The Proprietors of Atihau-Wanganui v Malpas - [1985] 2 NZLR 468

Court of Appeal Wellington
23, 24, 25 October 1984; 18 September 1985
Cooke, Richardson and McMullin JJ

Maoris and Maori land -- Maori vested lands -- Valuation of land at termination of lease to assess compensation for improvements -- As required by their leases, lessees cleared bush and forest to convert land for pastoral uses -- Millable indigenous timber was felled and burned in situ -- Milling was uneconomic when timber was burned -- If the timber had been standing at expiry of leases it would have been worth more than the value of the improvements effected by the lessees -- Whether, in ascertaining the unimproved value of the land, the valuer was required to assume that timber growing on the land at the beginning of the leases was still there.

About 1906, Maori land in the Parapara hills to the south west of Raetihi was leased to European settlers. The land was largely inaccessible and was covered in bush which contained trees. Under the terms of the leases, the lessees were obliged to bring one-fifth of the land into cultivation within four years of the date of the lease, and to put substantial improvements on it within six years. In the early years the clearing of the land was effected by the progressive felling and burning of the bush. Timber was felled and burned in situ. From the mid-1920s, when the milling of some parts of the area became economically worthwhile, timber trees were felled and removed from the bush before the bush was felled and burned. The leases, and their renewals, allowed the lessees to fell, cut and burn any timber standing on the bush land. The removal of timber was expressly provided for either by requiring it to be cleared or permitting it to be cut and removed on terms which required the proceeds to be shared equally between lessor and lessee. After the passing of the Maori Vested Lands Administration Act 1954 all timber trees growing on the leased land were reserved to the owners.

The leases on three blocks (ie, those leased by Malpas, McGregor and Wilson) expired on 30 June 1975 and notice was given by the Maori owners of their intention to resume possession of the land. Special valuations were made by the Valuer-General on the unimproved value of the leased land, the value of the improvements and the capital value as at 30 June 1975. The owners objected to the special valuations. In 1981 the Administrative Division of the High Court assessed the value of the improvements for the three properties at $990,750. Expert evidence satisfied the Court that millable indigenous timber which, if still standing would be worth in excess of $3 million, had been removed by the lessees from the blocks since the leases were first granted. However, the Court rejected a submission from the owners that, in ascertaining the unimproved value of the land, the valuer was required to assume that trees which were growing on the land at the beginning of the leases were still there. The owners appealed.

Held:

1 The leases were pastoral leases which contemplated that the lessees would develop the land at least to the stage of grazing, possibly to the stage of cultivation. At the time it was done, the felling, burning, stumping and clearing of bush

and forest was for the benefit of the land: it was recognised as improvements and classified as such by the leases. The removal of the trees was a necessary step in the process of bringing the land into cultivation, and the pastoral uses to which the lessees converted the land remained for the use of the owners. In doing that work the lessees destroyed an asset which today would be worth a sum in excess of the value of the improvements effected by the lessees; but at the time the work was done that asset was virtually worthless. Trees which had no millable value at the time they were removed but would have a value if still standing, could not be used to offset the value of the improvements obtained by clearing the bush and forest: a value which was not exhausted or diminished at the time of the valuation (see p 476 line 25).

2 The lessees were entitled to receive compensation for all improvements effected by them to the extent of two-thirds of the value of those improvements for the whole period of the leases, ie, from 1906 to 1975 (see p 479 line 13). Leave to appeal was granted but the appeal was dismissed.

Other cases mentioned in judgment

Alison v Valuer-General (1922) 6 LGR 25.

Donald v Valuer-General (1927) 8 LGR 91.

Income Tax (Commissioners for Special Purposes of) v Pemsel [1891] AC 531.

Reading v Valuer-General (1923) 6 LGR 132.

Wacando v Commonwealth (1981) 148 CLR 1; 37 ALR 317.

Wright's Objection, Re [1959] NZLR 920.

Appeal

This was an application for leave to appeal from a judgment of Speight J and R Frizzell (Administrative Division, Wanganui, LVP 103, 104 & 105/75, 22 December 1981).

Earlier judgments concerning a preliminary question of law are reported at [1977] 1 NZLR 609 (SC), [1979] 2 NZLR 545 (CA) and [1980] 1 NZLR 1 (CA).

D H Brown and C P Brosnahan for the appellant (the Proprietors of Atihau-Wanganui).

G P Barton and DJS Laing for the first respondent (I F Malpas), the second respondents (C S McGregor, D J McGregor, M A McGregor and H I Haywood) and the third respondent (W C Wilson).

C J McGuire for the Valuer-General.

Cur adv vult

The judgment of the Court was delivered by

McMULLIN J.

This application for leave to appeal is brought by the appellant pursuant to s 18A of the Land Valuation Proceedings Act 1948 against the judgment of the Administrative Division of the High Court (Speight J and Ralph Frizzell, Esquire) delivered on 2 December 1981 in respect of objections to valuations made by the Valuer-General of land owned by the appellant and formerly leased to the respondents. The proceedings have a long history and have already given rise to one appeal to this Court - The Proprietors of Atihau-Wanganui v Malpas [1979] 2 NZLR 545. Applications for leave to appeal to the Privy Council were dismissed on the ground that s 18A(4) of the Land Valuation Proceedings Act 1948 makes the decision of the Court of Appeal final: see [1980] 1 NZLR 1. The present application for leave to appeal was unopposed at the hearing. The issues of law raised in the judgment of the Administrative Division and on which the appellant seeks the determination of this Court are difficult. No determination was made on the application for leave; as is often the case the Court considered

the application against the background of the issues raised on the substantive appeal itself. These are dealt with fully in this judgment.

