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| IN THE Court of appeal OF new Zealand |
| CA307/2013[2015] NZCA 20 |

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| BETWEEN | AUCKLAND COUNCILAppellant |
| AND | GREEN & MCCAHILL HOLDINGS LIMITEDRespondent |

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| Hearing: | 21 October 2014 |
| Court: | Ellen France P, Harrison and Wild JJ |
| Counsel: | R B Lange for AppellantA R Galbraith QC and J G Collinge for Respondent |
| Judgment: | 11 March 2015 at 10 am |

JUDGMENT OF THE COURT

**A The questions of law posed on the appeal are answered “no”. The High Court was correct in its approach to the determination of compensation under s 62 of the Public Works Act 1981. Accordingly, when determining whether the value of the land was increased by the public work or the prospect of the work, the Land Valuation Tribunal should not have assumed the work was completed. The appeal is dismissed.**

**B The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.**

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**REASONS OF THE COURT**

(Given by Ellen France P)

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Introduction

1. This appeal raises questions about the approach to the assessment of compensation following the acquisition of non-marketable land under the Public Works Act 1981 (the Act). The issue arises because the road access provided on the completion of the public work, the Penlink Road, could increase the value of the respondent’s remaining land despite the reduction in size of its landholding following acquisition under the Act. However, whether or not the Penlink Road would proceed has been a matter of some debate. The question before us is how the likelihood of completion of the Road should be treated in assessing the compensation payable to the respondent, Green & McCahill Holdings Ltd (Green & McCahill).
2. The Land Valuation Tribunal (the Tribunal) rejected the claim brought by Green & McCahill against the appellant, the Auckland Council, for compensation.[[1]](#footnote-1) The Tribunal did so on the basis the betterment or increase in value to Green & McCahill’s land occasioned by the Penlink Road exceeded the value of the land being taken.[[2]](#footnote-2) In reaching that conclusion, the Tribunal said that s 62(1)(e) of the Act which requires any such increase in value to be deducted from the amount of compensation otherwise payable, required the Tribunal to proceed on the basis that the Penlink Road would be completed.
3. Green & McCahill appealed to the High Court on the basis the Tribunal had not correctly applied the Act. The appeal was successful and the claim for compensation was referred back to the Tribunal for reconsideration.[[3]](#footnote-3)
4. The Auckland Council sought and was granted leave to appeal to this Court on a number of questions of law.[[4]](#footnote-4) The questions can be addressed by considering whether or not betterment under s 62(1)(e) is to be assessed on the assumption that the Penlink Road has been completed. We deal with this issue after setting out the factual background and the history of Green & McCahill’s claim for compensation.

Factual background

1. The facts are set out in some detail in the High Court judgment.[[5]](#footnote-5) For present purposes, we need only note the following. The Rodney District Council, one of the Auckland Council’s predecessors, compulsorily acquired 33.3526 ha of Green & McCahill’s much larger block of land, over 888 hectares, in 2003. The land acquired was from one of Green & McCahill’s three titles comprising this block of land. The land was acquired to build an east-west road between the Auckland Northern Motorway and the Whangaparoa Peninsula called the Penlink Road. Construction of the Penlink Road is not likely to get underway before 2024.
2. The land acquired included a narrow tongue linking Green & McCahill’s land and State Highway 1A. That link was lost but the construction of the Penlink Road will enhance road access.
3. The acquisition also severed two small parcels of land from the remaining parts of Green & McCahill’s land. Road access to the severed areas will also follow from the Penlink Road. The map attached as an appendix illustrates the lay-out of the land and proposed road.
4. It is common ground that the land acquired, effectively shaved off the north‑western boundary of Green & McCahill’s land, is not marketable on its own. As we shall explain, this is significant in terms of the statutory scheme for valuing land and assessing compensation. Green & McCahill’s land is subject to a forestry right running for 27 years from 1990 and, in the case of 20 ha, 35 years. Green & McCahill intends to subdivide the land and we were advised some lots have now been sold.

