The New Zealand VALUERS' JOURNAL

SEPTEMBER 1988 VOLUME 27 NUMBER 10

Official Publication of the New Zealand Institute of Valuers

NEW ZEALAND INSTITUTE OF VALUERS

Incorporated by Act of Parliament

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Contributions with a biographical note of the author should be typewritten and sent to the Editor, PO Box 27146, Wellington, who reserves the right to accept, decline or modify material. Views expressed by the editors and contributors are not necessarily endorsed by the New Zealand Institute of Valuers. Copies of manuscript should be retained by the author as they cannot be returned. Deadline: two months prior. Business letters, subscriptions and advice of changed address should be sent to the General Secretary, The New Zealand Valuer 1986 ©. The mode of citation of this volume of *The New Zealand Valuers' Journal* is [1988] N.Z. Val. (page).

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Contents

Maori Land, Past, Present and Future

A very current topic today is Maori Land and Maori Land Rights.Opinions and views on Maori land vary from both ends of the scale and along with most things today times are changing.

Firstly be assured the paramount factor relating to Maori Land is the strong affinity Maori people have with their land. There can be no denying these feelings run far deeper than for Europeans in New Zealand; to most it is not a commodity to be sold but an inheritance of great value.

Multiple ownership of Maori land ensures this inheritance is passed on from generation to generation. However this aspect also creates problems for land valuers, among others. Examples include:

- Fractional interest valuations does the accepted formula apply?
- Security for mortgage recommendations?
- Partitions of separate allotments for individual shareholders are these fair and equitable?
- Sale of Maori land with a "majority" of shareholders agreeing?
- Unsurveyed areas of partitioned land.

These all create circumstances not encountered with freehold land as we know it under the torrens system.

Inspect any valuation library and you will find little, if any, published information or guidance on these matters. Valuers must be guided by the legislation stated in the Maori Affairs Act 1953 and Amendments together with Court decisions which have been documented.

From 1840 until the late 1970s the area of land in New Zealand under Maori ownership declined. In the mid 1800s large tracts of land were confiscated and large areas were purchased by barter or by monetary payment. Let us say that land was sold at its then market value in most cases. With the formation of the Native Land Court (later the Maori Land Court) the purchase of Maori land was judged by that Court as to its fair value and this system remains in place today. Valuers normally provide the Court with the land's current market value to which a further 15% is added and the sale proceeds.

Until the late 1940s the bulk of the remaining rural Maori land was farmed by the family unit. However, the urban drift of the late 1940s left significant areas of land under-utilised and unproductive. At that stage the sale of Maori land increased and continued through until the mid 1970s.

Much of this under-utilised land was placed under the control of the Maori Trustee who administered the land on behalf of the absentee owners. The success of this management varied.

Today, Maori land owners opt for the retention of their land, some of which is farmed again as a family unit. Some is leased to other farmers, some is developed for forestry on a long-term lease with profit sharing as the basis of rental, and some of the land has been formed into corporations again with profits shared. Iron stone sand is sold for royalties along the south Waikato coast and so on, thereby generating income for the shareholders.

In the mid 1970s the Maori Land Advisory Committee was formed and more recently the Maori Development Corporation, both bodies providing financial assistance to further develop Maori land. Today some incorporations are in such a sound financial position that they are able to purchase urban and rural land on the open market.

After almost 140 years of disposing of land, the opposite is now occurring and Maori land is increasingly being utilised to generate income for shareholders. During this time injustices were done. All are familiar with the Raglan Golf Course and Bastion Point of recent times and these matters have been rectified. More recently, a Crown acquisition in the northern area is currently under litigation in a Civil Court.

Local authorities now make considerable comment in their district plans with regard to Maori land. The wishes of the land owners are to some degree being met in so far as dwelling houses are now permitted more or less as clustered developments on multiple-owned land. Special loans are being made available for the property owners in these circumstances as security for a conventional mortgage is uncertain. Such developments are not permitted on European rural land.

The vexed question of inalienable Maori land being suitable security for a mortgage has been tested in the Court of Appeal where a very recent judgement from that learned body stated that a mortgage secured against inalienable Maori land was binding and the developers who are in default with mortgage payments are subject to mortgage redemption as for any other secured mortgages. This extremely important decision which in fact overrides Section 438 of the Maori Affairs Act 1953 is printed in full in this issue of the *Journal.*

As to the future who can tell. Much publicity has been given to the claims by various Maori tribes over large tracts of Crown land. This matter is in the hands of the various tribunals and the politicians. If compensation is to be paid, what will be the valuer's role in this settlement?

Clearly, the last decade has seen considerable change in the administration of Maori land. The land owners are becoming very active in the control of their property and the Maori Affairs Department has a much lesser role to play. Let us hope a balance is reached which is fair to all, or has that balance already been arrived at? If our profession is called on, in the future dealings with Maori land, it will be necessary to give serious consideration to all aspects of the situation. Let us acknowledge the complexities that confront the task.

A paper presented to the recent Pan Pacific Congress entitled "The Appraiser's (Valuer's) Role in the Resolution of Native Land Problems" appears later in this issue. I commend this paper to you. *W A F Burgess*

President Responds To Allegations of Valuer Involvement In Fraud

A tightening of the regulations governing property valuations in this country has been called for by the New Zealand Institute of Valuers.

Institute President, Mr Roger Hallinan, said regulations were required to ensure that only those persons registered as valuers in terms of the Valuers Act 1948 were allowed to prepare valuations of property.

R E Hallinan: "Regulations are required.."

"Currently, property valuations are beingpreparedby people who have been struck off the list of registered valuers for earlier misdemeanours, or who have not completed the necessary academic or work experience qualifications," said Mr Hallinan. Clearly the public is confused because they are unable to distinguish the difference between a "valuer" and a "registered valuer".

There does not appear to be widespread involvement of registered valuers in recent allegations of corporate fraud, Mr Hallinan said.

"In the two-year period from January 1 1986 to December 311987, the Valuers' Registration Board received only 49 complaints against registered valuers," said Mr Hallinan, "with 18 of the complaints being subsequently dismissed or withdrawn."

Of the 31 remaining complaints, 20 of them related to activities of the following four valuers:

Mr William Raymond Wright(eightcomplaints), MrHenry Leon Simkin (six complaints) and Mr Francis Ogilvie Evans (two complaints), all of whom have since been struck off the register of Registered Valuers. (See Legal Decisions page 610)

The fourth valuer (four complaints) has been reprimanded and fined on one charge, while there is a reserved decision on a second charge, and a further two charges have not been substantiated.

A further 11 complaints are yet to be determined.

"The correct perspective is that in New Zealand there are approximately 1730 registered valuers with only 15 registered valuers having had valid complaints laid against them with the Valuers' Registration Board over the two-year period to December 1987," said Mr Hallinan.

"In some cases there may well have been elements of contributory negligence by other parties who may have supplied false or misleading statements or documents to valuers and there is also the necessity to examine the involvement of lawyers and financial institutions in the lending process," he said.

"Few, if any, professional bodies so vigilantly protect the interests of the public as the New Zealand Institute of Valuers and the Valuers' Registration Board," said Mr Hallinan.

"Excellent professional standards are being set and maintained by the Institute's members, which is a direct result of ongoing education, professional publications, development of practice standards, and supply of sales information to members by the Institute and the Valuers' Registration Board," he said.

Mr Hallinan said that the Institute welcomed the Government's recognition of the term "registered valuer" in this year's Securities Act (Contributory Mortgage) Regulations, under which members of the New Zealand Institute of Valuers are able to perform their duty to the highest professional standards. Section 5 of the regulations defines valuation reports, their effective date, and specifies the test of the valuer's independence. Under the Third Schedule of the regulations, the specific report content is detailed.

"Registered valuers will not have any difficulty in complying with the requirements of the regulations in terms of report content, as they have always been encouraged by the Institute of Valuers, and the Valuers' Registration Board, to uphold stringent reporting standards," said Mr Hallinan.

For further information contact:

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WELLINGTON
Telephone: (04) 847-094

See full text of President's letter to Parliamentarians on Letters page.

From President to President .....

Roger,

The Chief and alternate Delegates reported at our recent Annual General Meeting, on the success of the Fourteenth Pan Pacific Congress, recently held in Christchurch. On behalf of our General Council, I wish to extend our congratulations to your Institute and particularly the Congress Chairman and organising committee. Their efforts were concomitant to an informative event and the standard of speakers was of high calibre and diversified. The interchange of information between sessions, I feel certain, has also broadened delegates' technical knowledge. The Fourteenth Pan Pacific Congress was cogent in our common desire to advance the appraisal and valuation professions throughout the region.

Australian delegates were greatly impressed and have indicated their enjoyment of all social activities and excursions. In this regard, I would like to impress our gratitude for your assistance to all Australian delegates.

Your gift of Volumes containing Proceedings of the Congress, is acknowledged and copies have been forwarded to our Divisions for the reference of our members.

Our granting of Honorary Membership of the Australian Institute of Valuers and Land Administrators, was extended as personal thanks for your involvement as President of the Host Institute.

We appreciated your attendance at our recent annual General Meeting on the Gold Coast and trust we will be in contact in the near future.

Yours faithfully
Greg McNamara
FEDERAL PRESIDENT
Australian Institute of Valuers

....From President to Parliamentarians

A letter was originally sent to the Rt Hon G Palmer MP and the following version was sent to all Members of Parliament on August 9

RE: Fraud Allegations and Valuers Act 1948

Valuation Profession and the NZ Institute of Valuers

As you are aware, allegations have lately been reported in the media concerning "corporate fraud" and the possible involvement of "valuers" in these matters.

I write specifically to advise that in respect of the activities of "valuers", the problem is not at all widespread amongst members of the NZ Institute of Valuers.

You will know that *any person* in New Zealand may call themselves a "valuer" and *any person* may make a "valuation". (This contrasts with the situation in many Australian States whereby only *a registered valuer* may call himself a "valuer" and indeed *only registered valuers* may make a "valuation".)

In New Zealand, the "Registered Valuer" does *not* enjoy that protection or monopoly, neither is the public protected against the non registered valuer. The Valuers Act 1948 regulates the profession of "Registered Valuers" and indeed established the Valuers' Registration Board which is a quango independent of the NZ Institute of Valuers.

Registration of a valuer by the Valuers' Registration Board upon completion of stringent educational and experience requirements automatically results in membership of the Institute of Valuers under current legislation.

It is obvious, therefore, that "valuations" may be prepared by other than Registered Valuers, people unknown to the Valuers' Registration Board and the New Zealand Institue of Valuers. It is equally obvious that the public, innocently or otherwise, may by employing "valuers" who have not completed academic qualifications, have not had adequate practical experience, may not be of good character and reputation, and may even have been struck off the list of registered valuers through some earlier misdemeanor.

My belief that there is not widespread involvement by Registered Valuers in allegations of corporate fraud is evidenced by the fact that in the two-year period (1 January 1986 to 31 December 1987) the Valuers' Registration Board received 49 complaints. Analysis, however, reveals that only 31 of these complaints were valid, the other 18 having been dismissed on account of there being insufficient grounds, the charges were not proven, or the complaint was withdrawn.

Of the 31 valid complaints received, 20 relate to the activities of only four valuers as follows:

Valuer A	8 complaints
Valuer B	6 complaints
Valuer C	4 complaints
Valuer D	2 complaints

Of these four valuers, 19 complaints have reached a conclusion to date with the following outcome:

Valuer A	Name removed from register	William Raymond Wright
Valuer B	Name removed from register	Henry Leon Simkin
Valuer C	Charges not proven (2) Reprimanded and fined (1) Awaiting reserved decision (1)	(name withheld)
Valuer D	Name removed from register	Francis Eyre Ogilvie Evans

At this time, therefore, there are a further 11 complaints which have not reached a conclusion. The delays in achieving a conclusion are of particular concern to the Institute of Valuers and the valuing profession generally. Essentially it seems that this problem may lie within the domain of the justice system and the legal profession.

Whilst not wishing to justify the actions of those valuers who have been struck off by the Valuers Registration Board, I would suggest that there may well be elements of contributory negligence by other parties. By that I mean that some parties may have supplied false or misleading statements or documentation to valuers, and of course there is the necessity to examine the involvement of the lawyers and the financial institutions in the lending process.

In my view, the above statistics should be contrasted with the fact that there are about 1730 registered valuers in New Zealand and yet only 15 Registered Valuers have had valid complaints lodged with the Valuers' Registration Board over

the two-year period. I believe these statistics place the matter in its proper perspective.

While not suggesting complacency, I believe the Valuers' Registration Board (by its control of valuer education and initial registration) and the NZ Institute of Valuers by its ongoing role in continuing education, its professional publications, its development of practice standards, and supply of sales information to its members, amongst many other regulatory functions, is achieving excellent professional standards from its members and to the benefit of the community.

I now wish to briefly refer to the activities of two "valuers" over the past two years, both of whom made valuations in the Auckland area. The first relates to a valuer whose name had been struck off the list of Registered Valuers on grounds of incompetence by the Valuers' Registration Board. That person simply removed the word "registered" from his business letterhead and continued to offer his services to the public and practice as a "valuer". Neither the Valuers' Registration Board nor the Institute of Valuers have any power to prevent this situation occurring.

The second example is in respect of an impostor who was not registered, qualified as a valuer or even known to the Registration Board or the Institute. He nevertheless claimed he was a registered valuer, his letterhead said so, and we are aware he made several valuations on this basis. Vigilance by Institute members in Auckland enabled the Police to bring charges under the Crimes Act and this person was sentenced recently by the Court.

Under the present climate of deregulation, it would be difficult to follow the Australian system and, by legislation, require that all valuations must be made by Registered Valuers, and indeed that no other person be able to call themselves a valuer, or make valuations.

However, as a qualified professional body, we do suffer from *a lack of identity* as between the term "Valuer" and "Registered Valuer". Mr Geoffrey Palmer recently stated the public would be substantially confused if they were expected to distinguish between a veterinarian and aregistered veterinarian. He endorsed continued protection of the word "veterinarian" as being applicable only to registered veterinarians in the interest of protection of the public and animals.

Under the current Valuers Act, I can assure you there is already considerable confusion in the minds of the public as between the term "valuer" and "registered valuer". Non-registered valuers are, of course, not subject to any Act and we therefore have the situation where those who call themselves "valuers" can get away with malpractice, whether qualified or not. The lack of statutory identity for the Registered Valuer is of very real concern and any influence you may be able to bring in this respect to strengthen the role of the Registered Valuer would be most welcome. The Institute of Valuers was pleased to see that the Government has recognised the term Independent Registered Valuer within the Securities Act (Contributory Mortgage) Regulations 1988. Members of the New Zealand Institute of Valuers are willing and able to perform their duties in full compliance with these Regulations and to the highest professional standards, however I consider that there are many other areas where the use of a "Registered Valuer" should be mandatory to ensure the better protection of the public. Should you wish to discuss any matters relating to my profession, I may be contacted direct at Robertson Young Telfer Ltd, PO Box 2532, Christchurch, phone 797-960. Thank you for your consideration of these matters.

yours sincerely
R E Hallinan,
PRESIDENT.

Membership Applications

Affiliate Status

Higgins, David M	Auckland

Studentship

Fong, Anthony W	Central Districts
Gillespie, Paul G	Central Districts
Hayes, Paul A	Central Districts
Healey, Karen A	Central Districts
Rigter, Adri P	Central Districts
Rolston, Brent J	Central Districts
Sweetapple, Rita M	Central Districts
Turley, Patrick D	Central Districts

Intermediate Status

Bruce, Andrew S	Auckland
Cardwell, Christopher G	Auckland
Fraser, Kent A	Auckland
Munting Clayton T	Auckland
Donovan, Michael K	Gisborne
Aitken, Carolyn J	Otago
Gemmell, Robert D	Overseas

Advancement to Associate Status

Carruthers, Elizabeth A	Auckland
Payne, Michael I	Auckland
Pride, James B	Auckland
Bentley, Neale Robert	Central districts
Weaver, Carey J	Otago
Collins, Kelvin R	Southland

Retired Status

Rule 14 (1)

Brown, Alan G	Auckland

Valuers Registration Board
Statement on Practical Experience Requirements For Registration

All potential applicants for registration as valuers should be aware of the requirements sought of them and as defined in section 19 of the Valuers Act 1948 which is set out below:

"19. Qualifications for registration

1. Every person who is not less than 23 years of age shall be entitled to be registered under this Act if he satisfies the Board that he is of good character and reputation and has attained a reasonable standard of professional competence and that:
   a. He holds a recognised certificate (as defined in subsection (2) of this section), and has had not less than three years' practical experience in New Zealand in the valuing of land within the 10 years immediately preceding the making of his application; or
   b. He has passed an examination or examinations approved by the Board and has had not less than three years' practical experience in New Zealand in the valuing of land within the 10 years immediately preceding the making of his application; or
   c. He holds a recognised certificate (as so defined) granted out of New Zealand, and has had not less than three years' practical experience in the valuing of land within the 10 years immediately preceding the making of his application, of which at least one year shall be experience acquired in New Zealand within the previous three years, and has passed an examination approved by the Board in the valuation law of New Zealand and is at the date of his application, or was within the previous 12 months, a member in good standing of an overseas institute or association of valuers with whom a reciprocity agreement has been entered into by the Board and that agreement is in full force and effect.
2. For the purposes of this section the term "recognised certificate" means a certificate, diploma, degree, or licence granted by a university, college, board, or other authority (whether in New Zealand or elsewhere) and recognised by the Board as furnishing sufficient evidence of the possession by the holder thereof of the requisite knowledge and skill for the efficient practice of the professional of land valuing."

The Board requires evidence of practical experience in order to satisfy itself, firstly, that the valuer has attained a reasonable standard of professional competence and, secondly, to satisfy itself that the valuer has had an acceptable degree of practical experience as defined in the Act. In order to satisfy itself on the above two points the Board has stipulated that all applicants must produce the material specified on the application form, ie a schedule of all valuations undertaken together with a sample of 20 reports completed over the period for which practical experience is claimed. All valuation reports should either include orbe accompanied by information relating to sales evidence and its analysis, rental evidence and its analysis together with other market research undertaken for the purpose of the valuation.

The requirements of the Act are for "not less than three years' practical experience in New Zealand in the valuing of land within the 10 years immediately preceding the making of his application". It is for the Board to decide in each particular case what constitutes experience in the valuing of land and also what constitutes the equivalent of three years such experience. This task is becoming increasingly more difficult for the Board since an increasing proportion of applicants are employed in what may be described as fringe valuation occupations in which only a proportion of their time is taken up by work which is clearly and unquestionably directly related to the valuation of land. Such occupations include land purchase officers employed by central and local government; property managers and administrators employed by a number of organisations having a large involvement in property ownership; persons involved in a mixture of real estate consultancy, marketing and appraisal work, etc.

All applicants, and particularly those whose work is partly or substantially involved in the "fringe valuation" fields have an obligation to satisfy the Board that the work they have been involved in over the period for which practical experience is claimed (and this can extend to a maximum of 20 years) can be regarded as the equivalent of three years' practical experience in the valuation of land. The Act does not require the practical experience to be continuous or full time. Indeed, the requirement that the experience must be gained within the immediately preceding 10 years, implies that a part-time involvement in the valuation of land over some period up to 10 years can be accepted by the Board. The Board does not accept university vacation work as a component in the three years' practical experience requirement.

Applications involved in the fringe valuation work must provide to the Board a comprehensive account of all work undertaken so that the Board can make a realistic judgement as to the valuation content.

The Board receives applications from valuers whose valuation work and reports thereon are required for "in house" purposes. This work and reporting is required by superiors or other staff members within the same organisation and the reports are not prepared or designed for the information of persons outside that organisation. Such reports may be prepared for internal asset performance and assessment; for decision-making as to whether or sell, purchase, lease or otherwise deal in property owned by the organisation or company; or for other internal purposes. Such valuation work may be accepted by the Board as being practical experience in the valuation of land and the reports, even though not for public consumption, are required by the Board in order to assess the valuer's standard of professional competence and extent of practical experience.

...valuers have prepared reports at the time of application...

It has come to the notice of the Board that when applying for

registration, some valuers have prepared reports at the time of application, from material and records compiled some years earlier than the time the assessment was undertaken. This practice is not acceptable to the Board. Valuers involved in these circumstances must present reports which were compiled at the time the evaluation was undertaken, and these reports must represent the work of the applicant. They must not be compiled from research, calculations and conclusions prepared by other members of the firm, on projects in which the applicant has had only a minor involvement.

In essence, the reports must be prepared at the time the valuation assessment was undertaken, and they must represent substantially the work of the applicant.

Applicants are warned that those who are not involved full-time in valuation work should not apply to the Board until they themselves believe that they have achieved the equivalent of three years' full-time practical experience in the valuation of land. In normal circumstances the Board will consider and take into account fringe valuation work in assessing the three-year requirement.

In the case of applicants for registration with rural experience the Board expects applicants to have produced a substantial number of reports. For example, assuming a full-time commitment to valuation work, one major report per week where large and complex farm properties are involved, and a greater number where less involved work is undertaken. Some flexibility would be allowed according to the type of work, viz a valuer could spend a considerable time preparing work for litigation or compensation. This could reduce the applicant's output in terms of numbers in a given period of time. The range of rural experience is usually governed by the practical limitations of the applicant's location. Applicants are expected to have a range of experience covering all classes of property within at least their provincial boundaries. The Board seeks to ensure that applicants have contact with as wide a range of work as possible. This desirably should include valuations for compensation and replacement insurance purposes together with economic feasibility analysis. Applicants should also be able to demonstrate clear understanding of legal principles not only as they affect valuation but also in respect of town planning and trustee law.

In making its decision as to whether or not to register an applicant the Board has to acknowledge that the applicant could immediately commence practice on his or her own account. Therefore the Board has to be fully satisfied that the applicant can offer to the public a service which is backed by a good academic training, practical experience and a responsible and professional attitude.

In recent years the Board has adopted the practice of interviewing a significant percentage of applicants for registration. As a result of these interviews it is clear that many aspiring valuers devote little time to continuing education once they graduate from university. The Board expects that all applicants for registration (and indeed all practising valuers) should keep up to date with the latest case law, literature and developments which are of significance to the valuation profession.

Board requires accurate diary from 1 January 1989...

In addition to the material now required in order to substantiate the amount of practical experience claimed by applicants, the Board gives notice that with effect from 1 January 1989, it will require all applicants to submit a diaryrecording a summary of all work undertaken on a day to day basis. This diary can be in the form of a simple "Collins Diary 81" type devoting one page to each day of the year. The Board requests that this diary be countersigned at three-monthly intervals by the applicant's controlling officer or supervisor who should certify that it is a true and correct record of work undertaken by the applicant. Applicants should note that this diary is not required for those periods claimed as practical experience prior to 1 January 1989.

World Valuation Congress 111
Singapore: April 23 -27 1989

After the successes in Cambridge (1984) and Vancouver (1987) we can truthfully say that WVC III is in response to popular demand. The National University of Singapore is responsible for organising the programme in 1989 in conjunction with the sponsoring universities of: Amsterdam, Auckland, British Columbia, City (London), and Texas. The Incorporated Society of Valuers and Auctioneers of the United Kingdom and on this occasion the Singapore Institute of Surveyors and Valuers are the sponsoring professional societies.

The main subject areas are the valuation of leisure properties; public sector valuation; and professional negligence and indemnity. A new programme feature is the introduction of a day of on-site inspections of properties relevant to the subjects of the papers; otherwise the format of the Congress remains the same two papers each morning and two kinds of discussion groups each afternoon. One type of discussion group deals with the subject papers of the morning and the other with subjects pre-selected by delegates. Altogether about 50% of the total programme time is given over to discussion.

The City-State of Singapore is an exciting place to visit in its own right. An outstanding record in economic performance in the post-war years is manifest in the scale of urban development which has taken place, but not all of the older buildings have been swept away and the tree-lined and flower-bedecked streets continue to justify the soubriquet "the garden city of Southeast Asia". An added attraction is its central location in relation to the other major tourist centres of this part of the world - Bali, Malaysia, Thailand, and Hong Kong. Singapore is also a natural stopover point for those travelling to and from Australia and New Zealand.

The all-in price registration, accommodation and meals - is even better than Cambridge and Vancouver: S$800 (current exchange rate is S$3.50=£1.00 and S$2.50 = US$1.00).

Philip H White, Co-Chairman WVC III

D

To: The Organising Secretary WVC 111
School of Building and Estate Management
Faculty of Architecture and Building National
University of Singapore
Kent Ridge, Singapore 0511

Please send me the free brochure for World Valuation Congress 111 to be held at the National University of Singapore from 23-27 April 1989.

NAME:.....

ADDRESS:

L - - - -

Real Estate Sales Distribution Systems
The New Zealand Experience

By R V Hargreaves

The availability of accurate and timely real estate sales data is a crucial ingredient in the valuation process. Modern developments in electronic data processing have given valuers a powerful tool to disseminate sales information.

New Zealand can contribute to an understanding of these methods because it is one of the few countries with a nationwide electronic sales distribution system.

This paper describes the establishment of the New Zealand Institute of Valuers electronic sales distribution system and some of the lessons learnt from the experience. Also described are the Valuation New Zealand public Videotex property database and the Real Estate Institute sales system. The paper gives a brief overview of Land Information New Zealand, an information system of the future.

Background

Rating valuations in New Zealand are almost exclusively carried out by Valuation New Zealand (VNZ), a central government organisation. The decision to use valuers employed by central government rather than local government was taken in the 1890s. With the benefit of hindsight this was a fortuitous move because not only did it achieve the original objective of providing an independent assessment service but it set the pattern of establishing a standardised property database.

The database of property information is the foundation of the national system of sales distribution. Transfer of the main elements of the VNZ manual database to computer format were completed in 1972. By 1981 the database had been considerably enhanced; random access was available as was a computerised system for recording, analysing and listing real estate sales information. At this stage access was only available at the site of the central computer.

The sales data originates from the lawyer acting for the seller who has a legal obligation (under Section 49 of the Rating Act 1967) to notify both VNZ and the local authority of the sale. The sales data is then verified at the local office of VNZ and sent down line to the central computer.

Every two weeks a magnetic tape is produced from the central computer which matches the sales file with the file containing the descriptive information. A private computer bureau converts the magnetic tape to microfiche and floppy diskettes. The flow of sales information through the system is shown in Figure 1.