This case is of historical as well as legal interest. It concerns three separate but adjoining blocks of land in the Parapara hills to the south west of Raetihi. The respondents and their predecessors in title have been lessees of this land from its Maori owners since 1906 or thereabouts. The three blocks comprise 392 hectares (Malpas), 970 hectares (McGregor) and 1784 hectares (Wilson).

In the early 1900s the land in this area, which was rugged and largely inaccessible, was covered in bush containing trees such as the great podocarps, some hardwoods, the smaller trees of the forest and thick scrub. But during the first 50 years of this century much of the land was transformed from that condition into pastoral farms. This was done by clearing the forest trees and scrub by felling and firing them and removing their stumps, where possible, from the burned areas.

This appeal involves a consideration of the state of the land at the beginning and end of this period of development. A convenient entry point to the case is the Maori Lands Administration Act 1900 which was passed to secure the better use of the lands then owned by the Maoris while at the same time ensuring that the ownership of these lands did not pass from the Maori owners. The statutory scheme aimed to accomplish these objects by the leasing of the land to settlers for development into farming land with compensation to be paid to the lessees for improvements effected by them during the period of development. The Act set up Maori Land Councils in which Maori lands could be vested by the owners for purposes of the Act and it authorised the transfer of land to such Councils for the purposes of leasing. Thousands of acres now in the name of the appellant (including the lands the subject of this appeal) were vested for this purpose. The 1900 Act did not itself set out the terms and conditions of the leases to be made under it but s 50(10) empowered the making of regulations prescribing the forms, conditions, and covenants of the leases to be made under it. In fact excerpts from the relevant regulations made in 1900 were set out in the leases and became part of the leases themselves. These regulations, when first made, were considered to be somewhat inadequate in their provision for compensation to the lessees for permanent improvements effected by them to the leased land and, for this reason, the leases in some areas were not at first sufficiently attractive to the European settlers who might otherwise have been interested in taking them up.

Several statutes bearing on the management and leasing of Maori lands were passed after the 1900 enactment. Most notable of these are the Maori Land Settlement Act 1905 which reconstituted the Councils as Maori Land Boards, the Maori Land Amendment Act 1952 which vested the lands in the Maori Trustee and the Maori Vested Lands Administration Act 1954 which provided for the vesting of the lands in the Maori owners of which the appellant is one. This last enactment was passed to give effect to the recommendations of a Royal Commission set up in 1949 to inquire into and report upon questions relating to leases granted under the 1900 Act, and to provide for new leases to be issued in place of the expired ones with new rights as to compensation. Further reference to the report and the 1954 Act is made later in this judgment. The report itself is of interest as an historical document.

Between 1903 and 1905 the Aotea District Maori Land Council, which was responsible under the 1900 Act for the issuing of leases in the Ohutu Block where the three subject properties are situated, arranged for a survey and subdivision of that block. After the survey various sections of land were offered for leasing for 21 years with a right of renewal for a further 21 years, the rental on renewal to be 5% of the unimproved value of the land at the date of renewal. Most leases on the block were taken up between 1904 and 1907. They required continuous occupation by the lessees for the development purposes. It is convenient to refer to them throughout as the 1906 leases.

As mentioned, because of the inadequacy of the initial compensation provisions, the response to the offer of leases in the Ohutu Block at first was poor. Consequently in 1903, with a view to attracting more settlers, a new regulation, reg 78A, was passed, making fuller provision for compensation for permanent improvements effected by the lessees. The regulations relevant to improvements under the 1906 leases are reg 74 to reg 83 of the 1900 regulations and reg 78A. Of these, reg 74 required the lessees to bring into cultivation, within four years of the date of the lease, not less than one-fifth of the land, and, within six years of the date of the lease, to put substantial improvements of a permanent character on the land of a value which varied according to its classification as first class or second class land. The term "substantial improvements" was defined to mean and include "reclamation from swamps, clearing of bush, gorse, broom, sweetbriar, or scrub, cultivation, planting with trees or live hedges, the laying-out and cultivating of gardens, fencing, draining, making roads, sinking wells or watertanks, constructing water-races, sheep-dips, making embankments or protective works of any kind, in any way improving the character or fertility of the soil, or the erection of any building". Regulations 75 to 83 provided for the lessees to be paid the value of improvements effected by them in the event of the sale or other disposal of the lease, including forfeiture, and reg 78A for the weighting of the land with the value of the lessee's improvements when the property was again offered for lease. Regulation 78A provided:

> "In any case where a lease is granted with a right of renewal for one further term only, not exceeding twenty-one years, the Council shall, on the expiration of such further term, or on the expiration of the original term, or in the case of a lease where the right of renewal is perpetual, on the expiration of any term, if the right of renewal has in any case been surrendered or otherwise determined, weight the land with the value of the improvements of the outgoing tenant on again offering it for lease; or the Council may in its discretion retransfer the land to the Native owners on payment of the value of the improvements and all other charges to which the land may be lawfully subject. The value of such improvements, or the balance thereof after deducting any amounts which may be due to the Council by the outgoing lessee, shall, when recovered by the Council, be paid over to him."