Green & McCahill applies for compensation

1. In 2004 Green & McCahill applied to the Tribunal for compensation under the Act. Green & McCahill sought compensation for the land acquired and for injurious affection to its remaining land.
2. The Tribunal delivered three decisions. In its initial decision, of 25 January 2006, the Tribunal considered the potential rezoning of Green & McCahill’s land for subdivision and the effect the acquisition had on any residential development.[[6]](#footnote-6) The Tribunal proceeded on the basis its task was to apply a “before and after” approach to the valuation of compensation, that is, taking the market value of the whole of the land and deducting the market value of the land after the taking and acquisition.[[7]](#footnote-7) Importantly, for the present appeal, the Tribunal said that in the “before” situation, the “existence or prospect of the Penlink project must be ignored. In the ‘after’ situation, the Penlink project must be regarded as being in existence.”[[8]](#footnote-8)
3. The next decision of the Tribunal was delivered on 19 October 2011.[[9]](#footnote-9) By that time the delays in the progress of the Penlink Road were apparent. Green & McCahill argued betterment could only accrue, and therefore could only be deducted from compensation, once the Penlink Road was constructed. Green & McCahill presented valuation evidence based on an alternative methodology. The Tribunal rejected this approach.
4. The Tribunal attributed the delay since its initial decision to Green & McCahill.[[10]](#footnote-10) The Tribunal confirmed that the approach foreshadowed in its initial decision applied. In particular, the Tribunal said betterment and the value of injurious affection to the remainder of the land could only be “coherently” ascertained by using a “before and after” method.[[11]](#footnote-11)
5. The Tribunal said it could not, in embarking on a valuation exercise, consider hindsight or speculative views about whether and when the Penlink Road would be built.[[12]](#footnote-12) The Tribunal continued:

[16] While no doubt the betterment occasioned to [Green & McCahill]’s land by construction of Penlink will only be physically realised when the construction is completed, it is wrong in principle to conclude from that that betterment, and injurious affection, arising from the public work cannot or should not be assessed at the date of taking. As counsel for the [Auckland Council] points out there are numerous instances where compensation taking into account both betterment and injurious affection has been assessed and paid well before the public works for which the land was taken has been completed, or even in many cases commenced. The most proximate example of that having been done is that of the arbitration concerning the taking of part of the adjacent Green Group land for the Penlink development which decision [Green & McCahill] cites and relies upon in other respects elsewhere in its argument.

1. The Tribunal’s conclusion was that no compensation was payable to Green & McCahill because there was betterment to the balance of its land that exceeded the value of the land taken.
2. The Tribunal’s final decision related to costs.[[13]](#footnote-13)
3. Green & McCahill appealed to the High Court against both the decision relating to compensation and as to costs.

**The High Court judgment**

1. In allowing the appeal, the High Court considered that a two phase approach to the determination of compensation was appropriate. First, on a “before and after” basis (if that method was appropriate in the circumstances) the Tribunal had to assess the value of the land. Secondly, the Tribunal was required to assess any increase in the value of the land resulting from betterment caused by the public work or the prospect of the work. In that part of the exercise, the Court said, the Tribunal was not to assume the Penlink Road would be completed. Rather, the Court said “[t]here has to be a proven causative connection arising out of the public work or prospect of the work that results in betterment.”[[14]](#footnote-14) The Court found the Tribunal erred by assuming the existence of the Penlink Road.

**Application for leave to appeal on questions of law**

1. Wylie J granted leave to appeal to this Court on the following questions:[[15]](#footnote-15)

(a) Did this Court wrongly determine:

 (i) that s 62(1)(b)(ii) [of the Act] requires that the market value of the balance of the owner’s land be assessed “after the taking or acquisition”, and not after the public work the subject of the taking or acquisition has been carried out?; and

 (ii) that the Tribunal fell into error when it held that the after valuation in this case had to proceed on the basis that the Penlink Road had been built?

(b) Did this Court wrongly determine that betterment can only be assessed separately pursuant to s 62(1)(e) of the Public Works Act (by reference to the prospect of the public work as at the specified date), and not as part of an after valuation pursuant to s 62(1)(b)(ii)?;

(c) Did the Court wrongly conclude that:

 (i) The Tribunal erred in not following the approach set out in [85](d) and (e) of the judgment and instead, holding that the existence of the Penlink Road was to be presumed in the after valuation under s 62(1)(b)(ii)?; and

 (ii) The Tribunal’s decisions of 19 October 2011 and 22 August 2012 should be set aside?

