THE OFFER-BACK PROVISIONS IN THE PUBLIC WORKS ACT 1981- A FAIR DEAL FOR THE PARTIES?

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I. INTRODUCTION

The protection of the rights of property owners has always been an inherent part of our system of land law in New Zealand. This protection extends to a property owner from whom land is compulsorily taken for public works. Section 40 of the Public Works Act 1981 was introduced in order to ensure that any land which had been so acquired but was subsequently considered no longer necessary for the public work anticipated was first offered back to the owner from whom it had been taken or to the owner's successor. The section, while detailed, appears succinct. It has however generated a significant amount of case law in recent years. Included among the litigious arguments are issues concerning the ambit of the words "any public works" and "any other public works", the possibility of the owner gaining a caveatable interest during negotiations, the effect of other statutory provisions, the ability to assign and the ability to delegate. This article examines the relevant decisions and traces a possible movement in 1996 towards ultimate fairness. It also looks at the inconsistency of judgments concerning the sequential or alternative powers found in s 42 of the Public Works Act 1981, a provision which sets out the obligations of local authorities where s 40 has been 'spent" or is no longer applicable.

II. SECTION 40 PUBLIC WORKS ACT 1981

Section 40 of the Public Works Act 1981 had no equivalent in the former 1928 Act.[1] As emphasised during the second reading of the Public Works Bill on 2 September 1981 the purpose of the Bill was to strengthen the rights of the property owner. Landowners were to be given a chance to re-acquire their land.[2] The statute, in its amended form, now reads:

s40 Disposal to former owner of land not required for public work

(1) Where any land held under this or any other Act or in any manner for any public work -

(a) Is no longer required for that public work; and

(b) Is not required for any other public work; and

1 A R Davies in (1991) 6 BCB 1 suggested that incidents such as the Critchell Downs controversy in the United Kingdom, the dispute over the Raglan Golf Course and the decision in *Upper Hutt City Council v Burns* [1970] NZLR 578 may have influenced the government to introduce the offer-back obligation.

2 The Hon W L Young highlighted its importance when he commented: "Labour Opposition members have said nothing about the special protection that has been given to a person whose property is taken compulsorily, and who then finds that the land is not required for the purpose for which it is taken. Under the Bill such landowners will have the chance to get their land back, which is something which has not happened before, and is something that is worthwhile."

(c) Is not required for any exchange under section 105 of this Act -

the chief executive of the department within the meaning of section 2 of the Survey Act 1986 or local authority, as the case may be, shall endeavour to sell the land in accordance with subsection (2) of this section, if that subsection is applicable to that land.

(2) Except as provided in subsection (4) of this section, the chief executive of the department within the meaning of section 2 of the Survey Act 1986 or local authority, unless -

(a) He or it considers that it would be impracticable, unreasonable or unfair to do so; or

(b) There has been a significant change in the character of the land for the purposes of, or in connection with, the public work for which it was acquired or is held -

shall offer to sell the land by private contract to the person from whom it was acquired or to the successor of that person -

(c) At the current market value of the land as determined by a valuation carried out by a registered valuer; or

(d) If the chief executive of the department within the meaning of section 2 of the Survey Act 1986 or local authority considers it reasonable to do so, at any lesser price.

(2A) If the chief executive of the department within the meaning of section 2 of the Survey Act 1986 or local authority and the offeree are unable to agree on a price following an offer made under subsection (2) of this section, the parties may agree that the price be determined by the Land Valuation Tribunal.

(3) Subsection (2) of this section shall not apply to land acquired after the 31st day of January 1982 and before the date of the commencement of the Public Works Amendment Act (No 2) 1987 for a public work that was not an essential work.

(4) Where the chief executive of the department within the meaning of section 2 of the Survey Act 1986 or local authority believes on reasonable grounds that, because of the size, shape or situation of the land he or it could not expect to sell the land to any person who did not own land adjacent to the land to be sold, the land may be sold to an owner of adjacent land at a price negotiated between the parties.

(5) For the purposes of this section, the term "successor", in relation to any person, means the person who would have been entitled to the land under the will or intestacy of that person had he owned the land at the date of his death; and, in any case where part of a person's land was acquired or taken, includes the successor in title of that person."

III. WHAT WORKS ARE RELEVANT?

Clearly, several events must occur before any entitlement accrues to the former owner or owner's successor. First to determine is whether the particular work comes within the statutory provision.

Discussion on the definition of "public work" is found in *Auckland City Council v Taubmans (New Zealand) Ltd.*[3] The Auckland City Council had acquired a substantial number of lots over a period of 35 years for a variety of public works. Over the years, many of the existing buildings had been demolished and the land was being used primarily as a car park. Its current designation was for a proposed bus terminal and public car-parking development. In 1992 the council entered into a swap agreement with Brierley Investments Ltd (BIL) whereby BIL exchanged a site it owned for the council-owned land. BIL planned to erect an hotel and casino on the site as well as to construct a public transport terminal with underground parking. The agreement stipulated the provision of the transport terminal and public parking area and its maintenance to the satisfaction of the council. It was

3 [1993] 3 NZLR 361.

submitted, inter alia, that s 40(1) applied in that the land was still required for either the public work originally envisaged or for another public work. Rejecting the argument, Barker J stated:[4]

> the definition of "public work" in the section cannot apply to the work proposed to be carried out by BIL. Although it has a public works flavour in that it includes a bus station and car park run under the council's surveillance, by no stretch of the imagination can a casino or an hotel development be seen as a 'public work'.

In *Buller Electricity Ltd v Attorney-General*[5] the question arose as to the status of a government work in this context. The plaintiff, in attempting to show that the Minister of Conservation had incorrectly decided that certain land was not available for a proposed hydro-electric scheme argued, inter alia, that s 40 did not apply to the land in question. The first component of this argument was that it was not the case that the land was no longer required for conservation purposes or any other conservation purposes or for any exchange under s 105 of the Act. Doogue J considered the definition of "government work" under s 2 which reads as follows:

> 'Government work' means ...; and includes land held or to be acquired for the purposes of the Conservation Act 1987 or any of the Acts specified in the First Schedule to that Act, even where the purpose of holding or acquiring the land is to ensure that it remains in an undeveloped state.

His Honour concluded that the relevant stewardship area came within the definition of a "government work" and was therefore a public work for the purposes of the Public Works Act.

