was not alleged at the hearing that the notice of desire (the s 18(1)(a) notice) was not served. It was accepted that it was served on a solicitor who was at that stage instructed to act for both Mrs Kett and her son. The point taken by Mrs Kett is that the notice must clearly and unambiguously describe the land desired to be acquired and the notice of desire served did not do so. Under s 18 of the Act if any land is required for any public work, the Minister "shall, before proceeding to take the land under this Act ... serve notice of his ... desire to acquire the land on every person having a registered interest in the land."

[60] There is no prescribed form of the notice to be sent under s 18. The description of the land in the notice of desire sent on 17 June 1999 read:

> "Land at Fowler's Access Road, approximately 1 km west of Waiwera, being Lot 6 DP 61445 and being part Section 9 Block III Waiwera Survey District, being all the land in Certificate of Title 24C/489, shown marked on the land requirement plan, attached, comprising 4.1227 hectares."

The plan attached was a plan of the land which showed the designation boundaries but also showed a hatched area noted as "land required for temporary occupation and motorway." The plan also included a table which showed the "area of landtake as 2.8179 hectares." If the plan itself is considered, the Minister did not require 1.3048 hectares of the total area of 4.1227 hectares. The description in the notice is somewhat confusing when it refers to "all the land ..., shown marked on the land requirement plan, attached, comprising 4.1227 hectares." On one interpretation, the complete area is required because of the reference to the total area, but on another

interpretation, it is only the "shown marked" land containing 2.8179 hectares which is required.

[61] It was submitted on behalf of Mrs Kett that the ambiguity referred to in the previous paragraph meant that the Minister had not complied with the necessary first step to acquire the land. Further, it was submitted at best the notice and plan are ambiguous and as such do not validly entitle the Minister to proceed further with the acquisition of the whole of the land. Mr Thorp relied upon the principles stated in *London & Clydeside Estates Ltd v Aberdeen District Council & anor* [1979] 3 All ER 876 and *R v Immigration Appeal Tribunal ex parte Jeyeanthan* [1999] 3 All ER 231.

[62] The Minister's response was that the notice was valid and substantially complied with s 18. Even if it was not compliant, and potentially confusing, his position is:

(a) No one claims actual confusion; and

(b) The error, (if any), was cured by the subsequent notice which was perfectly plain; and

(c) The notice served its purpose of setting a timeframe for negotiated purchase of the whole property; and

(d) Because the defect is capable of remedy, even now, under s 55 of the Public Works Act, the Court should not lend its assistance to the minor point by granting relief setting aside the entire process on this modest basis.

[63] The relevant provision of s 55 of the Act reads:

> "If any ... notice ... executed under this Act is found to contain any error in form or substance ... the ... Minister ... may in a subsequent document of the same type amend or revoke the first-mentioned document to correct the error, and the subsequent document shall be deemed to have taken effect on the same date that the first-mentioned document took effect."

In my view, it would be inappropriate for the Minister to invoke any power under this section unless he was satisfied there had been no prejudice to the recipient of the notice. The purpose of the notice of desire is to invite the landowner to sell the land

to the Minister after reasonable negotiations. If the landowner is not aware of what land is to be sold, the purpose of the section is frustrated. For this reason there must, in my view, be limits upon the Minister's exercise of his discretion under s 55. I do not see how the section in itself assists the Minister, particularly as the Minister has taken no steps to forward a subsequent document.

[64] In the *London & Clydeside Estates* case, the appellants alleged they were misled by the defect in the notice. In his judgment, Lord Hailsham LC considered the effect of non-compliance by a statutory authority with a statutory requirement. He noted that this was a field of rapidly developing jurisprudence of administrative law. He said at p 883 of his judgment:

> "In such cases, though language like 'mandatory', 'directory', 'void', 'voidable', 'nullity' and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition. As I have said, the case does not really arise here, since we are in the presence of total non compliance with a requirement which I have held to be mandatory. Nevertheless I do not wish to be understood in the field of administrative law and in the domain where the courts apply a supervisory jurisdiction over the acts of subordinate authority purporting to exercise statutory powers, to encourage the use of rigid legal classifications. The jurisdiction is inherently discretionary and the court is frequently in the presence of differences of degree which merge almost imperceptibly into differences of kind."

That the jurisprudence had developed was evident from the *Immigration Appeal Tribunal* case the headnote of which contains the following:

> "In determining the consequences of a failure to comply with a procedural requirement, the court had to assess the intention of the legislator against the factual circumstances of non-compliance, and in most cases it would be of little if any assistance to inquire whether the requirement was mandatory or directory. That question was at most a first step, and normally there were other questions which were likely to be of greater assistance, namely: (i) whether the statutory requirement was fulfilled if there had been substantial compliance with it and, if so, whether there had been such compliance; (ii) whether the non-compliance was capable of being waived, and if so, whether it had been, could or should be waived; and (iii) what was

the consequence of non-compliance if it was not capable of being waived or had not been waived."