1. We deal with these questions after setting out the statutory scheme.

The statutory scheme

1. Section 60 of the Act sets out the basic entitlement to compensation. Relevantly, s 60(1) provides that where, under the Act, any land:

(a) is acquired or taken for any public work; or

(b) suffers any injurious affection resulting from the acquisition or taking of any other land of the owner for any public work; …

 …

… the owner of the land shall be entitled to full compensation [from the acquiring authority] for such acquisition, taking, injurious affection, or damage.

1. There are some exceptions to this in s 61, none of which concerns us.
2. Section 62 deals with the assessment of compensation.[[16]](#footnote-16) It is helpful to set out the relevant detail of the section which is as follows:

(1) The amount of compensation payable under this Act, whether for land taken, land injuriously affected, or otherwise, shall be assessed in accordance with the following provisions:

 (a) subject to the provisions of sections 72 to 76, no allowance shall be made on account of the taking of any land being compulsory:

 (b) the value of land shall, except as otherwise provided, be taken to be that amount which the land if sold in the open market by a willing seller to a willing buyer on the specified date might be expected to realise, unless—

…

 (ii) only part of the land of an owner is taken or acquired under this Act and that part is of a size, shape, or nature for which there is no general demand or market, in which case the compensation for such land and the injurious affection caused by such taking or acquisition may be assessed by determining the market value of the whole of the owner’s land and deducting from it the market value of the balance of the owner’s land after the taking or acquisition:

 (c) where the value of the land taken for any public work has, on or before the specified date, been increased or reduced by the work or the prospect of the work, the amount of that increase or reduction shall not be taken into account:

 (d) the special suitability or adaptability of the land, or of any natural material acquired or taken under section 27, for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only pursuant to statutory powers, or a purpose for which there is no market apart from the special needs of a particular purchaser or the requirements of any government department or of any local authority:

 (e) the Tribunal shall take into account by way of deduction from that part of the total amount of compensation that would otherwise be awarded on any claim in respect of a public work that comprises the market value of the land taken and any injurious affection to land arising out of the taking, any increase in the value of any land of the claimant that is injuriously affected, or in the value of any other land in which the claimant has an interest, caused before the specified date or likely to be caused after that date by the work or the prospect of the work:

1. As the matter was argued by Mr Lange for the Council, the two specific questions of interpretation posed are whether ss 62(1)(b)(ii) and 62(1)(e) prohibit, first, the making of a valuation presumption that the relevant public work exists for the purposes of an “after” valuation pursuant to s 62(1)(b)(ii) and, second, the assessment of betterment as part of an “after” evaluation (with the public work presumed to exist) and instead require a separate assessment of betterment pursuant to s 62(1)(e).
2. It is common ground that s 62(1)(b)(ii) applies in the present case because the land taken is not marketable.
3. The date at which compensation is assessed in this case (the “specified date”) is the date on which the land became vested in the Council.[[17]](#footnote-17) That date is 2 October 2003.
4. We should also refer to s 64 of the Act concerning injurious affection of retained land. Section 64 provides that where land is taken or acquired from any person for the purpose of a public work which is to be situated partly on that land and partly on other land, compensation for injurious affection of the land retained by the claimant is to be assessed:

… by reference to the effect of the whole of the public work on the land so retained and not only to the part situated on the land taken or acquired from that person.