Complications have also arisen concerning the words "any other public work" in s 40(1)(b). It was argued in *McNicholl v Auckland Regional Authority*[6] that the offer-back obligation should not apply if the land is required for any public work. The Regional Authority had acquired land for a regional road. Following its decision to abandon the construction of the road, it offered the land to the Mount Wellington Borough Council. Chilwell J upheld the adjoining owner's claim that the land should be offered to him ahead of the second local authority. His Honour considered s 40(1)(b) to apply to a work undertaken by the same local authority. Any other interpretation would give the second local authority a clear, and unfair, advantage.[7] Subsequent legislation may have weakened this decision. In *Auckland Regional Council v Attorney-General*[8] Gault J noted the effect of the Public Works Amendment Act (No 2) 1987 in which the distinction between "essential works" and other public works was removed. The consequential amendment to s 40(1)(b) meant that land could be set aside for any public work, including those which could not formerly have been the subject of a compulsory taking.

4 Ibid, 365.
5 [1995] 3 NZLR 344.
6 [1984-1988] BCLD 2157 and 2765.
7 A R Davies in (1991) 6 BCB 1, 2 comments on Chilwell's observation that the second local authority would not need to carry out the steps stated in ss 18, 23 and 24 of the Public Works Act 1981. Such steps include the notice of desire and notice of intention, public advertising and response to objections lodged with the planning tribunal. He notes: "His Honour's intention was not drawn to the fact that most acquisitions by public bodies are achieved by agreement, using ss 17 and 20, with no need for the steps set out in ss 18, 23 and 24."
8 HC Auckland, CP 583/88, 24.9.1990; noted (1990) 13 TCL No 39.

Discussion arose in *Horton v Attorney-General*[9] as to the length of time available to the Crown (or, as in this case, to a State-Owned Enterprise) in which to decide whether land was still required for a public work. The Crown had originally taken land for coal-mining. It subsequently elected to get out of the coal mining business. The Crown then transferred the relevant land to Coal Corp, with the express contemplation that Coal Corp might itself wish to purchase the transferred lands. There was the possibility that Coal Corp might wish to continue a mining venture. Hammond J considered that Coal Corp needed time to assess what to retain and what to sell. Although Coal Corp at one stage acted as if it did intend to sell the relevant land, His Honour interpreted this as a State-Owned Enterprise "coming to grips with a new situation, and trying to resolve its own position".[10] To deny that certain land was still required for a public work because a State-Owned Enterprise briefly considered it was not was considered "unduly legalistic and [overlooked] the reality of what was unfolding".[11]

IV. "IMPRACTICAL, UNREASONABLE OR UNFAIR"

If the land does come within the ambit of s 40 and a resolution is made that it is surplus to requirements, the chief executive of the Department of Survey and Land Information or local authority cannot begin the process of offering the land for sale until it has established two facts either of which annul the obligation. The first of these is whether it is "impractical, unreasonable or unfair" to offer to sell the land as prescribed in s 40(2). In *Taubmans*[12] case, Barker J considered that the decision of the council that it would indeed be "impracticable, unreasonable or unfair" to do so was a reasonable one. There were two lots to which the offer-back provision did not apply, in seven cases the former owner had died with no successor or the former owner had been a company which had since dissolved, some lots did not conform with the current district scheme, some of the owners indicated no interest in buying back, approximately 17 former owners had assigned their interest,[13] many years had passed since the first acquisition of the lots and most of the original buildings on the land had been demolished.

The same issue was raised, but considered inappropriate to deal with, in *Auckland Regional Services Trust v Palmer*.[14]

V. "SIGNIFICANT CHANGE IN THE CHARACTER OF THE LAND"

The second factor for consideration is whether there has been a significant change in the character of the land for the purposes of, or in connection with the public work, for which it had been acquired or held.

There is little authority on this point. Barker J in *Taubman's*[15] case considered that, in the particular circumstances, there had been such a change. Most of the buildings had been demolished and where there had existed any commercial or industrial business, the vacant land was being used primarily for car parking.

9 High Court, Hamilton, CP 65/94, 16 December 1996.
10 Ibid, 56.
11 Ibid, 57.
12 [1993] 3 NZLR 361.
13 As to the ability or otherwise to assign one's interest under s 40 of the Public Works Act 1981, see *Glucina v Auckland City Council*, High Court, Auckland, M 931/95, 28.2.1996 subsequently detailed in this article.
14 [1996] 3 NZLR 752.
15 [1993] 3 NZLR 361.

VI. THE ELEMENT OF COMPULSION

Subject to s 40(4) if the chief executive, in his or her discretion, decides that neither of the conditions in s 40(2)(a) or (b) applies, the former owner or owner's successor is entitled to have the land offered back.

It has been argued that the circumstances under which the land was originally taken should be considered when the offer-back provisions become applicable. Should s 40 benefit not only the people from whom land was taken unwillingly but also those who were happy to negotiate a sale?

This aspect was considered by Tipping J in *Bowler Investments Ltd v Attorney-General.*[16] His Honour, while recognising that the element of compulsion could, depending on the circumstances of a particular case, be a factor to consider, clearly rejected the idea that anyone who willingly sold land under the Act should be excluded from the statutory obligation. His Honour saw no reason why someone who helpfully co-operated with the Crown should be in a less favourable position than a person who forced the Crown to undertake the formal steps for compulsory taking.

VII. RIGHT OF PRE-EMPTION - ANY POSSIBILITY OF ITS CONVERSION INTO AN OPTION TO PURCHASE?

If the offer-back provision is applicable, is it only ever a right of pre-emption or is there a stage in the negotiating process whereby the right converts into an option to purchase?

The case *Re Rutherford's Caveat*[17] is often cited as the authority for the proposition that a right of first refusal does not confer an estate or interest in land. Without exception, recent decisions approve this principle.[18] Such a right does not impose an obligation to sell - the power remains firmly with the owner of the land. Within the context of the offer-back provisions under the Public Works Act 1981, the land is still regarded as suitable for a public work and there has been no decision to sell. Problems arise when the chief executive or local authority considers the relevant land surplus to requirements.

Four different stages in the offer-back procedure can be identified:

- the chief executive or local authority decides that the land is surplus to requirements. The provisions in s 40(2)(a) and (b) have been deemed inapplicable but, as yet, no offer has been made.
- the chief executive or local authority has offered the land back at current market value as determined by valuation or, if he or it considers it reasonable, at a lesser price. No acceptance of the offer has been made.
- the offer has either been accepted or rejected at the price set.[19]

or

- the offer has been accepted but the price is disputed.

The final stage comprises two subordinate issues:

- price is not agreed upon, but the parties do not seek to go to arbitration.

16 [1988] BCL 2.

17 [1977] 1 NZLR 504.

