IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

AP 34-43/01

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IN THE MATTER	of section 26 of the Land Valuation Proceedings Act 1948
AND	
IN THE MATTER	of the Maori Reserved Land Amendment Act 1998
BETWEEN	THE ATTORNEY-GENERAL
	First Appellant
AND	CHIEF EXECUTIVE OF THE MINISTRY OF MAORI DEVELOPMENT
	Second Appellant
AND	ANTHONY INGHAM WILLIAMS & KERSTIN JOHANNA WILLIAMS
	First Respondents
AND	COLIN MARTIN CHRISTIE & PAULINE JOY CHRISTIE
	Second Respondents
AND	PHILLIP MOLLISON WOODMASS & CHERYL JUNE WOODMASS
	Third Respondents
AND	IAN ROBERT DIACK & LYNETTE GAIL DIACK
	Fourth Respondents
AND	LYN WILLIAM WILLIAMS, ANNE VIRGINIA WILLIAMS & DENNIS CECIL WOODS
	Fifth Respondents
AND	BRYCE IAN WILLIAMS & DIANA WILLIAMS
	Sixth Respondents
AND	WHATALOTTA HEIFERS LIMITED
	Seventh Respondent

Coram:	Doogue J W O Harrington
Hearing: (at Wellington)	29-30 October 2001
Appearances:	M T Parker with G Gardner for appellants J E Hodder with D Kalderimis for respondents
Judgment:	5 November 2001

JUDGMENT OF THE COURT

Introduction

[1] All the respondents ("the lessees") to these appeals are dairy farmers, who are members of the West Coast Settlement Reserves Lessees Association ("the Association"), and holders at the relevant time of some 10 farming leases of Maori land in Taranaki under the Maori Reserved Land Act 1955 ("the Act"). In 1997 Parliament amended the Act, introducing provisions which radically changed the terms of the leases under it but providing for the lessees to be compensated by the Crown for the effects of the amendments ("the 1997 Amendment"). The 1997 Amendment gave lessees a choice of two methods of claiming compensation: either in accordance with a schedule, which provided formulae for the assessment of the compensation, or by determination by the Land Valuation Tribunal ("the Tribunal") in relation to assessments of market value. In 1998 the provision in the 1997 Amendment for the Tribunal to assess the compensation was further amended and refined ("the 1998 Amendment"). Because there was dispute between the Crown and the Association as to the meaning of certain of the words in the 1998 Amendment, a case was taken to the Court of Appeal (*West Coast Settlement Reserves Lessees Association Incorporation & Ors v Attorney-General* (1998) 3 NZ ConvC 192,802).

[2] The lessees' claims for compensation under the 1998 Amendment were subsequently dealt with by the Tribunal, which upheld the interpretation of the 1998

Amendment urged upon it for the lessees. The Tribunal went on to accept the assessments of compensation put before it by the lessees' valuer on the basis of valuations supported by the lessors' valuer and an independent valuer. The Tribunal rejected an alternative approach to the law and to the assessment of the appropriate compensation put before it by the Crown. The Crown appeals from the Tribunal's assessment of the compensation in respect of each of the 10 leases which were chosen as a representative sample for the Tribunal to consider. The Crown says the Tribunal was wrong in law and in fact and that this Court should direct the Tribunal to reconsider the assessments of compensation on the basis put to it by the Crown. The lessees adopt and support the decision of the Tribunal.

[3] The appeals raise three essential issues, namely:

1. Was the Tribunal's approach to the interpretation of the 1998 Amendment correct?

2. If the Tribunal's approach to the 1998 Amendment was correct, was its determination of the relevant market values nevertheless wrong in fact?

3. If the Tribunal's interpretation of the 1998 Amendments was incorrect, was its determination of the relevant market values nevertheless justifiable in fact?

[4] Understandably the parties are more concerned with the correct legal approach to the 1998 Amendment. This is because the parties are primarily concerned with the proper approach to be adopted in respect of all leases held by members of the Association. The valuation methodology adopted by the opposing sides has either followed or been used as a basis for the legal argument presented.

[5] What we intend to do is first to enlarge briefly upon the general background already outlined and then to deal with the nature of the appeals, the relevant statutory provisions, the Court of Appeal's decision, and each of the issues identified, discussing the Tribunal's decision and any relevant evidence in the context of those issues.

General Background

[6] The West Coast Settlement Reserves, as the particular Maori lands have been known, have a lengthy history. As these appeals do not in any way involve the relationships between the lessees and the Maori owners, it is unnecessary for us to enter upon that history. For present purposes the relevant history commences in 1993, when the Government of the day considered proposals for the amendment of the Act to strengthen the position of Maori lessors. The proposals were made known to the public and had an immediate effect upon lessees and any dealings they wished to make in relation to the leasehold lands affected by the Act. This was particularly so as the original proposals contained no provision for compensation of lessees, notwithstanding the likely detrimental effect upon their position if the proposals became law. Understandably, there were submissions to the Government on behalf of the Association and other affected lessees. When the proposals were further developed and first became law in 1997, there was therefore provision for compensation for lessees for the consequences of the changes upon them. The 1993 proposals changed the position of lessees, notwithstanding that the Act was not amended until 1997. Because the 1997 Amendment made no provision for the consequences of the proposals between 1993 and 1997, further representations to Government resulted in the 1998 Amendment. Although this case turns upon the interpretation of s 4 of the 1998 Amendment ("s 4"), it is common ground that it arose out of the 1997 Amendment and that that amendment is also relevant to the present appeals. Some of the history to which we refer has been set out in a little more detail in the decision of the Court of Appeal already mentioned and, as the Tribunal notes, there is a concise summary of the history in an article by the Right Honourable Sir Geoffrey Palmer, "West Coast Lagan v A-G", 2001 NZLJ 163.

[7] The Tribunal heard the lessees' claims for compensation in April of this year and gave its decision in August of this year. The Tribunal records that the hearing of the matter spread over 13 days. The Tribunal had before it a substantial body of evidence, including that of some of the lessees, valuers, economists and others. The Tribunal's careful and comprehensive decision runs into some 59 pages and extensively traverses the law, the evidence and, in particular, the valuation

methodologies and economic bases supporting them put forward by the Crown and the lessees.