A brief reference should now be made to the system of valuation which has long since pertained in New Zealand, with its classification of capital value, unimproved value and value of improvements. For about a century there has been a valuation system in New Zealand for such purposes as rating, the assessment of estate and gift duties, the assessment of rentals on public lands and the calculation of compensation for improvements effected on leased land. This system has been based on the premise that the unimproved value of land varies, generally by increase, because of factors unconnected with the efforts of the owner or occupier. The system thereby recognises the community created increment which is included in the unimproved value. And it recognises the contributions of the owner or occupier in the value of improvements. That is the personal increment factor. In effect the capital value is the sum of the two, though not arrived at that way but by direct valuation. This system of valuation was recognised by s 6 of the Government Valuation of Land Act 1896 which provided for a uniform system of valuation to be administered by the Valuer-General throughout New Zealand. But the concept itself seems to have been recognised in practice before receiving statutory approbation. A new term "land value" was inserted in the Valuation of Land Act 1951 in place of "unimproved value" by s 3(1) of the Valuation of Land Amendment Act (No 2) 1970 but the definitions of capital value and improvements were retained. The new term "land value" does not need to be discussed as it has no bearing on this appeal. The application of the classifications of capital value,

unimproved value and value of improvements to a lease in which provision is made for compensation for improvements, means that when the lessee goes out of possession at the end of the term he hands over to the owner a property made more valuable than it was at the beginning of the lease by his actions, and so he is to be compensated for the improvements which he has brought about according to the formula provided in the particular lease.

This scheme of compensation and valuation was effectively adopted by the regulations which were incorporated in the leases from 1906 right through to the new leases entered into after the passing of the Maori Vested Lands Administration Act 1954.

In the 1920s the terms of the leases granted in the early 1900s expired but these were renewed for a further 21 years. The renewals were expressed in the form of fresh leases. While they were executed in years which differed according to the date of expiry of the original leases it is convenient to refer to them as the 1927 leases. They are referred to in more detail later. Then from the 1940s onwards the 1927 leases expired, and by June 1951 leases affecting approximately 100,000 acres in the Aotea Land Board's district had come to an end. However, their terms were extended further by the provisions of a series of Acts, the Maori Purposes Acts 1948, 1950, 1951, 1952 and 1953, pending a more final solution being found to the problems caused by their termination. One of the difficulties occasioned by the termination of the leases was the sheer insufficiency of funds held by the Maori Land Boards, and accumulated from the payment of rents, to compensate the lessees for the improvements they had effected. The value of the improvements effected by the various lessees in clearing the land of bush, and in grassing and fencing it, was very considerable in relation to the unimproved value of the land. The lessees for their part, expected to receive payment in cash for the improvements they had effected, and, if payment was not to be made in cash, the only course open to them under the leases (apart from the exercise of a right in certain cases to remain in possession pursuant to a special provision contained in the leases) was to have a receiver appointed with power to lease the lands and pay the value of the improvements out of the rentals received. The Maori owners for their part had funds which were quite inadequate to pay compensation and the raising of moneys to discharge this obligation was reckoned to be well-nigh impossible. This impasse was one of the principal reasons for setting up the Royal Commission in 1949. The Commission's report was published in 1951 (Appendix to the Journals, House of Representatives, G-5) and, as mentioned, led to the passing of the Maori Vested Lands Administration Act 1954.

One of the problems with which the Commission was concerned, and the very one which has given rise to these appeals, stems from the removal of millable timber from the leased lands in the process of clearing the bush. Regulation

74 of the leases made it obligatory for the lessees to bring one-fifth of the land into cultivation within four years of the date of the lease, and to put substantial improvements on it within six years, obligations which, counsel told us, proved largely impossible to fulfil. The first step to be taken in the settler's attempt to meet that obligation was to clear bush from the lands. But the leases required more than the felling of the bush. They were pastoral leases which contemplated that the lessees would develop the land at least to the stage of grazing, possibly to the stage of cultivation. The leases effectively required the settlers to carve farms out of country which in all likelihood was in much the same condition as it was when New Zealand first became a Crown Colony and possibly when the Maoris first arrived in New Zealand. There was, however, another factor which influenced the settlers to clear the land as quickly as possible. Rapid steps had to be taken toward the clearing and grassing of the land if the lessees were to be able to earn a living from it and meet the rentals payable under the leases. And so, in carrying out the terms of the leases and putting the land to the use that both the settlers and the Maori owners

intended for it, it was necessary for the former to clear the land of the bush which stood in the way.

In the earlier years of the leases the clearing of the land was effected by the progressive felling and burning of the bush. There was a sufficiency then, if not an abundance, of native timber available for milling in accessible places, and very little bush, if any, was milled for timber in the Ohutu area. Timber was a barely marginal resource on much of the land there and its ready availability on a large scale would have brought low prices at best for the vendors. In these earlier years timber on the leased properties would have been hard to dispose of having regard to the inacessibility of the blocks. The settlers were primarily, if not wholly, concerned with the removal of the total bush cover. Hence the practice of felling and burning it in situ.

