

## Landcorp failed to monitor survey of land for sale

<b>Legislation</b>	Ombudsmen Act 1975
<b>Agency</b>	Landcorp
<b>Ombudsman</b>	Mel Smith
<b>Case number(s)</b>	A11271
<b>Date</b>	2005

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*Lessee of Crown land given opportunity to purchase it freehold in 1996 from Landcorp—a review of title revealed land had been surveyed to exclude all internal waterways used by lessee for his salmon and trout farms and problem discovered too late for exemptions under Conservation Act—the consequences of survey effectively confiscated farms and lessee complained to Ombudsman that Landcorp’s failure to monitor survey allowed issuance of title for an unviable property—Ombudsman reviewed circumstances and agreed Landcorp should have ensured it was informed of survey progress—its failure to monitor meant Landcorp could not take more effective measures to overcome title issues and land subsequently not fit for sale—view formed that Landcorp’s sale was unreasonable—Landcorp disagreed with view but agreed to make ex-gratia payment to complainant*

In August 1981 a man leased property by way of a special lease with the Crown for a term of 15 years expiring in December 1996 and established trout hatchery (which included construction of gate-controlled intakes on the river bank, large pipes, artificial channels and ponding areas). An agreement signed in June 1988 with retrospective effect to April 1987, entitled Landcorp Farming Limited (Landcorp) to become the title holder of the lease and in October 1989, Landcorp consented to the man developing a salmon-rearing facility on the land. Thereafter the man obtained a Ministry of Agriculture and Fisheries Salmon Farm Licence, 32 year resource consents and all the other approvals necessary for the establishment of the operation.

Although his lease contained no right of renewal or purchase, the man had relied for security of tenure on a background of assurances given to him over the years to the effect that when

the land came to be sold, he could expect to have the opportunity to buy the freehold title. In 1993 the man was informed of a review of all the special leases adjacent to the river and a few months later he was told that titles were being issued and would probably be available late in 1994. The land was surveyed in 1993 but there was no discussion with the survey staff about the fish, intakes, water channels, ponds or the arrangements for the discharge of water from the facility. Neither the man, nor Landcorp, were approached as to what was to be included in the new title. In December 1993 certain land on the property was then vested in Landcorp by a declaration published in the New Zealand Gazette. This included the land in the special lease but excluded all the land's internal waterways. The practical consequences of this were:

- The land vested in Landcorp comprised only the areas surrounding the internal waterways and some seemed to have no road access. The waterways themselves were retained by the Crown.
- In the absence of an exemption granted before the land vested in Landcorp in 1993, if the man were to take a renewal of his lease or to freehold the land, section 24 of the Conservation Act would create marginal strips around all the waterways within the property as well as along the river front. These marginal strips covered much of what remained of the land and virtually all the areas used for the man's salmon operation.
- Public access over these areas would, in the man's view, render his fish rearing operations quite impracticable and therefore his farm had, in effect, been confiscated by the survey.

In 1994 the man received a letter from Landcorp enclosing a copy of the title and offering him the opportunity to purchase the freehold title. The consequences outlined above then became clear to the man and a protracted series of communications ensued between the parties with various measures suggested in an effort to overcome the situation. On the day when the lease expired and the marginal strips were to come into force at the end of 1996, the man considered he had no choice but to accept the freehold at a discounted figure, in the hope that arrangements could be made to resolve the situation. Given that he did not believe he could continue rearing salmon while his facility was subject to public access without incurring substantial loss of income, the man began legal proceedings for compensation for damage. He refrained from re-stocking his farm for about 5 years, which left him out of pocket in excess of \$250,000. The man sought compensation on two separate occasions from the Minister of Lands and Land Information New Zealand. He also complained to Landcorp that, by omitting to take any steps to inform itself of the progress made with the survey before title was raised, the company did not ensure that its title would encompass a viable property. This therefore put him in an impossible position on the expiry of the lease, as he was faced with the choice of either purchasing the remains of the property on whatever terms could be arranged or abandoning his development work of 15 years. He said he chose the former, making it clear that he would be unable to continue his farming operations and would look to Landcorp for redress.

The man then complained to the Ombudsman claiming that Landcorp failed to exercise expected care and diligence, which might have been expected when the survey was undertaken to ensure that the property it had acquired from the Crown would be a usable and

saleable unit. Although Landcorp attempted to address the problem through an approach to the Chief Surveyor, with a view to having survey and title measures adopted to undo the reservation of the waterways to the Crown, he claimed Landcorp did not take any other steps to explore alternatives which may have been practicable and effective. While the eventual sale was at a discounted price, it imposed on the complainant the burden and all the cost of carrying out the solution which had then been put forward, namely an exchange of the internal marginal strips for a wider one along the edge of the river. At the same time, Landcorp allegedly did not recognise that such an exchange would not overcome the exclusion from the title of the waterways themselves. As a result, even after the exchange, the complainant did not own those parts of the land - the waterways - where the most crucial parts of his operation were performed.