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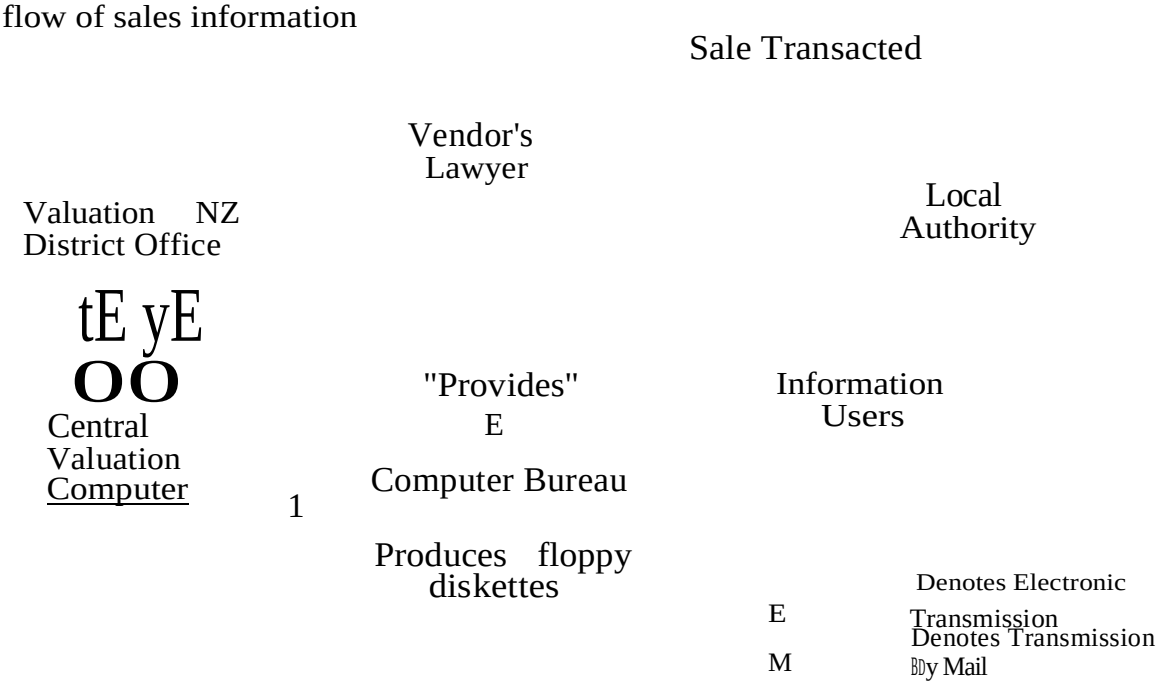
Bob has been regular contributor to The New Zealand Valuers Journal paving the way in anum; ber of areas on computer applications valuation. He has gained wide acclaim. with papers on the subject. This is a condensed version o raper titled "Nationwide Real Estate Sales Distribution:: Systems -- The New Zealand Experience" that the author` presented to World Congress III on Computer Assisted, Valuation and Land Information Systems held at Harvard.. University in August 1988.

Figure 1: The flow of sales information



The New Zealand Institute of Valuers Sales Systems

A. Microfiche

In 1981 valuers operating in the private sector were also given the opportunity of subscribing to the microfiche sales service on a fee paying basis. Cooper' reports that the reasons given by Mr Mander, then Valuer General, for opening up the VNZ sales database to the private sector were as follows:

> "...that an acceptable standard of valuation work could only be achieved with accurate up-to-date market information and the governmentrecognised it was in the national interest for all registered valuers, both departmental and public, to provide valuation services of the highest standard coupled with optimum economy."

Distributing sales data in the form of microfiche has turned out to be remarkably successful. For an annual subscription of $350 in 1988 a subscriber receives in the mail every two weeks a listing of all the property sales for the country. Annually there are about 100,000 sales nationwide and at the end of the year this all fits on about 20 postcard size microfiche negatives. Aggregate data are provided quarterly. At the user end the only piece of equipment necessary is a microfiche reader.

Some users utilise a microfiche reader/printer to obtain hard copy of selected microfiche frames. There was a very rapid uptake of the microfiche by members of the New Zealand Institute of Valuers.

By 1986 the number of subscribers had increased to approximately 600 individuals and firms. (The figures given include somereal estate firms who also subscribe to the system.)

Although microfiche is a relatively low technology solution to the sales distribution system it has the following advantages:

1. It has a lower cost than computer systems and is relatively error free. (About the only thing that can go wrong with a microfiche viewer is that the light bulb will need replacing periodically.)
2. It is a very good system of archiving information as millions of sales can be stored in a very small space. It is also much cheaper to keep the old sales on a fiche rather than live on a computer. In New Zealand, most of the valuers who have converted to computerised sales systems still use microfiche as a backup, and for archiving data.
3. It is cheaper to make microfiche copies than photocopies of documents. Microfiche require a minimal storage area. Some organisations have found that converting to microfiche storage instead of paper storage significantly reduces space requirements and rental costs.
4. Microfiche is more user friendly than most computer systems.
5. Portable microfiche viewers can be taken out in the field. The power source is the cigarette lighter in a car.
6. Microfiche can be distributed by the mail system, which is usually reliable in most countries.
7. Microfiche works best when there aren't a lot of sales to sort but sorting problems can be overcome to some extent by programming at the mainframe end. Thus microfiche don't have to be produced by the same format every time. For example, microfiche can be formatted by street address, or property type, or geographical location.
8. Microfiche is also an excellent way to cheaply copy and distribute survey and building plans.

There is sometimes a tendency to adopt the latest technology without really thinking about why. For a number of countries microfiche may be the best first step.

B. Electronic Sales Distribution

When the microfiche sales data system was introduced to New Zealand in 1981 it was widely acknowledged that it may have a limited life. Computerised on-line systems offer a number of potential advantages over microfiche. Computers are particularly good at rapidly sorting and analysing real estate sales information.

In February 1982 the New Zealand Institute of Valuers (NZIV) established a group called the New Technology Committee (NTC). The NTC was given the job of implementing a system to distribute the sales data in electronic format.

The first option to be seriously considered was a centralised system operated by a computer bureau. This would have involved mounting the sales on a central computer that subscribers could access with microcomputers through the telephone system. Such a system would have been similar to the Marshall and Swift sales service available in parts of the USA.

In the event this option was not adopted because in 1982 there were some doubts about the reliability and costof using the New Zealand telephone system for data distribution. It was felt that most potential users would not be able to justify the cost of a dedicated data circuit. The integrity of the data could not be guaranteed if the less expensive option of using standard voice circuits to transmit the data was adopted.

The option that was finally adopted in 1983 was a sales distribution system based on mailing the data out on floppy disks. A computer program was written to convert sales data from the mainframe tapes to floppy disk format. A file management program call "Valpak" was developed by the NZIV to enable users to store and retrieve the real estate sales data on microcomputers.

The first version of the "Valpak" program became available in late 1983. It was written fora CPM operating system environment on the ICL (International Computers Ltd, a British firm) range of microcomputers. The decision to make the electronic sales system available for just one brand of microcomputer was made to keep the system as simple and cost effective as possible and because the NZIV had become a retailer of ICL equipment.

This approach met with a mixed success from potential users of the service. A 1983 survey by the author3 showed that often valuers are not the people in the organisation who make the decisions about the type of computer equipment to be purchased. In the case of institutions such as banks and insurance companies computer purchases were normally dominated by accounting considerations and the need to have any microcomputer equipment compatible with the existing word processors and larger computers used by the corporation.

The other main thing that happened in New Zealand after 1983 was that the IBM PC and IBM look-alike equipment, that used the MS DOS operating system, began to dominate the sales of microcomputer equipment. In acknowledgement of the demand for a "Valpak" type program in MS DOS format the NZIV had the program re-written in 1986.

During the first three years the rate of uptake of the electronic sales system was much slower than originally predicted. By early 1986 there were only 20 valuation firms subscribing to the lfoppy disk sales out of a potential market of some 600 microfiche subscribers. During 1986 and 1987 sales accelerated and there are now about 125 sites using the "Valpak" system. Approximately 90 percent of the sites are using the MS DOS version of "Valpak".

In 1983 the NZIV "Valpak" program had very little competition. Now there are at least four main competitive systems. Two of the competitive systems operate on a time-sharing basis on mini computers and utilise the telephone system to link the user's terminal to the central computer. A directly competitive program called "Valdat" performs very similarly to "Valpak". The "Provides" videotex system is described in detail later in this paper.

Perhaps the lessons to be learnt here from the NZIV experience are:

1. If software is developed for just one brand of computer then it is best to pick a machine which has high sales and is likely to continue to be a dominant force in the market in the future.
2. The decision as to which brand of computer a corporation will purchase is often not made by the valuers in the firm. A computer must perform multiple uses for a firm. Even when valuers do make the decision it is often found that word processing and other considerations are more important than the sales data base.
3. Potential conflicts of interest can arise when a professional organisation such as the NZIV markets both computer hardware and software. There is a natural temptation to promote one type of hardware. Our experience was that the computer hardware business is so competitive and changes so rapidly that the NZIV were best to get out of selling hardware to members and just concentrate on developing specialised valuation software.
4. To maintain the NZIV share of the valuation software market involves ongoing promotion, enhancement of "Valpak", and the development of new products.

Valuation New Zealand

Under the more open and competitive economy that has operated in New Zealand since 1984 there is increasing pressure from central government on organisations such as Valuation New Zealand towards full cost recovery.

Apart from reducing staff to a minimum, VNZ has looked at ways to sell its services. In addition to the professional valuation skills of the staff, VNZ has a unique resource in the form of the property database. The database is now highly computerised and regularly updated. Most importantly the information from the database is now viewed as a saleable commodity.

There is clear evidence that people operating in the residential real estate market in New Zealand do take notice of the government valuation. Real estate salesmen quote selling and asking prices in terms of the percentage difference from government valuation. Regression indexing models in New Zealand use the government valuation as a variable for predicting sale prices.

In early 1988 Valuation New Zealand officially launched a computer system called "Provides" that gives subscribers access to a large part of their database.

A. Provides

The "Provides" system utilises videotex technology to give users access to a central government computer containing sales information, rating valuations on all the properties in New Zealand and real estate market statistics.

Videotex is the generic name for one of several systems that uses the telephone system to send information between computer and remote terminals. Videotex was first developed by British Telecom in the United Kingdom during the early 1970s.

Experience in the United Kingdom indicates that Videotex has particular application for volatile information such as stock market reports, real estate listings, real estate sales, commodity prices, etc.

The remote terminal can either be a dedicated Videotex terminal (with a built-in modem) or a personal computer fitted with the modem and appropriate software package.

The rate of adopting of Videotex in New Zealand has been relatively slowed up until quite recently because the telephone system did not have packet switching facilities and the connect time had to be paid for at long-distance phone rates. (Packet switching allows large volumes of data to be moved by computers through the telephone network at very high speeds. The standard connect time cost is 15 cents per minute.)

Table 1: PRIME MINISTER LANGE'S RESIDENCE

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Page # : 10014a   SIZE IN BYTES = 887
GCS PROVIDES SERVICE      10014a              CHOICE 0=
                VALUATION INFORMATION         CHOICE 1=
ROLL 36010 ASSMT 37300 SUFFIX                 CHOICE 2=
STREET 282 MASSEY RD                          CHOICE 3=
T.L.A. 0188 MANUKAU CITY                      CHOICE 4=
OWNER                                         CHOICE 5=
OCC: 1 LANGE DAVID RUSSELL                    CHOICE 6=
OCC: 2 LANGE NAOMI JOY                        CHOICE 7=
VAL DATE 1/07/87 TORAS CODES 111000           CHOICE 8=
VALUES:-  MAIN ROLL   SPEC VAL                CHOICE 9=
LAND          $26,300          $0             USER ACCESS=
IMPRVMTS      $58,200          $0             CUG=
CAPITAL       $84,500          $0             PRICE=
TREES         $      0         $0             TYPE=
CATEGORY RSB NATURE IMPS DWG OB 01 S/P
FLOOR AREA   140M2 USE 91 AGE 1950'S
LOT SIZE   0,0812Ha ZONE 9A UNITS   1
CONST: WALLS WOOD   ROOF IRON
COND: WALLS AVERAGE   ROOF AVERAGE
CERT TITLE: LD VOL FOLIO
LEG DESC LOT 11 DP 22695
  F FURTHER INQUIRY I INDEX X SALES N
  NEXT PROP P PREVIOUS PROP
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Table 2: OPPOSITION LEADER BOLGER'S FARM

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Page # : 10015a   SIZE IN BYTES = 882
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                VALUATION INFORMATION         CHOICE 1=
ROLL 5801  ASSMT 14600 SUFFIX                 CHOICE 2=
STREET MANGARINO RD                           CHOICE 3=
T.L.A. 0111 WAITOMO DISTRICT                  CHOICE 4=
OWNER                                         CHOICE 5=
OCC: 1 BOLGER JAMES BRENDAN                   CHOICE 6=
OCC: 2 BOLGER JOAN MAUREEN                    CHOICE 7=
VAL DATE 1/07/84 TORAS CODES 111000           CHOICE 8=
VALUES:-  MAIN ROLL   SPEC VAL                CHOICE 9=
LAND          $350,000         $0             USER ACCESS=
IMPRVMTS      $131,000         $0             CUG=
CAPITAL       $481,000         $0             PRICE=
TREES         $    1,000       $0             TYPE=
CATEGORY FLB NATURE IMPS DWG OB 01 FG
FLOOR AREA  470M2 USE 12 AGE
LOT SIZE  171.8985Ha ZONE IA UNITS     1
CONST: WALLS          ROOF
COND: WALLS           ROOF
CERT TITLE: LD VOL FOLIO
LEG DESC LOT 11 DP 20464 LOT 5 OF SEC 1
  F FURTHER INQUIRY I INDEX X SALES
  N NEXT PROP P PREVIOUS PROP
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Real Estate Sales

This portion of "Provides" gives the user access to all the property sales in New Zealand. It has the capacity to search for comparable sales using a variety of search criteria such as price, location, and physical attributes of the building. A typical residential search might involve the user obtaining a screen showing the addresses of comparable sales by location and price. Further screens could then be searched to show individual details on each sale property.

The cost per sale varies depending on the skill of the operator. The more frames that you look at the greater the cost. Similarly faster searches minimises the connect time to the system.

Rating Valuations

This part of "Provides" has information on the 1.33 million assessments contained in the Valuation New Zealand district roll database. An example of the information contained on an individual property assessment file is shown in Table 1 (previous page). You will notice that this assessment is the family home belonging to our Prime Minister, Mr Lange. To be fair I have also included the assessment for the Leader of the Opposition's farm as shown in Table 2 (previous page).

In New Zealand rating valuations have been done five-yearly but are in the process of being changed to three-yearly.

The usefulness of this information relates not only to the actual government valuation but also the other data contained on the record such as zoning information, legal description, ownership, and estimates of production in the case of rural land. Rather than send a clerk to stand in line and obtain a copy of the government valuation, time and money can be saved by doing the search on the "Provides" system.

Real Estate Market Statistics

Another major advantage of having one national assessment organisation such as Valuation New Zealand is the half-yearly production of real estate statistics on all phases of the market. These are produced both in booklet form and electronically through the "Provides" system. At the moment what appears on "Provides" is exactly the same as the hard copy. There is an obvious potential (with more sophisticated programming) to update the statistics on perhaps a weekly basis and utilise the full benefits of computer technology.

Overview of Provides

The "Provides" system is so new that many potential users have not yet had a chance to evaluate it The current list of subscribers shows that the main market so far is not valuing firms. A variety of real estate agents, lenders, developers, lawyers, and investors appear to be amongst the early adopters of the system.

Subscribers using "Provides" do not have to worry about continually updating their own database as the central system is automatically updated by VNZ. The NZIV "Valpak" system is likely to be less expensive than "Provides" for most valuation firms and this may be the reason that only a few valuers subscribe to the service at this stage.

B. National On-Line Enquiry System

Valuation New Zealand has its own internal on-line system installed in all offices to enable staff to access the rating valuation roll and sales information held on the central computer.

It is interesting to note the VNZ have quite a lot of computerised information on their database which is used for internal purposes and not released to the public. The most notable of these are the mass appraisal variables now held on the majority of urban residential properties.

Land Information New Zealand

The Land Information New Zealand (LINZ) system is an ambitious government funded project that attempts to integrate a number of property related databases (both existing and planned). The original concept was to establish a monolithic database that would initially contain valuation, cadastral and land transfer information.

The information was to be accessed by remote terminals in various government department offices around the country. The idea of putting all the data on one very large central computer was abandoned during the planning phase since the database would have been so complex as to be almost unmanageable.

Currently the LINZ objectives are as follows:

1. To develop an integrated "core" land information system.
2. To make public and private sector geographic data compatible.
3. To carry out a pilot study of an integrated land information system.

The core land information system is a computer system linking the survey, title and valuation records of four government agencies:

1. Land Transfer Journal this is the automated processing of documents received for registration under the Torrens system.
2. Index to Certificates of Titles this is a computerised index to land held in the Department of Justice (Lands & Deeds Division).
3. Maori Land Court Titles Index - this is an index to Maori Land administered by the Department of Maori Affairs.
4. Digital Cadastral Database this database will show the digitised boundaries of all land parcels and their identifiers in the Department of Survey and Land Information.
5. Valuation Roll System - this involves standardising some components of the existing Valuation New Zealand database to make it more compatible with other core systems.

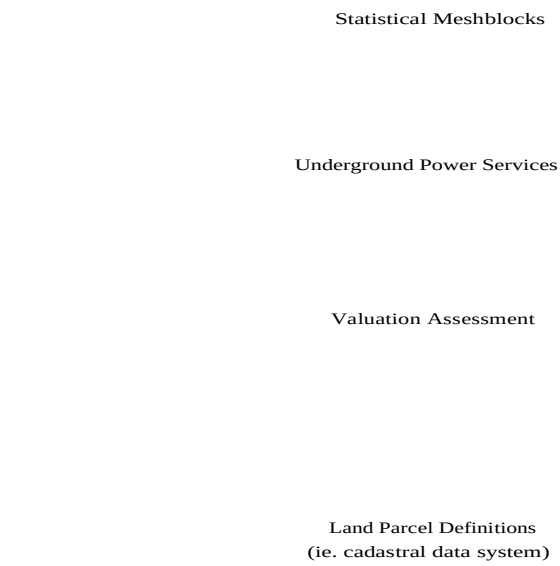
The LINZ pilot study has been aimed at sorting out the relationship between the core systems. One difficulty to emerge is that several of the core systems are using different ways of identifying individual properties. For example, the land transfer system relies on a certificate of title number, whereas Valuation New Zealand rely on an assessment number. Figure 2 (see opposite page)illustrates the concept of overlaying various databases.'

The Valuation database (already described) is the only one of the core systems that is actually operational. The Land Transfer database is partly computerised as is the cadastral database. One of the big problems is the cost and amount of manpower necessary to convert hard copy into digital form.

It is hoped to have the LINZ system operational in the Auckland area (55% of the traffic) towards the end of 1989 but only time will tell if this objective is met. Other parts of the country will be set up for LINZ on the basis of anticipated market demand.

The history of the LINZ operation shows that it has been far more difficult to implement the system than was originally envisaged. Overcoming some of the technical problems relating to the integrity of the data and the integration of databases has been slow and costly.

Figure 2: Overlays of Linz Components



Note: Dash lines have been provided on some layers to illustrate relationships but would not be stored as part of that data system.

The Real Estate Institute Sales System

It has been apparent for some time that the "official" sales system available from Valuation New Zealand suffers from delays reducing timelines of the sales data.

Under the Rating Act the lawyers acting for the vendor have a statutory obligation to advise within one month both the local authority and VNZ in writing of details of the sale. In practice, sale notices often take considerably longer to be advised.

McDonald5 reveals that in a 1980 survey it was shown that the average length of time between the date of agreement (when the sale price was agreed to) and the date of receipt (when the sale notice was received in VNZ) was 70.7 days for houses and 130.1 days for farmland. My view is that there hasn't been a great deal of improvement since then except when the market is quiet and the sales notices do come through more rapidly.

The slowness of the sales data often means that the official real estate statistics which are published every six months reflect what was happening in the market some time ago and not what is happening now. This can result in the market receiving mixed signals because there is a tendency for the general public to interpret the official statistics as reflecting current market conditions. In order to make authoritative statements about the current state of market the Real Estate Institute of New Zealand (REINZ) has recently (1987) introduced a compulsory scheme whereby all members have to furnish monthly statistics on residential sales. Appendix I shows a summary of the results of the Otago region. It can be seen that the REINZ sales system produces some additional information that is not shown in the Valuation sales system. These are:

- the interval between listing and sale;
- the asking price and sale price; and
- some detail about how the property was financed.

The output for the REINZ system is produced by the Auckland Multiple Listing Bureau. The REINZ system claims to cover 70-80% pf residential sales.

The REINZ sales system is so new that the architects of the system are not even sure that they are asking the right questions. The system is certainly promising and I can envisage a point where valuers will want to negotiate with the REINZ to incorporate the best features of this system with the existing Valuation system.

Integration and Further Developments

Neither the "Valpak" or "Provides" system currently gives the user any power to analyse the sales date using the appropriate units of comparison. Some preliminary work along this line is being carried out on the use of electronic spreadsheet programs to analyse the data. In the case of "Valpak" the program allows the user to "dump" a sales file int a computer format that can be recognised by a spreadsheet program.

All the sale systems that are currently available in New Zealand are lacking in some of the key information that valuers would like to have access to. The next step will no doubt be the integration of several existing databases. The LINZ system as described has established protocols so that various government and private sector databases can be integrated.

The time does not appear to be too far away when a valuer will be able to sit down at a terminal and obtain most of the property information necessary to perform a valuation. This is not to say that valuations will be done from the office but rather that much of the drudgery in having to travel around town to a variety of data sources may be removed. W,

Summary and Conclusions

The computer revolution has led to an information revolution. The rapidly evolving systems of distributing real estate sales information in New Zealand are one small part of this revolution. Most participants in the real estate business welcome the change that are occurring because the provision of better data should help lead the way towards the operation of more efficient markets. The New Zealand systems of real estate sales distribution by electronic means as described in this paper are a significant improvement over microfiche, particularly in the power that it gives the user to rapidly sort through thousands of sales.

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APPENDIX 1: REINZSALES DATA SUMMARY

DUNEDIN CITY — JANUARY 1988

	APT	CNW	H&I	R	RS	RXL	U	UXL	0	Total
Number of Sales	2		3	111	4	2	6	5	2	135
Value of Sales	54500		200500	7967800	102500	152000	464500	295500	347000	9684300
Average List Price	90000		72333	76963	29875	79000	82666	65900	231000	77814
Average Sale Price	77250		66833	71781	25625	76000	77416	59100	173500	71735
Average days to sell	8		42	71	84	8	170	78	28	73
Average Govt Valn	66000		51000	60905	20150	58650	74025	46625	90500	60494
Freehold	2		3	108	4	2	5	3	2	129
Leasehold										
Existing	2		3	108		2	6	5	1	127
New				1					1	2

	1 bdrm	2 bdrms	3 bdrms	4 bdrms	5+bdrms
Residential	2	21	58	21	10
Units	1	9			

	Up to 400	400-800	800-1200	1200+
Land Area	24	64	27	9

	B	C	F	H	I	L	0	P	S	T	V	U
Finance	9	61	1	12		6	3		7	8		9

OTAGO DISTRICT — JANUARY 1988

	APT	CNW	H&I	R	RS	RXL	U	UXL	0	Total
Number of Sales				14	2				1	17
Value of Sales				894500	41625				36000	972125
Average List Price				64884	21250				36000	57625
Average Sale Price				63892	20812				36000	57183
Average days to sell				72	22				56	64
Average Govt Valn				34000	10800					28200
Freehold				14	2				1	17
Leasehold										
Existing				14	2				1	17
New										

	1 bdrm	2 bdrms	3 bdrms	4 bdrms	5+bdrms
Residential		4	6	2	2
Units					

	Up to 400	400-800	800-1200	1200+
Land Area		3	6	7

	B	C	F	H	I	L	0	P	S	T	V	U
Finance		12		2					3			

PROPERTY TYPE

K APT = Apartment
CNV = Conversion
H&I = Home & Income

E
R = Residential House
RS = Residential Section

y RXL = Res Cross Lease
U = Unit,Town House
UXL = Unit Cross Lease
0 = Other

E = Existing Dwelling
N = New Dwelling

FINANCE

B = gBuildin Society
C = Cash
F = Finance Co.
H = Housing Corp
I = Insurance Co.
L = Solicitor
0 = Other
P = POSB
S = Savings Bank
T = Trading Bank
U = Unknown
V = Vendor

The Valuer's Role in Resolution of Native Land Problems

By John W Charters

The role is one of being willing to understand the Native Land problem and assisting those who seek to resolve the problem by advising the effect on values of resolution or assistance by endeavouring to adapt valuation approaches to suit resolution where this lies within the basic valuation principles.

The Valuation profession in relation to land is to give opinion as to a monetary quantum, a value, in respect of that land in given circumstances. The basis for quantification is arrived at after consideration of a circumstance in relation to the valuation principles of highest and best use and willing buyer and willing seller.

Native land is taken to be all the land of the land belonging continuously to indigenous inhabitants before and after colonisation and ultimate government. In New Zealand the indigenous inhabitant is the Maori and the coloniser was Britain.

Native land is taken to be all the land belonging to indigenous inhabitants before and after colonisation and ultimate government

To effect British sovereignty of New Zealand, a treaty (the Treaty of Waitangi) was signed between Maori, whose land was recognised as an independent state by Britain, and Britain in 1840. In dealings with native land, problems are perceived by both parties to the Treaty, depending upon each party's perception of expectation.

In dealings with land, its value as a monetary quantum is clearly significant if that is an acceptable expression of value to both parties in a circumstance. To this monetary extent, the valuer's role is very significant.

The Maori party was the dominant populous (numbers) and an unconquered independent state. Britain recognised the land of the Maori, prior to Treaty signature, as being in the ultimate ownership of the Maori on a tribal communal ownership basis.

In the report of the 1980 Royal Commission of Inquiry into Maori Land Courts, the custom relating to Maori land tenure is set out. In brief, it was generally agreed that:

a. A Maori title was communal.

b. Tribal rights might be classified under two headings:
   i. Territory which had been in possession of the tribe for several generations and to which no other claimants had been known; and
   ii. Territory acquired by conquest, gift or occupation. Conquest without occupation did not confer a title.

c. The chief of a tribe must be regarded as holding his position by a double title:
   i. From his undoubted descent through a long line of well known ancestors; and
   ii. As the elected head of the tribe, he was the representative of the territorial rights of the tribe because of his personal qualifications and influence, and recognised as a guardian as well as mouthpiece of the rights of the tribe. While he had the right of veto over the disposal of the land, he had only an individual right to the land like the rest of the people.

d. No fixed law existed in regard to Maori tenure except the law of might. Customs varied with locality. However, the Treaty was signed by chiefly tribal representatives who signed out of their collective concern for the well-being of all Maori.

e. The possession of land did not confer a right unless the occupation was founded on some previous take (ie basis of title) of which occupation could be regarded as a consequence and this take must be consistent with the ordinary rules governing and defining Maori customs.