From the mid-1920s onwards, with the declining availability in New Zealand of accessible native timber, milling of some parts of the Ohutu area became economically worthwhile. Where timber came to be milled for commercial purposes on the Ohutu Block the better and more accessible timber trees were felled and removed from the bush first, and the cut-over bush, which was what then remained, was felled and fired subsequently. The 1906 leases and 1927 renewals provided that royalties paid by millers for timber taken from the bush should be shared equally between the lessors and the lessees although the lessees were also entitled to take timber for building or other improvements on the land or for firewood for their own use. These leases and the renewals allowed the lessees to fell, cut and burn any timber standing upon the bush land, and the removal of timber was expressly provided for either by requiring it to be cleared or permitting it to be cut and removed on terms which required the proceeds to be shared equally. But the whole thrust of the leases was to ensure the development of the land by the clearing of existing growth and the terms of the leases, as the Administrative Division found in the judgment under appeal, not only condoned but encouraged the removal of millable trees. But after the passing of the Maori Vested Lands Administration Act 1954 all timber trees growing on the leased land were reserved to the owners.

It seems that no trees were ever milled on the Malpas block, only a small area was milled on the McGregor block, but some timber was extracted from the Wilson block between 1924 and 1931 and 80 acres was milled there in 1954. However, a number of trees which can now be identified from their stumps as one-time millable timber trees of a certain species, were cut down and fired in the general clearing operations of all the lessees over the years.

By way of expanding on the references already made to the processes of bush clearing it should be said that the pattern adopted by lessees who were not concerned with saving those trees which might, given the demand, have been millable, was to fell as much of the bush, including substantial trees, as they could, and then to set fire to the felled areas. Some larger trees were not felled but were burned down over a period of time by fires lit around their trunks. When the bush had been cleared of all growth, or as much of it as could be cut and fired, grass seed was sown in the ashes left on the cleared land between stumps and fallen logs. Following a good bush burn the growth of grass was considerable and, because of the natural fertility brought about by the rotting down of vegetation on the floor of the forest over countless years and the minerals contained in the ashes, the land was able to carry more stock in the first few years following felling and firing than it did some years later. The initial fertility could be maintained only by the sowing of fertiliser and, until the advent of aerial topdressing, the contour of the country made this difficult, if not impossible. The cutting and burning of the forests, possibly viewed now as wasteful by many who are rightly concerned to preserve the ancient forests and to save the last strands of indigenous timber from destruction, must be judged against the times in which they occurred. At

the beginning of this century forests grew over much of New Zealand; pasture did not. The early settlers could survive and make their way only by clearing the land of the then seemingly useless bush and converting it to pastoral uses.

The Maori Vested Lands Administration Act 1954 reflected the recommendations of the Royal Commission and provided for leases to be issued in place of the expired leases, but with timber trees reserved to the lessor. It also contained provisions for compensation to be paid to the lessees for improvements they had effected. Taking a practical view of the difficulties which now faced the Maori owners in meeting claims for compensation, and having regard to the low rentals paid by the lessees, calculated as they were on the unimproved value of the land at the beginning of the leases, the Commission recommended that the lessees should be paid two-thirds of all permanent improvements effected by them to the land. This recommendation was adopted in s 27 of the 1954 Act.

On 30 June 1975 the terms of the three subject leases, extended in the interim as they had been by legislative intervention in the 1950s, expired, and notice was given by the Maori owners of their intention to resume possession of the lands. Valuations were made by the Valuer-General to determine compensation for the permanent improvements effected by the lessees. These valuations set out, as required by the Act, the unimproved value of the leased lands, the value of the improvements and the capital value as at 30 June 1975. They were made by the Valuer-General for the purposes of determining compensation in terms of s 27 of the 1954 Act. The Maori owners objected to them. They were entitled to do so under s 14 of the Act. In The Proprietors of Atihau-Wanganui v Malpas [1979] 2 NZLR 545 this Court on appeal from Sir Richard Wild CJ considered a preliminary question of law on the valuations made by the Valuer-General. Confirming the decision of the Chief Justice it held that the words "exclusive of the value of any indigenous timber trees" in the definition of "unimproved value" in s 2 of the 1954 Act referred only to trees on the property at the time of valuation. This decision reflected the existing valuation practice which is referred to in the judgment of Archer J in Re Wright's Objection [1959] NZLR 920.

The point is one of considerable importance. There are upwards of 150 leases from the appellant to which the present proceedings will have relevance. Under these the lessees are entitled to the same measure of compensation as are the respondents. The Maori owners now claim that the value on 30 June 1975, when the leases ended, of commercially millable trees, extracted between 1906 and 1975 during the currency of the leases and their renewals, (assuming that these trees were still standing) would be in excess of $3 million, so that if the value of these now non-existent trees (Richardson J referred to them in the 1979 judgment as "phantom trees") were to be taken into account the value of the improvements effected by the respondents clearing the land would be cancelled out and no compensation would be payable to them.

The Valuer-General's figures for capital value, unimproved value and improvements for the three blocks at 30 June 1975 were as follows:

	Capital value	Unimproved value	Improvements
Malpas	$199,300	$18,800	$180,500
McGregor	$432,000	$41,650	$390,350
Wilson	$674,000	$62,500	$611,500
			$1,182,350

If these figures are upheld the compensation required to be paid by the appellant to the respondents would be an amount equal to two-thirds of $1,182,350 this last figure being the total value of the improvements effected to the three blocks

since the 1906 leases were executed. The Maori owners do not accept these valuations; they object to them. Before the Administrative Division they maintained that the capital value as fixed by the Valuer-General as at 30 June 1975 was too high; that the Valuer-General had failed to take sufficient account of the value of the land excluding improvements; that the unimproved value was too low; and that irrespective of whether or not the capital value as fixed by the Valuer-General was too high, that the value of the improvements was too high.

