Mangatu Incorporation v Valuer-General - [1996] 2 NZLR 683

High Court, Gisborne
25, 26 March; 19 June 1996
Barker J, Mr IW Lyall

Maoris and Maori land -- Valuation of land -- Definition of "land value" in the Valuation of Land Act 1951 -- Whether status as "Maori freehold land" under the Te Ture Whenua Maori Act 1993 diminishes the normal valuation of the owner's estate or interest in the land -- Te Ture Whenua Maori Act 1993, ss 2, 17, 129, 131, 136, 146, 147, 148, 151, 152, 153, 154, 160 and 164 -- Valuation of Land Act 1951, ss 2 and 20.

The appellants owned certain rural land which was "Maori freehold land" under the Te Ture Whenua Maori Act 1993 (the 1993 Act). That Act imposed a number of restrictions on the sale of Maori freehold land, although it also included a mechanism for lifting the restrictions and converting the land to general land. Pursuant to the Valuation of Land Act 1951 (VLA), the Valuer-General valued the land for rating purposes on the standard applicable to non-Maori freehold land available for sale on the open market, without making any deduction for the effect of the 1993 Act. The VLA provides that rural land is assessed for rating purposes on its "land value", which is defined as the owner's estate or interest in the land. The Land Valuation Tribunal at Gisborne (LVT) disallowed the appellants' objections to the valuation, deciding that the constraints in the 1993 Act did not constitute a change in definition in the VLA and it could therefore be disregarded in settling land value. It was of the view that where it was possible to sell land without restriction then existing constraints did not affect the value of the land, applying what it considered to be binding authority to that effect in Thomas v Valuer-General [1918] NZLR 164. The appellants appealed against that decision. The essential question in the appeal was whether the 1993 Act diminished the normal valuation of the owner's estate or interest in the land under the VLA.

Held:

(allowing the appeal) 1 The 1993 Act was undoubtedly part of the general law of New Zealand. In principle there was no objection to recognising the reality that in some situations the Act would affect the marketability of land and thus its value. The effect of the 1993 Act was such that it would be unjust to ignore the reality of the owners' position. The 1993 Act must be taken into account by valuers when fixing land value under the VLA (see p 695 line 24, p 695 line 30).

2 Under the statutory formulation of the VLA, value did not depend on an objective assessment of the worth of the land, but on the question of what a reasonable purchaser would pay for the owner's estate in the land (ie the marketable value of the estate) (see p 693 line 29).

Re Hutt Park and Racecourse Board (1907) 10 GLR 12 and Valuer-General v Ormsby (1907) 27 NZLR 44 applied.

3 The 1993 Act must be seen as a significant barrier to alienation. It indicated a legislative direction to "close the gate" on sales of Maori land. Whilst the precise

effect of the Act would not be clear until the Act was applied to specific factual situations over time, the policy of the Act was sufficiently clear. It was reasonable to assume that alienation of Maori land would present significant practical difficulties in the future. The presence of a statutory mechanism for alienation did not mean that the mechanism would be able to be employed with ease or regularity. The LVT placed undue weight on the existence of the statutory mechanism for alienation. Furthermore it could not be said that a buyer of Maori freehold land would necessarily receive an absolute fee simple. The buyer might remain bound by the land's status (see p 694 line 16, p 694 line 27).

4 The restrictions contained in the 1993 Act could not fairly be described as "personal to the owner". While the Act did prescribe a mechanism whereby the restrictions are lifted, there was a reasonably clear legislative direction to preserve the status of Maori land. There was thus some likelihood that land would continue as Maori freehold land even after

sale. The 1993 Act was an Act with wide application throughout the country, and could not be compared to restrictions imposed under a private deed of trust. It was one thing to say that a hypothetical fee simple unencumbered and subject to no condition restricting enjoyment or use must be taken into consideration and another to say that laws of the state which affect the value of land are not to be taken into consideration (see p 694 line 48, p 695 line 1, p 695 line 12).

Royal Sydney Golf Club v Federal Commissioner of Taxation (1955) 91 CLR 610, 624; [1955] ALR 479, 485 applied.

Gollan v Randwick Municipal Council [1961] AC 82; [1960] 3 All ER 449 (PC) and Thomas v Valuer-General [1918] NZLR 164 distinguished.

5 Given the varied nature of the land in question and the varied effect of the 1993 Act, it was not appropriate to make a finding on the reduced value of the land. The precise effect of the 1993 Act upon land value must be determined by valuers on a case-by-case basis. What the valuer must do in each case was to assess the precise effect of the 1993 Act on the particular piece of the land. In practical terms it would very likely mean starting with a valuation as if the land could be bought on the open market, and then allowing a deduction for the alienation restrictions. The deduction would vary in amount depending on the extent of the restrictions, the likelihood of Maori Land Court approval to the sale, and the nature of the property (see p 695 line 32, p 695 line 43).

Other case mentioned in judgment

Cleave, Re (Maori Appellate Court, Tai Tokerau District, AP 1995/5,22 May 1995).