Each Maori had a right in common with the whole tribe over the disposal of the land of the tribe...

f. Each Maori had a right in common with the whole tribe over the disposal of the land of the tribe, and an individual right, subject to the tribal rights to land used for cultivation or for bird, rat or pig hunting. But to obtain a specific title to land held in common, there must be some additional circumstances to give an individual preference over such land.

g• Neither manorial or seignorial rights obtained among the Maoris, and the chief of the tribe had no absolute right over the territory of the various hapu (family groupings) nor could he dispose of any but his own land without the consensus of those to whom it belonged.

Tribal and sub-tribal boundaries were sometimes disputed and the same land claimed by two or more groups. This often led

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to inter-tribal warfare.

Professor I H Kawharu in his book on Maori land tenure, *Studies of a Changing Institution*, summarised the rights of administration of customary land as follows:

a. Administrative authority: Land rights were administered by family heads at the sub-tribal level and by representative sub-tribal elders at the tribal level. At either level an individual's influence in debate was proportional to his mana (authority, influence, prestige).

b. Distribution of titles: In principle, every individual had a right to an equal share in the resources of his tribal land. In practice the individual rarely, if ever, stood apart from the extended family.

c. Definition of titles: With no documentation of any kind to certify his title to land, the Maori had to rely on memory. The administering body of elders, at least, knew every prominent natural feature and the way each was linked to the other in the boundary area between tribes.

d. Rights of usufruct: The right of every individual to an equal share of his community resources was recognised by giving him rights of occupation or access to those resources. These rights could not be taken from him without the sanction of the community authority that assigned them.

e. Security of tenure: The ritual sanctions that descended on any violator of ritual prohibitions were backed up by secular sanctions that gave a fair amount of security to tenure of land.

In a submission prepared by the Centre for Maori Studies and Research of the University of Waikato, it claimed that "If any Customary Land remains it would by and large consist of rocky barren Islands and some Tapu land excluded from Crown grants". The Green Lake in Rotorua is Customary Land.

Maori Land Holdings (ex New Zealand Planning Council)

1840	26,709,342 ha
1852	13,600,000 ha
1860	8,560,000 ha
1891	4,431,794 ha
1911	2,889,556 ha
1920	1,938,334 ha
1939	1,631,135 ha
1975	1,323,564 ha
1983	1,317,517 ha (4.9% of Land)

Population

Year	Maori	Non-Maori
1783	99.9999%	0.0001%
1840	Massive decline due lack of immunity to non-Maori diseases	25,000
1860	65,000	79,000
1896	42,113	701,000
1936	83,326	1,491,486
1981	279,252 (8.8% of population)	

Current Statistics of Maori Well-Being
(ex National Council of Churches)

Employment:	Maoris are 7% of the labour force but 23% of the unemployed.
Education:	80% Maoris leave school with no qualifications; 40% Pakehas leave school with no qualifications.
Justice:	Young Maori men are convicted 4 times more than Pakehas; young Maori women are convicted 6 times more than Pakehas.
Income:	Male Maori workers receive 20% less than non-Maori workers; Maori per capita income is 50% of that of Europeans.

From these statistics, it can be seen that the non-Maori settler ended up with a significantly greater proportion of the land compared with the Maori. Also, the Maori, in terms of employment, education, justice and income, does not enjoy an equal share of well-being, in those terms. If results are the indication of the parties' perception of the Treaty, then it would seem that the best utilisation of the land was for the non-Maori to have ownership. Perhaps, the parties thought that the highest and best utilisation of the land could be obtained in non-Maori ownership and that the non-Maori settler was desirous that this should be so and that the Maori was in accord and parted with ownership to him.

Given the disparity in fortune between the parties in time, then what has occurred would probably not have been what was agreed to at the time of signature. It is this disparity which has and is causing the native land problem. That this disparity has occurred has been the result of Municipal Law (law other than International Law) and its interpretation.

Under instructions from the British Colonial Secretary at that time, Lord Normanby, the Treaty of Waitangi was drafted by Hobson, the British Crown Representative, and Busby, the Office British Resident. The Maori version was interpreted by the Missionary Henry Williams and his son Edward. Thus there is the English version and the Maori version. The following is the English version, the Maori version, and a translation of the Maori version by Professor H Kawharu.

English Version

Article the First

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

Article the Second

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forest Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Article the Third

In consideration thereof Her Majesty the Queen of England extends to the Native of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

Maori Version

Ko to tuatahi

Ko nga Rangatira o to Wakaminenga me nga Rangatira katoa,

hoki, kihai i uru ki taua Wakaminenga, ka tuka rawa atu ki to Kuini o Ingarangi ake tonu atu to Kawanatanga katoa o o ratou wenua.

Ko to tuarua

Ko to Kuini o Ingarangi ka wakarite ka wakaae ke nga Rangatira, ki nga Hapu, ki nga tangata katoa o Nu Tirani, to tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o to Wakaminenga me nga Rangatira katoa auo, ka tuku kite Kuini to hokonga o era wahi wenua e pai ai to tangata nona to wenua, kite ritenga o to utu e wakaritea ai a ratou ko to kai hoko e meatia nei e to Kuini hei kai hoko mona.

Ko to tuatoru

Hei wakaritenga mai hoki tenei mo to wakaaetanga ki to Kawanatanga o to Kuini. Ka tiakina e to Kuini o Ingarangi nga tangata maori katoa o Nu Tirani. Ka tukua ki a ratou nga tikanga katoa rite tahi ke ana mea ki nga tangata o Ingarangi.

Translation of Maori Version (Professor H Kawharu)

The First

The Chiefs of the Confederation and all the Chiefs who have not joined that Confederation give absolutely to the Queen of England for ever the complete government over their land.

The Second

The Queen of England agrees to protect the Chiefs, the Subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages, and all their treasures. But on the other hand the Chiefs of the Confederation and all the Chiefs will sell land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchase agent.

The Third

For this agreed arrangement therefore concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties of citizenship as the people of England.

Given the existence of native land problems due to the preponderance of Municipal Law giving the settler a disproportionate share of fortunes, the official Government attitude has changed recently in an endeavour to seek and recognise inconsistencies of Municipal Law and its expression with the principles of the Treaty. To this end the Waitangi Tribunal was formed to make recommendations on claims relating to the practical application of the principles of the Treaty of Waitangi. (For interpretation of practical application see following pages "Remedies"). Initially, this was for Claims post-1975 but an Amendment to the Act in 1985 allows the Waitangi Tribunal to make recommendations dating back to 1840.

Under Section 52 of the Treaty of Waitangi Act, the Tribunal is to have regard to both Maori and English versions of the Treaty and to determine the meaning and effect of the Treaty as embodied in the two texts and to decide issues raised by the differences between them.

Therefore, the status and scope of the Treaty of Waitangi, provides an essential element in dealing with the native land problem. To this end, the report of the Waitangi Tribunal on the Orakei Claim of November 1987 is revealing. The following is an extract from that report.

Status and Scope of the Treaty of Waitangi

11.11.1 At the risk of over-simplifying our discussion of the status and scope of the Treaty of Waitangi it is convenient here to summarise the main elements. In doing so we reiterate our earlier disclaimer that we are not attempting to lay down a definitive and exclusive set of criteria by which claims should be assessed. We believe however that the following criteria are relevant to a consideration of the present claim.

11.11.2 It is reasonable to apply to the interpretation of the Treaty of Waitangi the general principles of treaty interpretation as applicable to municipal law.

Relevant principles are:

a. The primary duty of a tribunal charged with interpreting a treaty is to give effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of surrounding circumstances.

b. It is necessary to bear in mind the overall aim and purpose of the treaty.

c. In relation to bilingual treaties neither text is superior.

d. Given that almost all Maori signatories signed the Maori text, considerable weight should be given to that version.

e. The contra proferentem rule that in the event of ambiguity such a provision should be construed against the party which drafted or proposed that provision (in this case the Crown) applies.

f. The United States Supreme Court "indulgent Rule" that treaties with indigenous people (American Indians) should be construed "in the sense which they would naturally be understood by Indians" supports the principle (d) above.

g. Treaties should be interpreted in the spirit in which they

The treaty was an acknowledgement of Maori existence, of their prior occupation of the land

were drawn taking into account the surrounding circumstances and any declared or apparent objects and purposes.

11.11.3 Broad Implications of the Treaty

a. The Treaty was an acknowledgement of Maori existence, of their prior occupation of the land and of an intent that the Maori presence should remain and be respected.

b. While the Colonial Secretary's instructions to Captain Hobson required him to obtain "by fair and equal contracts with the Natives the cession to the Crown of such `waste lands' as may be progressively required for the occupation of settlers resorting to New Zealand" this was subject to the qualification that he was not to purchase "any territory the retention of which by them would be essential or highly conducive to their own comfort, safety or subsistence."

c. The Treaty recognised the Maori ownership of the whole of New Zealand and the Maori signed the Treaty on the basis that all their lands, cultivated or otherwise, were confirmed to them by the Treaty.

11.11.4 The Two Versions of the Treaty

a. In the Maori text the chiefs ceded to the Queen "Kawanatanga". This is less than the sovereignty ceded in the English text, and means the authority to make laws for the good order and security of the country but subject to the protection of Maori interests. The cession of sovereignty however is implicit from surrounding circumstances.

b. The Maori text conveys an intention that the Maori would retain full authority over their lands, homes and things prized. This is more than the "full exclusive and undisturbed possession" guaranteed in the English text.

c. In Maori thinking "rangatiratanga" and "mana" are inseparable. One cannot have one without the other. The Maori text of the Treaty conveyed to the Maori people that, amongst other things, they were to be protected not only in the possession of their lands but in the mana to control them in accordance with their own customs and having regard to their own cultural preferences.

d. The lands owned by the Maori were held by them tribally and communally. The communal right so existing was recognised by the Crown in the Treaty. The conferral in the Maori text of "te tino rangatiratanga" of their lands on the Maori people carried with it, given the nature of their ownership and possession of their land, all the incidents of tribal communalism and paramountcy. These include the holding of land as a community resource and the subordination of individual rights to maintaining tribal unity and cohesion.

e. In recognising the "lino rangatiratanga" of their lands the Crown acknowledged the right of the Maori people for as long as they wished, to hold their land in accordance with long standing custom on a tribal and communal basis.

11.11.5 The Nature of the Guarantee

In agreeing to confirm and guarantee to the Maori people the rights conferred on them in Article 2 of the Treaty in respect of their lands the Crown incurred an obligation actively to ensure that its Treaty undertakings were adhered to. It follows that an omission to provide protection is as much a breach of the Treaty as a positive act that removes or abrogates those rights.

11.11.6 The Delegation of Responsibility

a. Decisions of the Native Land Court in the exercise or purported exercise of their jurisdiction under Native Lands Acts or other statutes are not "acts done or omitted ...by or on behalf of the Crown" in terms of s. 6 (1) (d) of the Treaty of Waitangi Act 1975, but

b. The Crown cannot divest itself of its Treaty obligations by conferring an inconsistent jurisdiction on the Native Land Court or other judicial or non-judicial bodies.

c. Accordingly, it is not any act or omission of the Native Land Court that is justifiable but any omission of the Crown to provide a proper assurance of its Treaty promises when vesting any responsibility in the Court or, indeed, any other body.

11.11.7 Provisions and Principles

a. The tribunal is required to determine whether any matter of which a complaint can be made under s. 6 of the Treaty of Waitangi Act 1975 "was or is inconsistent with the principles of the Treaty" rather than with its provisions as such.

b. The essence of the Treaty transcends the sum total of its component written words and puts narrow or literal interpretation out of place.

c. The Treaty was more than an affirmation of existing rights. It was not intended merely to fossilise the status quo, but to provide a direction for future growth and development. It is not intended as a finite contract but is the foundation for a developing social contract.

11.11.8 Pre-emption and Reciprocal Duties

The two parts of Article 2 of the Treaty must be read together and construed in the light of the surrounding circumstances and other considerations referred to in 11.9.1 to 11.9.20. So read and construed, Article 2 imposed on the Crown certain duties and responsibilities, the first to ensure that the Maori people in fact wished to sell; the second to ensure that they were left with sufficient land for their maintenance and support or livelihood or, as Chief Judge Durie puts it in the *Waiheke Report* (1987:77), that each tribe maintained a sufficient endowment for its needs.

11.11.9 The Duties of the Treaty Partners

The Treaty signifies a partnership between the Crown and the Maori people and the compact between them rests on the premise that each partner will act reasonably and in the utmost good faith towards the other.

An understanding of criteria emanating from the Treaty will allow for considerations by the Tribunal, to give recommendations with respect to a claim. Having substantiated a claim, the matter of remedies arises and in settling on these matters requires acknowledgement of some principles. The following is an extract from the Report of the Waitangi Tribunal Orakei Claim of November 1987.

Remedies

Principles To Be Applied

In considering remedies in this case some principles need first to be settled.

14.1.1 There is in our view, no requirement that compensation should be scaled down to what is "practical". The claimants state their first claim this way.

As a result of the laws, policies and practices outlined in the preceding paragraph, and in spite of a partial settlement of our claims in 1978, we do not have today the tribal endowment which ought to have been our own inheritance and our provision both in material and spiritual terms for our descendants. Being cognisant of the Tribunals' obligation to make recommendations on the practical application of the Treaty of W aitangi to our claim, we do not seek the return of the entire 700-acre Orakei Block to Ngati Whatua but we claim that the Tribunal should

declare that we are rightly entitled to the whole of it.

Section 6(3) of the Treaty of Waitangi Act 1975, which enables us to make recommendations, does not use the word "practical". It says:

> "If the Tribunal finds that any claim submitted to it under this section is well founded, it may if it thinks fit having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future."

"Practical" appears in the preamble and short title to the Act and relates to claims not recommendations. Thus,

> "...it is desirable that a Tribunal be established to make recommendations on claims relating to the practical application of the principles of the Treaty..."

"Practical" in that context envisages claims in respect of circumstances not contemplated at 1840 see opinion of Chief Judge Durie (1987:Ch. *8) Waiheke Report* and compare the comments of Richardson J in *New Zealand Maori Council v Attorney General* supra:

> "Whatever legal route is followed, the Treaty must be interpreted according to principles suitable to its particular character. Its history, its form and its place in our social order clearly require a broad interpretation and one which recognises that the Treaty must be capable of adaptation to new and changing circumstances as they arise (380)."

and of Somers J in the same case:

> "The principles of the Treaty must I think be the same today as they were when it was signed in 1840. What is changed are the circumstances to which those principles are to apply."

Recommendations may be made in our opinion, for full and just compensation untempered by the convenience of the result. We depart in this respect from an earlier opinion of the Tribunal that it is obliged to make practical recommendations *(Manukau Report* 1985:8.1).

14.1.2 The effective settlement of many claims will often depend upon the willingness of partners to seek a reasonable compromise, but it follows that the Mana to propose a compromise vests not in the Tribunal but the affected claimant tribes. In this case the claimants themselves have made several compromises. Their claim is limited to the Orakei block and does not challenge other land deals of questionable propriety as outlined in 4.6.

In addition they seek not the return of the whole Orakei block, but only certain parts that remain in public ownership. They have not sought to upset private vested interests.

Further, in seeking the "public lands" the claimants do not necessarily intend the ousting of public user. They ask that any such lands restored be held rate free for so long as public user is maintained and that recreational areas remain subject to existing leases and licences.

Those substantial concessions. indicative of a reasonable approach, were made by the claimants in their form of claim. It may be in other cases, that this Tribunal should make findings of fact and interpretation and adjourn for the tribe and Crown to mediate a settlement if possible. There is not the need to do that in this case, but the options for mediation and an "out of Court" settlement must always remain open to claimants.

14.1.3 The principles of the Treaty are relevant to the consideration of remedies. The restoration of land taken may not be the necessary consequence of proof that it was taken wrongly. It may need to be asked for example, whether it is contrary to the principles of the Treaty to dispossess an innocent land holder who bought in good faith, for value and without nonce that a claim might lie see *Waiheke Report* 1987:Ch. 8 where it is said:

> "It is out of keeping with the spirit of the Treaty that it should be seen to resolve an unfair situation for one party while creating another for another."

14.1.4 The Tribunal is not constrained to considering only the particular remedies suggested by claimants, orally or in their form of claim. Our function is to determine whether persons are prejudiced through Crown actions contrary to the Treaty and if so, the action that might be taken to compensate for or remove that prejudice. In that respect we have a statutory brief, akin to the terms of reference given a Commission of Inquiry, and are not limited by the pleadings of parties. The constraints upon us are procedural not substantive and come rather from the rules of natural justice which warn against a proposed remedy, the prospect of which was not disclosed to a person likely to be adversely affected by it.

In this case we notified an intention to consider alternative remedies to those the claimants proposed in *Directions* of the Chairman of 8 August 1986, and the accompanying report (p 203) circulated to parties well prior to final hearing.

The point is important for another reason in this case. Though the greater part of the relief claimed is sought for Ngati Whatua and not the claimants, the claimants are not representative of Ngati Whatua (see para 2.2). Though tribal support was eventually given to the claim (see Para 10.4), it was not clear that the particular remedies the claimants proposed had similar tribal sanction.

As has already been stated, "The Treaty signifies a Partnership made between the Crown and the Maori people, and the compact between them rests on the premise that each partner will act reasonably in an utmost good faith towards the other." Again, as already stated, the effective settlement of many claims will often depend on the willingness of the parties to seek a reasonable compromise, but it follows that the Mana to propose a com-

promise is not in the Tribunal (who can commit the Crown) but the affected Claimant. Given the premise that each partner will act reasonably and in utmost good faith towards the other, claimants have made compromises, although recommendation remedy rests with the Tribunal.

In reference again to an extract from the report of the Waitangi Tribunal on the Orakei claim, the approaches to reparation in that case are stated.

Orakei Approaches Reparation

14.2.1 There are at least three approaches to reparation in this case, as we intimated in our background report to parties.

a. That proposed by the claimants themselves, to "return" lands still held in public ownership. There is room for conflict. They are mainly public parks and the public has considerable interest in keeping them.

b. An alternative approach is to quantify the loss of the Orakei block of 700 acres (283 ha) in monetary terms with damages for injuries, lost use and missed development opportunities. A host of variables confront the programming of a just calculation in a case such as this; and the assessment of "what might have been" is highly subjective.

c. Another is to re-establish in modern context an objective in the Treaty appropriate to the case - in this case, surely, the duty on the Crown to ensure the retention of a proper tribal endowment. The rationale for this approach, which is directed more to tribal restoration than to reparation, is more fully explained in the *Waiheke Report* (1987:Ch. 8).

14.2.2 The last approach commends itself to us in this case. It enables Ngati Whatua to pick up from where Tuhaere, one of the tribe's most prominent forebears left or before Public Works and Native Land Laws put paid to his tribal scheme. The worth of that scheme is proven in the results of the Anglican Church residential leasehold arrangements on nearby Church lands and which may have served as Tuhaere's model. Had Tuhaere's plans been allowed to work, without dismemberment of the capital asset, there is every prospect Ngati Whatua would be today a compact tribe, well provided for with homes, industries, community amenities and a continuing revenue for tribal programmes. In much the same way did the Church leaseholds fund Church programmes and a Theological College. We expect this approach to provide substantially less than reparation for the 700 acres (283 ha) but more than that which the claimants seek from the return of parklands, assuming the weight of public interest would deter any substantial development of them.

14.2.3 Any policy of tribal restoration must in our view be directed to assuming the tribe's continued presence on the land, the recovery of its status in the district and the recognition of its preferred forms of tribal authority.

The Tribunal, in following in this instance the approach of Tribal restoration, established that the Ngati Whatua of Orakei had insufficient land and cash with which to plan its proper restoration as a tribe. The Tribunal in making its recommendation (to give remedy) considers the claimant's proposals under principles previously stated. The Tribunal in the end gave remedies (recommendations) on the basis of restoration of Ngati Whatua in terms of status, homes, investment and representation. Status in Auckland as the traditional Mana Whenua (People of Auckland), homes for the return home, endowment (investment) to provide an economic base to maintain general tribal affairs, and representation such that traditional tribal authority may utilise its assets in an acceptable businesslike manner.

The law and its changes in time to meet the people's current expectations, provides the scope within which native land problems can be dealt with. That the valuation input is necessary is obvious and the valuation profession in New Zealand operates under valuation principles, valuation law and techniques to cope where it can. However, the valuation profession is not all embracing and some recommendations by the Waitangi Tribunal seek remedies with respect to the land for which there is no monetary equivalent, such as tribal status in an area where a particular land location (intrinsic value) is its only measure.

In 1986 there was a High Court decision in favour of Tom Te Weehi being able to exercise a customary fishing right.

In 1987 the Court of appeal found in favour of the New Zealand Maori Council that the transfer of Crown lands to State owned enterprises without consideration of Maori (Native) land grievances would be inconsistent with the principles of the Treaty of Waitangi, and therefore unlawful in terms of the State Owned Enterprises Act. Legislation is to be put in place so that the transfer can occur, but to be subject to the outcome of Maori Land Claims.

Also, in late 1987, subsequent to the Waitangi Tribunal report on the Orakei claim, the Government states that the Waitangi Tribunal recommendations cannot be appealed against, and that their recommendations are binding. However, legislation to this effect is not yet in place.

Maori have ownership in customary land, Maori freehold land and general land. As already stated, there is little customary land left. Maori freehold land is land under the jurisdiction of the Maori Land Court; all other land in New Zealand is general land.

The point is that Maori freehold land represents the bulk of what is left of Maori tribal lands. These are the lands that the current owners' ancestors occupied, used and controlled for hundreds of years and numerous generations. Today's Maori owners of this land are the direct descendants of those ancestors, and their rights to ownership and hence their connection with the life of the tribe, their Turangawaewae come from proving a continuous genealogical link.

...Maori freehold land represents the bulk of what is left of Maori tribal lands.

A piece of general land on the other hand, unless it provides ancestral connections, is just land - there may be pride of ownership, as there is for Pakeha, but that is all.

Maori culture remains tribal in essence, and so maintaining the link between the tribal members and the tribal lands is still crucial.

I quote from John Rangihau *Being Maori,* Te Ao Hurihuri: *The World Moves On* (pp 174-175):

> "Although these feelings are Maori, for me they are my Tuhoetanga rather than my Maoritanga. My being Maori is absolutely dependent on my history as a Tuhoe person as against being a Maori person. It seems to me there is no such thing as Maoritanga because Maoritanga is an all inclusive term which embraces all Maori, and there are so many different aspects about every tribal person. Each tribe has its own history and it's not a history that can be shared among others. How can I share with the history of Ngati Porou, of Te Arawa, of Waikato? Because I am not of those people, I am a Tuhoe person and all I can share in is Tuhoe history."

As aforementioned, the Waitangi Tribunal in the Orakei recommendations seeks legislation such that traditional tribal authority can express itself in a modern form. Currently there are Trust and Incorporation possibilities.

Maori Incorporations and Trusts are constrained in their activities by their court instruments and the limitations imposed by the Maori Affairs Act 1953 and Amendments. Again, in reference to the Waitangi Tribunal report on the Orakei Claim, in reference to the Ngati Whatua Trust Board, it states:

> "We consider that the Board's authority (ie Ngati Whatua Trust Board's Authority) should not be restricted to land vested in it by its Act, that it should be able to buy, borrow, lease, manage the like and should be authorised to represent the tribe in public affairs on all issues arising. We will recommend that the authority of the Board should be re-defined in its governing Act, in the manner outlined and with such particularity as may be settled in consultation with the Board."

A valuer in making valuations for security purposes for Maori Incorporations and Trusts, must ensure that he understands adequately the legal ramifications that relate to these in order that any restrictions that these may impose can be adequately reflected in the valuation.

A classic situation arose, one which gained considerable media attention on Maori freehold land at LakeRotoiti, Rotorua, to which a mortgage redemption is almost impossible. This is the Okawa Bay Lake Resort, a hotel and condominium time-share resort of some scale for New Zealand. There is implication here for advice given by legal and valuation professions.

This is a development on Maori freehold and set up under a Section 438 Trust under the Maori Affairs Act 1953 and as such, it can be and is a mortgagable security. It requires the Maori Land Court sanction. In 1987 there were liabilities on the Okawa Bay Lake Resort which included mortgages, instruments by way of security on furnishings, fittings and effects, repatriation of funds to time-share purchasers, liens and other unsatisfied costs.

A mortgage redemption would require the concurrence of a Maori Land Court Judge. Considering the present mood of the country relating to such matters, a mortgage redemption would be unlikely. Further, to overturn a Maori Land Court Judge decision would require a declaratory judgement from the Court of appeal. Again, a difficult proposition.

The remaining Maori freehold land is insufficient as an economic resource to support its owners. The land is mainly rural and much is not in its highest and best use. Clearly an undeveloped resource is not in the national interest. To obtain better utilisation of this land, where it is possible, often requires a high ratio of debt capital, but coupled with an insufficient ability to satisfy such debt, often provides inhibition to development.

The Valuer ... has to bear in mind that in one circumstance the land may be alienable and in another inalienable

The valuer, in assessing the value of Maori freehold land, has to bear in mind that in one circumstance the land may be alienable and in another inalienable. Given the inalienable circumstance relating to Maori freehold land, interested parties may ask what is the rateable value under a Land Value or Capital Value rating system in New Zealand; its Land Tax commitment under the same auspices, its mortgagable value, and its value for compensation.

Inalienable Maori freehold land may be leased.

If inalienable Maori freehold land is leased, a lessee's interest could be a satisfactory mortgagable interest. The value and recommendation will reflect the purpose of the lease structure and the economics of the resultant use.

In a holding of inalienable Maori freehold land, the owners could declare some of its land alienable to obtain debt capital to provide funding for an overall concept. However, the risk of redemption has to be accepted.

A recent development is the Maori Development Corporation, a new development bank established to help achieve improved returns from Maori based assets and to improve business skills within the Maori community. The funding of the Corporation is as follows:

The Government	$13 m
Maori Trustee	$7m
Fletcher Challenge	$2m
Brierley Investments	$2m
DFC New Zealand Ltd	$2m
Total	$26m

It is intended that an offering of shares will be made to Maori authorities to extend Maori ownership once the Maori Development Corporation is firmly established.

Assistance is offered by the Corporation in the form of:

Debt Finance (at commercial interest rates)	Table loans, Term Loans, Hire Purchase facilities
Equity Finance	Where potentially commercial projects are under-capitalised.
Project Feasibility & Management Support	Planning, Marketing

(On a subsidised basis)	Finance, Production

Other services and products will be available in response to demand.

I refer again to the duties of the Treaty partners as stated in the Waitangi Tribunal Report on the Orakei Claim:

> "The Treaty signifies a Partnership between e Crown and the Maori people and the compact between them rests on the premise that each partner will act reasonably and in the utmost good faith towards the other."

A recent example of partners acting reasonably in good faith towards the other was the Maori Affairs Amendment Act 1987 to amend the 1953 Act to abolish the Conversion Fund. Prior to the Amendment the Maori Trustee, (The Crown), had authority to acquire uneconomic interests in blocks of Maori land through the Conversion Fund financed by the Crown and to dispose of interests in lands or reserves arising therefrom. With the abolition of the Conversion Fund compulsorily acquired shares are to be returned at value to the Maori owners as well as any shares in a Maori Incorporation that was acquired by the Maori trustee out of the Conversion Fund.