The complaint also included allegations that land sold to the complainant was unsaleable in practical terms (and that he had had no option but to accept it on the terms made available as refusal would have meant the total loss of his investment in his operation) and that terms of sale represented an unfairness, particularly if they were to be construed as limiting his right to seek redress for economic loss.

In response to his inquiries, Landcorp advised the Ombudsman that it was an SOE and was clearly distinguishable from the Crown. It did not consider itself responsible in any way for the predicament in which the complainant found himself in 1996 and early 1997. Rather, the complainant had no right to renew or purchase the freehold interest and he had taken a huge risk in spending capital on development of the property without such rights and with no defined boundaries or freehold title issued. Landcorp submitted that the land was saleable and, as it was sold at a discounted price, it could not reasonably be described as unfair. The survey was the responsibility of the Crown, not Landcorp, and the Department of Conservation is responsible for administering the Conservation Act 1987. Landcorp was not the complainant's lawyer and therefore was not required to assist him in the marginal strips issue with the Crown. Landcorp also submitted that the eventual sale was accepted by both parties and they had full knowledge of the implications of the transaction. Therefore, Landcorp did not desire to enter into any dialogue with the complainant about resolving the issue with the Crown or seeking redress.

The Ombudsman noted that the problem at issue clearly arose from the circumstances of the survey. However the Ombudsman was not persuaded that Landcorp should be regarded as bearing no responsibility for the predicament in which the complainant found himself in 1996-97. It was the Ombudsman's view that Landcorp should have ensured that it would be kept informed of the progress of the survey so as to be able to take effective action about such matters as marginal strip issues. The Ombudsman concluded Landcorp's failure to keep itself informed about the survey had adverse implications for both Landcorp and the parties dealing with it. The Ombudsman accepted that, when Landcorp became aware of the marginal strip issue, it did express its concern in a forthright manner. However, this was too late to delay the original vesting of the land in it or otherwise overcome the marginal strip problem. It was the Ombudsman's view that Landcorp should have been aware of the problems earlier so it could have been in a position to take more effective measures to overcome them. Therefore, the Ombudsman was not satisfied that the property to which Landcorp had title to was fit for sale,

particularly when it had not taken action to render it fit. Rather, it seemed to the Ombudsman that Landcorp's focus had been on disposing of an asset that had proved almost a liability. Its agreement to the heavily discounted price of the land seemed evidence of this.

The Ombudsman considered the actions of Landcorp fell short of what was required of it in terms of its obligations of good corporate citizenship to the extent of being unreasonable or wrong. When Landcorp was advised of the Ombudsman's provisional opinion, (which included the suggestion that Landcorp offer the complainant an ex gratia payment, Landcorp maintained that it had no duty of care to the complainant to ensure that public access did not interfere with his farm nor was it required to inform itself of the likelihood of that interference with the inclusion of marginal strips by the surveyor. Landcorp submitted that the inclusion of the marginal strips was not a mistake but a deliberate act by a public official vested with the power to make those decisions. It said the complainant purchased the property in full documented knowledge of the marginal strips issue and paid a reduced price in recognition of this. In doing so, he agreed not to seek further compensation from Landcorp and therefore it was Landcorp's view that there was no reasonable basis for it to make any payment to the complainant.

However, the Ombudsman remained of the view that monitoring was appropriate and should have been undertaken as a matter of prudent practice and good administration. Had Landcorp monitored the survey process, it would have had the opportunity to make a timely application to the Minister of Conservation for exemption from the reservation of marginal strips as soon as it realised the implications of the survey. The Ombudsman made it clear that this did not mean Landcorp would necessarily have been successful in preventing the reservation of the internal waterways. However, it would have meant that Landcorp would have had the opportunity to seek an exemption from the Minister before that option expired when the land vested in Landcorp, and subsequent events did suggest that such an application would likely have been granted.

The Ombudsman acknowledged Landcorp's comments that the complainant entered into the sale with full knowledge and accepted the sale price which had been discounted to reflect the circumstances. However, the Ombudsman did not consider the complainant had a choice and, given the circumstances, finalising a sale on that basis did not, in the Ombudsman's view, accord with what should be expected of Landcorp and was unreasonable. The Ombudsman therefore sustained the complaint.

Before proceeding to make a recommendation, the Ombudsman invited Landcorp to take steps itself to seek some form of settlement with the complainant. Landcorp disagreed with the Ombudsman's view and maintained it had no obligation to monitor the survey process. As a result, it also could see no legal or moral basis on which to justify any ex-gratia payment to the complainant. However, in order to bring finality to the issue, Landcorp agreed to offer an appropriate and reasonable ex-gratia payment, having regard to what it considered to be its minimal role and the terms of its earlier settlement.

### **Comment**

The Ombudsman emphasised in his correspondence with Landcorp that he did not consider there to be an obligation on Landcorp to monitor the survey process undertaken by the Crown. Rather it seemed to him that monitoring would have been a proper precaution (and certainly good administration) to take in the company's own interests and that this is borne out by the company's actions in arranging to monitor the survey of large farm properties.

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