18 See for example: *Attorney-General v Methodist Church of New Zealand* [1996] 1 NZLR 230; *Auckland Regional Services Trust v Palmer* [1996] 3 NZLR 752; *Beneficial Finance Corporation Ltd v Multiplex Constructions Pty Ltd* (1995) 36 NSWLR 510.

19 Temm J in *Attorney-General v Methodist Church* [1996] 1 NZLR 230, 234 correctly suggests that a counter-offer may be made at this stage. In most cases, that counter-offer will be with respect to the price which may or may not be able to be resolved without recourse to arbitration.

- one party or both parties have recourse to s 40(2A). Does this provision create a right or a duty?

These stages present blurred parameters. Three 1996 decisions - two specifically on s 40 and the other more general - exhibit differing views on their significance. A fourth decision - released just before publication of this article - adds a further dimension to the debate.

The first case to consider is *Attorney-General v Methodist Church of New Zealand.*[20] The church was the successor of original owners of two out of three adjoining lots of land. The lots were acquired by the Crown many years ago. In 1989, exercising its obligation under s 40 of the Public Works Act 1981, the Crown offered the land back to the church for the sum of approximately $19m. A subsequent valuation obtained by the church assessed the value of the land at $12.5m. A further calculation may have raised the value to $14m. Both estimates fell short of the Crown's offer.

Although the required 40 day period was extended several times, the parties failed to reach a final agreement. In 1990, the Crown advised the church that the property had been put on the open market. It remained on the market until 1994 and throughout this time, the church indicated continued interest in the site. In December 1994 the Crown entered into a contract with a third party to sell the two lots, together with the third adjoining lot, for the sum of $11m. The church subsequently lodged a caveat against the two lots its predecessor had owned, claiming an estate or interest in the land as beneficiary by virtue of a constructive trust.[21]

Satisfied that the preliminary considerations under s 40 had been met, Temm J considered the various stages of the provision. His Honour held that the act of offering the land back to the owner did not convert the right of pre-emption into a caveatable interest. Section 40(2A) was identified as the mechanism available if the offer resulted in a disagreement as to price. It was held that, as there had been no agreement between the parties to so refer the matter, the section had no application. In his Honour's view, if there is no formation of a contract following an offer and if s 40(2A) cannot be used, the offeree has no caveatable interest in the land.

A similar stance was taken in the 1991 case *Harris v Attorney-General.*[22] No binding contract can arise if the parties do not agree to refer the matter to arbitration. The distinction between deliberately refraining from seeking an agreement to go to arbitration and passively not exercising the right has yet to be considered by the Courts. In *Harris* the parties actively chose not to proceed;[23] in *Attorney-General v Methodist Church*, Temm J considered it undisputed fact that "there was no agreement between [the parties] to refer the matter [of price] to the Land Valuation for decision."[24]

It seems clear that, according to Temm J, the protection offered by s 40(2A) should only be available if actively pursued. The church, by adopting a passive role, disadvantaged itself. It may well have been prepared to let the matter go to the Tribunal.

20 [1996] 1 NZLR 230. See later discussion on this case.
21 For a more detailed account of the proceedings, see (1996) 7 BCB 146.
22 High Court, Auckland, M 1336/91, 8 November 1991.
23 In *Harris* Eichelbaum CJ at p 18 stated: "The Department would also have noted that, despite the numerous assertions that some binding agreement had eventuated, the offeree's solicitor had avoided committing his clients to a determination of the current market value by an independent process."
24 [1996] 1 NZLR 230, 234.

Hammond J in the most recent decision on s 40, *Deane v Attorney-General*[25] made the following comment:

In *Attorney-General v Methodist Church* Temm J described the rights of the former owner as being a right of "pre-emption" ... In one sense that is correct, but some caution is called for. To the extent that such terminology may obscure the inchoate rights of the owner the statement can be misleading. A right of pre-emption is a right of first choice. It may arise in a variety of ways. Such may rest upon a mere contractual right held by some third person. But in a s 40 case, under the legislation there is not a distinct and complete separation of the former owner from her land: she has an ongoing - if inchoate - right to repurchase ... To equate the s 40 obligations of the Crown to a strict contractual regime is wrong in principle.

Attention is then drawn to relevant aspects of Tipping J's decision in *Motor Works Limited v Westminster Auto Services Ltd.*[26] Although this case did not involve a s 40 claim, it provides interesting comment on the status of a right of pre-emption and the possibility of its conversion into an option to purchase and thus a caveatable interest.

Concerning the stage at which an offer back is made but before there is any acceptance, Tipping J expressed clear views:[27]

... pursuant to the right of pre-emption, the vendor has actually made an offer to the holder of the right, which offer is normally open for acceptance for a stipulated period of time. The offer will be couched on the basis of the terms which the vendor is prepared to offer elsewhere. This situation cannot be materially distinguished from an option in the conventional sense and thus creates an interest in land: see *Morland v Hales* (1910) 30 NZLR 201 (CA) and *Bevin v Smith* [[1994] 3 NZLR 648].

The preceding stage was considered more difficult. The vendor has decided to sell but, in breach of the right, fails or refuses to make the necessary offer to the holder of the right. His Honour considered this a vital "triggering" point, the occurrence of which entitles the holder of the right to receive an offer. The holder is contractually entitled to an offer and the Court should order a reluctant vendor to make such an offer. The Court cannot however tell the vendor what the terms of the offer should be. Tipping J commented:[28]

[N]ot only must the vendor have manifested a wish to sell but he must also have manifested the essential terms upon which he is willing to sell. Then, but only then, can there be any question of specific performance. Unless the Court can order specific performance I do not see how the holder can be regarded as having an interest in land. Thus ... the holder of the right of pre-emption will not have an interest in land unless and until the circumstances are such that specific performance can be ordered and the vendor thereby required to make an offer on sufficiently certain terms.

In short, a caveatable interest can exist at this stage if the terms of the offer are sufficiently certain.

It is important to remember that *Motor Works* was not a Public Works Act decision. The qualification as to certainty of terms gathers complexity when put in a s 40 context. The general principle, however, clearly improves the position of a former owner. The third and most recent decision advances the argument.

25 High Court, Hamilton, CP 65/94, 16 December 1996, at 17.
26 High Court, Christchurch, M 211/96, 16 May 1996.
27 Ibid, p 3-4.
28 Ibid, p 5.

In *Auckland Regional Services Trust v Palmer*[29] land owned by the defendant's mother had been compulsorily acquired by the Crown in or about 1959. In 1987 the land was transferred from the Crown to the Auckland Regional Authority, and subsequently to its successor the Auckland Regional Council. In 1993, pursuant to restructuring provisions of the Local Government Act, the land was vested in the Auckland Regional Services Trust, at which stage the Auckland Regional Council lodged a caveat pursuant to s 707ZA of the Local Government Act against the title. In 1995 the trust considered the land surplus to its requirements. Having, in its opinion, fulfilled any obligations under ss 40-42 of the Public Works Act, it proposed to sell the land by public tender. Tenders were received on 18 December 1995.