A realistic market approach to the valuation of Conversion Fund Shares is made. The value of the Conversion Funds Share in a block has to be met. Concessions are given with respect to payment for re-vested shares.

The Valuer General makes a special valuation of the Fund's interests. In making this special valuation, the valuer shall have regard to the restricted marketability of the Fund's share in the land and the amount of income accruing from these shares.There is a right of objection to the Valuer General's assessment.

The Valuer General prepares a Certificate setting out the following particulars:

a. The area of the land, and the name by which it is commonly known or some other description of the land sufficient to identify it.
b. The shares in the land to which the special valuation relates.
c. The market value of those shares.
d. The date at which the value of the shares was determined.

In assessing the value of shares (an uncommon role for a valuer, although here directed by statute), the Valuer General has adopted the following methodology to give regard to the requirements of the special valuation.

The Capital Value of the block, or blocks of land, to which the shares relate is assessed by reference to sales. From this is deducted liabilities to give the Net Asset Value per share.An adjustment is then made for what the valuation department terms a liquidity factor. This is an alteration to the Net Share Value by a percentage adjustment after consideration of the nature of the debt owing. Consideration involves exercising judgement with respect to the enterprise (management and entrepreneurial ability) of the endeavour to which the block or blocks relate (for example, a mix of development of say a hotel, kiwifruit operation, traditional pastoral activity, a marae, and a burial ground) and the likelihood of being profitable. Essentially, the ability to meet debt considering the endeavour as a whole.A further percentage adjustment is then made to reflect the saleability of the shares. This adjustment requires, amongst other considerations, acknowledgement of the limited saleability of the shares because of restrictions upon whom may acquire ownership. Regard as to the number of shares to be valued compared with the total shareholding has to be made. It also has to have regard to whom is acquiring the shares and to what effect does increasing shareholding give to the purchaser. Is purchase for increased identity, for profit, or to influence the direction of the endeavour to which the land relates. For example, making some land alienable to give better effect to an overall desirable concept. A critical shareholding could command a good price. In the task of assessing the Conversion Fund shares (a valuer may be required to assess share value for other purposes), it was generally found that a downward adjustment for the saleability of shares was warranted. This was because the Conversion Fund shares are revested in the shareholder prior to the Maori Trustee ownership, and also the number of Conversion Fund shares is very small compared with the total shareholding in the block and therefore no enhancement in value to the small number of shares couldbe seen. In fact, it was seen as stated, to be reason to reduce the value of the Conversion Fund share.

Where the value of a Conversion Fund share in a block of land is less than $1,000, then the shares shall vest with the owners of the other shares without payment.

Where the vesting shares (Conversion Fund shares) are worth more than $1,000, then the value of the Fund's share shall be a debt owed to the Maori Trustee. The shares shall be deemed to be an advance made by the Maori Trustee out of the General Purposes Fund (a Fund representing the accumulated profits of the Maori Trustee Office) to the owners of the other shares. No interest shall be payable in respect of the presume advance. All income, or other money accruing from the Fund's share, shall be credited to the repayment of the advance and paid by the Maori Trustee to the General Purposes Fund. The owners of the other shares may at a meeting of owners, resolve to pay the debt owing the Maori Trustee.

I now refer back again to 1987 when the Court of Appeal found in favour of the New Zealand Maori Council in that the transfer of Crown lands to State Enterprises without consideration of Maori (Native) land claims would be inconsistent with the Treaty of Waitangi and therefore unlawful in terms of the State Owned Enterprises Act. Legislation is to beput in place so that the transfer can occur, but subject to the outcome of Maori Land Claims.

The advent of the State Owned Enterprises Act has seen the deletion and amalgamation of former State Departments to give various State Owned Enterprises. Left behind, under the auspices of the Department of State Services, are some remaining and new State Departments. Such a new Department is the Department of Conservation. As in the formation of the State Owned Enterprises, this new State Department has to recognise the Treaty of Waitangi. In the legislation which relates directly to the Department of Conservation, it says that in its dealings it must give recognition to the Treaty of Waitangi.

A Lease Agreement relating to Lake Waikaremoana and associated reserve, has the lessor as Tuhoe and Ngati Kahungunu people. It is leased to the Crown and specifically now to the Department of Conservation, and is due for rent review. The Lease document refers to a rental to be achieved by agreement between the parties. The matters to consider, so as to form the basis for valuation consideration so as to ascribe a rental, are to be by agreement.

At the previous rent review, the Treaty of Waitangi existed, but a specific directive on the part of the lessee (Department of Conservation) to consider matters with reference to it was not in place. In considering again Judge Dune's statement in the report of the Waitangi Tribunal report on the Orakei Claim, ie "The Treaty signifies a Partnership between the Crown and the Maori people and the compact between them rests on the premise that each partner will act reasonably and in the utmost good faith towards the other", it will be interesting to see if this very significant rent review will be a testament to this Partnership.

Court Of Appeal Decision: Comment

The Court of Appeal decision on the Okawa Bay Lake Resort case (14 September 1988) highlights the difficulties in dealing with Maori ancestral land vested in Trustees both for its protection and for its maintenance and future management for those beneficially entitled thereto. (See "Legal Decisions" this issue)

There is a classic conflict between the Maori concept of holding their lands and yet having the same available so that those entitled thereto derive benefit from it.

In this case the Maori land in question, multiply owned, is vested in Trustees under Section 438 of the Maori Affairs Act 1963.

It is assumed that the Trustees appointed were so appointed after due consideration and with the consent of all those beneficially entitled.

It is clear that the Trustees so appointed are just that, Trustees and no more, with their powers as stated in Section 438.The question was whether Trustees so appointed have the powers to alienate the said land so that those beneficially entitled and for whom they are Trustees thereby lose that which they hold in Trust for those same persons.

When one gives Section 438 such fair and liberal interpretation as would best achieve the purposes of that Section it is clear that no such powers would ever exist or ever be contemplated.

Even if one were to assume that in fact Section 438 did allow alienation so as to deprive those beneficially entitled to such land the situation is such that any person dealing with that land other than the Trustees or those beneficially entitled would be put on notice.

In the subject case, however, the Court of Appeal Somers J and Cooke P, with Richardson J concurring, held in fact that the actions of the Trustees in executing the mortgage documents with powers of sale therein for default or breach were bound thereby and the land could be so alienated on default or breach as aforesaid.In the view of Cooke P the duty of the Court was to "do justice" and that "there has to be justice to the borrower and the lender", that is Maori and Pakeba.

This in the writer's view is an extraordinary comment and surely it is the rule of law that must stand firm and that must be interpreted and applied in every situation.It is often the case that in applying the rule of law injustice, real or imaginary, is suffered by some person or persons.

Somers J in his judgment made what the writer feels is an even more extraordinary distinction by saying that a Section 438 Trust merely prohibited alienation by "gift or sale by the Trustees".

From those statements it can be clearly seen that the learned Judges were having difficulty with the Section but rather than attempt to make a reasoned interpretation of the Section and the Maori Affairs Act 1953 under which it was enacted they went outside these parameters and spoke instead of "the balance of justice and reality" and a selective and what could be termed convenient interpretation of the legal provisions in an endeavour to give credence to the argument that the Trustees could alienate such land thereby depriving those beneficially entitled to it, and from it.

In my view in this case those lending money should have been put on notice from the outset regarding the nature of their security and in particular whether or not their security was adequate in view of the obvious doubt regarding alienation rights of the Trustees.

This was not done and obviously the Lenders by taking the risk, as all Lenders do when lending money, are now faced with the very real problem of enforcing such legal rights under the powers of sale in their mortgages.

The submission has been made that Maoris have the opportunity of entering into such mortgages in a commercial world to derive all consequential benefits from their assets including land, but I would submit that it is equally possible for them to enter into borrowing arrangements without the necessity of power of sale provisions and indeed mortgages of leasehold are not an uncommon practice.

The effect of this decision from a Valuer's point of view is that should it be upheld then it would seem that all lands held under Section 438 Trusts or similar Trusts have an intrinsic value similar to ordinary freehold lands.

However, in the writer's view this raises even more difficulties in assessing values for such lands, suffice to say that a real problem exists and the Valuer should be acutely aware of the complexities inherent in making valuations in respect of such lands.

In conclusion, can it be rationally argued or even contemplated by those Maoris involved that their "ancestral" lands can in any manner or form be put at risk?

Pricing Property: Valuation and Revaluation Techniques

By R M McGough

This is *a Marketing* Property Conference and as a Valuer I do not hold myself out to be competent in marketing skills preferring to leave marketing as such to those who possess those talents.

Let me say at the outset that it is my belief that valuers as such are not a marketable product. They have, in my opinion, an independent auditing role and were that not the case, what is the purpose of their existence?

To put judicial support to that opinion, I would like to cover with you a 1977 English Court decision which appears to me to place the valuer's role in its proper perspective.

...valuers as such are not a marketable product...

It is a case that has so many parallels in our recent property market experiences and the recent traumas experienced by a small minority of New Zealand valuers, that it warrants careful consideration.

During my 1950s tuition, we were told of the valuers' liability in a case known as *Baxter v Gapp and Company Limited,* which was a 1938 decision we were expected to know by heart.

Following the *Hedley Byrne* decision in 1964, which extended liability beyond the person to whom the report was directed, comes what is in my opinion a decision which has made a lasting impression on myself as a valuer and should be compulsory reading for all those connected with property be they valuers, developers or financiers.

That case is *Singer & Friedlander Limited v John D Wood* & Co. The decision of Mr Justice Watkins was published in the *Estates Gazette Law Reports* Vol. 243, July 1987.

Briefly, Singer & Friedlander Ltd were merchant bankers who lent money to developers Lyon Homes Ltd on the basis of a valuation supplied by John D Wood & Co.

The decision outlines circumstances almost identical to our 1980s. High inflation, rapidly increasing land prices and financiers lending on ever-increasing margins relative to value. The market collapsed. The merchant bank had lent E1.5 million with all sorts of personal and company guarantees but when the default came, Mr Lyon personally had liabilities in excess of £50 million.

John D Wood & Co as valuers were thus sued on the basis that their valuation of £2 million with a loan recommendation of £1.5 million was excessive.

The outstanding portion of this judgment is, in my view, contained in the following paragraph:

> "If a valuation is sought at times when the property market is plainly showing signs of deep depression or of unusual buoyancy or volatility, the valuer's task is made more difficult than usual. But it is not in such unusual circumstances an impossible one. As Mr Ross said, valuation is an art, not a science. Pinpoint accuracy in the result is not, therefore, to be expected by he who requests the valuation. There is, as I have said, a permissible margin of error, the "bracket" as I have called it. What can properly be expected from a competent valuer using reasonable skill and care is that his valuation falls within this bracket. The unusual circumstances of his task impose upon him a greater test of his skill and bid him to exercise stricter disciplines in the making of assumptions without which he is unable to perform his task: and I think he must beware of lapsing into carelessness or over-confidence when the market is riding high. The more unusual be the nature of the problem for no matter what the reason, the greater the need for circumspection."

The judgment awarded nearly £500,000 damages against the valuer but it was also interesting to note in that judgment what Mr Justice Watkins had to say of a Mr Cooper of Lyon Homes Ltd who instructed the valuers:

> "I have neither heard nor seen Mr Cooper. Had I heard him give evidence, I have little doubt that his code of business conduct, among other things, would have received the most careful scrutiny by me."

The valuer was thus left holding the baby and the judgment, after questioning the morals of the recipient of the valuation who apparently went scot free, held the valuer responsible and I have no question with that.

The valuer is thus liable, can be sued and quite clearly has an auditing type role. The responsibility of the valuer in that case was obviously to the final user of the report or the lender and not to the person who commissioned the assignment.

What then is the difference between a marketing role and an auditing role. I accept that I could well stand correction on the views that I hold, but would put it to you that the roles have subtle differences.

The marketing role is to place whatever proposition is being sold in the best possible light, answering questions that arise as to detrimental features, in an honest manner. I subscribe completely to the caveat emptor or "let the buyer beware" principle.

Bob McGough is a life member of the New Zealand Institute of Valuers and has been a leading member of the profession for the past 25 or more years. His expertise and judgement on property matters is such that he is a sitting member of the Land Valuation Tribunal and is called on regularly to act as Sole Arbitrator or Umpire in, valuation disputes. Add to that a very busy valuation practice as a Din (or of C F Bennett (Valuations) Ltd, and his involvement as former President of The Institute, it is clear he was very well qualified to present the following paper, which was delivered to a recent IIR seminar on "The Marketing of Property".

The auditing role is to analyse a wide range of market transactions, explain the advantages and disadvantages of the property in question and having regard to that market range, the placement of the property in its appropriate position. That positioning must have regard to the norm and should not be swayed by the client's wishes. At the same time, the manner of reporting in written form should also be such that the recipients of a valuation report will be provided with sufficient information and logic, to permit them to make up their own minds and reach different conclusions to that of the valuer, should they so desire.

It would be idealistic in the extreme to ignore the fact that in any profession you wish to name, there will not be those who will bend to the client's wishes and thus adopt everything but the auditing role.

Those so-called professionals are not to be respected but then neither are those who seek their services in order to obtain the answer that suits their purposes best. In some cases, such users of valuation reports expend considerable sums of money and time in seeking the report or results that they themselves wish to establish. Strangely enough, when things go wrong, both the valuer and the instructor tend to go down the drain together.

Does the Valuer Influence the Market?

The degree of influence by the valuer varies, dependent on market conditions.

When the market is riding high, there will be many who will not heed advice that such a market may not last. As such, few vendors seek the services of a valuer in setting the price they wish to obtain because under those market conditions, their other professional advisers or even more so "the chap down the road" are felt to be far more competent.

Even in times of market buoyancy, a slightly higher proportion of purchasers than vendors seek valuation advice but I suspect that others may still have a greater influence.

During heady days, the greatest valuer influence is at the stage when the purchaser approaches the financier and in many cases, that will be the first instance that a valuer has been involved. Financiers of course, wish to protect not only their behind but their clients' money and as such, will not take advice from "the chap down the road" but rather a valuer, even though they are perfectly at liberty to not necessarily comply with that advice to the letter.

As a converse, the more depressed the market, the greater tends to be the number of valuation instructions from both vendors and purchasers alike.

The basic principles of valuation rarely change.

Analysis of Sales and Rentals

The basic principles of valuation rarely change. In very simple terms, it is the process of taking factual evidence in the form of market transactions, breaking down that evidence into simple common denominators and then applying those same denominators to the property to be valued.

Market evidence comes in a number of forms, not the least of which include:

1. Sales of vacant land.
2. Building costs.
3. Sales of comparable improved properties.
4. Market rentals for similar building types.
5. Investment returns applicable to comparable building types.

Where more than one method of valuation is available, the true answer is likely to emerge after consideration of all such methods as are available, together with the vital judgement as to which method is most applicable under any given set of circumstances of market conditions.

For example, during the last three years, the investment approach has remained supreme in the full knowledge that such an assessment exceeded the value of the land plus estimated building costs. As a valuer, I totally recognise and completely agree with the fact that a developer's entrepreneurial skills warrant a profit.

In the late 1970s, the investment approach usually resulted in a valuation less than that indicated by the replacement method but care had to be taken not to overlook the owner-occupier whose only alternative was to buy land and construct their own building. The late 1980s might well see a repeat of that history.

Perhaps the greatest change I have noted in my experience is not a rejection of the basic principles of sales and rental analysis, but rather the need to consider:

a. The background to the various transactions which has become of equal importance to the face value of a sale price or rental rate.
b. In the case of rentals, the multiplicity of various contractual obligations.
c. Changing economic conditions and an acceptance of changing requirements. For example, in more recent times Central City office buildings have a prime element of value in terms of the provision of on-site parking, building quality and outlook. The previously important "must be in Queen Street" has been severely diminished and although Queen Street still retains its dominance for ground floor retail purposes, off Queen Street office developments can command equal interest.

Sales analysis thus extends far beyond the mere acceptance of factual data but rather increasingly requires enquiry as to background. Often, such enquiry is fruitless for obvious reasons because nobody wishes to let on. However, if a wide range of market transactions is considered, the oddity will inevitably stand out.

Economic forecasting is, like valuation itself, not an exact science

Economic Forecasting

The valuer is expected to have a knowledge of a wide range of disciplines, not the least of which include building design, construction, quality of services, economics and law confined to valuation, title and lease documentation plus town planning.

Few valuers, myself included, would hold themselves out to be experts in any of the disciplines to which I refer, least of all economics.

Economic forecasting is, like valuation itself, not an exact science, subject as it is to the vagaries of the market and of course, political decision or indecision. My economic forecasting is based largely on the realisation that history tends to repeat itself and that what is commonly termed the Real Estate Cycle is a matter of fact. In that respect, I admit to feeling a good deal of sympathy for the young 1980s valuers who have experienced nothing until now, the most erroneous saying of all, that there is

no risk in property.

Over a long period of time, that saying may be correct but it has to be over a long period.

In short bursts, might I ask you to recall the 1960s names of J B L, Sargent Construction, Circuit Developments, etc. The 1970s recalls Securitibank, Merbank, Davisons, Cramp Developments, and so on.

Here we are in the 1980s and each of the last three decades has seen rises and falls in the degree of property optimism and pessimism. Despite recent comments to the contrary, I, like many valuers, was predicting that the 1984-87 conditions would not last well prior to the October 1987 collapse of the sharemarket. In some cases, people listened and thus a valuer influenced the market but in many cases, they did not. I admit also that my predictions of a cessation in demand and escalation were out by at least 12 months so that while my economic forecasting ultimately proved correct, my timing was not.

What then are the factors which guide the valuer in predicting the point at which the market may go or stop. Perhaps I could share with you some of my homespun indicators, together with predictions as to future pricing prospects.

NZIV Modal House Index

The Modal House Index stems from a monthly analysis of contract prices on low-cost housing. Even recognising that the residential sector movements do not necessarily coincide with the happenings in the commercial and industrial areas, the Index to which I refer is market-related in that it stems from an analysis of contract prices of "market" evidence.

History has also shown that cost of other building types of whatever sort you wish to name, have, with inevitable hiccups dependent on market conditions, seen a remarkable consistency in their relationship to the Modal House Index.

Consumer Price Index

In my experience property, because of demand and supply factors, rarely keeps in step with inflationary trends over short periods, but in the long term it does. I will endeavour to demonstrate that, but ask you to ponder on the fact that rents which dictate value can only be paid out of profits and hence the CPI must have at least some bearing.

Rent Movements

Rent movements are largely dictated by demand and supply factors in the property market together with building costs, such costs forming the bulk of the total outlay on any property development. Because property development tends to go in stops and starts and rental movements are affected by demand and supply, neither the Modal House Index nor the CPI will necessarily reflect that which is happening in the rental market.

Correlation

Perhaps I can explain my watch on each of the three indices to which I have referred, over a period of not two to three years but rather 10 years.

I have selected figures from a typical warehouse or factory building in the 20,000 sq ft range over a 10-year period from late 1977. I submit to you the following table which admittedly has some generalisations.

Year	Factory Rent per s ftq	Modal House per s ftq	CPI
1977	$2.00	$18	469
1979	$2.20 (+10%)	$23 (+28%)	600 (+28%)
1982	$3.00 (+36%)	$40 (+74%)	940 (+57%)
1985	$4.50 (+50%)	$52 (+30%)	1233 (+31%)
1986	$5.50 (+22%)	$58 (+12%)	1369 (+11%)
1987	$6.75 (+23%)	$63 (+9%)	1601 (+17%)
	+238%	+250%	+241%

Of the three columns, the Modal House Index and the CPI are the most closely matched over short periods of time with two aberrations:

1. A catch-up of the Modal House Index in 1979/82 following the doldrums of the residential market in the late 1970s.
2. The effect of the introduction of GST in October 1986 which materially affected the ability of the new house builder to compete with existing stocks not subject to GST.

Now let us turn to the prime dictator of "value" the rental column and what do we note.

1. On face value, an end result after 10 years very much coinciding with the increases shown in the other two indices.
2. However, a material change in lease contracts over the same period which more than offset the apparent slight falling behind of factory rents. The 1977 level would have been on the basis of a plus rates, insurance and internal maintenance type lease.

   The 1987 rent would have been plus rates, insurance, internal *and* external maintenance, *land tax* and in many cases plus carparking.
3. If I told you that in 1968/69 the average new factory rent was 75¢ psf with a Modal House price of $7.50 psf, you will note that a standard factory rent has, on average, represented 10% of the cost of the Modal House. When that gets materially out of line, I get the basic feeling that rents are liable to go as they did in 1982-1985, and stop as they will in 1988.

Add to that historical evidence, recent adjustments to the economy and the industrial situation may even worsen in the short term, but I have little doubt that in the long term, say three to four years, all will be back to equilibrium for the very simple reason that the real estate cycle will, with a reduction in demand, see an equal reduction in development until the existing space is taken up and the sudden realisation that prospective tenants are unable to find accommodation.

Should you be of the view that I concentrate only on the industrial sector, might I also put this to you:

All inclusive rent Lorne Towers when new 6/77	$6.277 psf
Same floor 7/87	$20.31 psf
Increase	223%
Modal House Index over the same period	250%
CPI increase over same period	247%

Property Returns

During the 1980s, property values have seen an added impetus over and above the rental increments to which I have referred. That has been occasioned by a reduction in property returns which, when coupled with increased rentals, have shown resultant ever-increasing property and land prices.

Over the last not even 10 but 30 years, we have experienced widely fluctuating inflationary trends and resulting from that, equally widely fluctuating interest rates. Throughout all that time, property returns have moved only marginally with the greatest movement being experienced in the 1980s when, with high interest rates and inflation, property returns have decreased rather than increased, which is the exact reverse to face value logic.

In fact, it is quite logical for that to happen. In times of high inflation, the prime motive for investing in property is the capital gain with immediate return being a secondary consideration. In

times of low inflation, the immediate return attracts more emphasis than capital appreciation.

Again, I return to my typical Mt Wellington, good quality warehouse to illustrate.

In 1976, that property was developed, rented and sold on the basis of a 10% return. The 10% benchmark was so firmly entrenched that the lease contract stipulated future rent reviews to be related not to market rents but 10% on the value of that property whether or not such return was appropriate.

A perusal of that file over the period in question indicates:

1979	market rents showed a little over 10% on value.
1982	refers to returns for brand new industrials around 9.25% to 9.5%.
1984	still around 9.5%.
1986	down to 8.5%.

During that period of 10 years, we experience high inflation and hence capital gain was the priority rather than immediate income. I would suggest to you that with the prospect of lower future capital gain, investment returns may well return to those that applied under similar market circumstances.

Again, in order to clarify the fact that the matters to which I have referred also apply in the commercial market, I have referred to my archives relating to fringe city office developments. I find as follows:

Grafton	late 1983	9.2%
Newmarket	late 1983	9.0%
Grafton	late 1984	8.5%
Grafton	mid 1986	7.75% (slightly conservative rents)
Grafton	late 1986	8.0%
Newmarket	asking 1987	7.5%

The valuers' grapevine has it that a Newmarket office development has recently sold at around 9%, so we are simply back to pre-boom times.

Effectively, it is my view that buyers will once again expect property returns commensurate with lower expectations of future capital increment.

That does not, in my view, mean massive property value reductions because returning to pre-boom returns means an adjustment of only 10% to 15%. It should also be remembered that the real estate cycle or pendulum tends to be counterbalancing. Boom times produce a grave danger of over development while a sudden reversal such as that recently experienced, will probably see the over-development possibility alleviated by shelved projects.

In the short term, there could inevitably be the odd "fire sale". Again, let me revert to history. The old Bycroft Building in Shortland Street, now developed as part of the Shortland Centre, is used to illustrate.

In December 1973, at the height of the last upsurge, that property sold for $1,000,000.

In June 1977, a forced auction by the Receiver, realised $460,000.

The buyer received a reasonable holding return by utilising the land as a carpark and then resold in June 1983 for $1,750,000.

Undoubtedly, there could well be isolated instances of such events occurring again but as a valuer, I would suggest that the entire property sector cannot be judged by such isolated instances. In the immediate future, there could thus be a different price in the event of a forced sale but one should not overlook the far greater number of owners who will simply not sell unless the price obtained is realistic.

I therefore do not predict doom but rather realism.

...under present market conditions, there could well be different valuations for different purposes...

Are There Different Valuation Assessments for Different Purposes?

It naturally follows from my preceding comments that under present market conditions, there could well be different valuations for different purposes and if I return to my emphasis on history, that is a relatively new innovation.

In the early years of my career, there was a saying that a property could have only one value. I am not convinced that the same could be said today and let me cite but a few examples.

1. A forced sale with limited buyer interest as opposed to an annual valuation of an investment company's assets, that company not being forced to quit.
2. Valuations for insurance purposes which are primarily concerned with cost and cost does not necessarily equal value. I am continually surprised by the number who endeavour to use insurance valuations as a reflection of possible market value.
3. Valuations subject to leases, obviously differ quite markedly from the otherwise unencumbered value. A Government Valuation, for example, is required by statute to be made free of any leases or other charges and will thus differ quite materially from a market value of the same property, subject to a lease.
4. During the last three years, I have been particularly conscious of a possible difference between a market valuation and a mortgage valuation. During the period to which I refer, nothing surprised and in advising vendors, the valuer needed to be careful not to under-assess property values because they can be just as liable in those circumstances as they are in the case of over-valuing for mortgage lending. The market valuation was thus a short-lived assessment, valid for only a few weeks following the provision of the advice, while a mortgage valuation of the same property, at the same date, was required to stand the test of time.

   It could well be argued that the valuations for both purposes should have been the same but with differing final recommendations. I shall refer to that situation under the heading of Risk Control.
5. Company asset valuations. Many companies utilise real estate assets which are specialised to some degree. For example hotels, motels, service stations, freezing works and so on, the value of which is dependent on the business carried on within the land and building component. It is a basic principle that valuations of company assets, represent value to that company itself. Hence, such assessments assume ongoing profitability of the business function which may well represent one value to that particular occupant and a completely different value to another.

Times have thus changed, even though the valuation principles have not. Care therefore needs to be taken to specify the purpose for which the valuation is required, together with a rec-

ommendation relative to that purpose and that purpose alone.

Risk Control

Valuation never has been, and never will be, an exact science and any person who pretends that it is, is idealistic in the extreme. Nevertheless, there is a right and wrong valuation but an equal number of shades between black and white.

Despite the obvious lack of precision, there is a reasonable margin of tolerance which I would put at around 10% in other than exceptional circumstances such as the one off property for which there is little or no market evidence, together with assessments required under contracts where the level of value is dependent on the legal interpretation of the documents provided. Remember, the valuer is not a lawyer and even lawyers' opinions are upset by higher authorities.

