

Appeal Decision

Valuer General v Mangatu Incorporation and Others

Court of Appeal 16 September 1997

The Judgment of Court of Appeal delivered by Richardson P recognises that the Te Ture Whenua Maori Act 1993 is a significant barrier to the alienation of Maori Land.

The Valuer General is required to value the owner(s)' estate or interest in land and has to consider the way it is alienated together with the Act's stated policy, to retain land in Maori ownership.

Because the Valuation of Land Act envisages a notional sale, the practical difficulties of obtaining agreement to sell are not taken into account in the hypothetical valuation process.

However, while the Valuer General has to assume a sale, he has to recognise a hypothetical purchaser who isn't in the preferred class of alienee will face serious problems in obtaining consent to the alienation. Even if consent is obtained it remains probable that a change of status to general land would be refused.

What effect this has on values is a question of fact on which the Court has offered no opinion.

The determination of land value must recognise those legal constraints on alienability. The effect of those restrictions on the saleable value of the estate or interest in the Maori freehold land to be valued is then a question of fact. The valuer's task is to determine what the hypothetical purchaser would pay to obtain the owner's estate or interest in the land.

The assessment of land value must be made on a case by case basis. The effect of restricted alienability will be affected by such factors as:

- the nature and size of the property;
- the historical connection of the owners with the land;
- membership of the preferred classes of alienees and the resources available to fund the purchase;
- the statutory role of the Maori Land Court in relation to the property and the prospect of obtaining confirmation of an outside sale from the court.

The case is to be referred back to the Land Valuation Tribunal for further consideration. A preliminary step will be for the Valuer General to reconsider the valuations in the light of the Court of Appeal's judgment.

BETWEEN THE VALUER-GENERAL

Appellant

**AND MANGATU INCORPORATION
AND OTHERS**

Respondents

Coram: Richardson P
Gault J
Thomas J
Keith J
Tipping J

Hearing: 8 September 1997

Counsel: M T Parker for Appellant
K A Palmer and H M Taumaunu for Respondents

Judgment: 16 September 1997

JUDGMENT OF THE COURT DELIVERED BY RICHARDSON P

The primary issue in this appeal pursuant to leave granted under s18A of the Land Valuation Proceedings Act 1948 is whether constraints on the alienability of land imposed by Te Ture Whenua Maori Land Act 1993 ("the 1993 Act") are to be taken into account in arriving at the land value under the Valuation of Land Act 1951.

The background

It is unnecessary to traverse all the material which is fully canvassed in the judgment of the High Court reported at [1996] 2 NZLR 683. The essential facts may be stated quite shortly. The Mangatu Incorporation and eleven other respondents objected to the revaluations by Valuation New Zealand of their respective lands carried out as at 1 September 1993. Such valuations are applied primarily for rating purposes. The particular local authority, the Gisborne District Council, assesses rural land for rating purposes on its land value as that expression is defined in s2 of the Valuation of Land Act. In terms of that definition, "land value"

... 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 a bona fide seller might be expected to impose if no improvements ... had been made on the said land.

The land in question is Maori freehold land within the meaning of s129(1) of the 1993 Act. It is in the Tairāwhiti Māori Land Court District where over 26% of the total land area is Maori freehold land or customary land. The critical question of wide significance is whether restrictive provisions of the 1993 Act are to be taken into account in arriving at the realisation value of the owner's estate or interest in the land.

Valuation New Zealand carried out the valuations as part of the three yearly revision of roll values in the Gisborne District pursuant to s9 of the Valuation of Land Act. It assessed the total land values of the objectors' lands, totalling 73,007 hectares, at \$40.259 m. It was common ground that, had the lands been non-Maori freehold land, that was a proper land value. There was no agreement as to the discount or discounts which should be made if account had to be taken of constraints on alienability. On the Valuer-General's approach no consideration was given to the impact of the constraints under the 1993 Act. A valuer called by the objectors arrived

at a discount for two properties of some 47% based largely on the percentage of Maori in the local population. And in the High Court the respondents sought a flat 30% discount as being applicable to all their lands.