[65] This is not a matter which was considered by the Court and therefore is not a matter which Mrs Kett can raise on appeal. However, if she had been able to raise it, she could not have succeeded. Mrs Kett knew from October 1998 that all the land was required. After the notice of desire was served, Transit continued to negotiate and made offers to her to purchase all the land. On 24 September 1999, she advised that an offer was unacceptable (see para 18). There were no adverse consequences to Mrs Kett because the notice may have been confusing. She was not confused and the purpose of the notice was not frustrated.

Taking of land indirectly required

[66] This alleged error of law is that the Court was wrong to find that the portion of the land which is not required for the public work, namely, the area of 1.3048 hectares, referred to in paragraph 60 above (the surplus land), was indirectly required. The Court finding was based on the disproportionate cost of fulfilling the obligation which Transit would have to provide access to the surplus land if it remains in private ownership. It accepted the Minister's case that because of the disproportionate cost the surplus land is indirectly required for the realignment of sector 2B. Accordingly it is a public work for which the Minister is empowered to take land under the Act.

[67] The obligation Transit may have to provide access to the surplus land arises from s 76 of the Transit Act. The relevant provisions of s 76 read:

"(1) If the making of a motorway has-

(a) Cut off all access by road to any land other than Crown land; or

(b) Separated one piece of the land of any person from another piece of land of that person-
and the Authority has not provided access to the land so cut off or between the pieces of land so separated, the Authority shall provide access to the land so cut off or between the

pieces of land so separated-

(c) By constructing a road, access way, or service lane; or

(d) By constructing a crossing under or over the motorway between the pieces of land that have been separated."

[68] The Court found that the realignment of the motorway will effectively cut off all access by road to the surplus land and if the surplus land is not acquired by the Crown, Transit will be obliged by s 76(1) to provide access to it in one or another of the ways stated in that sub-section. Further, the Court found the surplus land slopes very steeply down to the Waiwera River and contains no feasible area for building except near the southern edge by the river. There are two possible ways of providing access to that building site, one being an underpass under the motorway which will involve extensive physical work on the surplus land and remove all large areas of mature native bush at an estimated cost of several million dollars. The second alternative involves the construction of a retaining wall which would create a 5 metre wide road frontage to the surplus land. This would cost $200,000 but the Court also found this alternative would not be practical access to the only part of the surplus land where a building would be feasible. Providing practical vehicle access to that part was estimated to cost between $4 m. and $5 m. These were the factors underlying Transit's desire to acquire the surplus land and the finding the surplus land was indirectly required for the Government work. Another reason for wishing to acquire the surplus land was to facilitate the required amendment to the designation.

[69] Mrs Kett's main challenge to this finding was that it was wrong for the Court to determine that the land was indirectly required because of the cost or difficulty of complying with the mandatory provisions of s 76 of the Transit Act. In other words, the purpose of acquiring the land was to avoid Transit's obligations under s 76 and the land was not required for a Government work. A subsidiary submission that there was no factual basis for the finding cannot succeed because there was uncontested evidence upon which the Court was entitled to make the finding if it correctly interpreted the Minister's legal powers.

[70] The Minister's position is that the Act allows the taking of land required "indirectly" for a Government work. The surplus land is required indirectly to avoid wastage of project funds (public moneys) on the provision of access to the surplus land. There is no statutory limitation on matters which can be taken into account in considering whether the taking of such land is fair, sound, or reasonably necessary. In a case involving the balancing of public and private interests, impacts on the public purse are clearly matters of relevance. An associated submission was that Transit is obliged by statute to be fiscally responsible.

[71] The first issue is whether the Minister has power to take land required "indirectly" for a public work. On one reading of the Act, he does not have this power. The empowering section is 16(1) which reads:

> **16 Empowering acquisition of land**
>
> (1) The Minister is hereby empowered to acquire under this Act any land required for Government work.

This section empowers the Minister to take land "required for a Government work." Government work is defined in s 2 of the Act in the following terms:

> "any work or an intended work that is to be constructed, undertaken, established, managed, operated or maintained by or under the control of the Crown or any Minister of the Crown for any public purpose ..."

There is nothing in the definition of "Government work" which refers to land indirectly required for a Government work. Thus, when s 16(1) is considered alongside the definition of "Government work" the Minister is only empowered to take land required for a Government work.

[72] The reference to "anything required directly or indirectly for any such Government work ..." is found in the definition of "public work" which is also in s 2 of the Act. The relevant portion of that definition reads:

> "Public work and work mean
>
> (a) Every Government work or local work that the Crown or any local authority is authorised to construct, undertake, establish, manage, operate, or maintain, and every use of land for any Government work

> or local work which the Crown or any local authority is authorised to construct, undertake, establish, manage, operate, or maintain by or under this or any other Act; and include anything required directly or indirectly for any such Government work or local work or use:"

A "public work" includes both a Government work and "anything required ... indirectly for any such Government work ... or use." Something required indirectly for any Government work is a public work but is not itself part of a Government work. It is only land required for the Government work which the Minister is entitled to take under the empowering provision in s 16(1) of the Act.