Ms Palmer lodged two caveats.

The first caveat was lodged on 12 December 1995 claiming an interest as beneficiary by virtue of a constructive trust pursuant to the provisions of ss 40-42 of the Public Works Act 1981 and s 707ZA(1) and (2) of the Local Government Act 1974. The second, lodged in June 1996, claimed an interest pursuant to a binding agreement for sale and purchase made between Ms Palmer and the trust on 7 March 1996.[30]

Paterson J held that s 40(2) per se did not create a caveatable interest. His Honour noted that both judges in *Auckland City Council v Taubmans (New Zealand) Ltd*[31] and *Attorney-General v Methodist Church*[32] accepted this principle, the authorities for which are summarised in *Re Rutherford.*[33]

Did then the circumstances of this particular case convert a non-caveatable interest under s 40 into a caveatable interest? Paterson J considered the pattern of events. The trust had decided that the land was no longer required for public works under s 40(1). The trust offered the land back to the Crown without prejudice to its belief that it had an obligation under s 40. The offer back was not accepted by the Crown. In June 1994, the Crown advised the trust that all obligations under s 40 had been discharged. On 3 November 1995 the Chief Executive of the trust made a statutory declaration confirming that all persons whom the trust had considered had a

29 [1996] 3 NZLR 752.

30 On 20 December 1995 a Court order restraining the trust from selling the land was issued. In her reserved judgment, Cartwright J noted that: "None the less the first defendant [the trust] still has the opportunity to dispose of the land at the current market value, with procedures under s 40 of the Act which ensure that there will not be too much delay in reaching that end position."
The next day the trust's solicitors offered to sell the two lots to Ms Palmer for the price of $3.65m. A special condition of the offer noted that the offer was made without prejudice to the vendor's position that it had no obligation under s 40 to make such an offer.
On 22 December counsel for the trust sought clarification as to whether Her Honour had intended to prohibit an offer back to the plaintiff under the Public Works Act. The response, sent on 12 February 1996, made it clear that Her Honour had intended an offer back to be made pursuant to the procedures of the Act.
On 7 March Ms Palmer, through her agent and attorney, responded to the trust by letter in which she stated that she "formally accept[ed] the said offer with the price to be determined by the Land Valuation Tribunal as provided by the Public Works Act 1981 Section 40(2A)."
The trust adopted the view that the offer was not made pursuant to s 40 and was therefore not able to be accepted in the manner prescribed by Ms Palmer.
Considering the commercial aim and genesis of the contract, Paterson J held that the trust considered, rightly or wrongly, that it was not obliged to make an offer under s 40. Ms Palmer's letter was therefore a counter-offer, not an acceptance.
An order was made to remove the second caveat.

31 [1993] 3 NZLR 361.

32 [1996] 1 NZLR 230.

33 [1977] 1 NZLR 504.

right to repurchase under s 40 had been offered the land and all offers had been declined. At this stage no offer had been made to Ms Palmer.

His Honour considered that the test was whether the trust had put it out of its control to prevent Ms Palmer from purchasing the property. Reference was made to the obiter comments of Young J in *Beneficial Finance Corporation Ltd v Multiplex Constructions Pty Ltd*:[34]

> If, on the true construction of the documents, or, in the case of an oral contract, what the parties have said, one can see that contingently or unconditionally the proprietor of property has put it out of his or her control to prevent the grantee from acquiring the property, then a proprietary right is conferred on the grantee. If, however, the right of the grantee only extends to impose a personal obligation on the grantor to make an offer, then there is no proprietary right conferred."

The first caveat was lodged on 12 December 1995. By that stage the trust had taken action under s 40 and had made an offer to the body to which it thought it was so obliged. Paterson J held that there was an arguable case that, at this stage, the trust had reached a position whereby it was out of its control to prevent Ms Palmer acquiring the property if she so desired. If she had s 40 rights, she now had "more than a right to impose upon the trust an obligation to make an offer."[35] By 12 December the trust had created a situation whereby an original pre-emptive right had been converted into a caveatable interest.

Dealing with the view of Goff LJ in *Pritchard v Briggs*[36] that a right of pre-emption can never convert into a caveatable interest, Paterson J stated:[37]

> I can see no reason in principle why a right which was originally a pre-emptive right cannot become something more than that and impose a binding obligation on a party even though an option has not been given or an agreement has not been entered into. Why cannot a first right of refusal or a right of pre-emption, when triggered by the relevant contingency, give a caveatable interest in the land.

His Honour cited the Australian case *Transfield Properties (Kent Street) Pty Ltd v Amos Aked Swift Pty Ltd*[38] in support of the proposition that a right which originally does not confer any interest in land may "fructify" into such an interest. In *Transfield*[39] Santow J considered whether there was any difference, apart from temporal order, between the situation of an option to purchase at the outset and an option which occurs later upon the triggering of a right of first refusal. Having reviewed the divided authorities on the matter,[40] His Honour observed:[41]

> It is true that the right of first refusal may thus not from the outset represent an interest in land but only when the occasion for its exercise triggers it. However, that result seems wholly fair. Before the triggering event it would be unreasonable to fetter the owner of the land by the grantee of the right of first refusal being able to lodge a caveat in anticipation of the triggering. That a particular right may change its character from a mere contractual right to an interest in property does not offend either commonsense or experience.

34 (1995) 36 NSWLR 510, 524.
35 [1996] 3 NZLR 752, 757.
36 [1980] Ch 338.
37 [1996] 3 NZLR 752, 758.
38 (1994) 36 NSWLR 321.
39 For a detailed analysis of this case, see (1996) 7 BCB 157.
40 *Australian Safeway Stores Pty Ltd v State Authorities Superannuation Board* (1988) NSW ConvR 55-410; *Sterns Trading Pty Ltd v Shteinman* (1988) NSW ConvR 55-414; *Pritchard v Briggs*[1980] Ch 338; Megarry & Wade, *The Law of Real Property*, 5th ed, (1984) at 606.
41 (1994) 36 NSWLR 321,343.

Tipping J in *Motor Works*[42] identified the occurrence of a triggering event which requires the grantor to make an offer to the person holding the right of pre-emption. In Paterson J's terms, this "trigger" occurred when the trust took action under s 40 and offered the land to the body to which it thought it was so obliged. If Ms Palmer had rights under s 40, her right of pre-emption converted into a caveatable interest at this stage.