On its view of the scheme of the legislation the Land Valuation Tribunal considered it too early in the operation of the 1993 Act to conclude that the restrictive provisions would have any effect on the land value. On appeal the High Court held that whether a deduction allowance was to be made in a valuation to take account of the impact of the 1993 Act was a question of law; that that impact had to be taken into account by valuers when fixing the land value under the Valuation of Land Act; and that that effect would have to be determined on a case by case basis.

Finally, none of the properties was subject to a lease for a term of 12 months or more which would have constituted the lessee as occupier of the land for the purpose of the Rating Powers Act 1988, s2.

The 1993 Act

Because of the significance of the legislation and the policy underlying its detailed provisions, it is necessary to analyse the 1993 Act in some detail.

As stated in the long title, the object of the Act was to reform the laws relating to Maori land in accordance with the principles set out in the Preamble. The Preamble (the English text) states:

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 kawantanga 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.

Explicitly it states that retention of the land in the hands of Maori is to be promoted because of the special significance of land to Maori people. In support of that object and principle, the Act is to facilitate the occupation, development and utilisation of land for the benefit of its owners, their whanau and their hapu. Section 2 reflects the Preamble. It provides:

- (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.

That same approach carries through to s17 which sets out the primary and associated objectives of the Maori Land Court:

- (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.

By s129 all land in New Zealand has a particular status for the purposes of the Act, one of the six categories being Maori freehold land which is land "the beneficial ownership of which has been determined by the Maori Land Court by freehold order" (s129(2)(b)). And no land may lose the status of Maori freehold land otherwise than in accordance with the Act (s130). The statute goes on to provide for changing from Maori customary land to Maori freehold land by vesting order (s132), from general land to Maori freehold land by status order (s133), and for any land not already Maori freehold land to become Maori freehold land by a vesting order on change of ownership (s134). The reverse process from Maori freehold land to general land is authorised under ss136 and 137 but subject to satisfaction of various conditions. Section 136 applies where the land is beneficially owned by more than 10 persons as tenants in common: s137 where the legal estate is vested in a Maori incorporation or the trustees of a trust constituted under Part XII of the Act. In terms of s136 the court must be satisfied that the land can be managed or utilised more effectively as general land. There is no power to change the status of Maori freehold land which is owned by more than 10 individual owners.

Part IX and the supporting Maori Assembled Owners Regulations 1995 prescribe stringent quorum and voting requirements in relation to resolutions of assembled owners authorising the sale of Maori freehold land, with the quorum for a resolution to sell and the passing of the resolution requiring the support of those having at least 75% of the beneficial freehold interest in the land (Regs 33 and 45(3)). It is only where those requirements are "impractical" that the Maori Land Court can make an order under s137 and in such a case two further conditions must be satisfied (s137(1)(c) and (d)):

- (c) The alienation of the land is clearly desirable for the purpose of a rationalisation of the land base or of any commercial operation of the Maori incorporation in which or the trustees in whom the legal estate in fee simple in the land is vested; and
- (d) The rationalisation referred to in paragraph (c) of this subsection will involve the acquisition of other land by the Maori incorporation in which or the trustees in whom the legal estate in fee simple in the land is vested.

Following through the statutory scheme, by s146:

No person has the capacity to alienate any interest in Maori freehold land otherwise than in accordance with this Act.

Sections 147 and 148 go on to deal with the alienation of the whole or part of the land (s147) and with the alienation of undivided interests in the land (s148). Section 148(1) empowers the owner of an undivided interest in any Maori freehold land to alienate that interest to any person who belongs to one or more of the preferred classes of alienees. Except for an alienation within the preferred classes or the grant of a mortgage to a State Loan Department, "no owner of an undivided interest in any Maori freehold land has the capacity to alienate that interest separately" (s148(3)). Then, in terms of s147(2):

Where any Maori freehold land is to be alienated by sale, gift, or lease, the alienating owners shall give the right of first refusal to prospective purchasers, donees, or lessees who belong to one or more of the preferred classes of alienee[s], ahead of those who do not belong to any of those classes.

That expression "preferred classes of alienees" is relevantly defined in s2 as follows:

"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 the 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.

An alienation of any interest in Maori freehold land has no effect without confirmation by the Maori Land Court (s156). The Court must be satisfied as to various process and substance matters (s152) including under s152(1)(e) and (g).