[73] There are, however, other provisions in the Act which suggest the Minister's power to take may not be limited as suggested by this literal construction. Section 18(1) refers to the procedure which the Minister is required to follow before taking land under the Act, "where any land is required for any public work". This subsection suggests that land required for a public work may be taken under the Act. Section 18(2) gives the Minister the right after following the necessary procedure to "proceed to take the land under this Act." The "land" being referred to is the "land ... required for any public work." Then s 23(1) of the Act refers to "land ... required to be taken for any public work." There are other references in Part II of the Act dealing with land required for public work, including the reference in s29 to "where there is power to acquire or take any land for a public work under this or any other Act ...". These are all statutory indicators pointing to the Minister's power to take land for a public work as well as taking land for a Government work. If he is entitled to take land for a public work, such work by definition includes "anything required ... indirectly for any such Government work."

[74] While the matter is not completely free of doubt, I am of the view that the purpose of the Act allows it to be construed to empower the Minister to take land for a public work notwithstanding the reference to "Government work" in s 16(1) of the Act. There are two ways of doing this without straining the provisions of the Act. First, s 16(1) is not the only empowering section in the Act. The other sections referred to also confer power on the Minister to take land. Secondly, "required", as it appears in s 16(1) does not mean "directly required." The purpose of the Act and the other statutory provisions allow the word to be interpreted as either "directly or

indirectly" required. It is therefore my view that the Minister does have power to take land "indirectly required for a Government work." The existence of a second reason for acquiring the surplus land does not alter that power.

[75] It is necessary, therefore, to determine whether the Court committed an error of law when it determined that it was fair, sound, and reasonably necessary to take the surplus land in this case. This raises two issues, one legal and the other factual. The legal issue is whether the taking of land in order to avoid complying with the provisions of s 76 of the Transit Act can amount to taking of land indirectly required for a Government work.

[76] The adverb "indirectly" must be interpreted within the phrase "directly or indirectly." This phrase is not uncommon in statutes and is used in many different situations. There appears to be no direct authority on its meaning in the context of the Act. Any land which is required for the construction of the motorway or associated batters or for access to the motorway is land directly required. Land indirectly required would therefore be required for some associated reason. The combined effect of provisions such as ss 5, 10(e), 19(1), 26(3)(a) and 35 of the Transit Act do require Transit to act in such a fiscally responsible manner. It is self-evident that a Crown entity utilising taxpayers' money should operate in a fiscally responsible manner. In view of these requirements of Transit to act in a fiscally responsible manner, land would be indirectly required, in my view, if the non-acquisition of it would lead to a disproportionate cost or prevent the Government work proceeding. The direct reason for the Minister wishing to acquire the surplus land is to avoid Transit's obligations under s 76 of the Transit Act. This obligation has arisen because the adjoining land is required for a Government work. The Government work, namely, the construction of the motorway, is the indirect reason for the proposed acquisition. The surplus land is therefore required indirectly for a Government work. The Minister is empowered to take the land and the issue for the Court was whether it would be fair, sound, and reasonably necessary for achieving the objectives of the Minister to acquire the surplus land (the s 24(7)(d) consideration).

[77] In this case, the evidence before the Court was that since the designation, Transit has spent in excess of $175 m. of public funds on design, construction, management and land purchase of this major strategic roading project. The unchallenged evidence, already referred to, shows the considerable costs which would be involved in providing access to the surplus land. In my view, the disproportionate cost finding made by the Court was open to it on the evidence before it. This, in effect, was a factual issue and can only become a legal issue if the finding was not open to the Court on the evidence. Having determined that the finding of the Court was open to it, this ground of appeal cannot succeed.

Result

[78] Mrs Kett's appeal, having failed on all grounds, is dismissed.

MR SHANNON-KETT'S JUDICIAL REVIEW PROCEEDING

Relief Sought

[79] Mr Shannon-Kett, in his statement of claim, seeks an order reviewing and quashing the report and a declaration that the Minister is not entitled to take the land by proclamation. It is alleged in his statement of claim that the report was not valid for all or any of the reasons referred to in Mrs Kett's notice of appeal, "and any further grounds of appeal that may exist in that proceeding."

[80] The dismissal of Mrs Kett's appeal does not of itself dispose of the judicial review proceeding. While most of the findings made on Mrs Kett's appeal apply equally to the same points raised by Mr Shannon-Kett in his judicial review proceeding, the same considerations do not apply to either of the allegations that the notice of desire was confusing, or that the notice to take was not served on Mr Shannon-Kett. Different factual circumstances may apply in respect of the notice of

desire, and if the notice to take was not served on Mr Shannon-Kett, he is likely to have rights which Mrs Kett does not have.