There is thus a significant difference between a valuation that is wrong because of an honestly held belief, backed by honestly given but equally wrong advice, and a valuation that is patently wrong and not backed by market-related evidence.

What then are the risk controls that protect not only the valuer but also the recipients of valuation reports. For myself, I do notsubscribe to reports with disclaimers right, left and centre.

Some disclaimers, such as the pointing out of the fact that the valuer does not hold him or herself out to have carried out a structural survey are not unreasonable for the simple fact that that was not the purpose for which they were hired. Disclaiming liability to third parties, however, is evading the valuer's responsibility and in any case would, in my view, have little effect.

A reasonable balance must therefore be maintained if my contention that the valuer's role is an auditing one is correct. My risk controls are:

1. Request specific instructions as to the purpose for which the valuation is required.
2. If written instructions are not received, particularly from unknown clients, proceed no further.
3. Never be pressured into giving a quick, unconsidered opinion based on information provided by the client.
4. If information is provided by the client and time does not permit the checking of that information, always make it clear that the advice has been given within a stipulated time frame and that the information should be checked by documentary proof of the assumptions made. If the information provided is genuine, it will be readily available at short notice.

Unfortunately, those recommendations imply that the client is not to be trusted. In a very high proportion of cases they are, but the risk control is necessary because of the minority.

Perhaps the greatest risk control of all is in reality a marketing factor. I refer to a style of reporting which covers much more than a physical description of the property.

Reports should, in my view, cover each method of valuation as is appropriate, supported by the market comparisons used in each instance and finally, providing a definite conclusion relating to the purpose for which the valuation is required. In some cases, that may involve a rider to the effect that the assessment should not be used for any other purpose without reference back, as opposed to a disclaimer.

In so doing, the valuer markets his or her wares in a manner which entitles the recipient of the report to make up their own mind as to the action they may wish to take. I have no objection whatsoever to clients disagreeing with my conclusions but I do object to those who request that a report be refrained in a manner that suits their particular purpose and leaves me open to liability.

Conclusion

I firmly believe that valuation is an independent auditing role. That view is further reinforced by the fact that valuers can successfully be sued in the event of their actions being negligent and that is a responsiblity that the reputable valuer readily accepts in undertaking valuation assignments. In my experience:

a. The vast majority of valuers adopt the auditing role. By so doing, they market themselves and refuse to be used by their clients as a marketable product.

b. The very small minority of valuers who bend to their clients' wishes and thus present themselves as a marketable product to those same persons, inevitably become well known in the marketplace as a less than desirable benefit to those who use them.

Having said all that, how can one fathom the present political moves to deregulate the professions. If my profession has an auditing role as I suggest, then I must not only be capable of regulation but also of disqualification.

Honorary Memberships

Roger Hallinan was granted Honorary Membership of the Australian Institute of Valuers at the Triennial Congress of the Australian Institute of Valuers earlier this year.

Morley Donaldson, the Regional Manager, (Southern Region) for Valuation New Zealand, was awarded a similar distinction at the 12th Pan Pacific Congress in Kuala Lumpur in 1983.

Roger Hallinan (right) receiving honorary membership of the Institute from J McAuliffe at the Triennial Congress

Morley Donaldson

Book Rev4ew4

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INVESTMENT PROPERTY INCOME ANALYSIS AND APPRAISAL BY R A BELL

Reviewed by R V Hargreaves

This 1988 publication is a welcome addition to the growing list of textbooks published by the New Zealand Institute of Valuers.

I Robin Bell is to be congratulated for unravelling the complexities of the income approach to valuation in a clear and understandable way.

As a former university valuation lecturer Bell would have been well aware that many students and practitioners have difficulty understnding the mathematics of the income approach and the concepts involved with it.

This text will help to resolve many of these difficulties.

After introducing the reader to the notion of capitalisation in Chapter 1, Robin Bell spends the next eight chapters explaining with the six functions $1. His treatment of the compound interest formula, present values of future lump sums, and annuities follows a similar approach to that used in a number of other texts.

The strengths of this section of the book are in the liberal use of clearly worked valuation examples. The computer generated diagrams also assist the reader to understand the six functions of $1.

The next section of the book (Chapters 10 - 15) is largely devoted to a detailed explanation of the capitalisation process. The author takes the reader through chapters on basic capitalisation, dual rate and tax adjusted capitalisation, and finance weighted capitalisation.

He draws on his experience as a practitioner to illustrate each of these methods by the use of good practical examples that most readers will be able to relate to. Bell correctly points out that no *one* capitalisation method alone can necessarily be considered as being the best method. He is careful to explain that some of the capitalisation methods, included in the text for the sake of completeness, are rarely used in the New Zealand context.

The author does not enter into the debate about the theoretical pros and cons of the various capitalisation methods.

Chapter 16 introduces the notion of equity performance and is followed by chapters on the Ellwood method, discounted cash flows, growth and inflation, and miscellaneous techniques.

The book concludes with a short chapter on the impact that the new technology is having on the changing role of the valuation profession.

The author gives very full treatment to the rate of capitalisation part of the income approach equation but the text has very much less detail about the methodology involved in calculating the average annual future income.

A number of the examples assume a net lease arrangement. Perhaps some examples showing the detailed income and expenditure statements for commercial buildings would have enabled the author to explain the economic concepts implicit in this type of budgeting.

This is not the sort of book that lends itself to be read quickly. Readers will find that it is best to slowly work through the book chapter by chapter.

Examples are best assimilated with the aid of a financial calculator.

This reviewer predicts that the Bell book will become a standard reference text for students and practitioners of valuation. The shelf life of the book is assured because most of the material will not date.

Rob Bell will be known to many of ourAuckland members for the lecturing position he held over an *eight-and-a-half-year period at Auckland University and for his association with Darroch & Co. He took up his lectureship in Valuation in 1979 becoming the second full time staff member teaching the course which had evolved from the former Dip Urb Val to become a three-year full time Diploma in Valuation. Because of his exper tise and experience in the fields of PropertyMan agement and Development, he was responsible for the introduction of the new subject of Advanced Property Management first brought into the curriculum in 1980. In addition he taught the Valuation subject at advanced and final levels. His teaching in Valuation extended the financial mathematics content of coursework culminating .in the introduction of a further new subject, that of Advanced Financial Appraisal, brought into the curriculum when the Dip Val was superceded by the BPA degree.*

Rob Bell is a Fellow of theProperty ManagementInstitute, of which he was a co-founder, and is also a Fellow of The Royal Institution of Chartered Surveyors. He is an associate member of this Institute and of the REINZ and is a Registered Valuer. He has practised both here and overseas as a Valuer and as development consultant, property manager and investment agent. He wasformerly withDarroch &'Co in a consultancy role as a Valuer and latterly as Research Director, but has maintained his own independ ent property consultancy practice which he continues today. He is a Director of the International firm ofRiehard Ellis, recently established in New Zealand. His recent book, published by the Institute, is reviewed by Bob Hargreaves.

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RESIDENTIAL RENT CONTROLS IN NEW ZEALAND

By J A Gibson and S R Marshall

A New Zealand Institute of Valuers publication.

This publication covers the Tenancy Act 1955, Rent Appeal Act 1973 and the Rent Limitations Regulations 1984. The legislation is outlined in detail giving a good history of Residential Rent Controls.

Since this publication was planned

the Government has introduced the Residential Tenancies Act 1986, which came into effect on the first of February 1987. The Act has reformed laws relating to residential tenancies and established a tribunal to determine disputes. It also establishes a fund in which bonds payable by tenants are held.

Despite the change in legislation the NZIV has considered the work of Messrs Gibson and Marshall to be of historical value as it brings together in one volume the principal legislation that affected residential tenancies for so long in this country.

THE NEW ZEALAND LAND RESOURCE INVENTORY EROSION CLASSIFICATION

By E 0 Eyles

Water and Soil Miscellaneous Publication No 85

This bulletin describes the erosion classification system used in the New Zealand Land Resource Inventory. The 14 erosion types recognised in the inventory are described together with the methods of assessing the degree of severity for each type. Photographs illustrate each type of erosion in various parts of the country and computer generated plots indicate national distribution patterns.

A worthwhile publication for those who need to decipher the classification code or who would like to broaden their knowledge on a problem that affects a large part of the country.

TUSSOCK GRASSLANDS LANDSCAPE VALUES AND VULNERABILITY

By Michael Ashdown and Diane Lucas

A publication from the New Zealand Environmental Council dealing with the visual impact that man has had on the tussock grasslands.

The report has grown out of the Environmental Council's concern that tussock grassland landscape values need to be understood, identified and promoted.

It is recognised that change is an important part of all landscape development and it is to be expected and encouraged where clear benefits are shown. In some areas, however, other values may be important enough to warrant protection against change. Maximising economic returns at the expense of visual, cultural and ecological values will degrade the landscape. Economic potential from recreation may be lost.

The authors conclude that an approach must be taken that balances change with conservation, and a systematic nationwide survey is required to identify areas for conservation. Time is of the essence.

THE NEW ZEALAND PROTECTED NATURAL AREAS PROGRAMME: A SCIENTIFIC FOCUS

Edited by G C Kelly and G N Park

Imagine a country without character, with no distinctive landscape or no indigenous flora and fauna. It is not a pretty picture.

To protect our landscape in New Zealand effective policies and practices must be implemented even though adequate legislation already exists. The rate of change in the lowlands and some mountain areas is now so rapid that areas not identified for protection now will probably have disappeared in ten years' time. A sense of urgency is evident throughout the publication. This is reinforced by some excellent photos of the landscape and some of the man-made changes on it.

At this stage there are no definite proposals for conservation of defined areas under the Protected Natural Areas Programme. Proposals for conservation are intended after a detailed survey. This publication will make more interesting reading for anyone interested in the Protected Natural Areas Programme.

NOTICE TO ALL MEMBERS

OUTSTANDING SUBSCRIPTIONS

Rules 29 321108 112

Your Executive Committee recently considered the question of notice to members of overdue subscriptions.

It is the members' primary obligation to inform the Branch of any change of address in order that correspondence may be sent to the correct address.

Members travelling oveseas should advise this office of their forwarding address for the journal and other correspondence.

Notice of subscriptions due are advised to members by personal mail in December of each year. Payment is due by I January of the following year.

Executives have asked that the consequences of late or non-payment be drawn to members' attention and for this purpose the provisions of Rule 29 are stated below.

Members' assistance in prompt payment of their subscriptions is very much appreciated. Prompt payment substantially assists the Institute's cash flow, and assists in keeping subscriptions at a modest level.

29. If any member's subscription is overdue for three months, notice of such fact shall be sent to him by the General Secretary, and if he omits or neglects to pay his subcription within one month next after the date of such notice, the following action shall be taken:-

(a) If he is a registerd valuer, application shall thereupon by made to the Registrar to remove that member's name from the Register under Section 30 of the Act

(b) If any other case, the member's name may be removed from the roll of members of the Institute and from the date of such removal he shall cease to be a member, but without prejudice to the right of the Council to recover all arrears, including the subscription for the year then current.

Forthose who do overlook payment a reminder is usually sent with notice of the AGM. Non payment following that advice normally results in the action provided for under Rule 29 being implementd.

John Gibson
GENERAL SECRETARY

Land Identified For Private Purposes Of Value To Community Valuation Approach

by G Halstead

A perusal of different district planning schemes will show that in some zones, uses such as private schools, churches, private hospitals, golf clubs, bowling clubs and scout halls are not permitted as predominant or conditional uses.

To ensure that community type uses could continue as of right in zones not providing for such uses, the Town and Country Planning Act 1977 provided for councils to specifically identify land used for private purposes of value to the community.

Identified land is covered somewhat obliquely in the Town and Country Planning Act. The only reference is Section 73:

"73. Carrying out of certain work, etc, a conditional use

Where any land is specifically identified in the district scheme as being used for purposes of value to the community but not intended to be owned by the Crown, the Council, or any local authority, then:

a. The carrying out of any work on that land, including:
   i. The construction or alteration of any structure; or
   ii. The making of any excavation; or
b. The subdivision of that land; or
c. The use of that land for any purpose which is inconsistent with the identified purpose,

shall, in the absence of anything to the contrary in the district scheme, be deemed to be a conditional use of the land and shall not be permitted unless the consent of the Council is given in accordance with section 72 of this Act.

Cf *1953,* No 91, s.33A(6)"

Prior to the 1977 Act, the former 1953 Act provided for community type uses on private land to be designated in the same way as for publicly owned land. Some of the older district schemes continue to show designations of private land while some other schemes do not clearly differentiate between designations and identifications.

Some district schemes identify every piece of land connected with the community, such as churches, Salvation Army hostels, private schools, scout halls, childcare centres, MED depots and the like, while other schemes limit identifications to special and large sites such as cathedrals, private schools and golf links.

In the original 1953 Act, private designated land did not have to be given any appropriate zoning. This caused a lot of problems for valuers. In 1966 the Act was amended making it mandatory for councils to zone all designated land (both public and private).

An interesting point about the 1977 Act is that there is no specific requirement for identified land to be given a zoning whereas designated land must be zoned (Sec 121). However, in nearly all district schemes it will be found that identified sites are appropriately zoned as for other land and designated land.

One exception is the Lower Hutt City district scheme which does not zone land identified for community purposes. Uses are limited to the use stated (eg golf course). Another difference is that applications for buildings may be approved by the council without the expense and delay of going through the conditional use procedure. If the community use is terminated the land is given the appropriate zoning.

Another point about the 1977 Act is that it is not mandatory for councils to specifically identify land used for purposes of value to the community. For example, theTakapuna City district scheme provides for community use zones instead of relying on the identification of land in relation to Section 73. The community use zone includes existing public and private uses, but uses such as private schools, hospitals and churches are permitted in some of the other zonings and therefore are not necessarily covered by the community use zone.

To better understand the town planning implications of Section 73 on identified sites, the following is an extract out of Sheppard and McVeagh's *Town Planning Notes* published by Brookers and Friend Limited updated up to 31 March 1988:

73.01 Under the 1953 Act, land used for purposes of value to the community but not intended to be owned by the Crown, the council, or any local authority was nevertheless "designated" on the district scheme. But under this Act, such land is to be "identified", not "designated", which is reserved for public works: see definition i s.2(1). The full implications of "identification" of land for community purposes are not spelled out in the Act. It is presumed that the land would be zoned in the ordinary way, and that the ordinances governing the use and development of land in that zone (including bulk and location requirements) would be fully applicable, subject to the restriction imposed by this section.

The effect of an identification is that:

(i) it records in, and brings to public notice by, the district scheme that certain land is being put to a use which is of value to the community; and

(ii) the carrying out of work on that land, the subdivision of that land, and the use of that land for any purpose inconsistent with the identified purpose becomes a conditional use, in the absence of anything to the contrary in the district scheme.

Dilworth Trust Board v Auckland City (1980) 7 NZTPAZ 198.

If land is identified pursuant to s.73, the use of it which is so identified is a use which may be carried on as of right. However, that does not

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Graham has contributed to theInstitute in manyways over the past 15 years ineluding a long period as a member of the Education Commit tee and Board of Examiners. Graham, who has contributed to the NZVI on occasions in the past, is in private practice in Wellington as a Valuer and investment consultant.

destroy the zoning of the land, and the bulk and location requirements for the zone will be generally applicable. Yet in the absence of anything to the contrary in the district scheme, any work though it may comply with those requirements - requires conditional use consent. *Khandallah Lawn Tennis Club v Wellington City* (1985) 10 NZTPA 353.

73.02 The identification technique should be used sparingly: only those uses which are of special or outstanding value to the community should be specifically identified in a district scheme. See *Dilworth Trust Board v Auckland City*, supra, in which it was held that an area of 5.4 ha used as a centre forhockey was, because of its size and the number of people who use it, worthy of identification as "recreation ground"; but that it was not necessary to identify areas of 0.5 ha and 3750 sq m developed and used for croquet and tennis respectively, as those grounds werenot of value to a wider section fo the public.

73.03 *A private* parking area is not a use of land which is "of value to the community" in the sense in which that phrase is used in s.73, and it would not be appropriate to "identify" land so used in the district scheme. *Shorters Car Distributors* v Auckland City D No A68/80 C836. Nor is a private club such a use. *Wood v Christchurch City* (1982) 9 NZTPA 100. Conditional use consent was held to be required in respect of proposed clubrooms on public lands which were not public reserves but designated respectively "public open space" and "reserve" in *Junction Motors v New* Lynn *Borough* (1975) 2 NZLR 131; 5 NZTPA 305(SC); and *Barnes v Takapuna City* (1977) 6 NZTPA 196.

See also *Maine v Christchurch City* (1979) D B1764 (on appeal 1980) 7 NZTPA 92 (HC); ("public open space").

Where a public hall on land owned by an incorporated society was noted on the planning map as "community hall", s.73 was held to be applicable to its site: *Bell v East Coast Bays City* D No A65/80 C794. In that decision the Tribunal rejected a contention that only uses for purposes of value to the community are deemed by the section to be conditional uses.

73.04 *Semble,* this section does not apply to a building registered as a place of historic interest: *NZHistoric Places Trust v Wellington City* (1979) 6 NZTPA 538. It does not apply except where the land concerned is used for purposes of value to the community. *Wood v Christchurch City* (1982) 9 NZTPA 100. It cannot be applied to land which is already owned by a local authority. *Otago Harbour Board v Silverpeaks County* D No C67/84.

The most recent case mentioned in the *Town Planning Notes* is *Khandallah Lawn Tennis Club v Wellington City* (1985) 10 NZTPA 353. The Tribunal concluded that the meaning and purpose of Section 73 is as follows:

1. If land is identified for a purpose of value to the community, as in the present case, then its identity has been established and recognised by the district scheme. The opening words of the section are indicative of the fact that it is "being used" for those purposes and thus the *use* is recognised as a use which may be carried on as of right under the provisions of the scheme.
2. The identification does not destroy the underlying zoning which means that bulk and location requirements are generally applicable in relation to any proposed structures.
3. The section however recognises by implication that the type of construction or work which may be contemplated within an identified area may not be appropriate to the zone wherein it is situated.
4. The section therefore provides that any work, including construction or alteration of any structure, in the absence of anything to the contrary in the district scheme, shall be deemed to be a conditional use of the identified land. The use of the word "deemed" indicates that the construction may be a complying structure but, notwithstanding that compliance, the council can still exercise overriding environmental and amenity control.
5. The subsection dealing with the use of land for any purpose inconsistent with the identified purpose has caused unnecessary confusion.

   We consider that the reason for the subsection is to stop a council from identifying private land and prevent the owner from making use of that land in accordance with its zoning, if for any reason the owner decides to abandon the identified purpose.

   It prevents a council from being able to *force* a private person or organisation to continue activities which are a value to the community without being able to abandon that purpose without rights of compensation. For instance, should the appellant desire to utilise some of its courts for residential purposes it would be required to apply to the council for a conditional use, but would not be prohibited from that course by the presence of the identification.
6. However the requirement to apply for a conditional use contrary to an identified purpose is only necessary if there is nothing to the contrary in the district scheme. The Wellington district scheme does express a contrary intention (Clause 1.7.3 of the scheme statement) where it states that any work contrary to the community purpose, but in accordance with predominant uses in the underlying zone, *are* a predominant use and that conditional uses in the underlying zone *are* conditional.

To clarify the position on identified sites in Wellington City the council has just recently changed its district scheme. The effect of the scheme change is that any use or development consistent with the identified purpose shall be permitted as a conditional use in terms of the zoning. In the case of any use or development inconsistent with the identified purpose, the code of ordinances for the zoning are applicable. For example, if part of an identified church site is proposed to be used for pensioner housing, the proposal merely has to comply with the residential zoning.

Any private owner or occupier of identified land can abandon the identified use or purpose of the land and the Council cannot force reinstatement.

Any private owner or occupier of identified land can abandon the identified use or purpose of the land and the council cannot force reinstatement. There does not appear to be any formal procedures for correcting district scheme maps when an identified use ceases or is abandoned. For example, the Wellington City Council's planning maps show several identified sites on which the identified use ceased some years ago.

Any private owner can require that the council uplift an identified use from the planning maps in the district scheme. While a scheme change is usually necessary, it is only a formality.

A request for uplifting the identification on part only of the site is more a frequent occurrence and presents no difficulty if the land is surplus to the requirements of the identified use or purpose.

Before discussing the valuation approach to identified sites, the main town planning points can be summarised as follows:

1. The site must be used for private purposes of value to the community before it can be specifically identified in the district scheme.
2. The identified use can be continued as of right, even if not permitted as a predominant use or conditional use under the zoning applicable to the land.
3. The identified use can be abandoned or cease to exist without any reference to the council, and the council cannot force any reinstatement.
4. An owner of identified land can request that the identification be uplifted.
5. The identification of sites in relation to Section 73 of the Town and Country Planning Act 1977 should not be confused with designations. Only land owned or intended to be owned by the Crown or a local authority can

be designated for a public work.

In many cases, identification of sites can be a significant advantage to the private land owner involved. Without appropriate identification the owner could be faced with frustrating planning difficulties if the use or development did not comply with the code of ordinances for the zoning.

Perhaps the main advantage of identified land has been to uses that were established many years ago before the district planning schemes were required. In more recent years, anyone proposing to establish say a church or private hospital, can sometimes be faced with significant town planning objections if the proposed use is not allowed as a predominant use in the particular zone. Once established the use can the be given an identification.

Valuation Approach

When valuing privately owned identified land, some valuers including Government valuers, are discounting the land values by varying degrees, depending on the identified use and zoning.

Discounting of valuations is not likely to be criticised when the values are used for rating or land tax purposes. However, there are many ground leases of land on which there are private hospitals, private schools, recreation and sports grounds or other private uses, and specifically identified for such uses in the district scheme. If land values ar reduced merely on account of the identification the rentals are also reduced.

If land values are reduced merely on account of the identification, then rentals are also reduced.

Perhaps the best well known example is Athletic Park in Wellington which is aprivate rugby ground leased off the Maori Trustee. The land is now identified as private recreation in the Wellington City Council's district scheme. In the previous district scheme the land had both a private recreation designation and a public reserve designation which led to a protracted series of litigation when the 1970 ground rental was being determined.

Athletic Park is developed as a rugby stadium which is a use not covered by either the predominant or conditional uses for the residential C2 zoning applicable to the land. Having an identified use in the district scheme is a significant advantage from a town planning point of view.

Valuing land on which there is an identified use would normally be for the statutory Government valuations or ground lease purposes. Ground lease valuations are normally on the basis of the former statutory unimproved value or current land value or simply the land value exclusive of any improvements on the site.

It is fundamental when valuing the land component of any property, particularly for unimproved value or land value assessments, that the land must be envisaged as vacant land without any improvements, and the existence of any lease and the use of the land must be put completely out of mind.

Identified sites will include uses established before district planning schemes were introduced, uses permitted as predominant uses, and uses established after being approved under the conditional use or specified departure procedures.

Along with the fundamental principle of assuming land is vacant and unimproved when valuing the land there is also the principle that the conditional use or specified departure approvals must be put completely out of mind. See *McKee v Valuer-General* (2972) NZLR 436, 443 and also reported in the *N Z Valuer,* March 1971. The Town House Award case reported in *N Z Valuer,* March 1973, also restates the principles of valuing land on which buildings have been approved as a conditional use.

Naturally, if one envisages the land as vacant land for valuation purposes, any identified use given to the land by a district scheme should also be put to one side. The identification relates to the improvements on the land and the use of those improvements. An identification cannot be given to a vacant unimproved site because there has to be improvements before the land can be *used* for purposes of value to the community.

In a nutshell, it is the improvements on the land and the use

...it is the improvements on the land and the use of those improvements that give rise to the identified use in the district scheme and not the land itself.

of those improvements that give rise to the identified use in the district scheme and not the land itself.

The land should be valued simply on the basis of the zoning and the town planning ordinances affecting the particular zoning. If any premium value or discount value has to be given to an identified use property then this should be reflected in the value of improvements, not the value of the land.

For example, a church or religious institution identified as being used for purposes of value to the community and sited on land zoned industrial or commercial could have a low or even nil value on the improvements. On the other hand, a church in a residential zone could have a premium value on account of the town planning difficulties sometimes experienced in establishing new churches.

The reason why some valuers have been discounting land valuations of identified sites probably stems from the situation some years ago when private land was designated but not given a zoning. The town planning situation today is not only different but is better understood in terms of the rights of private land owners.

The wording of Section 73 suggests that it is a limitation or restriction on the land but it is merely there to control an identified use which in nearly all cases is not permitted as a predominant use and in some cases is not even permitted as a conditional use.

Having a site specifically identified in the district scheme is usually an advantage form a town planning point of view, but if a private land owner decides to cease using the land for the identified purpose, then a request can be made to the council to uplift the identification.

Some readers of this article will be quick to argue their own views based on the decision in *Lindisfarne College Council v Valuer-General* as reported in *the N Z Valuer,* March 1983.

The case involved an objection to the Valuation Department's five-yearly revaluation of the land value on the Lindisfame College property. The land value was $165,000 representing a 17.5% discount from $200,000 assessed on the basis of vacant residential zoned land without school buildings.

The Valuation Department had allowed the discount for what they had described as a private designation (which had in fact been invalidated by the 1977 Town and Planning Act) but the college was arguing for a lower value again in line with the valuation placed on a nearby public school site.

A surprising revelation was that the council (Hastings City Council) admitted that the private designation was invalid but had not decided (1981) whether the land would be given a specific identification (Section 73).

Another surprise was that the Valuation Department pursued with its argument that the private designation was still valid.

The Tribunal hearing the case merely upheld the Valuation Department's valuation by saying "the Tribunal is satisfied that the objector has not discharged the burden imposed on it by the act to show that the Department's value is incorrect". The Tribunal did not comment on whether the Department's approach was the correct one.

From the Tribunal's decision it would appear that the Valuation Department considered that the land had to be valued as a private school site plus the potential for some other use or for some other use of the college in the future. The principle of assuming that improvements on the land must be totally disregarded seems to have been clouded by the existence of the school buildings and private designation. Even if the private designation had been valid it was only there to recognise the school buildings and use as a school. As for identified sites, a private designation could not and would not have been given to a vacant or unimproved site.

The decision in *Valuer-General v. General Plastics (NZ) Ltd* (1959) NZLR 857, delivered by Judge Archer, and reported in *Land Valuation Casebook* page 295, makes some pertinent observations on unimproved value:

> "The general principle that in the assessment of unimproved value the improvements must be totally disregarded was confirmed by the Privy Council in *Toohey's Limited v Valuer-General* (1925) AC 439, an Australian case in which a similar definition of unimproved value had to be considered when Lord Dunedin said: "What the valuer has to consider is what the land would fetch as at the date of the valuation if the improvements had not been made. Words could scarcely be clearer to show that the improvements were to be left entirely out of view. They are to be taken not only as non-existent but as if they never had existed...what the Act requires is really quite simple: Here is a plot of land; assume that there is nothing on it in the way of improvements; what would it fetch in the market?"