Grace v Grace [1995] 1 NZLR 1 (CA).

Johnsonville Town Board, Re (1907) 27 NZLR 36.

Proprietors of Matauri X v Valuer-General [1981] 2 NZLR 585.

Te Runanganui o Te Ika Whenua Inc Society v Attorney-General [1994] 2 NZLR 20 (CA).

Valuer-General v Treadwell [1969] NZLR 320.

Valuer-General v Trustees of the Christchurch Racecourse (1995) NZ Valuer's Journal 53.

Wanganui Racecourse Trustees and Wanganui Jockey Club v Valuer-General (1982) NZ Valuer 25, 232.

Appeal

This was an appeal by owners of Maori freehold land against a decision of the Land Valuation Tribunal disallowing objections to the valuation of land without making any deduction for the application of the Te Ture Whenua Maori Act 1993.

Kenneth Palmer and Heemi Taumaunu for the appellant.

Camilla Owen for the respondent.

Cur adv vult

JUDGMENT OF THE COURT

: This appeal against a decision of the Land Valuation Tribunal at Gisborne given on 10 March 1995, raises novel questions concerning the effect of the Te Ture Whenua Maori Act 1993 (the 1993 Act) on the valuation of Maori freehold land for rating purposes. After hearing evidence and submissions, the tribunal had disallowed 12 objections to the valua-

tion of land with a total area of 73,007 hectares owned by various Maori interests. The Valuer-General had valued the bare land owned by all the objectors at $40.295m as at 1 September 1993.

The land is predominantly East Coast hill-country farmland within the catchment basis of the Waipaoa River, extending south to the Whareratas, north to Tolaga Bay and west to the Ureweras. In addition, there are 300 hectares known as the Awapuni blocks, on the site of a lagoon on the coastal fringe of Poverty Bay and on the south-western outskirts of Gisborne city. The Awapuni land is used for both agricultural and horticultural purposes.

The appellants do not contest that the valuations represent appropriate bare land values, if the correct standard of valuation applicable were that pertaining to non-Maori freehold land available for sale on the open market. The objectors hold the land in a number of different modes. Some objectors, including the **Mangatu** Incorporation are Maori incorporations formed under the 1993 Act or its predecessors. Some are trustees appointed by the Maori Land Court (MLC); others are individuals recorded by the MLC as part-owners with defined shares in particular blocks of land.

The lead appellant, **Mangatu** Incorporation (**Mangatu)** has 3650 individual shareholders with a total shareholding of 876,000 shares, mostly in small holdings. Its largest single shareholder owns 15,000 shares; only seven shareholders own more than 8000 shares.

All the land the subject of the objection is "Maori freehold land" being one of six categories of land listed in s 129(1) of the Act. In the Gisborne district, as in many other districts throughout the nation, rural land is assessed for rating purposes on its "land value" as defined in s 2 of the Valuation of Land Act 1951 (VLA) thus:

> . . . in relation to any land, means the sum which the owner's estate or interest therein, if unencumbered by any mortgage or other charge thereon, might be expected to realise at the time of valuation if offered for sale on such reasonable terms and conditions as the bona fide seller might be expected to impose, if no improvements . . . had been made on the said land.

The essential question in this appeal is whether the 1993 Act diminishes the normal valuation of the "owner's estate or interest in the land" in the above definition. Allowing the appeal could have ramifications throughout the country for other owners of Maori freehold land, for local authorities and for other ratepayers in the Gisborne district. If the Court sustains the 30 per cent discount off the $40.295m land value (as sought by the appellants), then, presumably, there will have to be some redistribution of the rating burden amongst the other ratepayers in the district.

Tribunal hearing

At the hearing before the tribunal, the appellants called five witnesses. The first was Mr Ria, a kaumatua of the Rongowhakaata tribe -- one of three tribes which are tangata whenua in the Poverty Bay region, known to Maori as Turanganui-a-Kiwa. He closely identified with the Awapuni lagoon which, for

him and the Kaumatua Council of Turanganui-a-Kiwa, has special ancestral status. In Mr Ria's view, the Awapuni land should never be sold because of its cultural and spiritual significance to past, present and future generations of Maori. In cross-examination, he stated his awareness of possible negotiations with an overseas interest to sell or lease some of the farmland subject to the objection.

Mr Tamaruinga Brown, the finance manager for Te Runanga Turanganui-a-Kiwa, supplied details of the Runanga which employs 50 full-time staff and has an economic base of $7m. He provided the tribunal with some demographic background; there are approximately 5157 people of Turanganui-a-Kiwa descent; 51 per cent reside within the region; 82 per cent aged 15 and over, have incomes under $30,000; 41 per cent have incomes of under $10,000. He considered that, if land were offered for sale to members of his incorporation, they would generally not have the resources to purchase the land at market rates. He gave information on the value of shares in the **Mangatu** Incorporation. Shares had traded recently at between $7 and $7.50. This figure contrasted with a valuation undertaken by accountants at $8.70 and an alleged balance-sheet valuation of $63. The selling price of around $7 was based on a return of 10 per cent.