[81] On my view of the position, it would not be appropriate to make an order quashing the report if Mr Shannon-Kett is able to make out his case. The report would still stand and enable the Minister to acquire compulsorily Mrs Kett's one half undivided interest in the land. Mr Shannon-Kett, if he succeeds in establishing grounds for relief, may be entitled to a declaration that the Minister is not entitled to take his one half undivided interest in the land until the Minister has complied with the statutory provisions. In practice, this would lead to the result sought by Mr Shannon-Kett but he could not, in my view, prevent the Minister compulsorily acquiring Mrs Kett's interest in part of the land. If Mr Shannon-Kett does establish grounds for judicial review, the Minister's position is that in the circumstances of this case, the discretion vested in this Court should not be exercised in Mr Shannon-Kett's favour.

Section 18(1) Notice (Notice of desire)

[82] The notice of desire was properly served on the solicitor who was acting for both Mrs Kett and Mr Shannon-Kett. Prior to the notice being served, there was a meeting at which both Mrs Kett, her son, their solicitor, and representatives of the Property Group attended. At that meeting, the solicitor agreed to organise a valuation and get back to the Property Group. The valuation was to be for the complete property. It is apparent from the correspondence that the Property Group made an offer through the solicitor acting for the owners to acquire the land including the surplus land. On 1 September 1999, after service of the notice of desire, the Property Group wrote to Mrs Kett and Mr Shannon-Kett at the Herne Bay address, noting that it had been endeavouring over the last couple of months through their solicitor to obtain their direction on the matter. It is a reasonable inference, in the absence of any rebuttal evidence from Mr Shannon-Kett, that the solicitor conveyed these approaches on to Mr Shannon-Kett. The letter of 1 September 1999 asked for advice on "your acceptance or otherwise of our offer to acquire the whole property at the figure offered ...". Although this letter was responded to by Mrs

Kett, the inference can be drawn that Mr Shannon-Kett knew of the offers. There is no suggestion that he was confused by the notice of desire and for reasons somewhat similar to those referred to in paragraph 65 above, I have concluded that Mr Shannon-Kett cannot rely upon the form of the notice of desire. Even if it could be argued that the form of the notice was contrary to the purpose of s 18, the circumstances are such that the discretion on a judicial review application would certainly be exercised against Mr Shannon-Kett.

Section 23(1)(c) Notice (Notice to take)

[83] Mr Shannon-Kett complains that the necessary notice under s 23(1)(c) of the Act was not served on him. Section 23(1) of the Act reads:

> **"23 Notice of intention to take land**
>
> (1) When land (other than land owned by the Crown) is required to be taken for any public work, the Minister in the case of a Government work, and the local authority in the case of a local work, shall—
>
> (a) Cause a survey to be made and a plan to be prepared, and lodged with the Chief Surveyor, showing the land required to be taken and the names of the owners of the land so far as they can be ascertained; and
>
> (b) Cause a notice to be published in the Gazette and twice publicly notified giving—
>
> (i)A general description of the land required to be taken (including the name of and number in the road or some other readily identifiable description of the place where the land is situated); and
>
> (ii)A description of the purpose for which the land is to be used; and
>
> (iii)The reasons why the taking of the land is considered reasonably necessary; and
>
> (iv)A period within which objections, other than objections by persons who are served with a copy of the notice under subsection (1)(c) of this section, may be made; and

(c) Serve a notice on the owner of, and persons with a registered interest in, the land of the intention to take the land in the form set out in the First Schedule to this Act.

[84] The service of the notice to take is an essential part of the compulsory taking procedure. A provision in the prescribed form of the notice states, "you have a right to object to the taking of your interest in the land." An owner who wishes to object must send a written objection "within 20 working days after the service of this notice ...". If Mr Shannon-Kett was not served with the notice, then there was not substantial compliance with the provisions of an essential provision of the Act. In such circumstances, the discretion which a Court exercises on a judicial review application would be very unlikely to assist the Minister.

[85] Section 4(1) of the Act deals with service and states:

"**4 Service and content of notices**

(1) Any notice under this Act may be served or given-

(a) By delivering it personally to the person on whom it is to be served or to whom it is to be given; or

(b) By leaving it, or sending it by post in a registered letter addressed to such person, at his usual or last known place of residence or business in New Zealand; or

(c) By so delivering or posting it to any agent or attorney of such person; or

(d) If such person is not known, or his whereabouts are not known, or his last place of residence or business is not known, or no agent or attorney of such person is known, to the person issuing the notice, by publishing it at least twice in a newspaper circulating in the locality in which the land affected by the notice is situated."

[86] The Minister's position is that there was effective service in this case. Alternatively, if service was ineffective, it was submitted the Court should exercise its discretion in favour of the Minister. Service of the notice is said to have been effected because:

(a) It was made at Mr Shannon-Kett's usual or last known place of business in New Zealand; and/or

(b) It was delivered to his agent (actual or ostensible); and/or

(c) It was plainly served by being given and received and therefore valid, even if it did not comply with the service requirements of s4(1) of the Act.

The ground in sub-paragraph (a) relies upon s4(1)(b) of the Act, the ground in sub-paragraph (b) relies upon s4(1)(c) and the ground in sub-paragraph (c) is based on the submission that the various methods of service prescribed by s4(1) are not exclusive.