1. Finally, we note s 78(1) of the Act provides that a claim for compensation must be made within a period of two years after the date of the proclamation or declaration taking the land. That period may be extended up to a maximum of six years after the date of the proclamation or declaration taking the land.[[18]](#footnote-18)

Decision

1. The appeal turns on a fairly narrow issue. That is, when determining whether the value of the land was increased by the work or the prospect of the work, was the Tribunal correct to assume the work was completed? We consider the High Court was right that the Tribunal should not have proceeded on that basis, essentially for the reasons given by that Court.
2. The first point to note is the reference in s 62(1)(e) to a causative link. Specifically, s 62(1)(e) provides for the deduction, from the total compensation otherwise to be awarded, of any increase in the value of the land of the claimant or in the value of other land in which the claimant has an interest “caused before the specified date or likely to be caused after that date by the work or the prospect of the work”. The words “caused” and “likely” indicate the need for a proven causative connection arising out of the public work. In other words, betterment must be established as a matter of fact.
3. Secondly, the reference to the “prospect” of the work also indicates proposed work may cause an increase in value. In some situations, a hypothetical purchaser may in fact recognise the prospect of the work causes an increase in value. Green & McCahill accept that proposition. But, this is a factual question to be answered in the particular case. It is not a matter of always assuming that the work has been completed. The Council’s approach therefore does not adequately address either the requirement for a causal connection or the reference to the “prospect” of the work. The words “caused” and “prospect” indicate a factual analysis is required.
4. As the High Court said, under s 62(1)(e) the Tribunal first establishes the value of the land and the value of any injurious affection. In this case, because the land is not marketable, the Tribunal may assess these two values on a “before and after” basis as envisaged by s 62(1)(b)(ii).
5. Because the “before and after” approach has been applied at the first stage of the analysis, the Council argues it must be applied to the other part of the analysis. In other words, the presumption that the public work exists in the “after” situation is one of the “counter-factual assumptions … inherent in” the total valuation exercise.[[19]](#footnote-19)
6. The Council seeks to draw support for this approach from an arbitration award involving the Penlink Road where the arbitrators said “a symmetrical factual assumption” including the presumption the Penlink Road would be completed was to be applied to both betterment and injurious affection.[[20]](#footnote-20) This award is not of course binding on us. In any event, the Council’s approach assumes s 62(1)(b)(ii) governs the assessment. We do not share that interpretation of the section.
7. The Council developed its submission on this aspect stating that the High Court approach ignores the fact that injurious affection and betterment are opposite sides of the same coin. Injurious affection must be assessed in the “after” valuation on the basis the public work exists at the specified date. It inexorably follows, it is submitted, that the same must apply to an increase in value. We do not agree that this necessarily follows. The two ideas may be linked in a factual sense but are not invariably coextensive. As the High Court observed, betterment is “only deductable from compensation that would otherwise be awarded for the market value of the land taken and for any injurious affection to other land of the claimant”.[[21]](#footnote-21) It is not deductable from the compensation awarded under other heads of loss.[[22]](#footnote-22)
8. The associated point made by the Council is that the High Court ignored s 64. Under s 64, injurious affection includes an assessment of the effect of the public work on the land retained. The Council says this assumes completion of the work. However, s 64 was enacted to deal with the fact that compensation could previously only be awarded for the impact of the public work on the particular piece of land that was taken.[[23]](#footnote-23) As the respondent submits, it does not assist with the point at issue on the appeal. In any event, the Council’s argument is dependent on the Council being correct as to the complete symmetry between injurious affection and betterment. We add that Green & McCahill’s amended claim for compensation did not claim injurious affection.