Paterson J's reasoning is reflected in Lindsay's comments in *Caveats Against Dealings in Australia and New Zealand*:[43]

> The key distinction between an option to purchase and a right of first refusal is that the right of first refusal does not impose any obligation on the owner of the land to sell, and therefore once the owner has decided to sell it can be argued that the distinction vanishes and the right of first refusal is converted into an option to purchase.

This view differs markedly from the decision in *Methodist Church*.[44] Temm J held that if the parties concerned had agreed to refer the matter of price to the Land Valuation Tribunal, then a binding contract would have been possible even though price had not been confirmed. Only then would there be sufficient certainty. If this is a correct statement of the law, there is no interim stage at which a caveatable interest can exist.

It seems clear from *Palmer* that the additional complication of price negotiation in s 40(2A) should not detract from Lindsay's simple proposition. Section 40(2)(c) states that the offer back "must be at the current market value of the land as determined by a valuation carried out by a registered valuer". Paterson J emphasized that once the trust made an offer to one of the affected parties, it had an obligation to make an offer to Ms Palmer at current market value. The judgment suggested that this is an acceptable objective standard. A review of Hansard makes it clear that the purpose behind the statute was to help the original property owner reacquire his or her land. If there is a problem as to price, the parties have recourse to arbitration. Section 40(2A) is intended to *further* aid the former owner's claim. Ironically, in cases such as *Methodist Church* its presence, seen as a qualification of the certain standard prescribed in s 40(2)(c), can be detrimental.

Valuable comment on this point was made by Hammond J in *Deane v Attorney-General*.[45] His Honour observed:

> As I see it, s 40(2A) is there for the protection of the former owner, and it should not be read down to a pre-emptive power in the hands of the Crown ... the subs 2A power merely enables resort to a Land Valuation Tribunal if its services are required by the parties. Such a provision enables resort to an agency of the state to resolve a dispute between the state and an individual. It is only one mechanism. It seems to me far more consistent with both s 5(j) of the Acts Interpretation Act 1924 and the philosophy of the Court with respect to compulsory acquisition cases ... to, if necessary, read the section up (if that is necessary) to one which protects a former owner by allowing reference to the Land Valuation Tribunal in the event of an irresolvable dispute as to price.

Lindsay and Paterson J favour the existence of an interim stage. While Paterson J in *Palmer* avoided classifying the right in this phase as an option to purchase, Lindsay refrains from the fine distinction. She comments:[46]

42 High Court, Christchurch, M 211/96, 16 May 1996.
43 The Federation Press, NSW, 1995, 107.
44 [1996] 1 NZLR 230.
45 High Court, Hamilton, CP 65/94, 16 December 1996, at 21.
46 Lindsay S, *Caveats Against Dealings in Australia and New Zealand*, New South Wales, Federation Press 1995, 108.

There is no obstacle in principle to holding that upon the owner forming the intention to sell the property, the other party to the agreement has a caveatable interest based on an option to purchase the property upon either (1) terms and conditions agreed in advance; (2) current market terms, as evidenced by a proper valuation; or (3) such terms and conditions as the owner may be offered by a third party.

Recent Canadian decisions suggest that a right of first refusal may convert into an option to purchase if "triggered" by a third party offer. The question of whether a right of first refusal constitutes a caveatable interest in land was raised in *Deck and Liebel v Redhead Equipment Ltd.*[47] Citing *Canadian Long Island Petroleums Ltd v Irving Industries (Irving Wire Products Division) Ltd*[48] Klebuc J confirmed the principle that a right of first refusal did not create an interest in land. However he also recognised Martland J's ruling in *McFarland v Hauser*[49] that a right of pre-emption in personam converts into an option to purchase, and thus an equitable interest in land, when the grantor of the right receives an offer to purchase which the grantor is prepared to accept. This principle has been confirmed in *Powers v Walter*[50] and in *Kopec v Pyret.*[51] Basing his decision on these authorities, Klebuc J held that the plaintiff's initial right of first refusal did not constitute an interest in land per se, but converted into an option to purchase when the grantor received an acceptable offer to purchase from a third party.

If this principle had been adopted in *Methodist Church*, the church would have been able to claim a caveatable interest when the Crown received and was prepared to accept an offer from a third party. Instead, the decision produced a bizarre result. The church, despite its continuing interest in the land, had no ability to caveat unless it agreed to take the dispute over price to the Land Valuation Tribunal. Four years after the original negotiations, the land (plus an extra lot) was sold to a third party at $8m less that the Crown's original offer.

If the third party's offer is higher than the sum intended to be paid by the original offeree, the sanctions imposed by s 146 of the Land Transfer Act 1952 should sufficiently discourage the lodging of an inconvenient caveat. In *Methodist Church*, however, the ability to caveat would have provided a better balance of power. It is noted, however, that complications arise with respect to equitable priorities. The time lag between the third party's offer and its subsequent acceptance could be minimal. Swift action by the offeree would be imperative in order to avoid displacement.

Palmer's case, clearly within Lindsay's second category, offers superior protection to a former owner and can be thus distinguished. The offer to the third party (clearly not the Crown) was made when the trust sought tenders. Tenders were received on 18 December 1995. Paterson J placed little importance on this event. His Honour held that Ms Palmer was entitled to lodge her caveat on 12 December 1995. The trust had, by that stage, placed itself in a position where it was obliged to make her an offer on s 40(2)(c) terms. Ms Palmer could caveat before third party involvement. In these circumstances equitable priority displacement is not a threat.

Reference should be made to Paterson J's obiter comments in *Palmer* concerning the rights or duties of parties to agree to take a dispute over price to the Tribunal. These were made specifically in the context of Ms Palmer's

47 (1994) 130 SaskR 7.
48 (1974) 50 DLR (3d) 265.
49 (1978) 88 DLR (3d) 449.
50 (1981) 124 DLR (3d) 417.
51 (1987) 36 DLR (4th) 1.

second caveat and were not intended to detract from the first caveat considerations.

Reviewing obiter comment that price can only be referred to the Land Valuation Tribunal under s 40(2A) if both parties agree, His Honour considered it surprising if a person with rights under s 40 could not insist that the price be fixed by the Tribunal.

Despite the discretion suggested by the statute, it may well be seen as a duty rather than a right. It should be noted however that if the certainty test advocated by Temm J in *Methodist Church* is to be satisfied the offeree, while he or she may insist that the price be so fixed, is nonetheless bound to buy at that price.