[87] It is common ground that only one notice under s23(1)(c) was sent. It was addressed as follows:

To: Muriel Kathleen Kett, married woman,
and Glenn Shannon-Kett, draftsman,
Both of Waiwera.
245 Jervois Road, Herne Bay, Auckland.

Mrs Kett and her husband owned the property at 245 Jervois Road and there were two houses at that address. Previously, Mr Shannon-Kett had lived in one of those houses but in September 1997, he moved back to Waiwera and lived in the house on the land. He went to Australia in August 1998 and returned to New Zealand on 10 September 1999 when he once again returned to reside at Waiwera. The land was his residential address when the notice to take was served.

[88] Mr Shannon-Kett ran a freight business from 245 Jervois Road, Herne Bay, from October 1994 until he sold it on 1 September 1997. In 1996 he had a serious accident which injured his hand and for which he initially received accident compensation. He now receives an unemployment benefit. At the time the notice to take was served, Mr Shannon-Kett was unemployed.

[89] Although Mr Shannon-Kett did not live at 245 Jervois Road in December 1999, his bank statements and his power and telephone bills for the land were sent to him at the Jervois Road address. Mr Shannon-Kett in evidence said that he went there periodically to collect these documents. He suggested he went about once a

month but, in my view, it is likely he went more often than this. He acknowledged that important documents were sent to the Jervois Road address during the relevant period. During earlier negotiations between the Property Group, Mrs Kett and Mr Shannon-Kett, solicitors acted for the Ketts. Transit paid the bills for such attendances which were addressed to Mrs Kett and Mr Shannon-Kett at 245 Jervois Road. In early 1999, Mrs Kett and her son were unrepresented and at that time, there were direct telephone discussions between Mr Shannon-Kett, who was then in Australia, and members of the Property Group. On 31 March 1999, Mr Shannon-Kett sent a fax from Australia to the Property Group's predecessor suggesting a meeting in April after he had returned to New Zealand. That letter stated:

> "A response by return fax is acceptable or if you prefer, by letter to 245 Jervois Road, Herne Bay, Auckland."

[90] Mr Ross submitted that as all Mr Shannon-Kett's significant correspondence, including his power and telephone bills and bank statements went to 245 Jervois Road, his place of business was 245 Jervois Road. This followed because it was the place from which Mr Shannon-Kett conducted his ordinary day to day affairs. Reliance was placed on a dictionary meaning of the word "business" namely "an affair; a concern, a process; a matter; a structure; ... dealings, intercourse ...". In other words, "business" as used in s 4(1) was said to mean an object of concern or activity, an action demanding time and labour. Mr Thorp, on the other hand, submitted "business" if given its wider meaning, could not mean in this case that Mr Shannon-Kett had a place of business, when in December 1999, he was unemployed.

[91] In s 4(1)(b) of the Act "place of ... business" is contrasted with "place of residence". Although "business" has several meanings, most dictionaries suggest its primary meaning is an occupation, profession, trade or work. There are numerous judicial interpretations of the word "business" but most of these are based on the context in which the term is used. In the context of s 4(1) of the Act, there is a clear comparison between "residence" and "business." The comparison suggests, in my view, that the legislature in s4(1)(b) gave alternative means of service, namely, either delivering to where a person lives or to where a person engages in his or her vocation. It does not refer to an address which a person uses as an address for receipt of certain personal documents. There are many statutes where the meaning

of "business" is the income earning activity of the person – see s 2 Commerce Act 1986, s 2 Consumer Guarantees Act 1993, s 33 Energy Resources Levy Act 1976, s 2 Evidence Amendment Act (No. 2) Act 1980, s 2 Fair Trading Act 1986, s 2 Income Tax Act 1976, s 21 Inland Revenue Department Act 1974, s 2 Medicines Act 1981 and s 2 Partnership Act 1908. In my view, the context of the Act requires "business" to have a similar meaning. It does not have the wider meaning contended for by Mr Ross.

[92] As Mr Shannon-Kett ceased to carry on business on 1 September 1997, he was not carrying on business at 245 Jervois Road when the notice to take was served on 21 December 1999. However, a further submission on behalf of the Minister was that 245 Jervois Road was still the "last known" place of business of Mr Shannon-Kett because that address was the last address at which he had carried on business. The Minister's representatives knew by the time they sent their notice to take that Mr Shannon-Kett had spent time in Australia and was no longer actively involved in a business venture operated from 245 Jervois Road. While on a strict literal construction, 245 Jervois Road was the last known place of address of Mr Shannon-Kett, it is, in my view, contrary to the purposes of s4(1) of the Act to enable service at the "last known place of business" when the server knows that the person is no longer in business and not residing there. The purpose of service is to bring the document served to the knowledge of the person to be served. This is unlikely to be achieved by allowing service on a past business address where the recipient may no longer be known to the occupiers of the premises. The fact that Mr Shannon-Kett was known to the occupiers of 245 Jervois Road cannot, in my view, affect the correct interpretation of s 4(1)(b) of the Act. It follows, in my view, the Minister cannot rely upon the provisions of s4(1)(b) of the Act.