After this Court delivered its decision in The Proprietors of Atihau-Wanganui v Malpas [1979] 2 NZLR 545 the Administrative Division of the High Court (Speight J and Mr Ralph Frizzell) heard valuation evidence and assessed the values of the respective properties as follows:

	Capital value	Unimproved value	Improvements
Malpas	$185,500	$42,750	$142,750
McGregor	$384,000	$91,000	$293,000
Wilson	$675,000	$120,000	$555,000
			$990,750

Two judgments were delivered in the earlier case in this Court. Although they differed to some extent in their approach, the two judgments were unanimous in their decision that the relevant words related to trees standing on the land at the time of valuation in 1975. The Court adopted what Judge Archer had said in Re Wright's Objection [1959] NZLR 920 at p 922. The earlier decision of this Court proceeded on the basis that there had never been any commercial milling of timber on the land and that the land was probably more valuable in its developed state. But expert evidence has since satisfied the Administrative Division that millable indigenous timber which, if still standing would be worth in excess of $3 million, has been removed by the lessees from the blocks since the leases were first granted in the early 1900s. The issue therefore now has to be considered in a factual setting very different from that previously assumed.

In these circumstances, in reaching its decision which is the subject of the present appeal, the Administrative Division rejected a submission made on behalf of the Maori owners that, in ascertaining the unimproved value of the lands, the valuer is required to assume that bush and forest of whatever kind growing upon the land at the beginning of the leases is still there. On this appeal two main submissions were made on behalf of the Maori owners.

The first submission was that the Administrative Division was wrong in holding that no allowance should be made for the 1975 value of the indigenous timber trees removed from the land from the commencement of the leases in the early 1900s in assessing whether, and to what extent, improvements had been effected by the lessees, and that it had erred in holding that the starting point in assessing unimproved value was the cut-over state or that which existed after the millable timber trees had been removed. Further to this it was contended that the Administrative Division had misinterpreted the earlier decision of this Court.

As mentioned, the judgments at the earlier stage of the proceedings were given on the assumption, which evidence since heard by the Administrative Division shows not to have reflected the factual position, at least in the case of the Wilson block, that no commercially millable timber was ever extracted. But implicit in each of the earlier judgments is a recognition of the need to consider the state of the lands at the commencement of the leases and their state when the leases came to an end in 1975, so as to compare like with like.

Both judgments held that the words "exclusive of the value of any indigenous timber trees" appearing in the definition of unimproved value, referred only to

trees on the property at the time of valuation, not to trees that had been on the property at any time. Both judgments made the point that since the unimproved value and the value of the improvement are required to equal the capital value, indigenous timber trees which are no longer there at the date of valuation cannot be taken into account. Both judgments made the point that it is work done on or for the benefit of the land in so far as its effect is to increase the value of the land and is unexhausted in that respect at the valuation date, that is to be taken into account as an improvement.

In a broad sense the contention of the appellant is that the work of felling, burning, stumping and clearing land of bush, while possibly a work done for the benefit of the land and as yet unexhausted, had not increased its value at the end of the leases; that, viewed in the light of considerations relevant in 1975 when the leases expired, the land was then worth less than it was worth in the state it was in in 1906 when the leases commenced; that the apparent improvements effected by the lessees to the extent of $990,750 (being the figure fixed by the Administrative Division) must be offset by the reduction in value brought about by the destruction of the commercial timber which, had it still been standing in 1975, would then have been worth about $3 million. As the Administrative Division put the appellant's contention:

> "Regardless of what may have been the improvements by the lessee properly understood in the way of constructing buildings, erecting fences, producing thousands of acres of pasture land, all would be extinguished and more by this enormous but theoretical counterbalancing figure for timber value."

We have reached the conclusion that the Administrative Division was right to ignore the value which the millable trees would have had at the end of the lease had they not been felled. We say that for several reasons. In the first place, the function of the Court in proceedings such as these is to determine the values, capital and unimproved, and the value of improvements, in terms of s 11 of the Maori Vested Lands Administration Act 1954 at 30 June 1975 when the owners resumed possession on the expiry of the leases. The ultimate effect of the Court's decision in so determining the values will be to determine the amount of compensation to be paid by the owners to the lessees. But the Administrative Division, and this Court on appeal from it, has a limited function. It is to fix the relevant values, not to award compensation. In particular it is not their function to act as Courts trying an action by the owners against the lessees for any alleged

waste: see Re Wright's Objection [1959] NZLR 920 at p 921. It follows that the present inquiry must be directed to the ascertainment of whether the felling, burning, stumping and clearing of bush from the land during the currency of the leases was for the benefit of the land in so far as its effect was to increase the value of the land and the benefit of the work remains unexhausted at the time of the valuation. If the work done by the present lessees meets that test it is both "improvements" and "improvements effected by the lessee" within s 2(1) of the 1954 Act. Whether work, sought to be classified as an improvement, was in fact done for the benefit of the land is a matter to be determined objectively and not subjectively. We prefer the view that the question should be -- was it for the benefit of the land at the time it was done? Not merely was it intended to be for the benefit of the land at that time? Whether the work done increased the value of the land and, if so, whether and to what extent the benefit remains unexhausted, are questions to be answered at the date of valuation. If the work done by the lessee has not resulted in a benefit it must be ignored as also must the intention or expectation of the lessee that it should do so. If, in doing a work which results in a benefit to the land, trees, then having no millable value were removed, and the benefit of that work remains unexhausted, the fact that these trees would, if still standing, now have a value is not to be an offset against the value of the improvements or used to diminish

their value if their benefit is unexhausted at the date of valuation. The removal of the trees was a necessary step in the process of effecting what was clearly regarded as an improvement at the time that the work was done. Where timber is milled commercially then land from which that timber was taken is to be taken in that cut-over state for the purposes of arriving at the unimproved value of the land - this for the reasons given by the Administrative Division in the judgment under appeal.