The Nature of the Appeals

[8] The appeals are brought in accordance with the Land Valuation Proceedings Act 1948, which applies by virtue of s 4(6). It is an appeal by way of rehearing from a specialist tribunal. While we will necessarily come to our own conclusions, we must take into account that the Tribunal had the advantages of seeing and hearing the witnesses. If, of course, the Tribunal is shown to be wrong in law by the Crown, then that may have different consequences than if the Tribunal is not shown to be wrong in law. Where the Crown is seeking to have us substitute our view on the facts for those found by the Tribunal, there is necessarily an obligation upon the Crown to show that the Tribunal was wrong or that its conclusions were not reasonably open to it upon the evidence. It is inevitable in areas of valuation that there is room for more than one view, and we do not regard it as our role to merely substitute our judgment for that of the Tribunal, unless it is shown in some way that the Tribunal's decision was wrong. (See *Calvin v Carr* [1980] AC 574 (PC), per Lord Wilberforce at 596E; *Pratt v Wanganui Education Board* [1977] 1 NZER 476 (SC), per Somers J at 490; *Hutton v Palmer* [1990] 2 NZLR 260 (CA), per Somers J at 268; *Rangatira Ltd v Commissioner of Inland Revenue* [1997] 1 NZLR 129 (PC), per Lord Nolan at 138-9; *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA); *Prior v Parshelf 45 Ltd* (CA 267/98, 20 September 1999) per Keith J at para [24]; *Glover Foods Processors Ltd v Leaosavaii* [1999] 1 ERNZ 478 (CA) per Richardson P 486-7 at para [22]; and compare *Williams v Minister of Lands* (CA 299/99, 5 April 2001).)

Relevant Statutory Provisions

The 1997 Amendment: Maori Reserved Land Amendment Act 1997

[9] **3. Purpose of Act**

(1) The purpose of this Act is-

(a) To provide, in respect of leases to which this Act applies, for a change to more frequent rent reviews and to fair annual rents based on the unimproved value of the land to be phased in over a 4-year period commencing 3 years after the commencement of this Act; and

....

(e) To provide for compensation to be paid to lessees for the change to more frequent rent reviews and to fair annual rents based on the unimproved value of the land and for the conditions imposed by this Act on the assignment of the lessees' interests in the leases; and

(f) To provide that the amount of the compensation payable to each lessee is to be, in accordance with an election made by the lessee, either

(i) The amount payable to the lessee under section 16; or

(ii) The amount determined by the Land Valuation Tribunal in accordance with section 18 as payable to the lessee; and

(g) To provide for a solatium payment to be made to those lessees who accept the amount payable by way of compensation under section 16, which payment is to be on the basis of one payment per lease, irrespective of the number of lessees, and is to recognise the justifiable but unquantifiable transaction costs that will be incurred by lessees as a result of the changes made to leases by this Act; and

(h) To provide a right of first refusal for lessors on assignment by lessees to third parties of leases to which this Act applies; and

....

16. Compensation payable to lessees

(1) The person who, on the commencement of this Act, is the lessee of a lease to which this Act applies is entitled to compensation for-

(a) The change to a more frequent rent review; and

(b) The change to a fair annual rent based on the unimproved value of the land; and

(c) The conditions imposed by this Act on the assignment of the lessee's interest in the lease.

(2) Where the details of a lease are added to Schedule 3 after the commencement of this Act and that lease, by virtue of its details being so added, becomes a lease to which this Act applies, the person who,

on the date on which the addition takes effect, is the lessee of that lease is entitled to compensation for-

(a) The change to a more frequent rent review; and

(b) The change to a fair annual rent based on the unimproved value of the land; and

(c) The conditions imposed by this Act on the assignment of the lessee's interest in the lease.

(3) The compensation payable to a lessee under subsection (1) or subsection (2) must be determined in accordance with Schedule 2.

(4) In this section, the term "lessee" means,-

(a) In relation to a lease registered under the Land Transfer Act 1952, the person registered as the lessee of the lease; and

(b) In relation to any other lease, the person entitled to be registered under the Land Transfer Act 1952 as the lessee of the land to which the lease relates.

[10] Section 17, which dealt with the right of a lessee to elect to have compensation determined by the Tribunal in the event of dispute over the amount of compensation payable under s 16, was replaced by s 3 of the 1998 Amendment but has no particular relevance to the present appeals.

[11] **18. Determination of compensation by Land Valuation Tribunal**

(1) Where a lessee files an application under section 17 (4) (b), the Land Valuation Tribunal has jurisdiction to determine, in accordance with this section, the amount to be paid to the lessee by the Crown as compensation for-

(a) The change to a more frequent rent review; and

(b) The change to a fair annual rent based on the unimproved value of the land; and

(c) The conditions imposed by this Act on the assignment of the lessee's interest in the lease.

(2) The Land Valuation Tribunal must, as soon as practicable after the application is filed, determine the market value, as at 1 January 1998, of the lessee's interest in the lease.

(3) That market value must be determined on the basis of what that market value would have been if this Act had not been enacted.

s8 Repealed & replaced by s4 (1998 Amendment Act) see pg.

(4) The Land Valuation Tribunal must determine, as soon as practicable after 1 January 2001, the market value, as at 1 January 2001, of the lessee's interest in the lease.

(5) The Land Valuation Tribunal may, in making determinations under this section, take account of relevant valuation evidence arising after the commencement of this Act.

(6) The amount of the compensation payable to the lessee under subsection (1) is the market value determined under subsection (2) less the market value determined under subsection (4).

(7) Every application made under section 17 (4) (b) must, subject to this section, be dealt with by the Land Valuation Tribunal in accordance with the provisions of the Land Valuation Proceedings Act 1948, which is to apply with all necessary modifications.

(8) In this section,-

"Land Valuation Tribunal" has the meaning given to it by section 2 of the Land Valuation Proceedings Act 1948:

"Lessee" has the meaning given to it by section 16 (4).

[12] Section 18 was repealed by the 1998 Amendment and replaced by s 4. The differences between the two sections will be highlighted below.

[13] Schedule 2 contained the provisions for compensation payable to lessors and lessees, with provisions in respect of lessees relating to s 16. It provides formulae for calculating a discount rate, an estimated unimproved value and compensation. It provides tables for relevant land inflation rates and market rent rates for different areas. It provides a method for compensation to be assessed without the need for valuations.

[14] Mr Hodder, fairly in our view, submitted that the appendix was more akin to an investment model assessment of compensation than one based on an approach to market values as provided for in s 18. Mr Parker accepted it does not produce a market value but did not accept it reflected an investment model assessment of market value.

[15] The essential provision for present purposes is s 4. Section 3 is referred to in it but does not assist its interpretation. Section 4, with the changes from s 18 of the 1997 Amendment underlined, provides:

> **4. Determination of compensation by Land Valuation Tribunal**
>
> (1) Where a lessee files an application under section 3(5)(b), the Land Valuation Tribunal has jurisdiction to determine, in accordance with this section, the amount to be paid to the lessee by the Crown as compensation for—
>
> (a) The change to a more frequent rent review; and
>
> (b) The change to a fair annual rent based on the unimproved value of the land; and
>
> (c) The conditions imposed by the Maori Reserved Land Amendment Act 1997 on the assignment of the lessee's interest in the lease.
>
> (2) The Land Valuation Tribunal must, as soon as practicable after 1 January 2001, determine the market value as at 1 January 2001, of the lessee's interest in the lease.
>
> (3) That market value must be determined—
>
> (a) First, on the basis of what that market value would have been, as at 1 January 2001, if the Maori Reserved Land Amendment Act 1997 and this Act had not been proposed or enacted; and
>
> (b) Second, on the basis of what that market value is, as at 1 January 2001, in the light of the enactment of the Maori Reserved Land Amendment Act 1997 and this Act.
>
> (4) The Land Valuation Tribunal may, in making determinations under this section, take account of relevant valuation evidence arising after the commencement of the Maori Reserved Land Amendment Act 1997 or this Act.
>
> (5) The amount of the compensation payable to the lessee under subsection (1) is the market value determined under subsection (3)(a) less the market value determined under subsection (3)(b).
>
> (6) Every application made under section 3(5)(b) must, subject to this section, be dealt with by the Land Valuation Tribunal in accordance with the provisions of the Land Valuation Proceedings Act 1948, which is to apply with all necessary modifications.