[93] The Minister's position was that whether or not 245 Jervois Road was Mr Shannon-Kett's place of business, service of the notice on Mrs Kett was service on her son's actual or ostensible agent. Further, even if his mother was not his agent on 21 December 1999, Mr Shannon-Kett subsequently ratified his mother's action of receiving the notice to take on his behalf.

[94] Implied actual authority rather than express actual authority was relied upon by the Minister. The implied authority which the Minister relied on is based on the conduct of the parties and the circumstances of the particular case. As noted in *Fridman's Law of Agency* (7th ed) at p 59,

> "the agency relationship may be impliedly created by the conduct of the parties, without anything having been expressly agreed as to terms of employment, remuneration, etc. The assent of the agent will be implied from the fact that he has acted intentionally on another's behalf. But in general it will be the assent of the principal which is more likely to be implied, for, except in certain cases 'it is only by the will of the employer that any agency may be created.' Such assent may be implied where the circumstances clearly indicate that he has given authority to another on his behalf."

[95] Evidence relied upon by the Minister in support of actual implied agency included:

> (a) numerous letters and notices addressed to both Mrs Kett and Mr Shannon-Kett going to Mrs Kett's address;
>
> (b) Mr Shannon-Kett clearly getting copies of this correspondence and notices and he taking no steps to insist on alternative communication;
>
> (c) a long course of dealings during which both Mrs Kett and her son had the same address for service;
>
> (d) Mrs Kett encouraging dealings with her son through her even when her son was living in New Zealand;
>
> (e) Mr Shannon-Kett himself actually encouraging communication to himself at 245 Jervois Road particularly with his letter of 31 March 1999 faxed from Australia;
>
> (f) Mrs Kett conducting sale and purchase negotiations on behalf of both of them even when her son was in New Zealand;
>
> (g) Mrs Kett having authority to receive notices on behalf of her son in a related access proceeding; and
>
> (h) Mr Shannon-Kett's acknowledgement that he relied upon his mother to tell him anything important.

It is necessary to consider in more detail the specific factual matters upon which the Minister relies.

[96] Mr Shannon-Kett and his mother had three separate firms of solicitors acting for them in their dealings with the Minister and Transit between 1 November 1996 and at least October 1999. During that time, it was only necessary for the Minister through his agents to deal with them jointly by sending one letter to their solicitor. It was only necessary to send one notice of desire addressed to both of them care of their then solicitor. In that period there were direct contacts between the Minister's representatives and Mrs Kett and her son. It is obvious from the correspondence that Mrs Kett took a leading role in the negotiations and instructions. One of the reasons for this was that during part of the time, Mr Shannon-Kett was in Australia. Another reason given by Mr Shannon-Kett was because of his business and health problems, he found the dealings difficult. In December 1998, the solicitor then acting for Mrs Kett and Mr Shannon-Kett wrote to Terralink to advise that all further contact and correspondence was to be addressed through him. When the Property Group representative endeavoured to obtain a consent to allow personnel to come on to the land for investigation purposes, a proposed form of consent addressed to them both was sent to the Jervois Road address. A member of Terralink made a filenote at the time indicating that he had phoned Mrs Kett to obtain a response to the request and was advised that she wanted her son to look at it before she would give an answer. It is apparent from a letter written by Mrs Kett to the then solicitors on 5 March 1999 that she was being advised by her solicitors of requests and information received from Transit, passing that information on to her son and seeking his opinions before responding to the solicitors.

[97] Between the receipt of the notice of desire and the posting of the notice of intention to take in December 1999, an access problem arose. Bell Gully acted for both Mr Shannon-Kett and his mother on that application. On 24 September 1999, Bell Gully advised the District Court that Mrs Kett had instructed the Court file to be forwarded to her "and she will henceforth represent herself and her son in those proceedings. We seek leave to withdraw accordingly." Mr Shannon-Kett filed an affidavit in those proceedings although he stated during this hearing that he did not instruct his mother to give the instructions which Bell Gully advised the District Court had been given by her. After the forwarding of the Bell Gully letter, the District Court communicated with Mr Shannon-Kett and his mother by writing to them at 245 Jervois Road. In October 1999 another barrister was instructed to act on

behalf of Mr Shannon-Kett and Mrs Kett in the access dispute. Although Transit won the access claim, it was ordered to pay costs to Mrs Kett and her son. Mrs Kett wrote to the District Court requesting payment of costs which had been awarded to both herself and her son.

[98] When Transit made an offer to purchase the land. Mrs Kett wrote to the Property Group and its predecessors in respect of this and other matters. Her correspondence used the plural pronoun and the plural possessive when referring to the ownership of the land and the value of it. In one letter she voiced her concern that it was not fair to her son that it would take five days at least for mail or three days by courier for documentation to reach her son and this would not give him sufficient time to read and consider the proposals. She concluded that letter by saying:

> "That we will endeavour to co-operate with you as we have always done, but this property remains ours, and any future settlement will be on our terms, at our consideration, and in our time, and I say to you now, 'remember this, change your tyrannical tactics and treat us now with respect and consideration to which we are due. This is our land, our life, our dream, brought by our sweat and toil, our sanctuary, which Transit have endeavoured to violate at every opportunity and we will relinquish it, if and when, and only when we are ready. I assure you of this."