The above case reinforces the fundamental principle to follow when valuing the unimproved value or land value. If the land is to be assumed to have nothing on it then it must also be assumed that any identification "for private purposes of value to the community" must be put out of mind. Any identification in the district scheme relates to existing improvements and the use of the land. An identification cannot be given for a proposed use.

A later article will look at the more controversial topic on the valuation of designated lands on which there are existing public works. It will be contended thata designation sometimes creates a premium value and that valuations for unimproved values or land values should not be discounted merely because the land is subject to a designation.

A New Approach To The Feasibility Analysis of Commercial Property Investments

By Leonie Freeman

The following article is the first of a series of three which are based on the thesis submitted as part requirements for a Masters of Commerce majoring in Valuation and Property Management at Lincoln College in April 1987. This was under the supervision of Mr M McGregor and Mr T Marks.

There were three major areas investigated which form the basis of the three articles.

1. Survey of Commercial Property Investors - The various types of groups operating within the commercial market and their respective objectives and constraints were investigated.
2. Market Feasibility Analysis Potential demand for office space was investigated using simple models and econometric analysis.
3. Financial Feasibility Analysis - An examination of a specific project and the application of linear programming as an alternative method of analysing and quantifying commercial investment decisions was conducted. An extensive sensitivity analysis on key factors was also undertaken.

A. Introduction

For any real estate investment to be successful, a careful analysis of the many contingencies on which the decision depends is required. Such a process (as illustrated in Figure 1.1: on following page) consists of five basic steps:

1. Identify the objectives, goals and constraints of the

Leonie Freeman is currently working as a Valuer for W E Simes and Company in Christchurch. Leonie completed a Master of Commerce Degree, majoring in Valuation and Property Management, at Lincoln College, Canterbury, in April 1987. She has a special interest in property investment analysis and development of computer soft ware for valuation and associated property practices.

In her thesis Leonie focused on the various steps involved in the real estate investment procedure, and introduced some new concepts to aid feasibility analyses of commercial property investment.

This is the first of three articles. The others will be printed in successive issues of The New Zealand Valuers' Journal.

investor.

2. Analyse the investment environment and market conditions.
3. Develop the financial analysis and forecast cash flows from the project as well as the costs of investment.
4. Apply the decision-making criteria which will convert the expected benefits or cash flows into a value estimate for the investor.
5. Make the investment decision.

This investment process is simply an orderly procedure to consider the influence of various factors on the feasibility of an investment. The necessity for such a procedure to be undertaken can be illustrated by highlighting some of the characteristics associated with commercial office space investment.

Large capital outlays are required to purchase or develop major buildings. The resulting equity contributions, even with substantial leverage, are relatively large.

A long initial construction period is inevitable and any income from the development is generally not forthcoming until the building is completed. Maintenance of a liquid position is essential throughout the development stage, until the investment begins to provide some cash inflows.

Associated with this is the uncertainty and risk of the potential project, caused by the unpredictability of future events. Changes in rental levels, building costs, inflation and interest rates together with changing tenant requirements such as air conditioning, computer facilities, sizes of required spaces and changing location preferences all influence and affect estimated profitability levels.

Profitability is also affected by external factors, such as the general economic and market conditions, availability and cost of mortgage funds and timing in relationship to business and real estate cycles. The real estate cycle is highly volatile and is caused by shifts in supply and demand of accommodation.

... the amount of real estate accommodation in production cannot be curtailed easily...

One factor creating the high volatility of the real estate market is that the amount of real estate accommodation in production cannot be curtailed easily, and once constructed, is permanent in market terms. Therefore once a development is commenced, major alterations in the project due to changing requirements, demand or other financial and economic factors are virtually impossible. The long planning and construction period required often results in continued commitment to building after any weakness becomes apparent in the demand for space.

In America, both the national and regional supply of office space has tended to follow a boom and bust cycle. Builders and lenders typically overreact to demand by producing enough office space for a five- to seven-year absorption period over a short term. This short-term over-supply results in medium-term periodic depression of rental rates, high vacancies and significant concessions by developers. In Christchurch these same extremes have to date not been reached, but construction of office space had tended to follow similar cyclical patterns.

There are, however, a number of inherent advantages from investing in commercial office space. The income streams derived from well located buildings with financially sound tenants are generally stable and continue over a reasonable period of time. If leased subject to standard arrangements that is, the lessee paying outgoings - the investor can generally expect periodic income increases while being protected against rising expenses. In association with capital gain the nett cash lfow from well located appropriate commercial buildings has maintained parity with, or bettered inflation.

In association with capital gain the nett cashflow from well located appropriate commercial buildings has maintained parity with, or bettered inflation.

Good commercial real estate is similar to other types of real estate investment in that it is generally a good hedge against inflation, and capital growth occurs. There are also the taxation benefits associated with such developments, resulting from interest and depreciation deductions which benefit a portfolio operator.

Non-economic benefits must also be considered, such as prestige of ownership, advertising ability, creating a flagship to the organisation's status and achievements or the need for highly specialised facilities.

B. Survey of Commercial Property Investors

A personal interview survey was conducted in an attempt to distinguish and segment the various groups operating within the Christchurch Central City Commercial Property Market. It was intended to measure individual characteristics and objectives, awareness of important financial and market factors involved, and techniques presently utilised to quantify investment decisions. The survey was based on those who invested in commercial office space within the Christchurch central city area, either within a development context or who purchase improved properties. A total of 34 respondents were interviewed, interviews being conducted in Christchurch between 1 and 9 December, and in Wellington on 11 and 12 December 1986. The following is a summary of the results obtained.

Section 1: Classification of Investors

A total of 34 people were surveyed. Ten (29%) were institutional investors, 9 (26%) were property companies, 5 (15%) were developers, 3 (9%) were individuals or small groups and 7 (21%) owned and occupied the building for business purposes only.

Section 2: Business Purposes Only

Seven respondents owned and occupied their respective buildings for business purposes only. No one undertook any further investment in central commercial property and were therefore not of major importance with regard to this survey. A brief summary of their responses indicate that all had owned the building for considerable periods of time, but few had any preconceived ideas concerning capital growth or wealth accumulation. Their preference for purchase, instead of leasing, was largely based on non-monetary factors such as the desire to be their own landlord, security and autonomy associated with ownership and general policy of the company. This sub-group was not questioned any further as the remainder of the questioning focused on active commercial investors within the market.

FIGURE 1.1

Real Estate Investment Process

Step 1. Identify investor's objectives, goals and constraints.

Risk-return preferences

Step 2. Analyse investment climate and market conditions.

Market analysis | Legal environment | Sociopolitical analysis

Step 3. Develop financial analysis.

Reversion decisions

Income taxation | Tax planning | Wealth taxation

Step 4. Apply decision-making critieria.

Rules of thumb | DCF models | Probabilistic-sensitivity models | Traditional valuation techniques

Step 5. Investment decision.

Source: Jaffe and Sirmans," Improving Real Estate Investment Analysis", *Appraisal Journal*, January 1981, page 89.

Section 3: Market Analysis

Twenty-two per cent of the remaining respondents undertook no market analysis work. Of the remainder, approximately one-third employed consultants, one-third undertook their own and the remaining one-third did a combination of the two.

The major types of market analysis undertaken included present and predicted supply levels, competition from comparable buildings, and potential demand from prospective tenants. It appears that there is currently little comparative market analysis undertaken and it is also unclear how thoroughly the above factors are analysed. The majority of investors rely on their own market experience or knowledge. There is some use of outside consultants, but there appears to be potential for consulting firms to develop and improve these database sources in a variety of key areas.

Section 4: Financial Analysis

All respondents undertook their own financial analysis work. Discounted cashflow techniques (56%) comprising net present value and internal rate of return are the most common investment analysis techniques utilised. The payback period is only used by a very small number of investors, but there were a wide range of techniques and methods used with varying degrees of popularity. The general level of risk and sensitivity analysis is low. A greater degree of confidence could be place on the various financial approaches used if some risk analysis were undertaken.

Respondents were asked to rank nine factors pertinent to a typical investment analysis in order of importance: cash flow, leverage, liquidity, capital gains potential, taxation factors, investment risk, overall return on investment, return to equity and non-monetary objectives such as prestige and advertising.

The factor regarded as the most important by respondents in relation to a typical investment analysis was capital gains potential (42%). Overall return on investment was ranked second (42%), followed by investment risk (31%). Cash flow, liquidity and taxation were generally ranked as being of medium importance. Leverage and return to equity had low levels of priority and non-monetary objectives were ranked the lowest although still considered to be significant by some groups.

The ranking of the above factors in order of importance in a typical investment analysis was then segmented according to the initial classifications.

It appears the institutional investors consider the most important factor to be capital gains potential with overall return on investment and investment risk second and third respectively. Leverage, liquidity, taxation factors and non-monetary objectives are factors with relatively less importance or with high levels of non-applicability.

Responses from the property companies indicated that capital gains, investment risk, overall return and return to equity all ranked equally as the most important factors. Leverage, liquidity and taxation varied, with cash flow being of medium importance.

Capital gains was ranked first by the developers together with leverage and cash flow. Taxation was relatively more important for this group.

Capital gains potential was ranked as the most important factor by all three private individuals followed next by cash lfow. Taxation and overall return on investment were of medium importance.

Section 5: Major Objectives

Work Undertaken: Twelve (44%) of respondents undertook development work only, 5 (19%) purchased completed buildings only, while 10 (37%) adopted a policy which comprised a combination of the two. The major objectives tended to be adequate return on capital, capital gain, cash flow, long holding period and investing or the development of high quality buildings.

Landbanks: Of those respondents who undertook development work, 13 (59%) purchased sites as landbanks for holdings and future redevelopment. When questioned on the holding yield, 5 (42%) commented that cash flows attributable to the landbank site had to cover outgoings including associated interest costs related to the site with 7 (58%) commenting that the desired holding period was very short because of high associated holding costs.

Pre-lease commitment: Respondents were questioned on whether their general development policy required some commitment or per cent of the building to be pre-leased before construction commenced. Sixty-five per cent required a pre-lease commitment or at least an indication before construction would commence.

For office space development, 69% of respondents required at least half of the building to be committed before construction commenced. The requirement for retail and industrial appeared to be much smaller. The need for pre-leasing is likely to be related to the economy. In periods of growth and expansion, investors are not likely to require such a commitment prior to construction commencing, compared with a downturn in the economy where a relatively higher percentage of the building must be pre-leased.

Holding period policy: The majority of respondents have a long-term holding policy - that is, greater than 15 years. Reasons for this included the potential for capital and rental growth (50%), it was part of an investment stock (36%) or adhered to the overall investment policy (36%). A further 29% mentioned that it was company policy, while 14% commented on the development of a quality portfolio being an important objective. Funds were not required elsewhere or affects of the claw back tax for less than a 10-year holding were reasons adopted by 7% of the respondents respectively.

The next significant group was those holding its buildings for less than one year (mainly developers), the major reasons being cash flow (80%), company policy (60%) and flexibility.

A small proportion of respondents was variable- that is, the decision is dependent on the individual investment and timing, or had a combination of both short- term and long-term policies - again this being dependent on the individual building.

However, if the price was right, 43% of the respondents would sell the building contrary to their stated long-term holding policy. Other major reasons included alternative use of funds (29%), better investment elsewhere (21%), change in company policy (21%) and the building was getting too old (21%) or not performing up to standard.

General financing policy: A total of 90% of the institutional investors used funds generated internally within the organisation, whereas funds for the property companies were primarily derived from domestic borrowing. A lesser proportion obtained finance from internal company sources, share issues and offshore borrowing.

Developers also had a similar mixture, although no funding was obtained from the issue of shares. Two-thirds of the individuals borrowed on the domestic market, while one respondent used its own sources.

The financing decisions provide an indication as to the degree of risk associated with investments. Two of the developers and property companies obtained at least part of their finance from offshore borrowing. This can be compared with the more conservative policies of the institutions whose funds were

generally from internal sources.

Choice of investment: Given the choice of a potential investment of either an industrial property, retail complex or commercial office block, 21(78%) elected the commercial office block. Reasons included the potential for capital growth (81%), rental growth (62%), minimum size required for any developments (14%) and less problems, both with management and tenancies.

The reasons provided by the two respondents choosing an industrial property were the long economic life and only one tenant was required.

The three respondents who selected a retail complex as first choice did so because of the associated rental and capital growth and the frequency of rental reviews.

Non-financial factors: A total of 10 (37%) of the respondents took into consideration non-financial factors. The major factor being the quality of the building (80%). Correct presentation of the company image was considered by 40% of respondents. Other factors included the prestige of ownership (20%), wanting to improve the look of the building and the nature of the organisation (10% each).

Portfolio monitoring: Monitoring of the respondents respective portfolios was carried out by 17 (63%) of the respondents. These included 10 institutions, 3 property companies and 4 developers. The main methods included rental review and return relative to value (56%), periodic revaluations (44%), percentage return calculated/composite yield (38%), rental growth (38%) and internal rate of return (25%).

The smaller number of respondents who monitor their portfolios illustrates the lack of sophistication in the property marketplace, and even amongst those that undertake some form of monitoring it is difficult to determine how thoroughly the above factors are considered. There is no doubt that investment performance of many properties in portfolios would be greatly enhanced by competent continuous professional management.

Section 6: Major Constraints

The major constraints as perceived by the various groups of investors were:

Institutional Investors

- Conservative policies adopted by their boards of management.
- Time taken by executives and boards in a bullish marketplace.
- Highly competitive marketplace.

Property Companies

- Lack of suitable improved and development sites of good quality.
- Ability to obtain adequate funding for investment to occur.

Developers

- Ability to obtain initial capital sums required and to adequately finance mortgage payments.
- Availability of, and the difficulty in securing, tenants before completion of the development.

Summary

The major groups investing in commercial office space in Christchurch were questioned on a broad range of areas concerning their objectives and constraints.

The results have provided an insight into the various policies adopted, the reasoning behind them, and they provide a base from which further market and financial analysis was undertaken in the thesis.

CASES RECEIVED

Notice of cases received are given for members' information. They will be printed in The New Zealand Valuers' Journal as space permits and normally in date sequence.

CASES NOTED

Cases "noted" will not normally be published in The New Zealand Valuers' Journal.
Copies of cases "received" and "noted" may be obtained from the Registrar of the Court under whose jursidiction the cases were heard. (A charge is normally made for photcopying.)

THE VALUERS' REGISTRATION BOARD

IN THE MATTER	of an Inquiry Pursuant to Section 32(2) of the Valuers Act 1948
AND	
IN THE MATTER	of Charges Under Section3 1 (1)(c) of the Valuers Act 1948 against Francis Eyre Ogilvie Evans, Registered Valuer, Orewa

DECISION OF A BOARD OF INQUIRY OF THE VALUERS' REGISTRATION BOARD

Members of the Board:	Mr R P Young (Inquiry Chairman) Mr D J Armstrong Mr P E Tierney
Counsel:	Mr M T Parker for the Valuer General
	Mr M D Edwards for Mr Evans
Date of Hearing:	8 June 1988
Date of Decision:	9 June 1988

This Inquiry arose from a complaint lodged by Equiticorp Finance Group Ltd. This Company had been approached by Daniel Overton & Goulding Solicitors acting for Goddess Engineering Ltd to finance the purchase of a commercial property in the centre of Papatoetoe.

In support of this application was a valuation and loan recommendation made by F E 0 Evans. Mr Evans' valuation of the property was $1,000,598 and his loan recommendation $667,065.

Equiticorp executives visited the site and made investigations which led them to the conclusion that the valuation was grossly overstated. They passed on this information to the Auckland Branch of the NZ Institute of Valuers. This was subsequently investigated by the Valuer General, reported to the Valuers' Registration Board on 24 November 1987 and it ordered that an Inquiry should be held.

Mr Evans was charged at that Inquiry which was held on Wednesday 8 June 1988 with the following charges:

1. Section 31(l)(c) of the Valuers Act 1948: That you have been guilty of such incompetent conduct in the performance of your duties as a Valuer as renders you liable to a penalty provided by the Valuers Act 1948 in that you, in compiling a Valuation Report dated 18 May 1987 in respect of a commercial property at 73-85 St George Street and Wallace Road, Papatoetoe,

grossly over-valued the property.

2. Section 31(1)(c) of the Valuers Act 1948: That you have been guilty of such incompetent conduct in the performance of your duties as a Valuer as renders you liable to a penalty provided by the Valuers Act 1948 in that you, in compiling a Valuation Report dated 18 May 1987 in respect of a commercial property at 73-85 St George Street and Wallace Road, Papatoetoe, made a mortgage recommendation that was excessive.

The substance of the charges which were denied by Mr Evans related to his valuation of a central Papatoetoe commercial property comprising 5 lock up shops and a defunct picture theatre located at 73-85 St George Street.

The recent sales/valuation history of the property presented to the Board:

Circa 2/87	Sale to Goddess Engineering (Mr & Mrs Teape) for $450,00
Circa 5/87	Sale of shares of Goddess Engineering for $570,000
Circa 5/87	Valuation by F E 0 Evans $1,000,598 and loan recommendation $667,065
Circa 5/87	Valuation by T J Horn for Valuer General $530,00 and loan recommendation $350,000.

Subsequently a principal of Goddess Engineering, Mr Bristow, informed the Board the property had been the subject of two swap deals which for one reason or another had fallen through and that the property was for sale at a listed price of around $1 million but that they would be prepared to negotiate at around $800,000.

Mr Bristow agreed under cross-examination that his Company had borrowed on the strength of Mr Evans' valuation in excess of $600,000, more in fact than had been paid for the property.

The shops built in 1927 were described to the Inquiry as having had only minor improvements and retaining much of their original appearance but all were let at rentals consistent with other local shops.

The theatre built in 1929 has structural defects to the extent that the stage area requires removal and the roof strengthening before the local authority would allow its proposed use as a craft or stall market. They would not permit it being used again as a theatre. The expected cost of the remedial work was around $100,000.

The theatre had been used as such until February 1987 when the lessee abandoned it, and had been producing a rental of $5720 p.a. However the lessee had been unable to pay his way and no rental had been paid after December 1986.

The income from the property in May 1987 was a total of $38,985 p.a. Mr Hom, an experienced Senior District Valuer, considered that the property would continue to produce that income, that an appropriate capitalisation rate was 10% but that the theatre should be demolished preparatory to redevelopment of the site. Mr Horn impressed the Board with the thoroughness of his investigation and the enquiries he had made.

It accepts that at the relevant date the correct valuation of the property was between $500,000 and $550,000. How Mr Evans arrived at a valuation of twice that figure was never made fully clear to the Board. Before it Mr Evans was confused and hesitant. He was unable to explain his reasons for adopting a rental for a disused picture theatre at $45,000 p.a. A theatre that hadpreviously produced arental of $5720 p.a.

The Board has the strong impression that he was overly swayed by Mr Bristow's enthusiastic view.

He was he said "vaguely aware" that the property was for sale at around $4-500,000, but chose to ignore that warning. He had made no adequate rental investigations to see if the rentals were current and comparable, was unaware of the current Government Valuation made in 1984 of $279,000 and was unable or unwilling to explain why he analysed two land value sales at around $240 per m2 and increased that figure to $653 per m2 for the inquiry property. Many other valuation and market analysis methods employed by Mr Evans left the Board in no doubt that in this type of valuation work he is completely out of his depth. The totality of his evidence and demeanour at the Inquiry left the Board with no option but to consider that Mr Evans was totally incompetent and unfit to be a Registered Valuer.

Accordingly, and acting within the powers vested in it by the Valuers Act 1948, the Valuers' Registration Board hereby finds that Francis Eyre Ogilvie Evans has been guilty of such incompetent conduct in the performance of his duties as a Valuer as renders him unfit to be registered under that Act. The Board therefore orders that his name shall forthwith be removed from the Register of Valuers.

R P Young
INQUIRY CHAIRMAN

THE VALUERS REGISTRATION BOARD

IN THE MATTER	of an enquiry pursuant to Section 32(2) of the Valuers' Act 1948
AND	
IN THE MATTER	of charges under Section 31(1)(c) of the Valuers Act 1948 against Henry Leon Simkin, Registered Valuer, Auckland.
Members of the Board	Mr D J Armstrong (Inquiry Chairman)
	Mr R P Young
	MrMRHanna
	Mr K E Stone for the Valuer General
	MrP G McMenamin forMr Simkin
	Mr J B Stevenson assisting the board
Date of Hearing:	10th December 1987
Date of Decision:	30th March 1988

This Inquiry arose from a complaint received by the Registrar of the Valuers' RegistrationBoard on 21st May 1987 from Mr N Harris, Chief Investigating Solicitor of the Department of Justice, with respect to certain commercial properties in Dunedin. The Valuer General investigated the complaint and reported thereon to the B oard in areport dated 22nd June 1987. Having considered the Valuer General's report, the Board decided that in terms of Section 32(2) of the Valuers Act, an Inquiry should be held.

By notice dated 30th July 1987 Mr Simkin was advised of the Board's decision, the charges against him and the Board's intention to hold an inquiry on 29th day of September 1987.

The date of hearing was subsequently deferred and took place on 10th December 1987. It is recorded that on the day before the Hearing, Mr Simkin had sought leave from the High Court before Mr Justice McGechan to have the Hearing put aside on the basis of the constitution of the Board. That application was declined and the Hearing proceeded as set down.

At the commencement of that Hearing, and before the charges were read, Mr McMenamin sought and was granted leave to read an application from Mr Simkin to have his name voluntarily removed under Section 29 of the Valuers Act 1948. The application was in the form of the following statement:

> "I Henry Leon Simkin of Auckland Registered Valuer Valuer, say: I am a registered valuer practising at Auckland and have been a valuer since 1950. In those 37 years I have completed thousands of valuations of all types of properties, competently, honestly and diligently. In recent years I have undertaken valuations for clients who have given me false information, have dishonestly used my valuation reports and who have deliberately misled myself and other professional people associated with them for the sole purpose of their pecuniary advantage. I do not accept that the Board as it sits today is properly constituted for the reasons that were submitted yesterday to Mr Justice McGechan in the Wellington High Court. However, in view of the fact that I am 66 years of age, I do not wish to continue exercising my legal rights and accordingly apply to have my name removed from the register of valuers. Given my lengthy career in the profession I ask that the Board so directs the removal of my name pursuant to Section 29 of the Valuers Act 1948."

Having heard the request from Mr Simkin, the board then invited comment from Mr Stone, who suggested that the action requested by Mr Simkin did not resolve the complaint, and that the matter before the Board should proceed. The Board's Legal Advisor Mr Stevenson gave similar advice. The Board then considered the request and in declining the application made the point that had it acceded to Mr Simkin's request, the matters before it wouldnot be resolved and that there would be no reason why at some time in the future he could not apply to be re-instated under Section 29(2) of the Valuers Act.

At that point Mr McMenamin who was appearing on Mr Simkin's behalf withdrew from the Hearing as did Mr Stevenson.

The Hearing proceeded with the reading of the Charges as follows:

1. Section 31(1)(c) of the Valuers Act 1948: That you have been guilty of such incompetent conduct in the performance of your

duties as a Valuer as renders you liable to apenalty provided by the Valuers Act 1948 in that you in compiling a Valuation Report dated 25 June 1986 in respect of the property at 77 Stuart Street, Dunedin, grossly over-valued the property.

2. Section 31(1)(c) of the Valuers Act 1948: That you have been guilty of such incompetent conduct in the performance of your duties as a Valuer as renders you liable to apenalty provided by the Valuers Act 1948 in that you in compiling a Valuation Report dated 25 June 1986, in respect of the property at 77 Stuart Street, Dunedin, made a mortgage recommendation that was excessive.
3. Section 31(1)(c) of the Valuers Act 1948: That you have been guilty of such incompetent conduct in the performance of your duties as a Valuer as renders you liable to a penalty provided by the Valuers Act 1948 in that you in compiling a Valuation Report dated 26 June 1986 in respect of the property at 85 Fryatt Street, Dunedin, grossly over-valued the property.
4. Section 31(1)(c) of the Valuers Act 1948: That you have been guilty of such incompetent conduct in the performance of your duties as a Valuer as renders you liable to a penalty provided by the Valuers Act 1948 in that you in compiling a Valuation Report dated 26 June 1986 in respect of the property at 85 Fryatt Street, Dunedin, made a mortgage recommendation that was excessive.
5. Section 31(1)(c) of the Valuers Act 1948: That you have been guilty of such incompetent conduct in the performance of your duties as a Valuer as renders you liable to a penalty provided by the Valuers Act 1948 in that you in compiling a Valuation Report dated 26 June 1986 in respect of the property at 85 Fryatt Street, Dunedin, grossly over-valued the property.
6. Section 31(1)(c) of the Valuers Act 1948: That you have been guilty of such incompetent conduct in the performance of your duties as a Valuer as renders you liable to a penalty provided by the Valuers Act 1948 in that you in compiling a Valuation Report dated 19 August 1986 in respect of the property at 9 Bond Street, Dunedin,made a mortgage recommendation that was excessive.
7. Section 31(1)(c) of the Valuers Act 1948: That you have been guilty of such incompetent conduct in the performance of your duties as a Valuer as renders you liable to a penalty provided by the Valuers Act 1948 in that you in compiling a Valuation Report dated 10 March 1986 in respect of the property at 595 Princes Street, Dunedin, grossly over-valued the property.
8. Section 31(1)(c) of the Valuers Act 1948: That you have been guilty of such incompetent conduct in the performance of your duties as a Valuer as renders you liable to a penalty provided by the Valuers Act 1948 in that you in compiling a Valuation Report dated 10 March 1986 in respect of the property at 595 Princes Street Dunedin,made amortgage recommendation that was excessive.

As neither Mr Simkin nor his Counsel were no present, no pleas on the matters before the Inquiry could be taken, and the Board therefore proceeded on the assumption that the Charges were denied.

Mr Stone opened his case by calling Mr S W Ralston, the Valuer General, who produced evidence of Mr Simkin's qualifications and registration as a Valuer. Mr Ralston outlined the background to the complaint and the steps that he took to investigate and report the results of that investigation to the Board.

The next witness was Mr G E Burns, a Registered Valuer from Dunedin who gave evidence of his valuations of the subject properties effective at the same dates as those which had been m ade by Mr Simkin. A schedule of the two sets of valuations is set out below:

Property	Valuer	LV	VI	CV	Loan Rec
Stuart St	Simkin	750,000	1,250,000	2,000,000	1,333,300
	Bums	130,000	620,000	750,000	500,000
Fry att St	Simkin	125,000	265,000	390,000	260,000
	Bums	23,000	115,000	138,000	69,000
Princes St	Simkin	1,837,000	663,000	2,500,000	1,666,660
	Bums	515,000	210,000	725,000	435,000
Bond St	Sirnkin	360,000	2,500,000	3,500,000	2,333,330
	Bums	322,000	1,153,000	1,475,000	983,000

It is clear from the above that there was a very wide difference of opinion between the two Valuers as to the worth of these properties.