The third witness was Mr M J McGregor, the sections officer (Alienations) at the Te Tairawhiti MLC. This witness outlined certain provisions in the 1993 Act, emphasising its thrust to retain Maori land in Maori ownership -- a concept which will be discussed later in this judgment. He outlined the sequence of events when Maori freehold land is sought

to be sold; the owners of at least 75 per cent of the shares of their legitimate proxies must give consent; those owners proposing to dispose of their interests in land must give a right of first refusal to the "preferred alienees" as defined in the 1993 Act (to be referred to later in the judgment). He confirmed that the average time taken by the MLC to confirm a sale after a positive meeting of owners is six months, depending on whether there have been any objections. Often, the quorum requirements for owners' meetings are not met; also, a substantial unclaimed pool of dividends can complicate the process of arranging meetings of individual shareholders.

Mr Andrew Warren, a registered valuer, took the view that the constraints under the Act meant that in valuing Maori freehold land, a discount of as high as 52 per cent should be applied to the normal "land value"; he opined that the range of potential buyers was small. In cross-examination, he acknowledged that there was no actual sales evidence to support his contentions. The tribunal rejected Mr Warren's assumptions which were not used by the appellants to support their appeal in this Court.

Finally, a Mr Harper, a chartered accountant with considerable experience as a share valuer of Maori incorporations, assessed the share trading price of **Mangatu** at $7.50; although a balance-sheet calculation might suggest $63, he referred to an alternative valuation prepared by his firm of $25.32. No evidence of **Mangatu's** balance sheet was given to the tribunal, although Mr Harper noted indebtedness of $3m and assets of $59m.

The tribunal held that neither the current share trading price of shares in **Mangatu** nor any of the other valuations of the share price was of help in assessing the land value; with this view, we agree. Without having the full picture of **Mangatu's** assets (including land other than Maori freehold land and other assets) its liabilities and its income and expenditure, we cannot see how evidence of share sales can be helpful to the task of assessing the value of its land.

Mr Clissold, managing district valuer in Gisborne for the Valuation Department, was called by the respondent. He had 29 years' experience in and a comprehensive knowledge of properties in the Gisborne district. He distinguished planning type restrictions from the restrictions imposed by the 1993 Act on Maori freehold land; he claimed that "the restrictions relate to the way in which the owners deal with their land and not to the interests in the land as such".

This witness acknowledged that the general policy behind the 1993 Act was to encourage the retention of ownership by Maori of their land; he considered that, whilst this object might well reduce the likelihood of Maori freehold land being sold, it did not reduce the value of the interest of the owners in the land. He was aware that the 300 hectare Awapuni land was originally a lagoon and an old riverbed which suffered from occasional ponding and salt problems. He was aware of the complex background relating to the beneficial ownership of the Awapuni land which is farmed by **Mangatu** on behalf of owners as yet to be ascertained. Mr Clissold was cross-examined on various legal authorities. Neither his view nor that of any other witness on the law is helpful to us.

Relevant legislation

The 1993 Act came into force on 1 July 1993. It will be necessary for a proper understanding of this appeal to reproduce first its long title and then s 2.

> An Act to reform the laws relating to Maori land in accordance with the principles set out in the Preamble to this Act
>
> Na te mea i riro na te Tiriti o Waitangi i motuhake ai te noho a te iwi me te Karauna: a na te mea e tika ana kia whakautia ano te wairua o te wa i riro atu ai te kawanatanga kia riro mai ai te mau tonu o te rangatiratanga e takoto nei i roto i te Tiriti o Waitangi: a, na te mea e tika ana kia marama ko te whenua he taonga tuku iho e tino whakaaro nuitia ana e te iwi Maori, a, na tera he whakahau kia mau tonu taua whenua ki te iwi nona, ki o ratou whanau, hapu hoki, a, hei whakamama i te nohotanga, i te whakahaeretanga, i te whakamahitanga o taua whenua hei painga mo te hunga nona, mo o ratou whanau, hapu hoki: a, na te mea e tika ana kia tu tonu he Koti, a, kia whakatakototia he tikanga hei awhina i te iwi Maori kia taea ai enei kaupapa te whakatinana.
>
> Whereas the Treaty of Waitangi established the special relationship between the Maori people and the Crown: And whereas it is desirable that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Maori people and, for that reason, to promote the retention of that land in the hands of its owners, their whanau, and their hapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu: And whereas it is desirable to maintain a Court and to establish mechanisms to assist the Maori people to achieve the implementation of these principles.
>
> **2. Interpretation of Act generally** -- (1) It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the principles set out in the Preamble to this Act.
>
> (2) Without limiting the generality of subsection (1) of this section, it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates

and promotes the retention, use, development, and control of Maori land as taonga tuku iho by Maori owners, their whanau, their hapu, and their descendants.

(3) In the event of any conflict in meaning between the Maori and the English versions of the Preamble, the Maori version shall prevail.