(7) In this section,—

Land Valuation Tribunal has the meaning given to it by section 2 of the Land Valuation Proceedings Act 1948:

Lessee has the meaning given to it by section 16(4) of the Maori Reserved Land Amendment Act 1997.

[16] The parties are agreed the only differences of substance between s 4 and s 18 of the 1997 Amendment are those in s 4(2) and s 4(3)(a). That in s 4(2) changed the valuation date from 1 January 1998 to 1 January 2001, largely, it would seem, to enable the valuation to be determined in the light of sales in that period. There was some argument about the additional words in s 4(3)(a) and (b). Section 4(3)(a) reflects the language of s 18(3) of the 1997 Amendment but adds the words "had not been proposed". They are the subject-matter of the Court of Appeal decision of 1998 and require no further comment. The words highlighted in s 4(3)(b) did not appear in the 1997 Amendment and Mr Parker endeavoured to make something of that. In our view they add nothing. They merely reflect the language of s 4(3)(a) and we are not prepared to assume the Legislature had any intention of changing the basic meaning of s 4(3) by their addition. If they did not appear there could have been uncertainty as to what the Legislature intended.

The Court of Appeal's 1998 Decision

[17] In *West Coast Settlement Reserves Lessees Association Incorporation & Ors v Attorney-General & Ors* (1998) 3 NZ ConvC 192,802 the Court of Appeal was requested to focus upon the meaning of the word "proposed" in s 4(3)(a). The Court made the following declarations at 192,805:

(1) in section 4(3)(a) of the Maori Reserved Land Amendment Act 1998 (the"1998 Amendment"), the term "proposed" does not mean "introduced into the House of Representatives", but includes any proposal publicly announced by the Government in 1993 or subsequently for changes to the Maori Reserved Land Act 1955 (the "1955 Act") to the same substantive and economic effect as those identified in section 4(1) of the 1998 Amendment,

(2) there is no substantive or economic difference between the Government's 1993 published proposals for changes to rent review frequency and a move to market-related rentals, and those changes

enacted in the Maori Reserved Land Amendment Act 1997 and identified in section 4(1)(a) and (b) of the 1998 Amendment, and

(3) in applying section 4 of the 1998 Amendment, the Land Valuation Tribunal should have regard to the legislative intention that lessees are not to be compensated for the Government proposing or Parliament enacting matters extraneous to those identified in section 4(1) of the 1998 Amendment.

[18] Having made those declarations, the Court was asked to express its reasoning for them, which led to the decision which has been reported. In expressing its conclusions, the Court said this, at 192,806-192,807:

> In argument before us Mr Parker, for the defendants, realistically accepted that "proposed" in s4(3)(a) is not to be equated with "introduced" and has to be read as encompassing Government proposals prior to the introduction of the Bill in 1996. That must be so for otherwise Parliamentary Counsel have used the obvious word "introduced". More importantly, it would make no sense for Parliament to have directed the Tribunal to disregard any effect on values arising from the proposals in the Bill and in the Act but for the Tribunal then to be unable to make adjustments for any detrimental effect of identical or nearly identical proposals made by the Government at an earlier time with an indication of its intention to bring in legislation. The benefit conferred by s4(3)(a) would be illusory. We do not believe that can have been intended. Indeed, it seems to us that s4(3)(a) simply underlines what may already have been implicit in s18(3) of the 1997 Act quoted earlier.
>
> In the two most crucial respects the proposals published by the Government in April 1993 differed only very slightly from what was eventually enacted in 1997 and in the meantime there had been no suggestion of anything different. They were (a) that after an initial period there would be seven yearly rent reviews and (b) that rentals would be set at market levels on each review. In the legislation the suggested 14 year period before the first of the new reviews was replaced by a specified date for the first review of each lease. After 31 December 2000 the leases are phased into the new market rent regime in four bands over the next four years. The banding is to facilitate administration of the rent review process by spreading the administrative burden.
>
> The legislation uses in relation to rent levels the expression "fair annual rent", the same expression as is used in the *Public Bodies Leases Act* 1969. That requires assessment of a market rental.
>
> Mr Parker expressed the Crown's concern lest s 4(3)(a) be construed in a way which might permit the Tribunal to take into account the effect on values of any proposal made by the Government in 1993 or

thereafter which was not equivalent to those matters described in s4(1). We believe this fear to be unfounded. In terms of s 4(1) the compensation is to be for the three listed matters only, and for nothing else. It cannot therefore be awarded for the effect of any alteration or proposed alteration to any other lease term. However, s 4(3)(a) requires the Tribunal to look beyond the exact changes to rent review, rent levels and assignment terms and requires it to make allowance for any effect of Government proposals relating to those three matters. Thus the effect of proposals from the Government having substantive and economic equivalence is to be taken into account in the Tribunal's assessment. As noted, there was a relatively minor difference concerning commencement of the rent reviews but the proposals for the rent regime can fairly be regarded in this context as the equivalent of what was enacted.

It is our understanding from exchanges with counsel during argument that any impact of the right of first refusal is very small in comparison with the alleged adverse effect on values of the other changes. (An allowance of only an additional 1% is made under the formula in Schedule 2 of the 1997 Act - see cl.16.) To the extent that the proposal in 1993 for termination after two further renewals, with the lessors enjoying a right of first refusal in the meantime, may have had a greater effect than if the Government's announcement had described only the right of first refusal finally enacted, that proposal will not have substantive and economic equivalence.

If the Tribunal finds that to be the position, the additional adverse effect of the proposal for termination of perpetual renewals is not to be the subject of compensation.

[19] The judgment ended with an observation at 192,807, namely:

This judgment is concerned only with the meaning of particular words in s4(3)(a) of the 1998 Act. We have concluded that those charged with valuing the lessees' interests must disregard certain adverse effects on the value of the leases after the announcement of the Government's proposals in April 1993. We have proceeded upon the assumption that there were in fact such adverse effects but we make no finding on that factual question which is a matter for the Tribunal. Nor do we indicate any view on the valuation method by which the Tribunal, guided by our declaration, is to make allowance or adjustment for any such adverse effects. The Tribunal will adopt whatever method it considers most appropriate and is free to receive such valuation evidence as it believes will best assist it in making the required determinations.