It was Mrs Kett who, on 24 September 1999, wrote to the Property Group advising that the offer to purchase the property was unacceptable. The letter did not refer to her son when she did so. It must be implied from the course of previous dealings, which Mr Shannon-Kett had condoned, that the letter was nevertheless written on behalf of both owners.

[99] After the notice to take had been sent in December 1999, the Property Group sent several letters to Mr Shannon-Kett and his mother care of the Jervois Road address. Mrs Kett replied to some of those letters in her own right. In a letter in April 2000, she stated:

> "I note Glen Shannon-Kett's name on your letter to me. Perhaps your office is unaware, although he has lived there for the best part of ten years, that my son's address is 51 Fowlers Access Road, Waiwera."

This is the first written indication which suggested correspondence for Mr Shannon-Kett should be forwarded to that address or P O Box, Waiwera. It was sent approximately three months after she had lodged a notice of objection to the taking and after many letters addressed to both Mrs Kett and Mr Shannon-Kett had been forwarded to the Jervois Road address.

[100] Although the proceedings were brought as judicial review proceedings, limited cross-examination of Mr Shannon-Kett and his mother was allowed. The reason for this was that questions of agency and Mr Shannon-Kett's knowledge of the forwarding of the notice were, in my view, relevant to the service and agency issues raised in the proceedings. Both Mr Shannon-Kett and his mother adopted a consistent line in answering questions. On many direct questions relating to crucial issues, they chose not to respond directly but to answer in an indirect manner. On the basis of this evidence, the notice to take was received by Mrs Kett on 17 December 1999. Although Mrs Kett obviously saw her son on Christmas Day, her evidence was that she did not tell him of the notice to take at that time and in fact did not tell him of the notice until after he returned from an Australian trip in early February 2000. In view of the manner in which Mrs Kett had represented her son previously, the importance of this notice and certain concessions made by Mr Shannon-Kett in his cross-examination, it is easy to be suspicious of the evidence that he did not see the notice until February 2000. However, both witnesses gave this evidence on oath and it is not appropriate, in my view, to make a contrary factual finding holding that he actually saw the notice.

[101] There were, however, concessions made by Mr Shannon-Kett which are relevant. He acknowledged his mother discussed with him the Transit offer to purchase the property and he gave her his views on this matter. It was up to his mother whether or not she reflected those views to Transit. While he claimed his mother only kept him informed of what she chose to tell him, he did concede that she would notify him of anything of reasonable importance. The notice to take was of vital importance to both him and his mother. He did not direct the Crown not to send documents to the Jervois Road address when he obviously knew letters and documents were going there and being referred on to him. Even if he did not see the notice to take until after he returned from Australia in February 2000, he

acknowledged that he saw it at that stage. He acknowledged he was expecting to receive the notice to take and it would be completely unrealistic on the evidence not to accept that he was both aware that the notice had been sent and the general contents of it before he actually saw the notice in February 2000. His mother would have known that time was running for the filing of objections and both of them would have known that only one copy of the notice had been served. The reason he gave for not taking any steps himself was that he had not been served with the notice. However, in my view of the evidence, he knew from early 2000 if not from late December 1999, that a notice to take addressed both to himself and his mother had been sent to 245 Jervois Road. He was aware of the significance and importance of the notice.

[102] Mrs Kett acknowledged that it was her practice to discuss with her son from time to time documents forwarded by Transit or its agents. She could not recall whether she spoke to her son about the offer to purchase, but it is clear from his evidence that she did. It is difficult to conceive that she would have rejected such an offer without discussing the matter with her son. I do not accept she objected to the taking without discussing the notice to take with her son.

[103] The facts referred to in the previous paragraphs establish, in my view, an agency relationship which may be implied by the conduct of Mr Shannon-Kett and his mother. Service of the notice to take cannot be considered in isolation when considering whether Mrs Kett was an agent by implication. There was a long course of dealings when both Mrs Kett and Mr Shannon-Kett acted in unison through solicitors. There was also a course of dealing where letters were addressed to them both care of Mrs Kett and she obtained instructions from her son and responded to the Property Group. Mr Shannon-Kett in March 1999, particularly asked that a notice be faxed to him at her address. Mrs Kett conducted sale and purchase negotiations on behalf of both of them and in another proceeding, had authority to receive notices on his behalf.