The Act continues the MLC as a Court of Record and defines precisely its jurisdiction and objectives. Section 17 is important:

17. General objectives -- (1) In exercising its jurisdiction and powers under this Act, the primary objective of the Court shall be to promote and assist in --

(a) The retention of Maori land and General land owned by Maori in the hands of the owners; and

(b) The effective use, management, and development, by or on behalf of the owners, of Maori land and General land owned by Maori.

(2) In applying subsection (1) of this section, the Court shall seek to achieve the following further objectives:

(a) To ascertain and give effect to the wishes of the owners of any land to which the proceedings relate:

(b) To provide a means whereby the owners may be kept informed of any proposals relating to any land, and a forum in which the owners might discuss any such proposal:

(c) To determine or facilitate the settlement of disputes and other matters among the owners of any land:

(d) To protect minority interests in any land against an oppressive majority, and to protect majority interests in the land against an unreasonable minority:

(e) To ensure fairness in dealings with the owners of any land in multiple ownership:

(f) To promote practical solutions to problems arising in the use or management of any land.

One of the categories of land under s 129 of the 1993 Act is "Maori freehold land"; this status attaches to "Land, the beneficial ownership of which has been determined by the Maori Land Court by freehold order". The other categories of land do not need to be set out. Under s 131, the MLC has jurisdiction to determine and declare by "status order" the particular status of any land. The MLC has power under s 136 to change the status of Maori land owned by not more than ten persons where various conditions have been satisfied.

Section 146 provides that no interest in Maori freehold land may be alienated other than in accordance with the Act. Section 147 defines the ability of owners holding under various forms of tenure to alienate Maori freehold land. Section 147(2) gives the right of first refusal of any Maori freehold land to prospective purchasers, donees or lessees who belong to one or more of the "preferred classes of alienee, ahead of those who do not belong to any of those classes."

This restriction does not apply to any alienation by way of lease effected by a Maori incorporation or by the trustees of a trust holding Maori land constituted under Part XII of the Act, or to any alienation by way of mortgagee sale (see s 147(3)). Under s 148, an owner of an undivided interest in any Maori freehold land may alienate that interest only to a person who belongs to one or more of the preferred classes of alienee; an undivided interest in Maori freehold land cannot be sold on the open market.

Alienation of any interest in Maori freehold land must be approved by the MLC by way of an application for confirmation under s 151. "Alienation" is comprehensively defined and includes mortgaging and leasing.

Under s 152, the MLC must not grant confirmation unless satisfied about certain specific matters listed in the section. These restrictions are concerned both with formalities of process and with concerns such as breach of trust and undue aggregation of farm land. More significant restrictions on the MLC's discretion are set out in ss 153 and 154 now quoted:

153. Court's general discretion -- (1) Subject to section 152 of this Act, on an application for confirmation made under section 151 of this Act, the Court may in its discretion, after taking into consideration the matters specified in section 154 of this Act, --

(a) In any case, grant or refuse confirmation; or

(b) In the case of a resolution of the assembled owners, decline to determine the application and direct the

recalling of the meeting of owners at which the resolution was passed.

(2) Where the Court grants confirmation, it may do so on such terms and subject to such conditions as it thinks fit.
(3) Before granting confirmation, the Court may, with the consent of the parties, vary the terms of the instrument of alienation or resolution.
(4) No appeal to the Maori Appellate Court shall lie from a direction for the recall of a meeting given by the Court under subsection (1)(b) of this section.

154. Grounds on which Court may refuse confirmation -- Without limiting the general discretion conferred by section 153 of this Act, the Court may decline an application for confirmation if the Court is satisfied that the alienation would not be consistent with the objects of this Act, having regard to the following matters:

(a) In all cases:
  (i) The historical importance of the land to the alienating owners or any of them, and their historical connection with it:
  (ii) The nature of the land, including its location and zoning, and its suitability for utilisation by the owners or any of them:
  (iii) The question of whether or not the owners have had an adequate opportunity to give the proposed alienation proper consideration:
  (iv) The question of whether or not the owners have demonstrated a proper assessment and understanding of the present value and the future potential value of the land:
  (v) The application by the owners of the principles of ahi ka:

(b) In the case of an alienation that is opposed by some of the owners:
  (i) The respective interests of the supporting and opposing owners:
  (ii) The size of the aggregate share of the land owned by the opposing owners compared to the size of the aggregate share owned by the supporting owners:
  (iii) The number of opposing owners compared to the number of supporting owners.

A certificate of confirmation by the Registrar of the MLC in terms of s 160 is required for leases and mortgages of Maori freehold land. The section does not apply to sales should a transfer of interest be approved by MLC; then, a vesting order can be made under s 164.

Part IX of the 1993 Act deals with the powers of assembled owners to approve proposals to alienate "Maori freehold land" and "general land owned by Maori".