9. The public work will often not be completed before the specified date. Against that background, the two year time limit for claims for compensation and the fact the matter is to be considered as at the specified date support the view that what is envisaged is a snapshot of the likely increase in value at the time of assessment.
10. We accept there are some indicia favouring the Council’s view. First, s 62(1)(a) makes it clear no allowance is to be made for the fact that taking is compulsory. This tells against an increase in value due entirely to the public work underlying the acquisition.
11. Secondly, if the work does not go ahead then the person affected by the taking will have the opportunity afforded by the offer back remedy and so is not left without redress.[[24]](#footnote-24) However, that process may be difficult and protracted.
12. Finally, the overseas material on the concept of betterment suggests betterment refers to the land value derived from the work.[[25]](#footnote-25) When that factor is considered against the fact that compensation assessments are made at the date of taking, it is hard to reconcile these two concepts unless the work is presumed to have been undertaken.
13. That said, we ultimately return to the wording of s 62(1)(e). The “before and after” concept in s 62(1)(b)(ii) is a method for assessing the market value of the “unmarketable” land taken. It does not follow from the use of that proxy that, when it comes to betterment, the increase in value of the claimant’s other land does not have to be proven. This is consistent with the approach taken in *Finlayson v Minister of Public Works*.[[26]](#footnote-26) The claimant in that case sought compensation after her land was taken for a railway. Work had been undertaken and the railway partly built before the claimant’s land was taken. Work was then suspended indefinitely. The issue was whether the respondent was entitled to claim a deduction for betterment. The case was dealt with by a Full Court of the Supreme Court.
14. Differing reasons were given for the approach to betterment. Myers CJ rejected the claim for betterment on the basis the enhancement of value was in fact caused by a different work, that is, the work completed before the taking.[[27]](#footnote-27) The injurious affection for which compensation was sought related to that part of the work that had been suspended after the taking. Herdman J noted the relevant section referred to an increase in value likely to be caused by the “execution of the works”.[[28]](#footnote-28) He considered the section should be interpreted to mean work that “has been or will be completed” not a work that, although begun, “will never be finished or may never be finished”.[[29]](#footnote-29) Blair and Kennedy JJ also agreed betterment could not be claimed.
15. The statutory provision in issue in that case was different.[[30]](#footnote-30) Further, *Finlayson* was not a case about the “before and after” approach and it was by the relevant time apparent that the work would never be completed. Nonetheless, we see the case as helpful on the concept of betterment. Bearing in mind the different statutory wording, it establishes the principle that there will not necessarily be a deduction for betterment resulting from work that is not going to be completed.
16. The Act has its origins in a report prepared in 1977 on its predecessor.[[31]](#footnote-31) However, we have not found anything in that report or in the legislative history that directly assists on the point in issue in this case. The Minister of Works and Development, the Hon William Young, in speaking on the report back of the Bill from select committee noted it liberalised payments for compensation,[[32]](#footnote-32) but that does not help on the particular issue. We consider the approach we are taking is consistent with the statutory purpose, namely, to provide full compensation for the taking of land for public works.