Was the Tribunal wrong in its interpretation of s 4?

Land Valuation Tribunal's decision

[20] Presumably because of the way in which the case was presented to them, the Tribunal's discussion of legal issues was a discussion in the context of the valuation methodologies put before it on behalf of the Crown and the lessees. However, when the Tribunal directed itself to the meaning of s 4, it upheld Mr Hodder's submissions for the lessees, accepting that the approach to the 1997 and 1998 Amendments should be that:

> [160] ...
>
> (a) The amendments permanently and adversely affected relevant leasehold interests.
>
> (b) The Tribunal compensation option provides a market value alternative to the second schedule compensation model.
>
> (c) Compensation is determined by the valuations set out in s 4(3) of the 1998 Amendment and the mathematical calculation, which then follows.
>
> (d) The "after" valuation requires a real valuation as at 1 January 2001.
>
> (e) The "before" valuation is necessarily hypothetical but maintains a "market value" focus and
>
> (f) S 4(1) is declaratory and does not impose a constraint on s 4(3).

[21] The Tribunal went on:

> [161] We prefer this interpretation of s 4 of the 1998 Amendment Act. We do not accept that the words "in the light of the enactment" in subsection (3)(b) mean that the second valuation has to be a hypothetical valuation as the respondents suggest. Nor do we accept that market value is limited to those matters contained in section 4(1) by the Tribunal quantifying and adding back into the "market value" the effect of other factors which may have depreciated the market value of the leases during the "shadow" period between 1993 and 1997 and the post amendment period to 2001. That is of course assuming that the respondents are able to persuade us that there are other such factors (and they have not). It is an approach contrary to

the plain meaning of the legislation. It also tends to introduce a concept of a market value for one purpose being different from a market value for another purpose involving the same property in each case. This would be contrary to the ratio in *Boat Park Limited v Hutchinson* to which we have earlier referred.

[162] We are of the view that this issue needs to be determined by considering what in reality the legislation is asking the Tribunal to do in order to arrive at the quantification of compensation. In doing this we have considered the purpose of the legislation. That purpose, as is set out in the provisions of s 3 of the 1997 Amendment, does not really give much assistance beyond the actual provisions of section 4 which contain the method of calculation. However, section 3 of the 1997 Amendment Act effectively lays the foundation for the scheme of the enactments and as far as we are concerned sets the basis of approach imposed upon us in section 4 of the 1998 Amendment Act. The lessees are to be compensated for what are fundamental changes to the terms of their perpetually renewable lease and the loss of substantial property rights.

....

[171] The difficulties, which have been presented to us on behalf of the respondents, must have been in the contemplation of the lawmakers. To meet that, a pragmatic solution consisting of the formula set out in the 1998 Amendment Act was adopted. We believe that the formula contained in subsections (3), (4) and (5) is specific. In particular we hold that subsection (3)(b) does require us to determine an actual market value as is submitted for on behalf of the applicants. Not, as submitted by the respondents, a market value which has further additions made to it in view of perceived, but not proven, depreciating factors outside those contained in section 4(1), nor a hypothetical market value based on an economic model which then has deducted arbitrary assessments for the depreciating value of the right of first refusal.

[22] We accept Mr Hodder's analysis of the essence of the Tribunal's reasoning as follows [references to paragraph numbers are to the Tribunal's decision]:

"(1) The purpose of the 1997 and 1998 Amendment Acts was to provide compensation for fundamental changes to the terms under which the lessees held tenure of their properties, involving the loss of substantial property rights: para 162.

(2) The Tribunal compensation option provides a "market value" compensation alternative to the Second Schedule (of the 1997 Amendment Act) compensation model: para 160.

(3) The substantial delay in the valuation date for this "market value" compensation is explicable by reference to a legislative

intention that the Tribunal have access to a body of post-Amendment enactment market evidence: paras 38, 161, 168, 169.

(4) Section 4(3)(b) of the 1998 Amendment Act - the "after" (or "with") valuation - required a "real" valuation based on comparable market transactions: paras 160, 161.

(5) The comparable sales can be applied, using Mr Larmer's [the principal valuer for the lessees] tenure discount approach, to the necessarily hypothetical "before" (or "without") valuation under section 4(3)(a): paras 42, 161.

(6) The comparable sales approach relied on by Mr Larmer had significant advantages over, and was more "valid" than, the investment model approach relied on by Messrs Burgess and Charteris [the principal valuers for the Crown], including

(a) incorporation of the significant effect of the right of first refusal ("ROFR") into the valuation without resort to a necessarily arbitrary adjustment by an "add on" sum: paras 155, 157, 159, 164, 165;

(b) avoidance of reliance on a "very difficult" exercise based on unimproved values (and "limited and unconvincing" evidence): para 121;

(c) avoidance of an excessive and cumulative number of intuitive assessments: para 174; and

(d) the availability of a credible cross-check by reference to Mr Crighton's [a supporting valuation witness for the lessees] investment model: paras 157, 166.

(7) Section 4(1) is declaratory, whereas sections 4(3) and 4(5) are the operative provisions which the Tribunal had to apply: paras 160, 161, 168, 172, 174.

(8) In any event, there were no factors other than those specified in section 4(1) proved to have caused the "after" valuation to be different from (and lower than) the "before" valuation: paras 156, 161, 164, 165.

(9) Accordingly, there was no reason to depart from the compensation levels derived from Mr Larmer's "before" and "after" valuations in relation to each of the "test" applications: para 176."

Argument for the Crown

[23] The essential argument for the Crown is that s 4(1) is the determinative provision of s 4 and more than explanatory or declaratory of Parliament's purpose. The submission for the Crown is that s 4(1) limits the Tribunal's jurisdiction to providing compensation for the three changes referred to in the provision. The Crown submits that this is supported by the sentences in the Court of Appeal's conclusions set out above:

> In terms of s4(1) the compensation is to be for the three listed matters only, and for nothing else. It cannot therefore be awarded for the effect of any alteration or proposed alteration to any other lease term.

[24] The submission for the Crown is that the remainder of the section is merely the mechanics as to how that operative provision is to be achieved and that the compensation can only be assessed for the three factors identified in s 4(1) however s 4 is approached. It is in particular submitted for the Crown that if the assessed value includes the effect of changes in the overall leasehold market or a perceived loss of perpetuity the purpose of the Act is not achieved. However, the Crown acknowledges:

> "This does not mean of course that the valuation needs to reflect only the calculated effect of rental changes because as the Court noted the Tribunal was to look beyond the exact financial effect and to make allowance for any effect of Government proposals relating to those three matters. This may also include uncertainties relating to actual rental levels if there was doubt about the rental rates which would be agreed or fixed at review date."