The Maori Assembled Owners Regulations 1995 (SR 1995/83) deal with the detail of meetings and notices. Part XI of the Act deals with leases, Part XII with trusts. The Court can appoint custodian trustees to hold Maori land for numerous owners. Some of the appellants are in this category. Part XIII deals with Maori incorporations which status is held by some of the present appellants including **Mangatu.**

Since the tribunal's decision, the Court of Appeal in Grace v Grace [1995] 1 NZLR 1, 5 has affirmed that the policy of the 1993 Act in terms of the preamble cited above is to promote the retention of Maori freehold land in the hands of its owners, their whanau and their hapu. In Te Runanganui o Te Ika Whenua Inc Society v Attorney-General [1994] 2 NZLR 20, 27 the Court of Appeal spoke of the permeating influence in New Zealand law of the Treaty of Waitangi.

Counsel for the appellant correctly submitted that, after many years during which a function of the MLC was to monitor the disposal of Maori freehold land,

that Court was now directed by the 1993 Act effectively to "close the gate" on sales outside the whanau and hapu, except in special circumstances. Counsel tendered a selection of recent decisions of MLC Judges. The attitude clearly demonstrated by these cases is that the wishes of a majority of owners are not necessarily decisive. "Preferred classes of alienees", as defined under the 1993 Act have priority when interests in Maori freehold land are to be sold. Maori reserved land or investment land has a different status and different considerations may apply to its alienation.

The Maori Appellate Court in Re Cleave (Maori Appellate Court, Tai Tokerau District, AP 1995/5, 22 May 1995) upheld the refusal by a single MLC Judge to grant a status change application from Maori freehold land to general land. This application has been brought by a sole owner of Maori freehold land under s 136 of the 1993 Act. The Court was not satisfied that the appellant had met one of the cumulative tests set out in s 136, ie that the land could be managed or utilised more effectively as general land. The judgment went on to reproduce ss 2 and 17 of the 1993 Act and then opined obiter:

"We are of the view that these two provisions along with the preamble of the Act had placed a clear requirement upon the Court to recognise that the retention of Maori land its utilisation for the owners their whanau and hapu must at all times be a primary matter to be taken into account. We suggest that where there is a discretion to be exercised the restrictions and requirements of these provisions should have primacy and unless it is clear that these restrictions and requirements are ousted, they must be given precedence."

The Maori Appellate Court then went on to hold that the MLC should not proceed to hear a s 136 application without involving the "preferred class of alienees".

The definition section of the 1993 Act defines this class as follows. It will be noted that in respect of an incorporation, there is an additional class of alienees:

"Preferred classes of alienees", in relation to any alienation (other than an alienation of shares in a Maori incorporation), comprise the following:

(a) Children and remoter issue of the alienating owner:

(b) Whanaunga of the alienating owner who are associated in accordance with tikanga Maori with the land:

(c) Other beneficial owners of the land who are members of the hapu associated with the land:

(d) Trustees of persons referred to in any of paragraphs (a) to (c) of this definition:

(e) Descendants of any former owner who is or was a member of the hapu associated with the land:

"Preferred classes of alienees", in relation to any alienation of shares in a Maori incorporation, comprise the following:

(a) Children and remoter issue of the alienating owner:

(b) Whanaunga of the alienating owner who are associated in accordance with tikanga Maori with the land vested in the incorporation:

(c) Other beneficial owners of the land who are members of the hapu associated with the land vested in the incorporation:

(d) Trustees of persons referred to in any of paragraphs (a) to (c) of this definition:

(e) Descendants of any former owner who is or was a member of the hapu associated with the land vested in the incorporation:

(f) The Maori incorporation, in any case where no person, who is, by virtue of paragraphs (a) to (e) of this definition, a member of a preferred class of alienees in relation to the alienation, accepts the owner's offer of an alienation of the shares to that member.

Relevant case law

Counsel for the appellants submitted that the class of notional buyers in the definition in the VLA is restricted, because Maori land is not able to be dealt with like ordinary European land. Counsel submitted that 30 per cent should be reduced from the valuations for this reason. There was no evidence as to why 30 per cent should be appropriate. The Court was asked to make an intuitive judgment on a percentage reduction as was done in Valuer-General v Trustees of Christchurch Racecourse (1995) NZ Valuer's Journal 53. In that case, however, there had been some evidence on the quantum of an appropriate percentage reduction.

Counsel for the respondent submitted that the appellants had not discharged the onus of proof which rested on them in terms of s 20(8) of the VLA. We prefer not to decide such an important case on such a technicality. We adopt the approach of the Court in Proprietors of Matauri X v Valuer-General [1981] 2 NZLR 585, 591:

> "Although the Act clearly defines the onus of proof, we take the spirit of the statute as a whole, including the provision for mandatory exchange of valuations to indicate that something less than the strict adversary approach is called for, as compared with ordinary arm's length litigation."

Whether a deduction is to be made from a properly-assessed valuation, because of the impact of the 1993 Act, is a question of law. This appeal is principally to decide whether the tribunal was correct in holding that no deduction was to be made. If the appellants succeed in showing that an error of law was made by the tribunal, then they have discharged the onus of proof. If there has to be a deduction, then the dimension of that deduction may vary from one block of land to another.