It was apparent from Mr Bums' evidence that he had an intimate knowledge of the commercial and industrial real estate market in Dunedin, that he had carried out a thorough inspection of each of the properties, and a careful analysis of available comparable evidence, and that he had applied sound and established techniques to the valuation exercise.

He was able to point to a number of factual errors in the data on which Mr Simkin had based his valuations, including one case where the rental was overstated by more than 100%, and others where such basic information as measurement of buildings and lettable areas were grossly incorrect.

In the absence of Defence Counsel, Mr Burns was exposed to detailed questioning by members of the Board, but was able to demonstrate a sound grasp of his evidence and that his technical approaches were both appropriate and fair in the circumstances.

While the Board *h*as been conscious that Mr Bums may have enjoyed some advantage in completing his valuations at a later date, it believes that he has as far as possible, excluded factors of hindsight, by confining himself to data available at valuation date.

We also note that by foregoing his opportunity to defend the case, Mr Simkin himself appears to have recognised that the Prosecution's evidence could not seriously be challenged.

From Mr Bums' evidence, the Board is brought to the unavoidable conclusion that in completing his valuations, Mr Simkin showed abasic lack of knowledge of the property market in Dunedin and a deficiency of fundamental research which inevitably resulted in his assessment of values which bore little relation to the true worth of the subject properties. This series of gross over-valuations has shown a degree of incompetence which is unacceptable to the Board, and to which the public at large should never be exposed.

We feel obliged to observe that as a result of the efforts of many individuals, the valuation of land has become widely accepted in New Zealand as deserving of professional status.

It is now a career to which many fine young men and women commit themselves with a confidence that they in turn will be able to build further upon all that has gone before.

In that context the inadequacies of work such as that carried out by Mr Simkin in the matter to which these charges relate must be of the very gravest concern.

The confidence of the public, and of other professionals, is a fragile thing it takes many years and much effort to build, but can be eroded almost at will, by the irresponsible actions of a few individuals. That prospect is not one which this Board will willingly tolerate.

This is the second time that Mr Simkin has appeared before the Valuers' Registration Board, and it is extremely disappointing to find that he has now been shown to have completed a series of valuations to standards which by his own action he recognises as deserving of no defence.

To claim that he was misled and given false information is no excuse, and indeed in the Board's opinion, is tantamount to an admission of incompetence. We believe that a Valuer who is properly practicing the skills and ethical standards of the profession must be able to recognise false information and must be prepared to stand against any pressures which are imposed by clients pushing to obtain levels of value suited to them, but unrelated to the true market.

It is with greatest regret and concern that the Board has heard this case, but it is its unanimous finding that, in the light of the evidence which has been placed before it on these matters, all the above charges are proven.

Accordingly, and acting within the powers vested in it by the Valuers Act 1948, the Valuers Registration Board hereby finds that Henry Leon Sinikin has been guilty of such incompetent conduct in the performance of his duties as a Valuer as renders him unfit to be registered under that Act.

The Board therefore orders that his name shall forthwith be removed from the Register of Valuers.

D J ARMSTRONG

THE PROFESSION

Valuation is a profession for both men and women with New Zealand specialisation tending to be either rural or urban although a composite rural and urban qualification is available. Qualities required are a good knowledge of the economics of the real estate market, a knowledge of modern commercial practice as it applies to building construction, urban and rural land development, town planning, farm management, modern commerce, investment and home ownership together with business management.

An essential requirement is the ability to undertake a concise, logical analysis relating to a project and, as a university degree is the necessary qualification, those entering the profession need sufficient academic ability to cope with university studies.

THE VALUER

The Valuer's work comprises a balance of outdoor and office work, meeting people, measuring properties and advising clients. A pleasant personality, the ability to converse, to make decisions and to write reports are essential requirements of the Valuer. In their work Valuers act as consultants, financial advisers, economists, statisticians and as expert witnesses in Court. Because no two properties are identical the work is interesting and varies from the valuation of small farms to the country's vast rural holdings in the rural sphere with residences, industrial complexes, shopping centres, units and multi-storey commercial buildings within the urban work content.

THE INSTITUTE

The New Zealand Institute of Valuers is the professional body representing New Zealand's qualified and Registered Valuers.

On a regional basis, the Institute represents some 2,100 members. With a head office and professional secretariat in Wellington, the Institute organises seminars, publishes journals and books and is responsible for professional standards, which it polices through a strict Code of Ethics.

THE VALUERS' REGISTRATION BOARD

As with all professions a basic qualification, currently one of the degrees set out on the next page, is essential for Registration, together with three full years practical valuing experience. There is also a minimum age requirement of 23 years.

The Board oversees educational and practical requirements and requires candidates to produce specimens of their work when applying for Registration.

The Board also considers complaints about Registered Valuers and has the power to suspend or remove Registration.

QUALIFICATION REQUIREMENTS

An essential quality is the imagination to meet the challenge of new valuation techniques with a university degree the required qualification and the necessary prerequisite for registration as a Valuer. There are seven primary qualifications available to those taking up valuation, any of which will enable the holder to apply for registration on fulfilling approved practical and age requirements. The qualifications are:

Bachelor of Property Administration

An urban qualification available at Auckland University.

Write to the Registrar, Auckland University, Private Bag, AUCKLAND.

2 Bachelor of Business Studies (Valuation)

An Urban qualification with some units available by extra mural study from Massey University. This degree has been re-named Bachelor of Business Studies (Valuation & Property Management) from 1988.

3 Bachelor of Agriculture (Rural Valuation Option)

A rural qualification. This degree is available at Massey University.

4 Bachelor of Agricultural Science (Rural Valuation Option)

The Valuation option of this degree centred on Massey University qualifies the holder in rural valuation.

Write to the Registrar, Massey University, Private Bag, PALMERSTON NORTH.

5 Bachelor of Commerce (Agricultural) in Valuation and Farm Management (Valuation Option)

The valuation option to this degree is a recognised rural qualification for registration and is available from Lincoln College.

6 Bachelor of Commerce (Horticultural) in Valuation and Horticultural Management (Valuation Option)

The valuation option contains the same valuation papers as 5 and is a recognised rural qualification for registration, available from Lincoln College.

7 Bachelor of Commerce (Valuation and Property Management)

This degree qualifies the holder with an urban qualification and is centred at Lincoln College.

Write to the Registrar, Lincoln College, CANTERBURY

8 A post graduate Diploma in Commerce (Valuation)

from Lincoln College *associated* with an *approved* first qualification.

Write to the Registrar, Valuers' Registration Board, P.O. Box 5098, WELLINGTON for details.

Students intending taking any of the above courses or interested in learning the full scope of the degrees are advised to consult the relevant university calendar, or write to the respective University.

EMPLOYMENT

To the Registered Valuer opportunities are available, both in New Zealand and overseas in private practice, lending institutions, development companies, finance corporations and Government Departments, regional authorities, many city councils and ad hoc bodies.

STUDY ASSISTANCE

The State Services Commission has approved a number of Government Departments offering study awards for selected courses at universities. Full details of the terms and conditions of these study awards are available by writing to the State Services Commission, P0. Box 329, WELLINGTON.

INFORMATION

Further information can be obtained from the General Secretary, New Zealand Institute of Valuers, P 0 Box 27-146 WELLINGTON

The following case is discussed in a paper included in this issue (page 587)by Jack W Charters and the explanation thereafter which refers specifically to this Court ofAppeal decision.

IN THE COURT OF APPEAL OF NEW ZEALAND
C A 124/88

BETWEEN THE HOUSING CORPORATION of New Zealand, a body corporate under the provisions of the Housing Corporation Act 1974, having its registered office at Lambton Quay, Wellington, Appellant

AND THE MAORI TRUSTEE, a corporation sole under the provisions of the Maori Trustee Act 1953 of Wellington, as Trustee of Okawa Bay Lake Resort,
First Respondent

AND DAVID HURIHANGANUI WHATA of Rotorua, Surveyor, LOGAN ARTHUR HENRY HALL, formerly of Mourea, now of Ngakuru, Retired Businessman, TE AHO ROGERS (also known as Welsh) of Rotorua, Married Woman, PIRIHIRA CHRISTINE JANET FENWICK of Rotorua, Married Woman, VERBIES MCCAUSLAND of Te Puke, School Teacher, and WHAKAREWA HUNUHUNU of Rotorua, Farm Manager as Advisory Trustees of the Okawa Bay Lake Resort Trust pursuant to Section 438 of the Maori Affairs Act 1953,
Second Respondents

AND NATWEST LOMBANK (NEW ZEALAND) LIMITED, a duly incorporated company having its registered office at Natwest House, 132 The Terrace, Wellington, carrying on business as Financiers,
Third Respondents

AND REGISTRAR OF THE HIGH COURT of New Zealand at Rotorua,
Fourth Respondent
C A 126/88

BETWEEN NATWEST LOMBANK (NEW ZEALAND) LIMITED, a duly incorporated company having its registered office at Natwest House, 132 The Terrace, Wellington, carrying on business as Financiers,
Appellant

AND THE MAORI TRUSTEE, a corporation sole under the provisions of the Maori Trustee Act 1953 of Wellington, as Trustee of Okawa Bay Lake Resort,
First Respondent

AND DAVID HURIHANGANUI WHATA of Rotorua, Surveyor, LOGAN ARTHUR HENRY HALL, formerly of Mourea, now of Ngakum, Retired Businessman, TE AHO ROGERs (also known as Welsh) of Rotorua, Married Woman, PIRIHIRA CHRISTINE JANET FENWICK of Rotorua, Married Woman, VERBIES MCCAUSLAND of Te Puke, School Teacher, and WHAKAREWA HUNUHUNU of Rotorua, Farm Manager as Advisory Trustees of the Okawa Bay Lake Resort Trust pursuant to Section 438 of the Maori Affairs Act 1953,
Second Respondents.

Coram: Cooke P
Richardson J
Somers J

Hearing: 26 July 1988

Counsel: J J McGrath Q C and C J Booth for Housing Corporation
B W F Brown and M A F Gilkison for Natwest
C R Pidgeon Q C and J A Grant for Maori Trustee and Advisory Trustees
No appearance for Registrar (abiding decision of Court)

Judgment: 14 September 1988

Judgment of Cooke P

These appeals, heard together, are from an order of Doogue J in the High Court at Rotorua on 19 July 1988 granting interim injunctions restraining the mortgagees (to whom it is convenient to refer as Natwest and the Housing Corporation) from exercising their powers of sale. The property which is security for the mortgage advances is now vested in e Maori Trustee. Previously it was vested by order of the Maori Land Court in the trustees of the Okawa Bay Lake Resort Trust; they are now advisory trustees. The land is approximately six acres on the western shore of Lake Rotoiti and the mortgages were entered into to finance the project of constructing and operating on the land the Okawa Bay Lake Resort, a complex including a hotel (40 guest rooms and three suites) and 15 condominium units, the use of which has been granted under time-share licences for 20 years.

Unfortunately the project has not been successful. Occupancy rates have been much below forecasts; forinstance in the yearended 30 April 1988 the rate was 44 per cent against the 55 per cent forecast in August 1987. The achieved rates have fallen still lower since. On 22 June 1988 Coopers and Lybrand reported to the Maori Trustee a serious deterioration in results in recentmonths. They attributed the decline in occupancy to various causes, including general economic conditions, the particular difficulties of the tourist industry, and adverse publicity arising from the financial difficulties of the trust. They also reported deficiencies in management and marketing.

Very high interest rates, reaching even 38.5 per cent, on the Natwest loan have been the consequence of an initial decision to raise funds offshore (in eurocurrency), adverse changes in exchange rates, and the conversion of the loan to a New Zealand one. Although these rates are said to be related to the rates paid in turn by Natwestto borrow funds on daily call, they would appear to place an unsustainable burden on the mortgagor. There is also a dispute with Natwest about liability for exchange losses. If these were the only factors in the case, I should be disposed to favour an interim injunction pending the fullest examination of the whole transaction with Natwest and its history. But they are by no means the only factors.

Opened in 1985, the projecthas been in financial difficulties virtually from the start. For more than two years the interested parties have been engaged in efforts and negotiations to find a way out of the difficulties, but nothing has been achieved. In a memorandum dated 8 August 1988 counsel for the Maori Trustee has notified the Court that it is possible at present for income generated by the hotel to meet any interest payments. The Okawa Bay Lake Resort Trust has not other funds to meet interest payments. The Maori Trustee cannot use other trust funds and believes that he would be unlikely to obtain the approval of the Board of Maori Affairs for resort to his general purposes fund as he cannot show that there would be sufficient security. The Maori Trustee has already invested $1 million in the project, secured by a charge ranking after the Natwest and Housing Corporation mortgages; he is receiving no interest and states that he is also owed at least $200,000 for commission and costs. The hotel is being kept open at a cost to the Maori Trustee of $20,000 a month.

Counsel's memorandum mentions, as had been mentioned at the hearing in this Court, the possibility of leasing the hotel as a going concern to "Asian investors", and says that the interest received continues to look very promising. But this suggestion evidently remains as nebulous as it was on 26 July. Nothing in the slightest degree specific has been put before the Court about it.

On 26 July we explained the course that we were taking as recorded in the following minute:

> "The Court will take time to consider its judgment in this case. Judgment will not be delivered before 9 August 1988. Judgment will not necessarily be delivered on that day, but it will not be earlier.
>
> "The main reason for reserving judgment is to enable the Maori Trustee to try to evolve some practical proposal to ensure that the mortgagees will not suffer further loss.
>
> "In the light of the argument heard today it is quite probable that, if no arrangements are reached between the parties in the meantime, or failing agreement approved by the Court, the result of the appeals will be that the Housing Corporation at least will not be restrained from exercising the power of sale.
>
> "In taking this course the Court is in effect giving the Maori Trustee a last chance to prevent a mortgagee's sale. The Court does not overlook the attachment of the Maori owners to their land; they are receiving an indulgence that might not normally be extended to mortgagors. It must be clearly understood that such an indulgence cannot be extended indefinitely."

I am afraid that the time for indulgence is now past and it is necessary to proceed to judgment. Excluding the liabilities to the Maori Trustee, the trust appears currently to owe to the mortgagees more than $6 million. The Housing Corporation's advance was $1.5 million; as at 12 May 1988 a total of $2,092,420 was claimed for capital and arrears of interest at 13 per cent per annum. Interest has of course been accumulating since. Whether or not the figure just mentioned is precisely accurate, it is a sufficient indication of the scale of the indebtedness to the Housing Corporation.

The Judge was plainly hesitant to grant interim injunctions, saying that one of the matters which gave him the gravest consideration was whether in granting relief to the plaintiffs he would not in fact be making the position far worse than it was at the date of his decision. The lack of subsequent progress confirms that ground of concern. He was persuaded, however, that there were some seriously arguable issues. In the light of these, and more particularly a fundamental one to which I shall refer shortly, he decided to grant the temporary relief.

Apart from the fundamental point, the Judge was prepared to put into the seriously arguable category questions as to the validity of the notices given by the two mortgagees under s.92 of the Property Law Act 1952 and questions as to the interest payable to Natwest. The notice objections are mere technicalities and in my opinion without substance. Having had the advantage of reading in draft the judgment to be delivered by Somers J, I am content simply to express full agreement with him on those objections. I also agree generally with what he says about the Natwest mortgage and in any event do not consider that the

Housing Corporation's rights should be prejudiced by any issues between the plaintiffs and Natwest. On the hearing of the appeal Mr Pidgeon sought to resurrect some other points which Doogue J had regarded as not seriously arguable, but again I can find nothing of substance in any of these.

Turning to the fundamental point, it must first be noted that the mortgage to the Housing Corporation, dated 4 October 1985, includes a power of sale in standard terms, being a varied form of paragraph 8 of the fourth schedule to the Property Law Act 1908. At the date of the mortgage the relevant powers of the trustees of the Okawa Bay Lake Resort Trust were conferred by a varied trust order under s.438 of the Maori Affairs Act 1953 made by the Maori Land Court on 21 August 1984. Another varied order, affecting part of the land, was made on 8 September 1986. So far as material the orders are in identical terms. In the 1984 order those terms include:

"2. OBJECTS: Except as hereinafter may be limited the objects of the Trust shall be to provide for the use, management and alienation of the land to best advantage of the beneficial owners or the better habitation or use by beneficial owners. to ensure the retention of the land for the present Maori beneficial owners and their successors, to make provision for any special needs of the owners as a family group or groups, and to represent the beneficial owners on all matters relating to the land and to the use and enjoyment of the facilities associated therewith.

"3. POWERS: The Trustees are empowered:

"a. General

"i. In furtherance of the objects of the truest and except as hereinafter may be limited to do all or any of the things which they would be entitled to do if they were the absolute owners of the land provided however that the Trustees shall not alienate the whole or any part of the fee simple by gift or sale other than by way of exchange on the basis of land for land value for value and then effected by Court Order or in settlement of a proposed acquisition pursuant to the Public Works Act or similar statutory authority or by partition as hereinafter provided.

Specific: Without limiting the generality of the foregoing but by way of emphasis and clarification as well to extend the powers of the Trustees it is declared that the Trustees are empowered:

"v. To Borrow: To borrow money for the purpose of the furtherance of any of the trusts or powers herein contained whether or not with security over all or any real or personal property of the trust."

The argument for the trustee is that the power of sale in the mortgage is void or unenforceable as contravening the order of the Maori Land Court. Reliance is placed on the words in the objects clause, 2, "to ensure the retention of the land for the present Maori beneficial owners and their successors" and on the proviso in clause 3a as to general powers "provided however that the Trustees shall not alienate the whole or any part of the fee simple by gift or sale..." Doogue J thought that this argument raised a serious issue to be tried and that it was inappropriate for him to determine the matter on the interlocutory proceedings.

As far as the point is capable of argument, we have heard it argued. In my opinion it is clearly unsound. The reference in the objects clause to ensuring retention has to be read in its context, which includes an express reference to alienation, and could not reasonably be taken to exclude entering into mortgage containing a power of sale if the trustees regarded this as a way of achieving the use of the land to the best advantage of the beneficial owners. The proviso to clause 3a speaks of a gift or sale by the trustees, which is not the same thing as the exercise of a power of sale by a mortgagee. The borrowing power specifically extends to giving security over any real or personal property of the trust. As counsel for the trustee had realistically to concede, mortgages of land normally contain a power of sale. Such a power is not essential or invariable, but it is so common that to find it omitted would cause surprise. The project on which the trust was embarking was the establishment of a resort. Large-scale finance was essential. The prospects of obtaining it could well have been crippled if the security of a power of sale could not be offered.

Mr Pidgeon suggested that if the power of sale was valid it would be possible for an unscrupulous landowner to avoid the restrictions against alienation of Maori land such as this by granting for a consideration a mortgage for a token amount, deliberately making default and allowing the power of sale to be exercised. Counsel naturally made no suggestion, however, of any such fraudulent device in this case. I am sure that if such a case ever occurred the court would have ample jurisdiction to annul or redress such a breach of the truest order and the legislation.

In short, to deny the Maori owners or their trustees the right to give a mortgage containing a power of sale on default could be to deny them the right to develop their property in the way most beneficial to them. The unfortunate outcome of this venture cannot be allowed to obscure that important point.

In an affidavit sworn on 24 June 1988 Mr Stanley Tetekura Newton, J P, Q S M of Mourea, an elder of Ngai Pikiao, after tracing the history of the land, said:

"42. The present owners of Mourea Papakainga 3D Block derive their title from the customary ownership of their ancestors. This land has never belonged to the Crown. It has never, to this day, been alienated from its Maori ownership nor, I believe, have the pre-emption rights contained in Article The Second (Ko to Tuarua) of the Treaty of Waitangi ever applied to this land.

"43. The Maori is often criticised for not achieving in the modem European world. The Okawa Bay Lake Resort Trust represented a giant leap forward in at world for Maoridom. The failure of this venture would be a major setback for Maoridom. The loss of ancestral land would be a tragedy. I fear that the confidence of Maori people to embark on any useful development or innovation on Maori land would be dealt a crippling blow."

One can understand the feelings so strongly expressed there, but the matter has to be seen in perspective. Ambitious business ventures require the taking of risks and fail from time to time. Indeed that has been clearly illustrated by other resort or hotel projects that have come before the courts. One view is that, if the Maori people are to move forward economically, they must be allowed, through their trustees duly appointed and authorised by the Maori Land Court, and on appropriate advice, to accept the risks as well as the hoped-for rewards of enterprise. Some would argue for a more paternalistic protection. Perhaps the results of this venture could be pointed to as evidence of a need for that. Again it may be argued that the Maori owners for the time being should never be permitted to commit ancestral land to a development project if there is a significant risk that in the end, through misfortune or otherwise, the land will pass out of Maori ownership. But, whatever may be the best answer in principle for the future, in this case the Court cannot turn the clock back.

The possible loss of 2.5 hectares of cherished land is a grievous one, even though the actual area of the land is not great. This Court certainly does not overlook that and is not at all unmindful of Maori interests. But our duty is of course *to do* justice, and there has to be justice to the lender as well as to the borrower, to the Pakeha as well as to the Maori.

In this case I am satisfied that the balance of justice and reality is on the side of a mortgagee's sale. It seems from the judgment of Doogue J that he would have taken the same view but for his reservation, in the absence as he said of full argument, about what he rightly called the fundamental issue.

Once that fundamental issue has been decided, after sufficient argument, in favour of the appellants, as it is now being decided, the balance of justice and convenience points unmistakably to a sale. Any remaining issues between the Maori owners and either mortgagee can be litigated if necessary. Adjustments and claims for damages are not ruled out. It would be artificial and unduly complicated to free the Housing Corporation from an injunction but leave one standing against Natwest. A sale by the Housing Corporation subject to the Natwest mortgage might well be impracticable or unsatisfactory: potential buyers would see that mortgage as a very severe handicap. Accordingly I would allow both appeals and discharge the interim injunctions against both mortgagees.

There are other points in the case with which I have not specifically dealt. On all these (including res judicata) I agree with what Somers J will say in his judgment. Since counsel for the Housing Corporation asked us to deal with the point I add that it would appear that a transfer in exercise of the power of sale of either mortgagee would not be an alienation of Maori land by a Maori and accordingly would not require confirmation under s.222 of the Maori Affairs Act 1953: *Frazer v Walker* (1966) NZLR 331, 350, 353; (1967) NZLR 1069, 1079; *Murray v Scott* (1976) 1 NZLR 643, 655.

The Court being unanimous, the appeals are allowed and the injunctions discharged. Costs are reserved.

Solicitors:

Kensington Swan, Wellington and Auckland, for Housing Corporation

Bell Gully Buddle Weir, Wellington, for Natwest Lombank

Hannah Grant and Gilbert, Rotorua, for Maori Trustee and Advisory Trustees

IN THE COURT OF APPEAL OF NEW ZEALAND C A 124/88

BETWEEN THE HOUSING CORPORATION of New Zealand, a body corporate under the provisions of the Housing Corporation Act 1974, having its registered office at Lambton Quay, Wellington, Appellant

AND THE MAORI TRUSTEE, a corporation sole under the provisions of the Maori Trustee Act 1953 of Wellington, as Trustee of Okawa Bay Lake Resort, First Respondent

AND DAVID HURIHANGANUI WHATA of Rotorua, Surveyor, LOGAN ARTHUR HENRY HALL, formerly of Mourea, now of

Ngakuru, Retired Businessman, TE AHO ROGERS (also known as Welsh) of Rotorua, Married Woman, PIRIHIRA CHRISTINE JANET FENWICK of Rotorua, Married Woman, VERBIES MCCAUSLAND of Te Puke, School Teacher, and WHAKAREWA HUNUHUNU of Rotorua, Farm Manager as Advisory Trustees of the Okawa Bay Lake Resort Trust pursuant to Section 438 of the Maori Affairs Act 1953,
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AND REGISTRAR OF THE HIGH COURT of New Zealand at Rotorua,
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Second Respondents.

Coram: Cooke P
Richardson J
Somers J

Hearing: 26 July 1988

Counsel: J J McGrath Q C and C J Booth for Housing Corporation
B W F Brown and M A F Gilkison for Natwest
C R Pidgeon Q C and J A Grant for Maori Trustee and Advisory Trustees
No appearance for Registrar (abiding decision of Court)

Judgment:
14 September 1988

Judgment of Somers J

These are appeals by the Housing Corporation of New Zealand and Natwest Lombank (New Zealand) Ltd against interlocutory orders made by Doogue J in the High Court at Rotorua on 19 July 1988 restraining them until further order from exercising powers of sale contained in mortgages given to them by the trustees of the Okawa Bay Lake Resort Trust. The Judge found that there were serious issues to be tried in respect of the validity of the powers of sale and the notices given under s.92 of the Property Land Act 1952 and, in the case of the mortgage to Natwest, as to the amount of interest payable to it, and that the balance of convenience favoured the grant of the injunction.

All these issues and others raised by the Maori Trustee in support of the judgment were the subject of argument in this Court. At the conclusion of the hearing judgment was reserved and the parties told that it would not be delivered before 9 August 1988. As then mentioned, the main reason for deferring judgment was to enable the Maori Trustee to try to evolve some practical proposal to ensure that the mortgagees would not suffer further loss. It was indicated if no arrangement could be made between the parties it was probable that the Housing Corporation at least might no longer be restrained from exercising its powers of sale. In so delaying judgment the Court referred to its understanding of the attachment of Maori owners to their land. The course taken was, in effect, to give the Maori Trustee a last chance to prevent sale.

By memorandum of 8 August 1988 senior counsel for the Maori Trustee has advised the Court that current interest on the mortgages cannot be met. A proposal, mentioned at the hearing, to convert the hotel on the land to time-shared units and another, that the hotel be leased, have been pursued but no tangible suggestion has been or can be put to the mortgagees. In those circumstances the Court must now give judgment.

The land subject to the mortgages is Maori freehold land as defined in s.2(1) of the Maori Affairs Act 1953 and it known as Mourea Papakainga 3D Block. It is land of the Arawa sub-tribe Ngati Te Takinga and is situated at Okawa Bay on the shores of Lake Rotoiti. The origins of the tribal connection with and the history of the land are clearly and movingly described by Mr Newton, Kaumatua of Ngati Pikiao.

I take up that history in very recent times with the fact that for 30 years up until September 1982 it was leased and used as a camping area. Section 438(1) of the Maori Affairs Act provides that "For the purpose of facilitating the use, management, or alienation of any Maori freehold land... the [Maori Land] Court may... constitute a trust". On 16 March 1981, in anticipation of the lease falling in, the land was vested by the Court in seven trustees and the trusts upon which it was to be held were declared in a separate order. By a further order made on 3 February 1983 the land was vested in the six continuing trustees, one having retired. On 24 May 1983 and again on 21 August 1984, new trusts were declared by the Court under s.438(3)(a) they are erroneously stated as made under s.43 8(5). By the last of them the name of the trust was changed to "Okawa Bay Lake Resort Trust".