[25] Adopting this approach, the Crown goes on to submit that the Tribunal should have acknowledged that s 4(1) and the general purposes expressed in s 3 of the 1997 Amendment require the Tribunal to ensure that the value difference it was assessing represented only compensation for the changes set out in s 4(1). For the Crown it is submitted that approach is consistent with such statements as were made in Parliament upon the introduction of the 1997 Amendment, but the Crown accepts that such statements were not made by the Minister introducing the Bill.

[26] This central argument for the Crown underpins the whole of its remaining argument in respect of the Tribunal's approach to s 4 of the 1998 Amendment. It is because of that approach that the Crown says that its witnesses were entitled to justify their market values by an investment model assessment of before and after valuations to reflect the consequence of s 4(1) and not other possible effects upon values. It is unnecessary for present purposes to traverse the valuation methodology arguments which were introduced into the case. The appropriate methodology must flow from the statute and not dictate the meaning of the statute.

Argument for the lessees

[27] The essential difference between the argument for the lessees and the argument for the Crown is that, in the submission of the lessees, s 4(1) is explanatory and descriptive and that the operative parts of the section are s 4(2), (3) and (5).

[28] The lessees challenge the submission for the Crown that s 4(1) had primacy. In the submissions for the lessees there is nothing in s 4(1) which is inconsistent with or requires a reading down of the actual operative provisions. In support of this argument it is noted that the provisions of s 4(1) serve as a reminder that compensation is directed to the impact of the legislative changes "on the value of the leasehold tenure itself" but is not available for other matters which might have been claimed, for example injurious impact on a business or on adjoining land or on the individual lessees, either emotionally or financially.

[29] That this is so is, it is submitted for the lessees, is made clear by the Court of Appeal in its 1998 decision. There the Court of Appeal recognised that the compensation is for the listed matters and not for the effect of any alteration or proposed alteration to any other lease term. However, as the Court of Appeal went on its decision at 192,807:

> However, s 4(3)(a) requires the Tribunal to look beyond the exact changes to rent review, rent levels and assignment terms and requires it to make allowance for any effect of Government proposals relating to those three matters. Thus the effect of proposals from the Government having substantive and economic equivalence is to be taken into account in the Tribunal's assessment.

[30] For the lessees it is submitted that this approach is also consistent with the comparable provisions of the 1997 amendment, and, in particular, s 3(1)(e) and s 16(1), with there being no expectation that the compensation under Appendix 2 of the 1997 Amendment will solely address the matters which the Legislature has identified in the provisions of ss 3(1)(e) or 16(1) of the 1997 Amendment or s 4(1). The lessees emphasise that the Crown's approach would have s 4(1) limiting the scope of s 4(3), which would contradict the plain language and structure of s 4.

[31] It is submitted for the lessees that all of these matters were well understood by the Tribunal: in particular, in paragraphs 161, 168 and 171 to 174 of its decision, some of which are set out above. It is submitted the Tribunal was correct to reject any suggestion that s 4(1) meant that the section 4(3) "market values" could only be determined by isolating and concentrating on the three factors referred to in s 4(1).

[32] These submissions for the lessees are underpinned by the principles argued for by the lessees and upheld by the Tribunal set out in paragraph [20] above.

Discussion

[33] On this central issue we prefer the decision of the Tribunal and the argument for the lessees to the argument for the Crown. Section 4(1) provides that the Tribunal has jurisdiction to determine "in accordance with this section" the amount to be paid to the lessee by the Crown's compensation for the three matters identified in that subsection. Parliament has determined, therefore, that the compensation is to be fixed in accordance with the following operative subsections of s 4, namely subss (2), (3) and (5), all of which are clearly binding upon the Tribunal. The obligation upon the Tribunal is to comply with those operative provisions. Its obligation is not to substitute for those operative provisions an approach to what it regards as the appropriate compensation for the three matters identified in s 4(1) or some other approach. The dicta in the decision of the Court of Appeal are entirely consistent with that approach and with the decision of the Tribunal and the arguments for the lessees.

[34] To the extent that the Crown relies on the dicta in the decision of the Court of Appeal that compensation "cannot therefore be awarded for the effect of any alteration or proposed alteration to any other lease term" it is important to note that that is relating to the lease terms. The Court of Appeal immediately goes on to say that s 4(3)(a) requires the Tribunal to look beyond the exact changes. Thus the Crown can gain no assistance from the Court of Appeal's dicta.

[35] In determining the market value of the lessees' interest in the lease in accordance with the provisions of s 4(2)(3), it is for the Tribunal to determine the market value in accordance with valuation law. For the Tribunal's purposes that law is determined by the Court of Appeal in *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 as relied upon by the Tribunal. As the Court of Appeal determined in that case at 83-84:

> In the absence of a legislative direction or qualifying instruction to the contrary, the objective of a valuation is to assess the market value of the subject property at the effective date. The market value, or fair market value, is arrived at by determining what price the property would sell for on the open market under the normal conditions applicable in the market for the type and location of the property being valued. (See Jefferies (supra), ch 2-2.) Fundamental to this task is the willing seller/willing buyer principle. Thus, "market value" is defined in the New Zealand Institute of Valuers', Valuation Standard 1, in these terms:
>
> > "Market value is the estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller in an arm's-length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion."
>
> It follows that there cannot be a market value for one purpose and a market value for another purpose. The price for which the willing seller would sell the property to a willing but not over-anxious purchaser cannot vary depending on the purpose of the valuation. Market value remains the same irrespective of whether the valuation is required for mortgage lending purposes or for selling purposes or for buying purposes.

[36] What controlled the Crown's approach to s 4 was its view that the Tribunal is obliged to adopt an approach to market value which concentrated upon the provisions of s 4(1). This had led the Crown to the proposition that, because a

comparative sales approach as at 1 January 2001 in the light of the 1997 and 1998 Amendments might contain allowances for something other than the provisions of s 4(1), a different approach to market value based on an investment model was called for. This in turn led the Crown to have to submit that, because comparative sales between the passing of the 1997 Amendment and 1 January 2001 might contain allowance for something other than the provisions of s 4(1), the valuation under s 4(3)(b) must be purely hypothetical. Although it is accepted that valuations are normally on the basis of a hypothetical transaction, we prefer the more cogent and persuasive approach for the lessees that the valuation under s 4(3)(b) of the 1998 Amendment must be a realistic assessment of market value. We accept that, unless in a particular instance factors are identified which are not a result of the enactment of the 1997 and 1998 Amendments, it is appropriate for the Tribunal to treat the value as at 1 January 2001 as being a consequence of the factors referred to in s 4(1).

[37] The Crown resisted this approach but in our view had no justification for doing so. It has to be noted that the Tribunal under s 4(4) was entitled to take account of relevant valuation evidence arising after the commencement of the 1997 and the 1998 Amendments. In our view the Tribunal was entitled to take the view that s 4(3) required it to determine market value as at 1 January 2001 on a before and after basis in the way that it did.