VIII. The Interplay With the Local Government Act - Added Confusion?

Certain provisions in the Local Government Act 1974 have been used by counsel for former owners in an attempt to establish that the owner possesses an interest in the land which will therefore support a caveat.

The two sections - s 594ZG and s 707ZA - state:

594ZG. Obligation to lodge caveat - (1) The rights of persons from whom land was acquired and their successors to have land offered to them under s 40(2) of the Public Works Act 1981 shall be deemed to be interests in land for the purposes of section 137 of the Land Transfer Act 1952, and the local authority that transfers the land to the local authority trading enterprise pursuant to this Act is hereby authorised to lodge, and shall lodge an appropriate caveat.

(2) In stating, in a caveat lodged pursuant to subsection (1) of this section, the interest claimed by the caveator, it shall be sufficient, for the purposes of section 138 of the Land Transfer Act 1952, to refer to sections 40 to 42 of the Public Works Act 1981 and this section.

707ZA. Obligation to lodge caveat - (1) the rights of persons from whom land was acquired and their successors to have land offered to them under s 40(2) of the public works Act 1981 shall be deemed to be interests in land for the purposes of section 137 of the Land Transfer Act 1952, and the Auckland Regional Council is hereby authorised to lodge, and shall lodge, an appropriate caveat.

(2) In stating, in a caveat lodged pursuant to subsection (1) of this section, the interest claimed by the caveator, it shall be sufficient, for the purposes of section 138 of the Land Transfer Act 1952, to refer to sections 40 to 42 of the Public Works Act 1981 and this subsection.

Section 594ZG applies to land transferred to local authorities; s 707ZA applies to land transferred to a trust. Significant arguments have been raised to support the proposition that s 594ZG should be read as applying to all persons from whom land has been compulsorily taken and their successors rather than applying only to transfers to local authority trading enterprises. If the former proposition is correct, the former owner or his or her successor can indeed caveat.

In *Taubman's* case[52] Barker J, noted that s 594ZG was a part of an 1989 amendment to the Local Government Act 1974 which created local government trading enterprises. Section 594ZF provides that a local authority can transfer land acquired under the Public Works Act 1981 to a local authority trading enterprise without going through the provisions of ss

52 [1993] 3 NZLR 361.

40-42 of the 1981 Act. His Honour rejected the proposition that the right to caveat only applies in that situation:[53]

I am not able to read down the section as suggested .... In remedial legislation, such as s 40(2) of the 1981 Act, I should not be prepared to hold that s 594ZG was not of general application; although it makes a specific requirement in the case of a transfer of land acquired under the 1981 Act from a local authority to a local authority trading enterprise, that fact does not diminish the generality of the wording.

Opposing views appear in later cases. Temm J in *Methodist Church*[54] refused to interpret the first half of s 594ZG(1) in isolation, contending that it must be read with the rest of subs (1) which directs the authority that is transferring the land to a local authority trading enterprise to lodge an appropriate caveat. Referring to s 707ZA and to similar provisions in the Crown Research Institutes Act 1992, the Health Reforms (Transitional Provisions) Act 1993 and the Southland Electricity Act 1993 His Honour concluded that s 594ZG did not contain a provision of general application.

This view was endorsed by Paterson J in *Palmer's* case.[55] His Honour confirmed that the section should be read in the context of the part of the Act within which it appears and should not be given universal application:

The provisions of Part XXXIVA [Local Government Act 1974] are a code in respect of local authority trading enterprises and in my view, the legislature could not have intended that the section have general application particularly as it was incorporated in the Local Government Act by the Local Government Amendment Act (No 2) 1989 which made numerous changes to the Local Government Act and inserted various parts in that Act. I cannot conceive that the legislature would in effect give further rights under the Public Works Act by tucking away the amending provision in a new part to the Local Government Act dealing only with local authority trading enterprises.

Paterson J added a further dimension to the debate. While disagreeing with a general application of s 594ZG, His Honour held that in the particular cases where s 594ZG was relevant (a transfer to a local authority trading enterprise) it did confer a caveatable right on the previous owner. A similar right existed when land was transferred to a trust pursuant to s 707ZA. Therefore in the circumstances of *Palmer's* case, 707ZA did create a caveatable interest.

There was also raised the further question of whether the lodging of the council's caveat precluded the previous owner from also lodging a caveat. Identifying s 148 of the Land Transfer Act 1952 as applying only to situations where a caveat had lapsed, Paterson J saw no impediment for a member of a class to register a caveat even though a class caveat had been registered pursuant to a statutory requirement.

IX. The Effect of S 24(4) State-Owned Enterprises Act 1986

In *Horton v Attorney-General*[56] it was necessary to consider the proper construction of s 24(4) of the State-Owned Enterprises Act in relation to s 40 of the Public Works Act.

Section 24(4) of the State-Owned Enterprises Act 1986 states:

53 Ibid, 367.
54 [1996] 1 NZLR 230.
55 [1996] 3 NZLR 752, 755.
56 High Court, Hamilton, CP 65/94, 16 December 1996, Hammond J.

Nothing in Sections 40 to 42 of the Public Works Act 1981 shall apply to the transfer of land to a State enterprise pursuant to this Act, but Sections 40 and 41 of that Act shall after that transfer apply to that land as if the State enterprise were the Crown and the land had not been transferred pursuant to this Act.

In an assets transfer agreement between the Crown and Coal Corp, a clause granted Coal Corp an option to purchase, prior to their sale or other disposal, one or more of the surplus properties, as specified in an annexed schedule. The plaintiff's land was included in the schedule. The Crown argued that the exercise of this option cancelled any entitlement by the plaintiffs to a s 40 claim. The argument was rejected. Hammond J stated:

In my view, s 24(4) is a simple and a very necessary substitution provision. Parliament actually turned its mind to the problem that, in a privatisation exercise, Crown land which was otherwise subject to the Public Works Act provisions would, in some cases, be "transferred" to State-Owned Enterprises. As a matter of general policy, it seems quite obvious and, with respect, appropriate that Parliament did not intend that the Public Works Act rights of former owners should be diminished in the course of privatisation. This legal conclusion is reached by giving s 24(4) its plain and ordinary meaning.

X. Can the Former Owner's Contingent Right Under S 40(2) be Waived or Assigned?

Should the former owner for any reason decide that he or she does not wish to have land offered back under the provisions of s 40(2) Public Works Act 1981, is it possible to either waive that right or to assign it to a third party? This issue was considered by Baragwanath J in the case *Glucina v Auckland City Council*.[57]

In 1974 Mr and Mrs Wilkinson donated their substantial property to the City of Auckland. The council accepted it, in terms of s 305(1)(a) of the Municipal Corporations Act 1954, for the purposes of a display museum. By 1992 it was clear to the city council that the property was unsuitable for the purpose of a museum. Moreover Mr Wilkinson, by then a widower, was keen to enter a retirement home. Discussions between the Council and Mr Wilkinson ensued and, in December 1992, a deed was prepared by the city solicitors recommending that the land be sold. Clause 2 of the agreement stated that Mr Wilkinson neither wanted nor expected the council to offer the property back to him under s 40 of the Public Works Act 1981.