It is not suggested that the value of the improvements done by way of cutting, felling, burning and clearing the bush was in fact exhausted or diminished at the time of the valuation. In fact, we were told that the Maori owners are now using the land for the training and settlement of Maori farmers, a function which the land could not discharge had not the lessees first done the clearing work. So the pastoral uses to which the lessees converted the land remain for the use of the owners. In reality the argument for the owners was that in effecting work, which at the time it was done was recognised as improvements (the leases classified such work as improvements), the lessees destroyed an asset which at the time the work was done was virtually worthless, although viewed in the light of today's values the timber is worth a sum in excess of the unexpired value of the improvements. An argument of this kind concentrates on the word "is" in the statutory definition of "Improvements" and gives in our view insufficient weight to history. The destruction of the forest can be brought into account, if it can be brought into account at all, only in proceedings claiming damages for waste. But in making that observation we do not wish to be understood as suggesting that the owners can maintain any claim of the kind.

There may be cases where, in the effecting of improvements a valuable natural asset is destroyed; for example, the destruction of a lake as a water source by the building of an access road. In such a case it is possible that the loss of the one must be offset in the valuation of improvements against the benefits to be derived from the other. But this is not that case. We are unanimously satisfied that the historical factors discussed in the present judgment justify a distinction.

The point is not free from difficulty, if only because the statutory definitions are open to the interpretation indicated in some of the dicta quoted in [1979] 2 NZLR at pp 549-550 that the unimproved value must be arrived at by considering the land as it would have been at the relevant date for valuation if at that date it had no improvements upon it. But on the argument of the present appeal counsel drew attention to three historical factors, none of which had been brought to notice in 1979 arguments, which also tell against adopting that approach. They are part of the background against which the legislation has to be interpreted.

First, in the 1913 Explanatory Memorandum quoted in [1979] 2 NZLR at p 552 the Valuer-General stated that it became a question for the valuer to determine whether the land would not sell at the present day at a higher price with the timber on it than it would without the timber. Subsequently, however, the view of the Department changed. In the corresponding Explanatory Memorandum issued by the Valuer-General in 1938, with reference to the Valuation of Land Act 1925 and its amendments, the following is stated at p 7:

> "In many cases if the original land covering, as of bush, flax, etc, had been preserved, it would to-day give a considerably added selling-value to land, because it would have a use as timber, firewood, or fibre, which value had to be sacrificed to allow the Dominion to be developed agriculturally. It would therefore be unreasonable to assess the unimproved value with a value for these purposes, as there was no such value at the time when development had to be undertaken."

Counsel for the Valuer-General put this passage to us as representing a departmental practice now of long standing. The material legislative provisions have been in

effect re-enacted more than once since that practice became established. As Mr McGuire contended, on the authority of Lord Macnaghten in Commissioners for Special Purposes of Income Tax v Pemsel [1891] AC 531, 590-591, long-standing administrative practice can properly be taken into account in ascertaining parliamentary intention in such circumstances.

Secondly, the practice has evidently not been confined to New Zealand but has applied in Australia also, in relation to statutes similarly worded. We were referred to three decisions of Pike J in the Land and Valuation Court of New South Wales which are treated in Australian textbooks as correctly stating the existing position: Alison v Valuer-General (1922) 6 LGR 25; Reading v Valuer-General (1923) 6 LGR 132; Donald v Valuer-General (1927) 8 LGR 91. The effect of the three cases, more particularly Reading, is that the value of timber originally on land which would have been of value at the date of valuation, but which was felled at a time when it had no value, should not be included in the unimproved value. It seems therefore that the current New Zealand legislation has been enacted against the background of a general Australasian understanding.

Thirdly, we permitted counsel to refer to passages in Hansard relating to the Maori Vested Lands Administration Bill 1954 (304 New Zealand Parliamentary Debates 1969-1976). It is clear from what was said both by the Minister of Maori Affairs and by the Leader of the Opposition that the Bill represented a compromise arrived at after extensive negotiations between the Maori owners (acting on the advice of Sir Alexander Johnstone QC) and the lessees and following upon the report of the Royal Commission already referred to. It is also clear that a basic assumption on both sides in working out that compromise was that there would be compensation to lessees on reversion of the lands to Maori possession. As already mentioned, however, the Administrative Division point out that in the present cases (and the same must apply in many other cases) no compensation at all would be payable if the lands were valued as if still in timber.

For present purposes it is not necessary to embark on a discussion of the use of parliamentary debates as an aid to legislative interpretation. There is a valuable discussion by Mason J in Wacando v The Commonwealth (1981) 148 CLR 1, 25-27. The only purpose of referring to the debates here is to bring out that the Act was preceded by a broad agreement between the Maori owners and the lessees. The Courts are entitled to lean towards an interpretation of the Act which would not run counter to a fundamental premise of that agreement.