[38] There is no ambiguity in s 4(2),(3) or (5), which required the Tribunal to enter upon an artificial valuation process for the purpose of addressing the components of s 4(1), when the Legislature specifically required the Tribunal to determine the matter in accordance with the provisions of s 4(2), (3) and (5).

[39] The Crown has put forward no argument and said nothing which persuades us that the Tribunal was wrong in any respect in its approach to the provisions of s 4 of the 1998 Amendment.

[40] We should note that there were also distinct subsidiary arguments raised for and against the Crown's approach on this primary issue which we have not found necessary to address. In particular, it is submitted for the lessees that the factors identified in s 4(1)(a), (b) and (c) of the 1998 Amendment must necessarily include

any consequences caused by such factors. The Crown took issue with that approach. It is not necessary to address it directly. The approach of the Tribunal on the central issue, which we support, automatically takes care of the lessees' subsidiary argument. The approach of the Crown would not do so. If it were necessary to decide this issue, then the subsidiary argument for the lessees has merit. After all, the intention of s 4 is to award compensation for the factors identified in s 4(1)(a), (b) and (c), which is inevitably directed to the consequences of those factors. It is because each of those factors has detrimental consequences for the lessees that Parliament has provided for compensation to be payable. If they did not have detrimental consequences, there would have been no provision for compensation. Parliament has not spelled out the detrimental consequences, leaving those consequences to be determined by the operative provisions of the section.

Second issue: If the Tribunal's approach to the 1998 Amendment was correct, was its determination of the relevant market values nevertheless wrong in fact?

The Decision of the Tribunal

[41] The Tribunal, which accepted Mr Larmer's evidence for the lessees, summarised it thus:

> [35] Mr Larmer's primary approach in determining the current market values for the various properties was to consider sales of both freehold and leasehold properties. He sought to establish relativity between freehold and leasehold transactions. To that end he analysed such relativity of sales between 1989 and December 1992 which may be defined conveniently as *pre shadow* transactions; and on the other hand such relativity of sales that have occurred since 1 January 1998 when the legislation was enacted. He referred to these as *post amendment* transactions. However, directly comparing sale prices of leasehold and freehold transactions might be misleading and therefore after deducting the value of structural improvements from similarly located parcels of land with similar physical and productive characteristics, a useful degree of uniformity may be established. This difference between the equivalent freehold land and leasehold land value was defined by him as *tenure discount*. From an analysis of these ratios or tenure discounts Mr Larmer sought to establish a relativity between the price paid for a leasehold property and the equivalence to freehold land.
>
> [36] In all calculations, Mr Larmer separated out the value of structural improvements and adopted the approach (as did the

respondents' valuers) that the value of these improvements remained constant. Two separate calculations were applied, one utilising the analysed data gathered for the pre shadow period, the other utilising the post amendment period data. He excluded from calculation all sales evidence from what he called the transitional period ie January 1993 to December 1997. In doing so, Mr Larmer contended that he was excluding:

a) Any sales that could have been influenced by the release of the Marshall Review and Framework for Negotiation in April 1993 and subsequent working group reports;

b) Amending legislation prior to the final enactment of the Maori Reserved Land Amendment Act 1998;

c) Factors referred to in the Court of Appeal decision which we are to exclude;

d) Other general factors which, while not necessarily accepted as being present may, if they did exist influence value.

[42] The Tribunal noted that this approach had the support not only of Professor Quigley, the economist called on behalf of the lessees, but Mr Gordon, the valuer retained by the lessor, and a Mr McKillop, a valuer for local banks, who had extensive experience of advancing funds to lessees of the West Coast leasehold lands.

[43] The Tribunal noted in respect of this approach:

> [156] Going back to the period in the early 1990s, the position which the lessees at that stage anticipated was that they would have continued as they had for many years simply applying leasehold discounts to freehold values to determine the purchase price of the leasehold properties. This state of affairs had continued for many years and there was nothing at that stage to suggest that it would not continue. This type of approach to valuation had applied regardless of the many fluctuations which have occurred over time in the business of farming. It is clear that any agitation from Maori as to tenure had come to the fore prior to this time and indeed was not confined to leasehold tenure but also to freehold tenure as agitation in other parts of the country had shown. This is adverted to in the evidence of Professor Quigley and Mr Gordon. We mention this because it is particularly material to which approach we are prepared to accept.

[44] Having fully discussed the evidence for the lessees and the Crown and the relevant law, the Tribunal concluded:

> [173] In conclusion therefore after careful consideration of the evidence adduced and the respective merits of the valuation methods proposed we are firmly of the view that the comparative market approach adopted by Mr Larmer is the most valid. It seems to us that it is the only method which can robustly meet the criteria set out in section 4 of the 1998 Amendment Act. We do not accept Professor Boyd's allegation of conceptual problems with this approach. The section clearly requires us to determine market value on a "before" and "after" basis; the difference being the lessee's interest in the lease and in turn the quantum of compensation. Mr Larmer's methods for determining the "before" and "after" market values are also supported by other valuers with extensive experience with the lands in issue. Indeed one of these, Mr Gordon, is the very valuer employed by the lessor. He unreservedly supports Mr Larmer's evidence.

[45] The Tribunal went on to reject the approach put before it on behalf of the Crown in the following language:

> [174] We consider that for the reasons stated, applying the investment or economic or financial model, as it has been variously called, other than as a secondary cross check is fraught with difficulty. This method appears to us to be contrary to the requirements of the formula contained in section 4 and at variance with sound valuation principles and standards. It endeavours to deal directly with the compensatable factors in section 4(1) rather than providing a true market value for the respective points in time. To adopt Mr Hodder's submission the consequence of this approach is an unreasonable "reading down" of the subsequent provisions. Even when dealing directly with those compensatable factors it cannot cope with all three and requires too many intuitive assessments as the evidence of Mr Burgess has shown. It then loses fairness as an appropriate and robust method of calculating the measure of compensation to which the applicants are entitled. In short we do not consider that the methodology and calculations submitted in evidence persuade us that it is a preferable method to the tenure discount method of Mr Larmer.

Submissions for Crown

[46] For the Crown it is accepted that, if the Court upholds the Tribunal's approach on the primary issue just discussed, as it has done, then it was open to the Tribunal to adopt a direct comparison method between valuations before and after, using current sales evidence as an indicator of value rather than an investment model approach. However, the Crown submits that the issue then is whether the Tribunal was correct to accept the valuations of Mr Larmer.

[47] Those valuations adopted a system known as the "tenure discount method", which was supported by Mr Larmer, Mr Gordon, and Mr McKillop. The Crown accepts that in ordinary circumstances in Taranaki such a practice has been adopted.