**Result**

1. For these reasons, the questions of law posed on the appeal are answered “no”. The High Court was correct in its approach to the determination of compensation under s 62 of the Act. The appeal is accordingly dismissed.
2. We add that it is agreed that, if the High Court’s approach is correct, the matter will need to be remitted to the Tribunal for further consideration. That is because there was insufficient material before the Court on which to assess what compensation, if any, should be paid to Green & McCahill. The High Court’s order referring the claim for compensation back to the Tribunal accordingly stands.
3. Costs should follow the event. The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

Solicitors:

Simpson Grierson, Auckland for Appellant

John Collinge, Auckland for Respondent

APPENDIX A



1. *Green & McCahill Holdings Ltd v Rodney District Council* [2011] NZLVT 1. [↑](#footnote-ref-1)
2. We use the term betterment to denote an increase in value as that is the terminology used by the parties. [↑](#footnote-ref-2)
3. *Green & McCahill Holdings Ltd v Auckland Council (as successor to Rodney District Council)* [2013] NZHC 507 [High Court judgment]. Wylie J sat with a valuer, Mr G J Horsley. [↑](#footnote-ref-3)
4. *Green & McCahill Holdings Ltd v Auckland Council* [2013] NZHC 1086. [↑](#footnote-ref-4)
5. High Court judgment, above n 3, at [3]–[32]. [↑](#footnote-ref-5)
6. *Green and McCahill Holdings Ltd v Rodney District Council* LVT Auckland LVP12/04, 25 January 2006. [↑](#footnote-ref-6)
7. At [13]. [↑](#footnote-ref-7)
8. At [15]. [↑](#footnote-ref-8)
9. *Green & McCahill*, above n 1. [↑](#footnote-ref-9)
10. At [12]. [↑](#footnote-ref-10)
11. At [10]. [↑](#footnote-ref-11)
12. At [11]. [↑](#footnote-ref-12)
13. *Green & McCahill Holdings Ltd v Auckland Council as successor to Rodney District Council* [2012] NZLVT 3. [↑](#footnote-ref-13)
14. High Court judgment, above n 3, at [80] (footnote omitted). [↑](#footnote-ref-14)
15. *Green & McCahill*, above n 4, at [15]. [↑](#footnote-ref-15)
16. Forms for the making of claims are prescribed: s 82(1) and sch 3. [↑](#footnote-ref-16)
17. Section 62(2)(a). [↑](#footnote-ref-17)
18. Section 78(3). [↑](#footnote-ref-18)
19. *Transport for London (formerly London Underground Ltd) v Spirerose Ltd (in administration)* [2009] UKHL 44, [2009] 1 WLR 1797 at [50] per Lord Neuberger. [↑](#footnote-ref-19)
20. *Kilmacrennan Farm Ltd v Rodney District Council (Award)* A R Galbraith, G Cheyne, K Stevenson 7 June 2005 at [109]. [↑](#footnote-ref-20)
21. At [79]. [↑](#footnote-ref-21)
22. At [79] with reference to *Laws of New Zealand* Compulsory Acquisition and Compensation at [72]. [↑](#footnote-ref-22)
23. Squire L Speedy *Land Compensation* (New Zealand Institute of Valuers, Wellington, 1985) at 36; and see *Sisters of Charity of Rockingham v The King* [1922] 2 AC 315 (PC) at 326−328; *Edwards v Minister of Transport* [1964] 2 QB 134 (CA); and *Seller v Minister of Public Works* [1934] NZLR 988 (Compensation Court). [↑](#footnote-ref-23)
24. Section 40. [↑](#footnote-ref-24)
25. For example, comment during the passage of the Land Compensation Act 1973 (UK): (3 April 1973) 341 GBPD HL 170−171; Department for Communities and Local Government *Compulsory Purchase* *and Compensation: Compensation to Residential Owners and Occupiers* (April 2010) at 16; Michael Barnes *The Law of Compulsory Purchase and Compensation* (Hart Publishing, Oxford, 2014) at [3.26], [6.42], [6.45]−[6.46], [9.39]−[9.52], and [9.59]; *Mir Bros Unit Constructions Pty Ltd v Roads & Traffic Authority of New South Wales* [2006] NSWCA 314 at [43]−[46], [57] and [58]; *Leichhardt Council v Roads and Traffic Authority (NSW)* [2006] NSWCA 353, (2006) 149 LGERA 439 at [37] per Spigelman CJ; Douglas Brown *Land Acquisition* (6th ed, LexisNexis Butterworths, Chatswood (NSW), 2009) at 143−144 and 251; Alan Hyam *The Law Affecting Valuation of Land* (4th ed, Federation Press, Sydney, 2009) at 441, 443 and 457; Eric CE Todd *The Law of Expropriation and Compensation in Canada* as cited in *Vihvelin v Saint John (City)* (2000) 229 NBR (2d) 1 (QB) at [163]−[165]; and Francis C Amendola and others “Eminent Domain” in *Corpus Juris Secundum* (Thomson West, 2007) vol 29A, 79 at 365−366. [↑](#footnote-ref-25)
26. *Finlayson v Minister of Public Works* [1934] NZLR 456 (SC). [↑](#footnote-ref-26)
27. At 464. [↑](#footnote-ref-27)
28. At 467. [↑](#footnote-ref-28)
29. At 467; and see at 470−471. [↑](#footnote-ref-29)
30. Section 79 of the Public Works Act 1928 referred to a deduction from the amount of compensation to be awarded of “any increase in the value of such lands likely to be caused by the execution of such works”. [↑](#footnote-ref-30)
31. DG McGill and others *Report of the Public Works Act Review Committee* (1977). See also the discussion of the history of the legislation in *Waters v Welsh Development Agency* [2004] 1 WLR 1304 (HL); *Hardiway Enterprises Ltd v Palmerston North City Council* [2013] NZHC 2310 [2013] 3 NZLR 848 at [32]–[38]; and Speedy, above n 23, at 40. [↑](#footnote-ref-31)
32. (10 July 1981) 438 NZPD 1483; contrast the comments of Opposition MP David Caygill who said that many of the enhancements in compensation reflected current practice in the Land Valuation Tribunal: (25 September 1981) 441 NZPD 3641. [↑](#footnote-ref-32)