The deed was signed by Wilkinson and forwarded to the council for approval. The plaintiff, Glucina, reached an oral agreement to purchase the property at the price of $1.9 million. The propriety of the proposed sale subsequently attracted public controversy. As a result the council resolved not to execute the deed but rather to lease the property to Glucina for a five year term with a five year right of renewal. The lease, dated 30 June 1993, contained a right of first refusal to the lessee to purchase the property at market value if the council decided to sell.

On 13 September 1993, Wilkinson and the Glucinas executed a deed in which Wilkinson assigned to the latter party any interest he had in the property pursuant to s 40 of the Public Works Act 1981. The deed also recorded Wilkinson's personal wish that the property be sold to the Glucinas. It should be noted that, by this time, the Glucinas had spent a substantial

57 High Court, Auckland ,M 931/95, 28.2.1996. A full discussion of this case is found in a casenote by the writer in (1996) 7 BCB 182.

amount of money improving the property and meeting the heavy rent and rate demands.

In April 1995 Wilkinson and the council executed a further deed similar in substance to the December 1992 deed. Immediately upon its execution the council resolved, pursuant to s 230 of the Local Government Act 1974 to sell the property. Glucina duly received notice of the council's decision to sell and, on 12 July 1995, indicated his desire to purchase. However on 11 July the council purported to re-enter the premises and determine the lease claiming arrears of rent and a breach of council ordinances. The unpaid rent payment had fallen due on 10 July. On 27 July the council, pursuant to s 42(1)(c) of the Public Works Act 1981, advised owners of neighbouring properties of its desire to sell the property. One neighbour, Mr Lane, expressed interest. Glucina subsequently issued proceedings. He offered to clear any rent arrears and remedy any breaches, but this offer was refused by the council.

Baragwanath J first considered whether Mr Wilkinson could assign any right under s 40(2) to the Glucinas. The question was dealt with in two parts: first, was the right assignable; secondly, if not, could a former owner commit himself to make available to a third party the benefit of his rights without infringing public policy?

His Honour concluded that there was clearly no power within the legislation to assign any such right. The provision provided explicitly to whom the offer was to be made. It clearly did not include an assignee.

However, Baragwanath J saw no reason why a former owner could not contract with a third party as to his or her exercise of the contingent right. To suggest that this was against public policy would be inconsistent with the former owner's ability to deal with the land as he or she pleased, once the sale had been completed.

There followed an analysis of the various deeds. Baragwanath J considered that Mr Wilkinson's rights under s 40(2), while capable of being waived, had not been so waived in the December 1992 deed. Had the core of the agreement - the sale of the property and the allocation of resultant funds for the establishment of a museum - not collapsed, the deed would have had effect as a waiver. It did however collapse. As no waiver existed, there was no legal impediment to the efficacy of the 13 September 1993 deed. Concerning the construction of this latter deed, His Honour concluded that the facts satisfied the test in *Prenn v Simmonds*.[58] It was thus necessary to determine what common intention could be imputed to the parties to the deed, viewing it simply as a matter of contract. Mr Wilkinson wanted to ensure that the Glucinas were not disadvantaged. Mr Wilkinson could not assign the right, but he could, and did, contract by it.

Consideration was given as to whether the deeds of 13 September 1993 and 27 April 1995 were to be read together. In the April 1995 deed, Clause 1.3 stated that Mr Wilkinson neither wanted nor expected the council to offer the property back to him under s 40 of the Public Works Act 1981. If one were to read this in isolation, it would be regarded as a waiver of the s 40(2) right. However, Baragwanath J, again citing *Prenn v Simmonds*[59] considered that the clause must be read together with the earlier deed. To find otherwise would have been "repugnant to the essential thrust of the dealings between Mr Wilkinson and the council".[60]

58 [1971] 1 WLR 1381, House of Lords.
59 Ibid.
60 High Court, Auckland, M 931/95, 28.2.1996, at 35.

Mr Wilkinson therefore retained his rights under s 40(2). While capable of being waived, they had not been so waived. Mr Wilkinson was contractually bound to make available to the Glucinas the benefit of his rights and to facilitate the passing of title to them. The council was therefore obliged to offer to sell the property to Mr Wilkinson as the person from whom it had been acquired. The council could then proceed to sell the premises in accordance with Mr Wilkinson's directions in accordance with his obligations to the Glucinas.[61]

XI. Can the Statutory Powers Contained in S 40 be Delegated?

This issues arose in *Deane v Attorney-General*.[62] During the "Think Big" era of the 1980's, a number of farms were taken for a large scale open-cast coal mine. The plaintiff owned one of these farms which was acquired by the Crown on a willing buyer/willing seller basis in 1986. A short time later, the plaintiff entered into a lease-back with the Ministry of Energy for "his" farm and adjoining land. In 1988, the Crown and Coal Corp entered into an agreement for the transfer of the Crown's coal related assets to Coal Corp pursuant to s 23 of the State-Owned Enterprises Act 1986. The agreement included a provision that Coal Corp would act as the Crown's agent for the sale of surplus coal-related properties. The plaintiff's land was included in the annexed schedule. A considerable amount of correspondence ensued between Coal Corp and the plaintiff and, as was held by Hammond J, there was, for the purposes of s 40, concluded an agreement for the repurchase of the land at a price to be negotiated, or, if necessary, fixed by the Land Valuation Tribunal.

During the negotiations as to price, matters were complicated by the delivery of the decision of the Court of Appeal in *Tainui Maori Trust Board v Attorney-General*.[63] The effect of the decision was the Court's direction that state assets should not be disposed of without adequate protection for the legitimate interests of affected Maori. Following this decision, Coal Corp purported to withdraw its original offer back to the plaintiff.

In its various defences, the Crown argued, inter alia, that Coal Corp was not authorised at the stage the offer-back was made, to exercise the provisions contained in s 40. Hammond J held that Coal Corp did have such authority on behalf of the Crown. His Honour considered that the statutory powers contained in s 40 of the Public Works Act 1981 could be exercised not only by the Chief Executive of the Department of Lands (or the Department in existence at the time of exercise of the power) but also by a person to whom those powers had been delegated by the Chief Executive pursuant to statute. In reply to another of the Crown's defences, His Honour held that, in this case, the Tainui injunction did not have any effect on the performance by the Crown of its obligations under s 40.