[48] However, it is submitted by the Crown that for the purposes of compensation assessment a method used for every-day valuation for sale or mortgage purposes may not be sufficiently robust. It is submitted that the tenure discount method is not a direct comparison method of valuation but rather is an indirect comparison method which involves a number of simulations, starting from a leasehold sale price, assessing two freehold values, and then concluding with the leasehold value. It is accepted that that does not render the method flawed but submitted that it does increase the need for the exercise of valuer judgement and reduce its accuracy.

[49] The Crown's criticism of the approach is that in the before situation the range of discounts used is too wide to be reliable. In the Crown's submission it also has to be assumed at 1 January 2001 that there has been no change in general leasehold market factors since 1990 to 1993, despite the fact that up to one half of the current lease term had expired. It is submitted that Mr Larmer was forced to rely on outdated sales evidence from the 1990-1993 period and assume that the evidence would be equally applicable to 2001. It was noted that Mr Larmer undertook no cross-check of the pre-change valuation.

[50] The Crown criticises the assumption of tenure discounts in respect of both the before and after situation. The Crown submits that in respect of the post-1998 situation there was a relative paucity of sales, 23 in all, upon which Mr Larmer could draw, and that the correlation between the tenure discount adopted and the directly comparable sales evidence is not great.

[51] Accordingly, the Crown submits that there are necessarily doubts about the validity of the tenure discount method in the context of a compensation case and that these can be avoided by placing primary reliance, as the Crown did, on an investment approach to valuation.

[52] The Crown accepts that, because of the way the case was presented to the Tribunal, it is difficult to argue about the details of Mr Larmer's valuations both before and after, if it is considered that a tenure discount method is the appropriate way to assess the value.

Arguments for lessees

[53] For the lessees it is submitted that there is no reason why this Court should interfere with the Tribunal's adoption of Mr Larmer's valuations. The Tribunal had the advantages, as the trial Tribunal, of assessing the cogency and credibility of the lessees' witnesses, which it preferred to that of the Crown witnesses. The lessees' witnesses had the benefit of local knowledge and experience. There is thus no basis for this Court to interfere with the approach adopted.

Discussion

[54] The Crown simply has not satisfied us that there is any basis at all for this Court to interfere with the approach of the Tribunal in its adoption of the evidence for the lessees given by Mr Larmer based upon the customary methods of determining market value in respect of dairy farms in the Taranaki area. Critically that approach was supported by that of Mr Gordon, the lessor's valuer and Mr McKillop, an experienced valuer for mortgagees

[55] We remind ourselves that in *Boat Park* the Court of Appeal made clear that there could be only one valuation of market value. The Crown accepts that the method adopted by Mr Larmer, with the support of the other valuers, was the one used for every-day valuations for sale or mortgage purposes but suggests it may not be sufficiently robust for the purposes of compensation assessment. That was entirely a matter for the Tribunal. The Tribunal was entitled to prefer, as it did, the approach of the lessees' valuers to that put forward on behalf of the Crown.

[56] It is always possible after the event to be critical of any valuation, as it necessarily involves subjective exercises of judgment. However, none of the criticisms advanced by the Crown of the approach by Mr Larmer is such that this Court could contemplate determining that the Tribunal was wrong in accepting his

approach, backed as it was by both the lessors' valuer and a further independent valuer. When the thrust of the Crown case relied upon an investment model approach rather than a comparative sales approach, it was understandable that the Tribunal, when it put such evidence to one side, accepted the lessees' evidence. It could not be expected to then enter upon a detailed consideration of differences between the valuers in respect of independent properties based upon other workings by the Crown valuer.

[57] We are satisfied that it was entirely open to the Tribunal to accept, as it did, the tenure discount method adopted by the lessees' valuers as being a tenable approach to its obligations under s 4.

Third issue: If the Tribunal's interpretation of the 1998 Amendments was incorrect, was its determination of the relevant market values nevertheless justifiable in fact?

[58] We have already decided that there was no error of law on the part of the Tribunal, but it is preferable that we go on to deal shortly with what the position would have been if we had been of a different view on the primary issue of law. As Mr Hodder in his final submissions noted, the Crown's approach on the appeals was really predicated on two propositions, namely,

> 1. that the approach of the Tribunal was flawed as it meant that the compensation awarded by it might include allowances for matters other than the three factors specifically referred to in s 4(1), and
>
> 2. to avoid the risk that the valuation methodology accepted by the Tribunal might provide compensation for factors other than those in s 4(1), it was incumbent upon the Tribunal to adopt the investment model approach of the Crown's valuers and professional advisers.

We deal with each of these points separately.

Did the Tribunal's approach result in it compensating the lessees for factors other than those specified in s 4(1)?

[59] It was implicit in the submissions for the Crown that that might be the case. The submissions for the Crown worked upon the premise that there was no evidence that the difference in values relied upon by the lessees did not include factors other than those referred to in s 4(1) and that therefore the decision of the Tribunal was inevitably flawed. The essence of the submission was that, when there was no evidence either way, it was not open to the Tribunal to infer that the approach of Mr Larmer and of the other valuers for the lessees necessarily excluded all factors other than those referred to in s 4(1). In particular, it was submitted for the Crown that there was a real risk that it included a provision for an "effective loss of perpetuity". This submission was made in reliance upon certain evidence from Mr Gordon. The Crown goes on to extrapolate from that evidence that the compensation awarded by the Tribunal must contain an allowance for a loss of perpetuity in respect of the leases when that in fact has not occurred and was not one of the factors under s 4(1).

[60] With all respect to the submissions for the Crown, we are entirely satisfied that more has been read into Mr Gordon's evidence than was intended. It has been unnecessary for the purposes of this judgment to refer in detail to the consequences of the changes resulting from the factor referred to in s 4(1)(c), namely the conditions imposed by the 1997 Amendment on the assignment of the lessees' interest in the lease. In the simplest terms it is now impossible for a farm to necessarily remain in a family as the 1997 Amendment provides a mechanism by which the lessor may within two generations purchase back the leasehold interest. We have no doubt that that is all Mr Gordon was referring to. The simple fact is that the lease can no longer be handed down with certainty within the family from generation to generation. That comes directly within the provisions of s 4(1)(c).

[61] In any event, we regard the Crown's submissions as flawed. The reasons are twofold. First, as the Crown acknowledges, Mr Larmer, despite the legal submissions for the lessees, approached the matter upon the basis that the value difference to be determined by him related only to the effect of the three factors set out in s 4(1) and it was implicit in his evidence that no other factor impacted upon

his valuation. That evidence was supported by Mr Gordon and Professor Quigley. The Tribunal found as a fact that there were no factors other than those referred to in s 4(1) which affected the relevant valuations after the proposing and passing of the legislation. The Tribunal accepted Mr Larmer's assumption

> [15] ... that any adverse effect from 1993 to 1997 by proposals other than the actual legislative changes would be expected to have worked its way out by the expiry of the three year period to 1 January 2001. Certainly the respondents did not argue otherwise in this regard. We assume, in the absence of such evidence, that there are no adverse effects on value from announced proposals which were not finally included in the legislation. The issue which was the subject of some evidence and substantial dispute between the valuers during the course of the hearing was whether there were additional adverse effects on value from what we shall refer to as general, social and commercial considerations arising during the period from 1993 to 1 January 2001.