Further, if these proceedings were in fact to be treated as a means of determining to what extent, if any, the loss of millable timber trees should be brought into account in fixing the compensation payable to the lessees by the Maori owners, the terms of the various leases could not be ignored. To ignore them would be to impose financial sanctions on the lessees for carrying out the very obligations imposed on them. From the 1906 leases it is clear that both parties intended that the lessees would carry out bush clearing as part of the improvement work. The lessees were required to bring the land into cultivation and otherwise to improve the land. The whole purpose behind the leasing arrangements was to enable the Maori owners to retain ownership while at the same time having the land converted for pastoral purposes. It was intended that at the end of the leases the land would be resumed by the owners as pastoral land. These were benefits the Maori owners were to obtain from the leases. The lessees for their part assumed the burden of bringing bush covered land into production. The benefits they received from this were the use of the land in the pastoral state to which they had converted it during the rest of the term and the promise of compensation for their work at the end. Under the 1906 leases the lessees were required to clear the bush. They were entitled to cut as much marketable timber as they required for building or other improvements on the land or for firewood for their own use. The royalties for

timber which was cut and removed from the land were to be divided equally between the lessees and the owners. It is not suggested that the lessees have failed to account to the owners for their share. Clause 9 of the 1927 leases contained somewhat similar provisions for the cutting of marketable timber. Section 29 of the 1954 Act and cl 30 of the 1956 leases reserved the millable timber to the owners. The contractual provisions of the 1906 and 1927 leases should not be overlooked in the fixing of compensation. To allow of what is effectively a counterclaim by the owners, in the face of these provisions, would enable them to escape the payment of compensation for the doing of work for which the lessees received no monetary compensation and for ridding the land of what was then regarded as a burden when they necessarily undertook the work as part of the obligations which the owners imposed on them.

The second submission made on behalf of the owners was that, even if there were rights of compensation for the lessees in the 1906 leases, these rights were not carried forward into the subsequent leases. In 1927, when the first leases expired, fresh lease documents rather than documents of renewal, were executed. But these leases recorded that they were executed in terms of the lessees' rights to renewal under the earlier leases. Moreover the form of a 1927 lease was expressed to be a lease "Under the Native Land Act 1909 and its Amendments being a renewal of a Lease granted under the Maori Lands Administration Act 1900 and its Amendments and the Regulations made thereunder". The 1927 leases provided for the making of a valuation at the end of the lease of all substantial improvements of a permanent character made by the lessee "during the preceding and the current term" and in existence on the land at the time of valuation. "Substantial improvements of a permanent character" included the clearing of bush from the land. Clause 17 provided that the amount of compensation should not constitute a debt payable by the Board or the Maori owners to the lessee, but that it should, until paid or otherwise discharged, constitute a charge on the land and upon all revenues received therefrom by the Board after the termination of the said term, and the said charge should be enforceable in accordance with the provisions of s 263 of the Native Land Act 1909. Clause 18 conferred the right to the lessee to remain in possession of the land until the compensation was paid.

The Administrative Division held that s 263(1) of the 1909 Act, to the provisions of which we make more detailed reference, was imported into the 1927 leases, and thereby removed any doubt that may have existed as to the rights of the lessees to compensation for improvements effected in the form of the 1906 leases.

The appellant contends that the Administrative Division was wrong in reaching this conclusion. The argument for the appellant, as it was put by Mr Brown, started with the 1906 leases. He submitted that the 1906 leases contained no general provision conferring a right to compensation on lessees for improvements effected by them to the leased lands; that in essence the relevant provisions of the leases did no more than provide for the passing on of any benefits effected by lessees to the purchasers of their interests, and for the payment to the Maori owners of the amount received for improvements done by the outgoing lessees as and when they were received, the Council having the right but not the duty to sue an assignee who had not paid the amount of any valuation of improvements; and that reg 78A, which required the land to be weighted with the value of the improvements effected by the outgoing tenant when offered for further leasing, with provision for the land to be transferred back to the Maori owners on payment of the value of any improvements, did no more than, at the most, create some form of charge on the land but conferred no rights on the lessees to sue for compensation. That is, while assignees and the Maori owners had to recognise the value of the improvements done, the outgoing lessees had no right to enforce payment from the owners.

Then it was argued that the 1927 leases contained no rights of compensation; that although they provided for a valuation of all substantive improvements of a permanent character made by the lessees during the preceding and current terms of the leases, and for the deduction from the compensation payable to the lessees of the costs of repair or reinstatement to improvements that had been destroyed by the lessee, and for the charging of the land with compensation which remained unpaid, they made no express provision for the payment of compensation to the lessees.

Finally, it was said that the Maori Vested Lands Administration Act 1954 did not improve the lessees' position in respect of compensation for improvements as s 7 of that enactment did no more than confer on the lessees the same rights to compensation as were conferred on the lessees by the leases purporting to be renewed.