Counsel discussed certain authorities which we now consider. In Re Hutt Park and Racecourse Board (1907) 10 GLR 12, the board was given a Crown grant of land to be retained for the purposes of a racecourse and other stated purposes. The board was empowered to grant leases for up to 21 years over part of the property. It was claimed that the land value should not be based on the fee simple estate but upon a limited estate; unimproved and capital value were defined under legislation similar to the VLA. Cooper J stated at p 15:

> " . . . the valuation must be made upon a totally different principle, and that this land must be valued only upon the basis of the limited powers of disposition which the trustees have in law over this reserve."

In Re Johnsonville Town Board (1907) 27 NZLR 36, a Full Court considered a valuation of Maori land for determining compensation upon compulsory acquisition. Williams J, giving the judgment of the Court, characterised the estate of Maori owners as "less than fee simple" due to their inability to devise the shares but "very much like a tenant in tail". Fee tail was abolished in New Zealand by the Property Law Act 1952, s 16.

In Valuer-General v Ormsby (1907) 27 NZLR 44, a Magistrate had found that because Maori land was then prohibited by law from being sold, leased or otherwise dealt with, the estate or interest of the Maori land owner had a nil value. On appeal, Denniston J disagreed that the land had a nil value; he remitted the matter to the valuers to assess what value a purchaser would pay to be put in the same position as the owner. His Honour acknowledged that such a value would be "undoubtedly very difficult to assess", and suggested that the possibility of the removal of the alienation restrictions was one factor which could be taken into account.

In Thomas v Valuer-General [1918j NZLR 164, a Full Court considered the valuation of land leased from a Maori Land Board which had the power to sell to the Crown with the consent of the owners or to sell to any other person upon the resolution of the owners plus the consent of the Governor-General. The Court

considered and distinguished preceding cases and held them inapplicable to the situation where the hypothetical purchaser could become the freehold owner with an unrestricted title.

Three Judges considered that the statutory restrictions on ownership were transient or personal and the proper valuation should not take into account the alienation restrictions. Hosking J stated at p 174:

> "The question of the effect of the restriction on the saleable value of the estate or interest to be valued is in all cases one of fact, although the character or scope of the restriction itself may be one of law. .
>
> If there is an inherent restriction preventing sale the assumption of saleability must still be adopted in order to value, but the saleability to be assumed would be that of the thus-limited interest to the owner."

In Wanganui Racecourse Trustees & Wanganui Jockey Club v Valuer-General (1982) NZ Valuer 25, 232, a Land Valuation Tribunal, chaired by Judge Lowe, purported to follow the Hutt Racecourse case. The objection concerned the Wanganui Racecourse, land zoned and designated as a "recreation reserve for sporting purposes". The tribunal allowed a deduction of 50 per cent from the normal valuation as an additional allowance for the restricted powers of disposition of the owners who could not have sold without the consent of the Minister of Lands. That decision -- not binding on us -- did not review the case law. The tribunal offered no reason for the 50 per cent deduction; the case was probably wrongly decided.

In Valuer-General v Trustees of the Christchurch Racecourse (supra), Holland and Mr Lyall had to assess the appropriate valuation of Riccarton Racecourse. The land was held by trustees under a private Act of Parliament; the Reserves Act 1977 also applied to the land. The statutory purpose for the trustees' holding the land was to establish a racecourse; there were restrictions upon leasing and no power to dispose of the freehold. The Court considered whether a deduction should be made from the valuation reached by normal methods because of the statutory restrictions on the use and alienation of the land. Two valuers reduced their valuation by 50 per cent for this reason, another valuer made no allowance. The Court made a deduction of 35 per cent from the normal valuation. The Court stated at p 57:

> "The requirements of the Valuation of Land Act and the definition of land value obliged the Tribunal and us to determine a value achieved from a notional sale ignoring the fact that in its present state the land could not be sold. We therefore must assume the hypothetical purchaser to be a person able to acquire title to the land but with the restrictions existing on it including the inability to sell. Such a purchaser will almost certainly be a person or body intending to carry on a racecourse. The alternative available to that purchaser is purchasing rural land."

Counsel offered this case in support of the view that a percentage deduction should be a conventional valuation method. See Valuer- General v Treadwell [1969] NZLR 320 where there was a percentage enhancement because of a possible zoning change.

There is no mention in the Christchurch Racecourse judgment of the Privy Council decision concerning the proper value of a racecourse, held by trustees under a not dissimilar basis; ie: Gollan v Randwick Municipal Council [1961] AC 82. The Randwick Racecourse in Sydney was held by trustees under a deed of grant subject to various trusts and conditions limiting the use of the land for recreational purposes. There was also an applicable private Act of Parliament. If the land were not used for the stated purposes, it reverted to the Crown.