[62] The Tribunal subsequently made clear the Crown had been unable to persuade it that there were other factors which had affected the values subsequent to the Government proposals in 1993 and specifically rejected the evidence for the Crown to that effect. The Tribunal preferred the evidence of the lessees in respect of such claims by the Crown and found that the factors relied upon by the Crown were not proved "to have operated on values beyond the legislative changes".

[63] Thus the Tribunal has made findings of fact, as it was entitled to do, negating not only the Crown's supposition that in the absence of evidence that there might have been other factors affecting values other than those within s 4(1) but also the suggestion there were other factors and found that there were no such factors.

[64] Secondly, and in any event, the submission for the Crown on this point relies upon an underlying supposition that the onus was upon the lessees to establish that the market values upon which they relied were affected by no other factors than those in s 4(1). We consider the Tribunal was fully entitled to do as it did and accept that in the absence of evidence that there were other factors it could properly infer that the effect of other factors was purely conjectural and could be disregarded. In other words, in the absence of any probative basis for suggesting that there were factors other than those in s 4(1) which affected the difference in values, the Tribunal was entitled to infer that there were none. The Crown approach depends upon the

requirement that the Tribunal conjecture or speculate that there might be other factors. There can be no such requirement of the Tribunal. Rather it was entitled to proceed upon the basis that in the absence of evidence to the contrary there were no other factors affecting value.

[65] The Crown's argument under this head relied to some extent upon the fact that it appeared that in the 1993 to 1998 period leases sold at more favourable prices than in the 1998 to 2001 period. From this the Crown asked the Tribunal and then this Court to assume that there had to be other factors affecting the sale prices other than those contained within first the Government proposals and then the 1997 and 1998 Amendments. Clearly this is a non sequitur. It was entirely open to the Tribunal to adopt the approach that it did. Until the 1997 and 1998 Amendments became law, prospective purchasers could well have had more confidence as to the possible outcome of the Government's proposals than prospective purchasers after the Amendments had been enacted. That view is reinforced by evidence from the lessees as to the effect of giving the lessor the first right of refusal to purchase the leases. Particularly in an industry such as the dairy farming industry that could result in a depression of values which would not necessarily crystallise until after it became law.

[66] Thus, even if we had been of the view that the Tribunal had approached s 4 incorrectly in law and that the proper approach was that adopted by the Crown, we would not have been prepared to set aside the decision of the Tribunal upon the basis that its decision may have encompassed factors extraneous to those referred to in s 4(1). For the reasons already given, it is clear that the Tribunal, in making its valuation, was not assessing any factors other than those referred to in s 4(1) and not awarding compensation for extraneous factors.

Was the Tribunal obligated to accept an investment model approach to the market valuations required of it under s 4(1)?

[67] The Crown's approach to the use of an investment model was based upon the proposition that Mr Larmer's approach could not appropriately filter out factors other than those contained within s 4(1). Its approach was that there could be no reality about either of the valuations under s 4(3) and that both were inevitably

hypothetical and that accordingly the investment model approach was the right one for evaluating the effects of the factors in s 4(1). The whole of the Crown's case was postulated upon this basis before the Tribunal. Leaving aside whether the Tribunal and this Court are right in respect of the meaning of s 4, it is apparent from what we have already said that in approaching the valuations under s 4(3) the Tribunal in fact looked at whether they made provision for factors other than those contained within s 4(1) and were satisfied that the lessees' approach was preferable to the Crown's approach.

[68] We are of a similar view. So long as there was a cross-check on the approach of Mr Larmer, and there was, both by him and Mr Crighton, his approach was inevitably preferable to that of the Crown. It is true the Crown argue that there was an insufficient cross-check of Mr Larmer's approach, but that is a secondary issue. We consider the fundamental proposition to be that the Tribunal was fully entitled to accept that the methodology normally applied in Taranaki in respect of the valuation of dairy farms and dairy farm leases was entirely preferable to an investment model methodology, which, although it may provide a cross-check, has little application in normal circumstances to rural valuations. There may be exceptions in circumstances where there is high capital investment in a particular rural holding, where the position is more comparable to high capital investment on urban properties. However, in rural situations, where land values are often more significant than the value of structural improvements, it can have little real application. That is particularly so in respect of farmers. Their decisions to buy and sell are not necessarily investment driven. Thus it is entirely preferable that where, as here, there is an established way within a particular rural industry for determining the market value of the properties used for that industry that that approach should be adopted in the first instance.

[69] The problems of the investment model when applied to the cases in hand were exemplified by the artificiality of the attempts by the Crown's principal valuer to relate the results to his assessments of value otherwise obtained. We do not need to go into the detail of this aspect of the matter, but the fact remained that the model which the Crown relied upon gave rise to more problems than it solved. The approach of Messrs Larmer, Gordon and McKillop was firmly based in long-

established practice. The Crown's suggestion that it was not robust enough for the assessment of compensation under s 4, when it had been robust enough to deal with all transactions in the market over a substantial period, is on its face wrong. Regardless of the correct meaning in law of s 4, the Tribunal was fully entitled to accept Mr Larmer's approach, supported as it was by the valuers with a knowledge of the area, and to reject the investment model methodology as supported by the Crown's witnesses. There was nothing in s 4 which required the Tribunal to adopt the investment model methodology of valuation.

[70] Thus, even if we were wrong in our approach to s 4, we would not have regarded it as following that the Tribunal should have adopted an investment model methodology. Rather the contrary. It simply has not been shown that the values adopted on behalf of the lessees did include any factor which was not to be taken into account under s 4.

General

[71] It appeared to be common ground that if we had been satisfied that there was an error of law and an error by the Tribunal in its assessment of market values which required any reconsideration of the valuations then it would have been necessary for a reference back to the Tribunal. We agree with that approach. It was apparent from the argument before us that if there was a determination that the approach of the Tribunal was wrong in law and that either as a consequence or independently the Tribunal had adopted the wrong approach to the before and after valuations it seemed to us inevitable that there would need to be a reference back to the Tribunal rather than this Court operating as a decision-maker of first instance. That is particularly so in the present case where not only might there be other evidence which the parties would want to see considered but the ultimate decision has substantial precedent value for all members of the Association and the Crown.

Decision

[72] The appeals are dismissed

Costs

[73] The lessees are entitled to one set of costs among them, which are fixed in accordance with category 3 of the Second Schedule and column B of the Third Schedule to the High Court Rules, together with the reasonable disbursements of each of the lessees. In the event of disagreement, such costs and disbursements are to be fixed by the Registrar.

Signed at 9.30 a.m. ~~p.m.~~ this 5th day of November 2001

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