(1) The Court shall not grant confirmation of an alienation of Maori freehold land unless it is satisfied - ...

(e) That, having regard to the relationship (if any) of the parties and to any other special circumstances of the case, the consideration (if any) is adequate; and

...

(g) That, in the case of a lease for a term of 42 years or longer, the special circumstances of the case warrant the grant of such a term.

Further, reflecting the clear thrust of the Preamble and the policy underlying the provisions we have been discussing, ss153 and 154 provide:

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.

154. Grounds on which Court may refuse confirmation - Without limiting the general discretion conferred by section 153 to 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.

The Tribunal's decision

The Land Valuation Tribunal considered *Thomas v Valuer-General* [1918] NZLR 164 authority for the proposition that where there are restrictions on 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 1993 Act provided a statutory mechanism for processing proposed sales and obtaining consent and there was no persuasive evidence before the Tribunal at that early stage in the operation of the Act that the Maori Land Court would not permit any such sales to non-Maori where there is no one in the preferred classes of alienees that is entitled in the matter and the necessary majority of shareholders approve. The objectors had not met the onus of proof on them of sustaining the objection (Valuation of Land Act 1951, s20(8)).

The High Court decision

The appeal succeeded. The court held that in terms of the definition of land value that value did not depend on an objective assessment of the worth of the land, but on what the hypothetical purchaser would pay for the owner's estate in the land, that is the marketable value of the estate. The 1993 Act must be seen as a significant

barrier to alienability. It indicated a legislative direction to close the gate on sales of Maori freehold land outside the whanau and hapu, except in special circumstances. The presence of a statutory mechanism for alienation did not mean it could be employed with ease or regularity. Further, it did not follow that a buyer of Maori freehold land would necessarily receive an absolute fee simple. The power to convert Maori freehold land to general land would have to be exercised consistently with the expressed objectives of the statute. It is foreseeable that some purchasers of Maori freehold land will remain bound by the land's status, thus requiring a first refusal to be provided to those within the preferred classes of alienees. Unlike the position in *Thomas v Valuer-General*, the restrictions contained in the 1993 Act could not be described as personal to the owner. The 1993 Act is a statute with wide application throughout the country, unlike *Gollan v Randwick Municipal Council* [1961] AC 82 where the restrictions were imposed under a private deed of trust. The reality is that in some situations the Act will affect the marketability of land and thus its value. The effect of the Act is such that it would be unjust to ignore the reality of the owner's position.

Finally, given the varied nature of Maori freehold lands and the varied effect of the 1993 Act, it would be inappropriate to make an across the board guideline discount of 30% to reflect the impact of the 1993 Act on the value of the lands. The precise effect on land value must be determined on a case by case basis.

The argument for the Valuer-General

Mr Parker for the Valuer-General submitted that it was desirable for rating purposes that properties be valued in accordance with the principle of uniformity of value. The principle is that properties which are similar to each other should be valued on the same basis so that each property owner bears an appropriate uniform

share of the rating burden. While the Valuation of Land Act 1951 does not expressly require or authorise that approach in relation to the three-yearly revisions, s41(5) implicitly requires new valuations to preserve uniformity with existing roll values of comparable parcels of land.

The policy of the 1993 Act, Mr Parker submitted, is to retain ownership of Maori land for Maori, but it does not prohibit alienation. He accepted that the 1993 Act is a significant barrier to alienation out of Maori ownership as has been reflected in the recent decisions of the Maori Land Court and the Maori Appellate Court (e.g. *Re Cleave* (1995) 3 NZ Conv 192, 245). But it does not restrict alienation between Maori who are members of the preferred classes. As a matter of law, Mr Parker submitted, the Valuer-General in making a valuation is required to assume a sale of the land and is required to ignore restrictions on sale. He acknowledged that *Thomas v Valuer-General*, being decided as it was against a completely different legislative and social background, does not assist in the resolution of the legal issue. But he relied on *Gollan v Randwick Municipal Council* and in particular on the statement of Viscount Radcliffe at p94:

It is not in dispute that a formula of this kind requires the making of certain hypotheses. A sale of 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. All this follows from the fact that a sale of such an estate has to be assumed.