Lord Radcliffe giving the opinion of the Privy Council stated at p 94:

> "A sale of the fee simple has to be assumed whether or not the land in question can legally be sold, and the fact that there is some lawful impediment to sale cannot be allowed to enter into the assessment of value. Similarly, it is irrelevant that the land may be so settled or encumbered that there is no single person or even combination of persons who can at the relevant date effectively transfer the fee simple."

Counsel sought to differentiate this case on the basis that the statute in Gollan referred to the "fee simple" of the land, whereas the Act in question refers to the "owner's estate or interest". We cannot accept this as a valid point of distinction nor the submission of counsel for the appellants that the interest of Maori owners was more like a fee tail.

The form of land holding in New Zealand is "fee simple" as the 1993 Act itself acknowledges in several places. For example, s 250(2) speaks of "legal estate in fee simple". Under that subsection, the MLC can vest the legal estate in fee simple in specified Maori freehold land in a Maori incorporation but without affecting the beneficial interests which remain vested in the several owners.

Tribunal's decision

In its decision, the tribunal applied Thomas v Valuer-General; it distinguished the Christchurch Racecourse case, considering the type of restriction there to be more enduring than is the case with Maori freehold land. In the result, it held that there was insufficient evidence to confirm one way or the other the likely attitude of the MLC towards sales of Maori freehold land to non-Maori. It ended with the view that the constraints in the 1993 Act did not constitute a change in definition in the VLA Act and could therefore be disregarded in settling land value.

Decision of this Court

The VLA, as noted above, requires the Court to assess what sum the owner's unencumbered estate "might be expected to realise at the time of valuation if offered for sale on . . . reasonable terms . . .". Under this statutory formulation, value does not depend on an objective assessment of the worth of the land, but on the question of what a reasonable purchaser would pay for the owner's estate in the land (ie the marketable value of the estate); see Re Hutt Park and Racecourse

Board (supra) at p 14. This focus on the owner's estate led Denniston J to state in Valuer-General v Ormsby (supra) at p 48:

> "[I]t is, as pointed out by Mr Justice Cooper in The Hutt Park and Racecourse case, a sale not of the land, but of the owner's estate and interest in it. I think the proper standard in respect of this land is, what sum would a purchaser give for being placed, in respect of it, in exactly the same position as the owner? What, that is, would he give for the possession of the land for the same estate as the respondent -- subject, that is, to the same restrictions on alienation?"

If that were the only available reading of the statute, there would be little difficulty in concluding that the 1993 Act is relevant to this valuation. However, the tribunal relied upon Thomas v Valuer-General in preference to Ormsby, stating:

> "The Thomas case is, with respect, in our view binding and clear authority that where there are restrictions upon alienation and the possibility that the land can be sold with any restrictions ending, then the constraints do not affect the value of the land."

The appellants argue that the Thomas case should be distinguished from the present case on three grounds. First, the 1993 Act gives the present case a different statutory context. In particular, the Native Townships Act 1910 (under consideration in Thomas) contained no statutory directives to retain land within the iwi, such as

are found in the 1993 Act. Second, Thomas was concerned with the rates liability of a non-Maori lessee who was in occupation of the land in question, not with the valuation of the estate of the Maori owners. Third, the 1993 Act provides a special procedure for valuation where land is to be leased to a non-Maori. This, the appellants argue, means that the Thomas case cannot support the general valuation approach contended.

It seems clear that the decisive factors in the Thomas case were: (i) that the Court considered the trustees were not in reality hampered in their ability to dispose of the land; and (ii) that any buyer of the land would receive an absolute fee simple free from any conditions whatsoever.

In our view, neither of these factors can be said to apply in this case. As to the first point in Thomas, the restriction on alienation was that the consent of the Governor-General was required. There is no discussion in the reported case as to the likelihood of that consent being able to be secured; it seems implicit in the judgments that the requirement was not seen as onerous.

In contrast, the 1993 Act must be seen as a significant barrier to alienation. As was noted above, the Act indicates a legislative direction to "close the gate" on sales of Maori land. Whilst the tribunal was correct in saying that the precise effect of the Act will not be clear until the Act is applied to specific factual situations over time, the policy of the Act is sufficiently clear. It is reasonable to assume that alienation of Maori land will present significant practical difficulties in the future. The tribunal also placed some weight on the fact that the 1993 Act provides a "mechanism" for alienation. While that is undoubtedly true, the presence of a statutory mechanism does not mean that the mechanism will be able to be employed with ease or regularity. With respect to the tribunal, we consider that undue weight was attached to this factor.

As to the second point, it cannot be said that a buyer of Maori freehold land will necessarily receive an absolute fee simple. Section 130 of the 1993 Act provides that Maori freehold land cannot lose its separate status otherwise than in accordance with the Act. The relevant sections (ss 135, 136 and 137) place restrictions on the circumstances in which the MLC can make a status order converting "Maori freehold land" to "General land". While the power undoubtedly exists to convert "Maori freehold land" to "General land", the power must be exercised consistently with the expressed objects of the Act. The decisions of the MLC since the 1993 Act came into force show a firm adherence to the stated legislative purposes. It is foreseeable that some purchasers of Maori freehold land will remain bound by the land's status, thus requiring a right of first refusal to be provided to those within the preferred class of alienees. This again provides a point of distinction from the Thomas case.