The plaintiff was held to be entitled to have the property sold to him at the price being the market value of the property as at the date of the contract, 7 March 1989. This was to be determined by agreement between the parties or, failing agreement, by the Land Valuation Tribunal. At that stage, the

61 As this article went to print, the writer noted a bulletin release advising that, after a long legal battle, the Auckland City Council had been cleared by the High Court, to sell the property now worth $3 million. Further details of events subsequent to the original case were not available.

62 High Court, Hamilton, CP 65/94, 16 December 1996.

63 [1989] 2 NZLR 513.

suggested purchase price was somewhere between $430,000 and $550,000. The Government valuation of the land as at 1 September 1994 (which was the most current roll value at the date of hearing) was $1,130,000.

XII. THE POWERS UNDER S 42 - SEQUENTIAL OR ALTERNATIVE

Section 42 of the Public Works Act 1981 outlines the procedure necessary when disposing of surplus land to people other than the original owner.

Recent judgments have considered whether the powers in s 42(1)(c) and (d) are alternative or sequential. If sequential, the land must first be offered to any adjacent owner. In some instances such a mandate can cause not only inconvenience and expense, but may also make it more difficult to obtain full market price.

Section 42 states:

s 42 Disposal in other cases of land not required for public work

(1) Where -

(a) Any offer to sell land under section 40(2) of this Act has not been accepted within 40 working days or such further period as the chief executive of the department within the meaning of section 2 of the Survey Act 1986 or local authority considers reasonable; or

(b) Any land is no longer required for a public work and subsections (2) and (4) of section 40 do not apply -

the chief executive of the department within the meaning of section 2 of the Survey Act 1986 or local authority may

(c) Cause the land to be offered for sale to the owner of any adjacent land at a price fixed by a registered valuer; or

(d) Cause the land to be offered for sale by public auction, public tender, private treaty or by public application at a specified price:

Provided that where a local authority proposes to sell land by private treaty the provisions of section 230 of the Local Government Act 1974 shall be complied with.

In *McNicholl v Auckland Regional Authority*[64] Chilwell J suggested, on an earlier form of the Act, that if s 40 did not apply, the local authority was obliged to offer the land to the adjacent landowner. A similar view was taken by Gault J in *Auckland Regional Council v Attorney-General (No 2).*[65]

However, in *Manukau City v Attorney-General,*[66] the Court of Appeal suggested that the powers under s 35 of the Public Works Act 1928, a forerunner of s 42, could be regarded as alternatives.

Barker J in an obiter comment in *Taubman's* case[67] considered that the rights that the adjoining owner had under s 42 were unclear:

> the permissive word of s 42 ("may") is to be contrasted with the mandatory wording of s 40(2) which requires that the local authority (unless the two exceptions apply) "shall offer to sell the land..."

It was unnecessary for His Honour to consider the correctness of the ruling in *McNicholl*, as the owner of the adjacent land was not interested in buying the compulsorily acquired land.

64 High Court, Auckland A 952/85 and A 1164/85, 8 August 1986.
65 High Court, Auckland, CP 583/88, 24 September 1990.
66 [1973] 1 NZLR 25.
67 [1993] 3 NZLR 361.

His Honour also raised and left for further debate the question of whether "adjacent land" meant the land which was adjacent when originally acquired by the council or, as in this case, one or both of the amalgamated titles.

The issue was again raised in *Auckland City Council v Attorney-General.*[68] The council sought the Court's interpretation of s 42(1)(c) and (d). It was not seeking a declaration with reference to any particular property but rather as a guiding principle for future dispositions of surplus land. Thorp J considered whether the court had jurisdiction under s 2 of the Declaratory Judgments Act 1908 to give an "advisory opinion" when it was not required to determine the issue between two represented parties. His Honour acknowledged judgments which advocated an expansive interpretation of s 2: *Re Chase*[69] and *Auckland City Council v Taubmans (NZ) Ltd.*[70] *Taubmans* case was distinguished on the grounds that the question of interpretation was in relation to specific parcels of land, there were representations from people directly interested in supporting each of the alternative interpretations of the statute and the question was directly related to a claim for removal of caveats. Thorp J considered that the Court, when asked to act in a purely advisory role, "should be particularly slow to do so in the absence of 'a proper contradictor'."[71]

The application was dismissed. A pedantic procedure was thus created for the council. For the issue to be determined inter partes, the council would need to advise neighbouring owners of surplus land that it did not intend to offer them the land, thus inviting them to object to its "alternative power" interpretation of the statute.

The Auckland City Council alone has in recent times sold an average 17 properties a year as "surplus land", that is land no longer required for public works. It seems likely that some local authority will consider the pedantic procedure worth the effort. A clear guidance from the Court on the issue will undoubtedly be welcome.

XIII. CONCLUSION

The offer-back obligation in the *Public Works Act 1981* was introduced in order to give original landowners or their successors in title an opportunity to reacquire their land. Legislative intention at the time indicated that this was a genuine attempt to provide special protection for those from whom land had been compulsorily taken.

Subsequent case law has rigorously tested the statutory provision. The Courts have adopted a realistic approach to various issues concerning the definition of a "public work", the interpretation of relevant subsections, the ability to waive or assign the s 40 right, and the right to delegate. The State-Owned Enterprises Act 1986 cannot be interpreted to diminish the rights of former owners. The question of whether a right of pre-emption can have chalemonic characteristics is a general one of considerable importance. Narrowed to the confines of the Public Works Act 1981, it can substantially enhance or detract from the protection originally envisaged. The provision of a right - or a duty - to refer a price disagreement to arbitration must have been intended to further aid the former owner's claim. It should not be allowed to cloud the standard of certainty prescribed in s 40(2)(c). The

68 High Court, Auckland, CP 670/93, 12.10.1994, Thorpe J.
69 [1989] 1 NZLR 325.
70 [1993] 3 NZLR 361.
71 High Court, Auckland, CP 670/93, 12.10.1994, at 7.

decision in *Auckland Regional Services Trust v Palmer*[72] reflects the general trend towards the view that a right of first refusal, if triggered by the necessary contingency, may indeed ripen into a caveatable interest. Closely inter-related, relevant sections in the Local Government Act 1974 have added confusion but Paterson J's statements in *Palmer* help define the scope of their application.

The necessity for a clear direction from the Courts concerning the sequential or alternative powers under s 42 gathers momentum as local authorities are faced with an increasing number of properties no longer required for public works.

72 [1996] 3 NZLR 752.