The somewhat imperfect nature of these compensation provisions was referred to by the Commission in its report (paras 35-39) although counsel before the Commission seemed able to agree that compensation for improvements effected since 1906 should be paid to the outgoing lessees. But when the compensation provisions are viewed as a whole it becomes apparent that, whatever defects there may have been with regard to the setting up of complete machinery provisions for the payment of compensation, the clear purpose of the 1900 regulations, the 1906 leases, and the 1927 renewals, was that the lessees were to be paid full compensation for permanent improvements effected to the land from 1906 onwards. This is particularly clear from the passing of reg 78A which the Commission said was enacted to make the leasing more attractive to prospective settlers by the provision of compensation either at the end of the original term or the end of the renewed term. Improvements were defined by reg 74 as including the clearing of bush. Although reg 79 provided that the outgoing tenant did not have a claim against the Maori owners personally for the value of improvements in default of payment, neither that regulation nor any other extinguished what might be called the declared intention of reg 78A that the lessees were to be compensated for their improvements. While the Maori owners may not have been liable in personam to meet claims for compensation, the land was encumbered with the value of the improvements until these were paid to the former lessee; when leased again it was weighted with the value of the improvements; and it could not be transferred back by the Council to the original Maori owners without payment of compensation. In short,

the regulations spelled out an entitlement to compensation even though the provisions for its payment may have been less than perfect.

The Maori Lands Administration Act 1900 was repealed by s 431 of the Native Land Act 1909, but, by virtue of s 434 of the latter, regulations made under the former survived for the purposes of the 1909 Act. Section 287(3) of the 1909 Act (included in Part XV) on which the Administrative Division relied provided:

> "Nothing in this section shall affect any lease or other alienation to which any such land is subject at the commencement of this Act, or the right of any person to enforce any valid contract made with respect to any such land before the commencement of this Act."

While the leased lands became subject to the 1909 Act (s 287(1)) the lessees' rights under the 1906 leases survived because of the saving provisions of s 287(3).

Other provisions of the 1909 Act should be mentioned. Section 266(1) (included in Part XIV which related to leasing) provided:

> "Every lease granted under this Part of this Act shall be in the form prescribed, or in such one of the forms prescribed as the Board thinks fit, and may contain such terms, covenants, and conditions (consistent with this Act) as are authorised by regulations."

Section 263(1):

> "Every such lease the term whereof (including the term of any renewal thereof under a right of renewal) is not less than ten years shall confer upon the lessee a right to compensation, on the termination of the lease or of any such renewed lease by effluxion of time, for all substantial improvements of a permanent character (as defined by the Land Act, 1908, or any other Act amending or substituted therefor and in force at the time when the improvements were effected) which are put upon the land during the continuance of the said term and are unexhausted on the termination thereof."

And s 263(3):

> "The compensation so payable shall not be recoverable from the Board as a debt, but shall constitute a charge on the land demised and upon all revenues therefrom by the Board after termination of the lease and of any renewal thereof."

These sections establish that whatever the lessee's rights (including the right to compensation) might be, they were preserved; that land vested in the Board should be reserved for leasing on terms that every lease that was not less than 10 years in duration should confer on the lessee a right of compensation for all substantial improvements of a permanent character; and that such compensation was to be a charge on the land although not recoverable from the Board as a debt.

The 1927 leases were given in respect of the renewal period of 21 years referred to in the 1906 leases. The drafting of the 1927 leases caused some difficulties because of substantial alterations to the law. Ultimately leases were granted in a special form without any reservation. Although the 1927 leases were in truth no more than renewals of the 1906 leases and contained a recital to that effect, they omitted provisions of the 1906 leases and contained provisions which were not in the earlier ones. In particular, as Mr Brown pointed out, the provisions of the 1900 regulations, now revoked but replaced with regulations similar in content in 1909, were not incorporated into the 1927 leases as they had been in the earlier ones. For the respondents it was contended that it is reasonable to read into the 1927 leases a right to compensation on the same terms as were contained in the 1900 leases because the recitals of the 1927 leases declare them to be renewals of the earlier leases, they being in effect documents which caused the earlier rights of renewal which had been exercised by the lessees to survive. And, the 1927 leases were expressed to be granted by the owners in exercise of the powers vested in it by Parts XIV and XV of the 1909 Act and "of the right of renewal granted" by the 1906 leases. Although then the 1927 leases are in form new leases, the fact that they contained no express rights to compensation is not

to be taken as an abandonment of these by the lessees or the non-recognition of compensation obligations by the owners.

We think that the respondents' contentions are well founded and that, although the compensation provisions in the 1927 leases are not as full as those of the earlier leases, the 1927 leases are to be read as relating not only to improvements effected since the commencement of the 1927 leases, but also to improvements effected between 1906 and 1927 and in existence at this last date. Thereafter the compensation rights were preserved by the 1954 Act.

Therefore the Administrative Division was right in concluding that whatever rights the lessees had under the 1906 leases were preserved by the 1927 leases so that the lessees were entitled at the end of the 1927 leases to compensation for all permanent improvements effected between the commencement of the original leases in 1906 and the expiry of the renewed terms about 1948.

For these reasons we think that the Administrative Division was right in the decision it reached. The application for leave to appeal to the Court is granted

but the appeal is dismissed. The appellant is to pay costs to the respondents in the sum of $5000 together with disbursements to be fixed by the Registrar. There will be no order for costs in respect of the Valuer-General.Appeal dismissed.

Solicitors for the appellant: Horsley, Brown & Co (Wanganui).

Solicitors for the respondents: Brandons (Wellington).

Solicitors for the Valuer-General: Crown Law Office (Auckland).