[104] It is difficult to believe, and I do not believe, that Mrs Kett did not refer all vital communications which were jointly addressed to them to her son. Mr Shannon-Kett knew that this was the means Transit and its agents were communicating with

him and he took no steps to advise them not to do so. He condoned the course of dealings between the Crown's agent and himself through the medium of his mother. The matter was so important to Mr Shannon-Kett that he made a special trip back from Australia in April 1999 to familiarise himself with the position. If he was not happy with correspondence being addressed to him and his mother jointly at his mother's address, he took no steps to advise Transit accordingly. He was expecting the notice to take. The course of his conduct was such that he, by implication, appointed his mother the occupant of 245 Jervois Road to accept notices and correspondence on his behalf. She was the agent for him by implication.

[105] In this case I am also of the view that the Minister could have probably relied, if necessary, on express agency. The letter of 31 March 1999 faxed from Australia authorised the forwarding of the response to 245 Jervois Road, Herne Bay. This was in accordance with the manner in which communications had been communicated to Mr Shannon-Kett in the past. This letter and his conduct would, in my view, amount to express authority.

[106] The Minister also relied upon ostensible authority. This was because Mr Shannon-Kett allowed the Minister's agent to believe that Mrs Kett had the requisite authority. Ostensible or apparent authority is possessed by an agent when the conduct on the part of the principal gives rise to an estoppel. In the context of agency, the application of the principles of estoppel mean that a person who has allowed another to believe a certain state of affairs exists, with the result there is reliance upon such belief, cannot afterwards be heard to say the true state of affairs was far different, if to do so would involve the other person in suffering some kind of detriment – see *Fridman's Law of Agency* (7th ed., p 111). The normal elements are a representation, a reliance on the representation, and an alteration of the party's position resulting from such reliance. Mr Thorp, referred to para 38 of the *Laws of New Zealand : Agency,* and submitted there cannot be ostensible authority unless there be a representation in the form of words or other conduct by the principal. I accept that the relevant representation must come from the principal and therefore, if there was ostensible authority in this case the representation must have come from Mr Shannon-Kett. That does not mean that Mrs Kett's actions are irrelevant. If Mr Shannon-Kett, by his conduct, allowed his mother to undertake matters which had

the appearance of her acting for her son and she so acted, his conduct can in law amount to a representation. Mrs Kett's actions may lead to inferences being drawn as to the representation made by her son.

[107] There was, in my view, a representation by Mr Shannon-Kett. Conduct can amount to a representation and in some cases so can silence. The conduct which amounted to a representation is the conduct upon which I have found that there was an implied authority. This included Mr Shannon-Kett's knowledge that documents were forwarded to him and Mrs Kett jointly at 245 Jervois Road, his failure to advise Transit or its agents that his mother had no authority to accept documents on his behalf, and the previous course of conduct which he had condoned. Mr Shannon-Kett by his conduct represented to the Minister that it was in order to forward notices and correspondence addressed jointly to himself and his mother at 245 Jervois Road, Herne Bay. The joint notice of desire was but one incident of this conduct. Mrs Kett's actions in replying on behalf of both, using the plural pronoun in her letters and protesting at the limited time she had to refer matters to her son support the finding that her son made the representation.

[108] Based on this representation, the Minister sent the notice to take to the Jervois Road address This was reliance upon the representation. The Minister then acted to his detriment by proceeding on the basis of the representation. There will be considerable cost to the Minister if it is held that he was not entitled to rely upon the representation. The costs caused by the delays which will be occasioned if it is necessary to serve a notice to take on Mr Shannon-Kett and then go through the objection process will be considerable. The project could be delayed for another 12-18 months at a considerable cost to the public purse. All three elements of an estoppel existed and there was thus agency by ostensible authority.

[109] I therefore find that Mrs Kett had both implied and ostensible authority to accept the notice to take on behalf of Mr Shannon-Kett. She probably had express authority as well. Mr Shannon-Kett can therefore not succeed on his review application on the grounds that the notice to take was not served on him. He has no further right to object to the taking of the land.

[110] For the sake of completeness a further matter needs to be addressed. On 4 August 1998, Mr Shannon-Kett, just before going to Australia, signed an enduring power of attorney in favour of his mother. This gave his mother general authority to act on his behalf in relation to the whole of his property. A note attached to the power of attorney indicated that the donor must indicate whether it was to have effect only if he became mentally incapable. His evidence was that the power of attorney was explained to him before he signed it. However, apparently on the same date, he signed a handwritten note which his mother also signed in which he stated that the enduring power of attorney "is only to be in effect when I am outside of New Zealand, if I become mentally incapable or I am deceased." When cross-examined Mr Shannon-Kett was somewhat vague as to the reason for this document, and there must understandably be suspicions as to the timing of the signing of the document and the reason for it. However, I do not make a finding that it was not a genuine document.

RESULTS

[111] Both Mrs Kett's appeal and Mr Shannon-Kett's application for judicial review fail. The appeal is disallowed and there will be judgment for the Minister on the judicial review application.

COSTS

[112] The Minister is entitled to costs against Mrs Kett and Mr Shannon-Kett. These will be calculated on the basis of Category 2B of the Second and Third Schedules to the High Court Rules. The costs awards will include disbursements to be fixed by the Registrar in the case of dispute.

Signed at 8-10 am/pm on 28 June 2001

B J Paterson J