The tribunal further relied, at p 18 of its decision, on the following passage from Hosking J's judgment in Thomas at p 174:

> "If the restrictions are personal to the owner and the estate or interest itself is saleable, and upon a sale a buyer gets what he buys free from all restrictions, there does not seem to be any foundation in fact for a difference in the saleable value as compared with the value of the like estate or interest in the like land free from restrictions."

Again, we see points of distinction between that statement and the present case. In our view, the restrictions contained in the 1993 Act cannot fairly be described as "personal to the owner". While it is true that the Act prescribes a mechanism whereby the restrictions may be lifted, there is a reasonably clear legislative direction to preserve the status of Maori land. There is thus some likelihood that land will continue as Maori freehold land even after sale. For the same reason it is by no means assured that a buyer would take "free from all restrictions". For these reasons, we do not consider that Thomas provides the simple answer to this case.

We have also considered the advice of the Judicial Committee in Gollan v Randwick Municipal Council (supra). We conclude that Gollan is distinguishable from the present situation on the ground that the restrictions in that case arose from a deed of grant "on the same footing as a grant of land inter partes made by one citizen to another" (p 94). Although the Privy Council did not "express any view as to the validity of the distinction . . . between restrictions . . . imposed on title by Crown grant and . . . by the operation of a local planning scheme" (p 99) we consider that the private nature of the restrictions in Gollan is sufficient to distinguish the case from the present facts. The 1993 Act is an Act with wide application throughout the country. As part of the general statutory law, it cannot, in our view, be compared to restrictions imposed under a private deed of trust.

A closer parallel may be drawn between the present case and Royal Sydney Golf Club v Federal Commissioner of Taxation (1954) 91 CLR 610. In that case, the High Court of Australia held that planning restrictions imposed by a local ordinance had to be taken into account in assessing land value. While we do not wish to draw a direct parallel between planning restrictions and the operation of the 1993 Act, we would adopt the following statement at p 624 of the Court's judgment:

> "[I]t is one thing to say that a hypothetical fee simple unencumbered and subject to no condition restricting enjoyment or use must be taken and another to say that laws of the State which affect the value of land are not to be taken into consideration."

The 1993 Act is undoubtedly part of the general law of New Zealand. In principle, we see no objection to recognising the reality that in some situations the Act will affect the marketability of land -- and thus its value. In saying this, we do not wish to take the position that all restrictions imposed by general statute must be taken into account. However the effect of the 1993 Act is such that it would be unjust to ignore the reality of the owners' position.

Our conclusion, therefore, is that the 1993 Act must be taken into account by valuers when fixing land value under the VLA.

We were invited by counsel to find that a "guideline reduction" of 30 per cent is appropriate to reflect the impact of the 1993 Act on the value of the land. Given the varied nature of the land in question and the varied effect of the 1993 Act, we do not consider it appropriate to make such a finding.

The precise effect of the 1993 Act upon land value must be determined by valuers on a case-by-case basis. What the valuer must do in each case is to assess the precise effect of the 1993 Act on the particular piece of land. For example, an undivided interest in Maori freehold land cannot be alienated at all, except to those within the preferred class of alienee. Such land must obviously be treated differently from land which can at least in theory be alienated. The valuer must then assess what value a hypothetical purchaser would pay in order to own the land.

In practical terms, this will very likely mean starting with a valuation as if the land could be bought on the open market, and then allowing a deduction for the alienation restrictions. The deduction will vary in amount depending on the extent of the restrictions, the likelihood of MLC approval to the sale, and the nature of the property.

Some land, such as the Awapuni land, which is part of the present appeal may have great spiritual significance to Maori and therefore should be far less likely ever to be alienated out of Maori ownership. In other cases, it could be in the best long-term interests of the particular iwi for land to be alienated.

The task of the valuer will not be easy. He or she will have to proceed on a case-by-case basis and be aware of current trends in the decisions of the MLC. The recent examples of MLC decisions that we have seen show a reluctance to allow alienation of the iwi, but such alienation must always be a possibility despite the restrictive statutory criteria.

The decision to reduce government valuations of bare Maori freehold land, whilst reducing rate liability, may have other consequences which may not be quite so beneficial to the Maori owners. For example, if land were to be acquired compulsorily, the "willing buyer/willing seller" formula could be affected downwards as could determination of rentals based on government valuation.

The appeal is allowed. Under s 26(4) of the Land Valuation Proceedings Act 1948, the objections are remitted to the tribunal for further consideration in the light of this judgment. No doubt both parties will wish to call further valuation evidence.

The appellants are entitled to costs both in this Court and before the tribunal together with disbursements as fixed by the Registrar. We shall receive memoranda if counsel cannot agree on the quantum of costs in this Court. The quantum of costs, disbursements and witnesses expenses before the tribunal can be fixed by the tribunal.Appeal allowed.

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