In short, Mr Parker said, the assumption of a sale should ignore the restrictions imposed by the 1993 Act or, alternatively, should assume that appropriate steps had been taken and the alienation confirmed. Finally, he submitted, as far as the particular

properties are concerned, the limited evidence before the Tribunal did not justify any reduction in value.

Analysis

The question is whether constraints on the alienability of Maori freehold land imposed by the 1993 Act are to be taken into account in arriving at the land value under the Valuation of Land Act 1951. The answer requires consideration of the basis of the valuation under the 1951 Act and the effect of the 1993 Act. There are three crucial features of the statutory scheme.

First, the subject of the valuation is "the owner's estate or interest" in the land. It is not a valuation of the pure fee simple. In that respect the inquiry is different from what was required under the Valuation of Land Act 1916-1951 (NSW) which was before the Privy Council in *Gollan v Randwick Municipal Council*. By s6 of that statute the unimproved value of land was the capital sum which the fee simple of the land might be expected to realise if offered for sale on such reasonable terms and conditions as a bona-fide seller would require. It was in relation to that provision and a like provision relating to the improved value of land that Viscount Radcliffe at p94 made the statement set out above. He then went on to consider whether the fee simple assumed to be sold was a pure estate in the land without reference to the actual title under which it was held or whether it was the actual title with the consequence that notice of any restriction on user or enjoyment by which the title was affected entered into the valuation. The conclusion at p101 was that prima facie "the fee simple of the land" in s6 did not refer to the actual title vested in the owner at the relevant date but to an absolute or pure title such as constitutes full ownership in the eyes of the law. By contrast the definition of land value in the New Zealand statute focuses on the owner's estate or interest.

Second, the valuation is made on the statutory premise that the owner will sell its estate or interest in the land. The definition envisages a notional sale by a willing but not anxious seller to the hypothetically willing but not anxious buyer. It explicitly assumes "a bona fide seller". It follows that for valuation purposes practical difficulties in actual sales of obtaining agreement from individual owners and of obtaining the necessary quorum and agreement to sell in the case of Maori incorporations and trusts are not taken into account in the hypothetical valuation process.

Third, in terms of the definition, the land value is the sum which the owner's estate might be expected to realise if offered for sale on such reasonable terms as a bona fide seller might be expected to impose. The value is what a willing but not anxious seller would sell for and what a willing but not anxious buyer would be prepared to pay for the property. As in other valuation matters it must be assumed that the hypothetical purchaser is a person of reasonable prudence, properly informed as to all the relevant facts.

The 1993 Act imposes very significant constraints on the sale of Maori freehold land, particularly sale to a purchaser who would also seek to change its status from Maori freehold land to general land. Parliament could not have expressed the policy more clearly. Drawing on the Treaty of Waitangi and the special significance of land to Maori people, the 1993 Act reflects as the primary objective to be applied throughout the legislation and by the Maori Land Court the retention of Maori land by Maori and the use, development and control of Maori land by Maori. The machinery provisions allowing for alienation of land are directed and restricted to that end. Preferred classes of alienees have priority. Significant conditions and restrictions limit free alienability. There is no question of majority decisions of owners necessarily carrying the day. Any agreement of the owners is subject to the contingency that the

Maori Land Court may in the exercise of its powers and responsibilities refuse to confirm the alienation or to change the status of the land.

Section 152(1)(e) is also significant. It envisages that the relationship of the parties to a proposed sale and other special circumstances should be taken into account by the Maori Land Court in assessing the adequacy of the consideration payable. It seems implicit that in some circumstances alienation within the preferred classes may warrant a lesser consideration than would otherwise be regarded as adequate.

The Maori Land Court exercises its powers and responsibilities in relation to applications to confirm the alienation of Maori freehold land and to change its status to general land in conformity with the policies and principles underlying the legislation. Reflecting the Preamble and the interpretation approach mandated by s2, the court's primary objective in exercising its jurisdiction and powers is to promote the retention of Maori land and general land owned by Maori in the hands of the owners and to promote the effective use, management and development of the land by or on behalf of the owners (s17). Statutory preference is given to those coming within the preferred classes of alienees over any other potential buyer. And the court may refuse confirmation if satisfied that the alienation would not be consistent with the objects of the Act having regard to the matters specified in s154. Consistently with the statutory scheme, the appellate court in *Re Cleave* saw the primacy of the retention of land within whanau and hapu under ss2 and 17 as the overriding factor in the exercise of the discretion and refused to change the status of the land to general land as sought by the sole Maori owner. The 1993 Act is major legislation directly affecting the alienability of very substantial areas of land. It is clearly distinguishable from the statutory restrictions in *Thomas v Valuer-General*. In that case the lessee of land vested in a Maori Land Board had power to sell to the Crown with the consent of the owners or to sell to any other person with the consent of the owners and the assent of

the Governor in Council. The purchaser obtained an unrestricted title and the preceding steps affecting alienation were not seen by the Full Court as significant.

While no one can be absolutely excluded as a possible purchaser of Maori freehold land, the 1993 Act imposes a significant barrier on alienation. Just as on an actual sale, the hypothetical seller and purchaser would have to obtain confirmation of the alienation from the Maori Land Court. The inquiry under the Valuation of Land Act assumes a sale, not the possibility of a sale. The hypothetical purchaser would recognise that anyone not within the preferred classes of alienees would face serious legal restraints in obtaining that confirmation. Further, after confirmation the purchaser's interest will still be subject to the same constraints on alienation. Even if within the preferred classes of alienees, the hypothetical purchaser would recognise that as in *Re Cleave* the court would be likely to refuse an application for change of status to general land. And, if the purchaser is from outside the preferred classes of alienees, refusal would be even more likely.

The determination of land value must recognise those legal constraints on alienability. The effect of those restrictions on the saleable value of the estate or interest in the Maori freehold land to be valued is then a question of fact. The valuer's task is to determine what the hypothetical purchaser would pay to obtain the owner's estate or interest in the land.

The factual answer and guidelines for the future

If, as we hold, Valuation New Zealand erred in law in its valuation approach, its valuations prepared on an erroneous basis cannot stand. No question of onus of proof arises. The matter must be reconsidered on a proper legal basis.

Mr Palmer submitted that a guideline reduction of 30% or another approximate figure would be a proper benchmark recognition of the likely impact of the 1993 Act on the hypothetical market value of the owner's estate or interest applicable both to the present case and generally. There are two reasons why the submission must be rejected.

First, the material before the court is inadequate to form the basis for any assessment. The sale prices of small shareholdings in Maori incorporations have no direct relationship to the value of the Maori incorporation's estate or interest in a particular piece of land. And the one valuation arriving at a discount largely on a population basis seems inherently flawed and was not in the end relied on by Mr Palmer as establishing the appropriate level of discount.

Second, as the High Court held, the assessment of land value must be made on a case by case basis. The effect of restricted alienability will be affected by such factors as the nature and size of the property, the historical connection of the owners with the land, membership of the preferred classes of alienees and the resources available to fund the purchase, the statutory role of the Maori Land Court in relation to the property and the prospect of obtaining confirmation of an outside sale from the court. In the absence of further guidance in the legislation valuers will have to weigh the considerations in a sensible and practical way to arrive at what may well be a robust and imprecise judgment.

Finally, this decision does not mean, as submitted by Mr Parker, that the land in issue must bear a particular burden of rates. It is always open for a rating authority to exercise the various choices as to rating systems, differentials and charges under the Rating Powers Act 1988 to arrive at what in its judgment is the appropriate relative incidence of rates on properties within its district.

Result

For the reasons given the appeal and cross-appeal are dismissed. The High Court remitted the objections to the Tribunal for further consideration noting that no doubt both parties would wish to call further valuation evidence. The Tribunal will now consider the objections in the light of this judgment. Assuming that Valuation New Zealand revises its valuation approach accordingly, the objectors will carry the usual onus of displacing the valuation arrived at by the Valuer-General.

The parties are agreed as to the costs of this appeal and no orders for costs are required.

A handwritten signature in black ink, appearing to be 'W. Barber', written in a cursive style.**Solicitors:**

Crown Law Office, Wellington, for appellant.

Wilson Barber & Co, Gisborne, for respondents