The mortgage to Natwest was given on 6 December 1984 and that to the Housing Corporation on 4 October 1984. The mortgagees entered into a deed on 5 November 1985 providing that the two mortgagees would rank "pari passu in security", that the proceeds of any sale would be distributed pro rata and that neither mortgagee would take action under its mortgage without first consulting the other.

On 8 September 1986 the Maori Land Court, on the application of the six trustees, vested the land in the MaoriTrustee in their place and, by another order on the same day, they were appointed advisory trustees in which capacity they are second respondents to the two appeals by the mortgagees. Also on 8 September 1986 new trusts were declared by the Court (again said to be done under s.438(5)). It was to the trusts then declared that reference was made during the hearing although the mortgages were given while the trusts declared by the order of 21 August 1984 were in force. I will return to this point.

The changes of trusts and trustees and the two mortgages reflect changes in the use to which the land was put after the camping lease fell in. In 1984, having taken advice, the owners decided to develop a resort hotel and time-share condominium complex. The trustees arranged to borrow $1.5 million from the Housing Corporation and $4 million from Natwest. The mortgages mentioned were given to secure these sums. The complex has been largely completed. The result was stated by Mr Hall as being that "since the hotel was opened it has gained an excellent reputation as a conference venue and has hosted a number of international conferences".

By about mid 1986 the Trust found itself unable to meet its obligations under the mortgages. On 1 July 1986 Natwest served a notice of default under s.92 of the Property Law Act. There were meetings and negotiations in an effort to rearrange the financing of the work. The first result was the appointment of the Maori Trustee already mentioned. The importance of the undertaking and the reason for the appointment of the Maori Trustee were stated by the solicitor for the six trustees to the Maori Land Court:

"...the particular project is very definitely in the big business and high finance category. This is a project which is watched, probably from all quarter of Maoridom and it is a project for which, in particular, owners of this block can look on with certain pride in what has been achieved and for what ow is established at Mourea Papakainga No. 3D. The world of hotel ownership and development is a very specialised one and one which requires constant attention and access to expertise and it is also one where financial considerations arc very important to ensure that a hotel, and I speak of any hotel, is able to establish itself in the most practical way in the tourist arena. The Maori Trustee, in this instance, has from the beginning had involvement and is thoroughly familiar with and has assisted the development of this project. The project has reached the stage where it is able to look at and, hopefully, take advantage of new financial structure that would put it in a position in the long term, of security. But it is a fact of the commercial life, as Your Honour has alluded to, that dealing with financiers, one needs to be recognisable or known by them. For that reason, as Your Honour has mentioned, a statutory trustee is in a better position to deal with those financiers so that the best advantage can be taken of what the financial marketplace has to offer. The present trustees seek to remain as advisory trustees because it is important that in the overall development of what occurs there is that aspect of knowledge of the people for whom this is being done and the land on which it is being done and the overall knowledge of the project to date which is shared by the present trustees and the Maori Trustee. But the best possible way and if that means taking advantage of what the marketplace can provide for the trust, the best way to take advantage of that is to have a statutory trustee, that is an entity that financial institutions and others can deal with, with confidence, such as the nature of the marketplace combined with the existing trustees to give it a rounded and full administration. It is considered by the trustees that under this format the project can go ahead and continue to lead the way, as it does, in development of this type for Maori land..."

On 16 September 1986 the Maori Trustee, the two mortgagees and another

company, Hall Group Ltd, entered into a deed rearranging the liabilities of the trust to the Housing Corporation and Natwest. It is not necessary to refer to its terms other than to say it called for an immediate payment of $1 million by the Maori Trustee to Natwest and a new advance by Natwest to a new company. The latter arrangement and other matters were to be completed by 16 December 1968. The Maori Trustee repaid Natwest $1 million on 16 September as required by the Deed but was unable to carry out other parts of the arrangement so that, in effect, as provided by Clause 8 of the Deed, all parties were restored to their pre-deed position save for the payment to Natwestby the Maori Trustee.

In the event Natwest gave a second notice of default under s.92 of the Property Land Act on 9 April 1987. Subsequent attempts to reach some modus vivendi failed and on 3 July 1987 the Maori Trustee made application to the Maori Land Court in effect for a declaration that the Housing Corporation mortgage was invalid because the mortgage had not been endorsed with a memorial that it had been produced to the Registrar and had been noted in the record of the Court as required by s.233 of the Maori Affairs Act. The Housing Corporation then presented its copy of the mortgage to the Court for endorsement but the Registrar declined to endorse it. The full history of this matter is referred to in the judgment of McGechan J in the suit next mentioned.

The Housing Corporation then applied to the High Court for a review of the Registrar's decision and for orders declaring that its mortgage was a valid instrument. The defendants included the Maori Trustee, the Registrar of the Maori Land Court, Natwest and others. On 22 July 1987 McGechan J made interlocutory orders restraining the Maori Trustee from taking any further steps about the validity of the mortgage in he Maori Land Court.

The action was heard in the High Court on 21 and 22 October 1987. The Maori Trustee as owner and as trustee was represented by Mr Gault Q C and Mr Woods. In those capacities it abided the decision of the Court. In its capacity as the holder of a statutory land change for $1 million (the repayment to Natwest) it resisted the Housing Corporation's claims. In his valuable judgment delivered on 18 December 1987 McGechan J held that the Housing Corporation mortgage was a valid instrument. In reaching that conclusion the Judge held that the provisions of s.233 of the Maori Affairs Act were subservient to the indefeasibility of title conferred by the land Transfer Act but that the District Land Registrar had power under s.81 of the Land Transfer Act to cancel registration on the grounds that it was wrongfully obtained or is wrongfully retained. An issue not raised in those proceedings by the Maori Trustee although plainly capable of being raised was whether other provisions of the Maori Affairs Act and the terms of the trusts affecting the land prevented the trustees from giving a mortgage containing a power of sale. To this point also I will return.

There was no appeal against the judgment of the High Court and there is nothing to suggest that the District Land Registrar has cancelled or is now contemplating cancellation of the Housing Corporation's mortgage. It ought also to be mentioned that the Natwest mortgage had been endorsed under s.233 of the Maori Affairs Act.

On 24 December 1987 Natwest served its third notice of default under the Property Law Act. On 18 January 1988 the Housing Corporation served notice demanding payment of the monies advanced by it together with interest accrued due as it was entitled to do. No payment of principal or interest was made and two days later the Corporation gave notice of default under the Property Law Act

The two mortgagees joined in making an application to the Registrar of the High Court at Rotorua to sell the land and an auction was arranged for 15 July 1988. On 29 June 1988 the Maori Trustee and the advisory trustees commenced proceedings in the High Court seeking relief under a number of heads, in particular that the powers of sale contained in the mortgages are void and of no effect, that the two-day interval between the Housing Corporation's demand and its default notice was insufficient, that Natwest's default notice was defective, and that the claims to interest by Natwest were erroneous.

The Judge granted an interim injunction on 1 July 1988. As a result the sale was cancelled. On 18 and 19 July the Judge, as mentioned, maintained the injunction until further order and set a timetable for the hearing of the action.

With that lengthy introduction it is possible to turn to the issues raised on the appeal.

Validity of Power of Sale

The power of sale in each mortgage is that contained in Clause 8 of the Fourth Schedule to the Property Law which is implied in mortgages by s.78 of that Act. In each mortgage the provision of clause 8 are varied to a greater or lesser extent as is authorised by s.78.

Section 438 of the Maori Affairs Act 1953 contains the following provisions which touch on the issue:

"(1) For the purpose of facilitating the use management or alienation of any Maori ... land... the Court may... constitute a trust in accordance with this section.

"(5) ...Any trust so declared may authorise or direct the trustees to use or manage the land for any purpose, or to subdivide the same, or to alienate or dispose of the same, or any part thereof, *or* any interest therein, in any manner whatsoever, and whether for consideration or otherwise...

"(7) No alienation by trustees in whom land is vested by an order under this section shall require to be confirmed under Part XIX of this Act..."

The word "alienation" is defined in s.2(1) and means unless the context otherwise requires "the making or grant of any transfer, sale, gift, lease, licence, easement, profit, mortgage, charge, encumbrance, trust or other disposition..."

The trust declared on 21 August 1984, which was in force when the mortgages were given, contains the following statements as to objects and general and specific powers:

"2. Objects: Except as hereinafter may be limited the objects of the Trust shall be to provide for the use, management and alienation of the land to best advantage of the beneficial owners or the better habitation or use by beneficial owners. to ensure the retention of the land for the present Maori beneficial owners and their successors, to make provision for any special needs of the owners as a family group or groups, and to represent the beneficial owners on all matters relating to the land and to the use and enjoyment of the facilities associated therewith.

"3. POWERS: The Trustees are empowered:

"a. General

"i. In furtherance of the objects of the truest and except as hereinafter may be limited to do all or any of the things which they would be entitled to do if they were the absolute owners of the land provided however that the Trustees shall not alienate the whole or any part of the fee simple by gift or sale other than by way of exchange on the basis of land for land value for value and then effected by Court Order or in settlement of a proposed acquisition pursuant to the Public Works Act or similar statutory authority or by partition as hereinafter provided.

"b. Specific: Without limiting the generality of the foregoing but by way of emphasis and clarification as well to extend the powers of the Trustees it is declared that the Trustees are empowered:

"v. To Borrow: To borrow money for the purpose of the furtherance of any of the trusts or powers herein contained whether or not with security over all or any real or personal property of the trust."

The new trust declared when the Maori Trustee was appointed contains identical provisions save for the reference to the Trustee instead of the Trustees and one other which should be mentioned, namely a specific power:

"xii. To see: To sell call in and convert into money all or any of the assets of the Trust including improvements to the land if such improvements are capable of being sold separately provided that nothing herein shall empower the Trustee to sell the land."

I do not think this last provision requires any separate consideration. It cannot affect the question now in issue, namely, whether the trustees giving the mortgage could include in it a power of sale. As to the land it adds nothing to the restraint upon sale contained in the general power set out above.

With all respect o the Judge, I do not think the point is seriously arguable. What the trust prohibited was the alienation by gift or sale by the trustees. What it expressly permitted was the borrowing of money for the purpose of the trust "whether or not with security over all or any real. ..property of the trust".

It is perfectly true that a mortgage need not contain a power of sale; the powers implied by s.78 of the Property Law which include a power of sale may be varied or negatived. But the power to give a mortgage "with security... over real...property" must in my view embrace the power to give a mortgage with the added security of a power of sale. So to hold is not to contradict the prohibition on sale by the trustees. Any sale which results from a power of sale is not such a sale by the trustees as the general power prohibits.

Because of the importance of this matter to the beneficial owners of the land I have thought it desirable to go into the merits of this point. But in truth I do not think it was open to the Maori Trustee to take to for it was res judicata. The general rule, as stated by Wigram V C in *Henderson v Henderson* (1843) 3 Hare 100 at p 119 is that:

where a given matter becomes the subject of litigation in, and adjudication

by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward the whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward in contest..."

See too N Z *Social Credit Political League Inc v O'Brien* (1984) 1 NZLR 84 and *Chamberlain v Deputy Commissioner of Taxation* (1988) 62 ALJR 324.

There is plainly some discretion in the application of this rule as the words "(except under special circumstances)" indicate. In the proceedings before McGechan J the validity of the mortgage was put in suit. The point now made is not directed to the validity of the mortgage as a whole but is directed to a substantial and, in the circumstances, critical feature of it. It could and ought to have been raised in the earlier action.

Demand and Notice by Housing Corporation

The Housing Corporation mortgage secures the sum of $1.5 million repayable upon demand. As to $1 million interest was payable at 16% p.a. subject to provisions as to variation and to a proviso for capitalisation of the first year's interest if demand had not been made. After the first year, pending demand, interest and principal were payable by quarterly payments over a 10-year period. The other $.5 million unless earlier demanded was repayable by two payments of $250,000 each at the end of the first and second year and carried interest at 16% p.a. payable quarterly.

On 18 January 1988 the Housing Corporation made demand on the Maori Trustee for payment of the sum of $1,999,558.40. The demand was delivered to the Maori Trustee. According to a note endorsed on Exhibit RJB 10 to the affidavit of Mr Bacon, the solicitor for the Corporation, it was served at 9.40am on Monday, 18 January 1988. No part of the monies demanded was paid and two days later on 20 January 1988 a notice under s.92 of the Property Law Act 1952 was served on the Maori Trustee at 11.53am according to a note on Exhibit RJB 11. The demand was as follows:

To: THE MAORI TRUSTEE (Acting in his capacity as the responsible Trustee of the Okawa Bay Lake Resort Trust)
Office of the Maori Trustee
Massey House
Lambton Quay.Wellington

WHEREAS

A. The HOUSING CORPORATION OF NEW ZEALAND advanced the sum of $1,500,000.00 on security of Memorandum of Mortgage H.628934 (South Auckland Registry) given by DAVID HURIHANGANUI WHATA, LOGAN ARTHUR HENRY HALL, TE AHO ROGERS PIRIHIRA CHRISTINE JANET FENWICK, VERBIES McCAUSLAND and WHAKAREWA HUNUHANU.

B. All principal, interest (including capitalised interest, and all other monies secured under the above security are repayable upon demand.

C. The monies owing and unpaid to the Housing Corporation of New Zealand under the above security as at 15 January 1988 were:

Balance of principal	$1,612,000.08
Six (6) equal quarterly instalments of $52,390.01 each due from 22 August 1986 to 22 November 1987	$314,340.06
Interest on arrears for period:	
23.11.86 to 22.5.87	$6,810.70
23.5.87 to 22.11.87	$14,064.10
23.11.87 to 15.1.88	$30,429.26
Legal fees from 24.1186 to 10.9.87	$21,914.20
	$1,999,558.40

D. Interest is accruing on outstanding monies at the rate of thirteen (13) per cent per annum.

NOW THEREFORE the HOUSING CORPORATION OF NEW ZEALAND HEREBY makes demand for the payment of the sum of ONE MILLION NINE HUNDRED AND NINETY NINE THOUSAND FIVE HUNDRED AND FIFTY EIGHT DOLLARS AND FORTY CENTS ($1,999,558.40) together with all interest and all other monies owing and unpaid by the Mortgagor under and pursuant to the securities referred to in Recital A and requires that the Mortgagor pay all such monies to the Housing Corporation of New Zealand at its Head Office, Lambton House, 152 Lambton Quay, Wellington by 4 pm on Monday, 18 January 1988.

DATED the 18th day of January 1988.

The notice of default under s.92 of the Property Law Act 1952 was as follows:

TO: THE MAORI TRUSTEE
(Acting in his capacity as the responsible Trustee of the Okawa Bay Lake Resort Trust), Office of the Maori Trustee, Massey House, Lambton Quay, WELLINGTON

DEFAULT

THE HOUSING CORPORATION OF NEW ZEALAND being the Mortgagee under the above-mentioned Memorandum of Mortgage, hereby gives you notice that you are in default under the Mortgage as follows:

1 You have failed to pay the sum of ONE MILLION NINE HUNDRED AND NINETY NINE THOUSAND FIVE HUNDRED AND FIFTY EIGHT DOLLARS AND FORTY CENTS NEW ZEALAND ($1,999,558.40) such sum being the amount due and payable under the Mortgage, as at 15 January 1988 ("the amount in arrears").

REMEDY

You are hereby required to remedy the said default:

a. By payment of the sum of $NZ1,999,558.40 being for the balance of principal and interest due and unpaid.

b. By payment of interest on the amount in arrears calculated at the rate of 13 per cent per annum from the 15th day of January 1988 up to and including the date of actual payment of the amount in arrears.

CONSEQUENCES

If you do not remedy the said default in the mannerherein required before the 21st day of February 1988 the Mortgagee will have the right to sell the land described in the Mortgage or to enter into possession of that land.

Dated at Wellington this 20th day of January 1988.

A number of submissions was made on behalf of the Maori Trustee impeaching the demand and the validity of the notice under s.92. First it was said that the demand was invalid. No direct submissions on the point were made. The objection must I think be related to the time by which it was to be complied with, namely 4 pm on the day on which it was given. This is linked to the submission that to give a notice under s.92 within two days was harsh and oppressive.

It is not in doubt that a debtor obliged to pay on demand is entitled to a reasonable time within which to comply with the demand and that what is reasonable depends upon the circumstances of the case. ANZ Banking *Group (NZ) Ltd v. Gibson (1986)* 1 NZLR 556. Here it is clear that the mortgagors had long been in default, time had been given and promises made but not kept, and that the Maori Trustee had no prospect whatever of meeting the demand whether the time given was hours, days or even a month. I am of opinion there is nothing in this point.

Then it is said that the provisions of the mortgage to the Housing Corporation prevented the giving of a notice under s.92 until the expiration of 30 days from failure to comply with the demand. Clause 2.07 of the mortgage varies the provisions of clauses 8 and 9 of the Fourth Schedule to the Property Law Act. So far as is material it provides that:

"Subject to the provisions of s.92 of the Property Law Act the whole of the principal monies, interest and other monies secured...may be called up immediately... and the powers of sale and all other powers, rights and ermedies...conferred on the Mortgagee... may be exercised and enforced by the Mortgagee if the payment of any instalment of principal or interest... shall be in arrears or unpaid for 30 days after the respective days and times by this instrument appointed for payment thereof respectively... And it shall not be necessary for the Mortgagee to...make any further demand.

Mr Pidgeon submitted that a default by the mortgagor was necessary before the Housing Corporation could give notice under s.92. That default only arose when the demand was not timely met and that 30 days must then elapse before notice could be given under s.92.

I am of the opinion that this is to misconceive the contractual provisions

mortgage. Clause 2.07 provides that if instalments of principal or interest are in arrears or unpaid for 30 days after the days and times "by this instrument appointed *for* payment thereof respectively" all monies may be called up immediately and the power of sale exercised without any further demand. Those days and times must be such as are stated in the mortgage. The clause is not directed to failure to comply with a general demand for repayment of the principal sum and other monies. To read the clause in the way suggested would mean that the covenant to pay on demand would, in substance, be a covenant to pay within 30 days of the demand.

Another submission is that the subsequent notice under s.92 does not comply with the provisions of the Property Law (Mortgagee's Sales) Regulations 1983. Section 92(1 A) of the Property Law Act 1908 (as enacted by s.4(2) of the Property Law Amendment Act 1982) provides as follows:

> "(IA) Every notice shall be in the font prescribed by regulations made under this Act; but no notice shall be void by reason of any variation from the prescribed form unless the notice does not adequately inform the mortgagor of:
>
> (a) The nature and extent of the default complained of; and
>
> (b) The date (being a date that complies with the provisions of subsection (2) of this section) by which he is required to remedy the default (if it is capable of remedy); and
>
> (c) The rights that the mortgagee will be entitled to exercise if the default is not remedied within the specified period,
>
> and the variation materially prejudices the interests of the mortgagor."

The schedule form in the Regulations, so far as relevant to the present case, provides:

> "You have failed to pay [Specify each default of payment claimed, stating the amount, due date, and nature (for example, principal, interest, insurance premiums, etc) of each missed payment, and such other particulars as are necessary to adequately inform the mortgagor of the nature and extent of the default.]."

The Housing Corporation's notice under s.92 set out only the total sum payable without distinguishing between principal, interest and other stuns. This, it was said, was not in compliance with the Regulations. Ido not think that is right. Some parts of the monies demanded had already fallen due for payment; these included quarterly instalments of interest and principal in respect of the advance of $1 million and interest on the advance of $1.5 million. As to these it was not strictly necessary to make a demand. The balance comprises principal and interest accrued from the preceding interest date together with costs for which demand was necessary. The notice under s.92 related to the total amount for which demand had earlier been made. The default specified was the failure to pay the sum so demanded. That I consider was a sufficient compliance with the Regulation as to the form of such notice. But in any event the notice adequately informed the Maori Trustee of the nature and extent of the default complained of. The notice refers to a total sum due and payable "as at 15 January 1988". Two days earlier the Maori Trustee had received the demand for the same amount stated to be owing and unpaid as at that date. It fully particularised the way in which it was made up. It is not possible to contend, and it was not contended, that the Trustee did not know the components of the total sum referred to in the notice.

Finally, it was submitted that the s.92 notice ought to have been served on the Advisory Trustees as well as on the Maori Trustee. I am satisfied that cannot be right. They were no longer mortgagors, had never been liable beyond the assets of the trust, and nothing was or could be claimed against them.

Advertisement and Place of Sale

It was submitted that the advertisement for the sale proposal was inadequate and that the sale should have been proposed at the property itself or at Rotorua. The Judge obviously thought there was nothing in this point and neither do I. Apart from that the date of the sale has ow passed. If another sale is arranged it will have to be re-advertised and the mortgagees will no doubt consider the criticisms made.

Natwest

The Maori Trustee's case against Natwest embraces a number of submissions; that the terms of the mortgage are oppressive within the meaning of s.9 of the Credit Contracts Act 1981, that the interest provision is unjustly burdensome and unconscionable, that provisions empowering Natwest to increase the interest rate have been misconstrued by it, and that in some instances interest rates were varied from dates not justified by the terms of the agreement between mortgagor and mortgagee. In addition to those matters it is said that there is a major dispute as to the liability for foreign exchange losses and that excessive legal costs have been debited to the mortgagor. Along with these matters the s.92 notice serviced by Natwest is claimed to be defective.

The Judge held that the interpretation of the loan agreement between Natwest and the then trustees gave rise to a serious question to be argued as to what interest was payable for the period of default. He said:

> "The First Defendant has chosen to pass on to the Plaintiff interest at the rate varying from call rate for the periods which the First Defendant says it is appropriate. It seems tome highly arguable that the First Defendant's rights in terms of this clause do not extend in the way submitted on behalf of the First Defendant but are limited in the way submitted on behalf of the Plaintiffs."

This finding, at the core of the dispute between the Maori Trustee and Natwest as to interest, is said by Natwest to be erroneous.

The starting point is Natwest's loan offer made by letter dated 10 October 1984. It offered facilities described as follows:

> "4. Amount: A A multi-currency eurocurrency facility up to a maximum sum the equivalent of NZ$3,500,000 to be drawn in currencies available to Natwest.
>
> B A commercial bill discount facility available only in New Zealand dollars up to a maximum of NZ$500,000."

In addition to what is described as a Facility Fee and an Unutilised Fee in both cases the letter stipulates the following Margins:

> "Facility A: (b) Margin: 2.25% p. a. over the interbank cost of funds in the market where Lombank raises funds for onlending to the borrower (probably either LIBOR or SIBOR).
>
> Facility B: (b) Margin: 3% p.a. over the 90-day prime nonbank bill selling rate established by Natwest on each rollover of bills drawn under the facility."

The letter also states that the borrower will "bear any risk or benefit of exchange currency fluctuations i respect of Facility A". The proposed repayments were stated as "assuming no currency fluctuations".

The trustees accepted Natwest's offer and the terms concerning Facility A were then set outin an agreement dated 6 December 1984. (It should be said that the mortgage contains a provision that it is collateral with the loan agreement.) Under it Natwest stood ready to advance the Commitment Amount to the borrowers in a drawing or drawings on stipulated notice. The "Commitment Amount" was defined as meaning the amount in United States dollars equivalent to NZ3.5 million. The borrower could require drawings in United States dollars or in any currency other than United States dollars which in Natwest' opinion was fully transferable and convertible into United States dollars. A drawing was defined as one amount equal to the Commitment Amount or amounts in United States dollars of not less than $NZ1 million and the drawn down date is the date "the (applicable one of the) drawing(s) is to be advanced". Clause 4 provides:

> "The Borrower shall repay the Loan in the following manner:
> (1) $NZ1,050,000 on 13 June 1986
> (2) $NZ525,000 on 13 December 1986
> (3) $NZ525,000 on 13 June 1987
> (4) The balance of the loan on 13 December 1987."

The provisions about interest need to be set out in full. Clause 5 provides:

> "(a) Interest on (each of) the Drawing(s) will accrue from day to day and (subject as hereinafter provided) shall be payable by the Borrower for each Interest Period about to commence at the rate of two and one quarter percentum (2.25%) per annum above the rate as established by the Lender at which monies for the duration of the Interest Period next to commence of amounts equivalent to such Drawing(s) and in the relevant currency would be offered to the Lender by major banks in the Capital Centre interbank market at 11.OOam (Capital Centre time) two (2) business days prior to the Drawdown Date of such Drawing(s) and each Renewal thereof respectively provided however that in the event that more than one Drawing takes place under this Agreement then, at the option of the Lender, the Interest Period for the second and subsequent Drawing(s) shall expire on the last day of the then current Interest Period of the first Drawing.
>
> "(b) Interest on (each of) the Drawing(s) shall be due and payable on each successive Interest Payment Date.
>
> "(c) The rate applicable to each Interest Period shall be established by the Lender which shall advise the Borrower forthwith by telex or cable and confirm in writing by airmail.
>
> "(d) The said interest shall be calculated on the basis of a year of three hundred and sixty (360) days (unless the Present Currency is denominated in

Pounds Sterling or Australian Dollars in which case the said interest shall be calculated on the basis of a year of three hundred and sixty-five (365) days and on the actual number of days elapsed.

(e) On the last day of each Interest Period the (applicable one of the Drawing(s) shall be notionally converted into New Zealand Dollars and if the amount in New Zealand Dollars so derived exceeds by more than five percentum (5%) of the amount of such (one of the Drawing(s) which would have been outstanding had it been drawndown and remained denominated in New Zealand Dollars, after taking into account any repayments which have occurred, the Borrower shall, at th option of the Lender, prepay (such of) the Drawing(s) by such amount in the Currency in which it is denominated at the time the calculation is made as will ensure that no such excess arises."

The expression "Interest Period" is defined as meaning:

"for (each of) the Drawing(s) a period of three (3) or six (6) months as the Borrower may select by notice given to the Lender not later than five (5) business days prior to the commencement of the relevant Interest Period commencing with the Drawdown Date for (such of) the Drawing(s) or on the expiration of the preceding Interest Period as the case may be: provided that:

"(a) each Interest Period except the initial Interest Period shall commence on the date of expiry of the preceding Interest Period

(b) the Borrower shall select or be deemed to have selected Interest Periods of such durations (not exceeding six (6) months) as may be necessary to cause an Interest Period to end on each of the days set down for repayment of an instalment of the Loan as referred to in Clause 4 hereof

(c) subject to paragraphs (b) above and (d) below if the Borrower shall fail to give notice as aforesaid selecting the duration of any Interest Period the Borrower shall be deemed to have selected an Interest Period of three (3) months

(d) if the Lender shall notify the Borrowernotlater than three (3) business days before the commencement of the Interest Period that the Interest Period selected or deemed to have been selected by the Borrower is unacceptable to the Lender the Interest Period shall unless the parties hereto otherwise agree be three (3) months

(e) if any Interest Period would otherwise end on a day which is not a business day such Interest Period shall be extended to the next succeeding day which is a business day unless the result of such extension would be to carry such Interest Period over into another calendar month in which event such Interest Period shall end on the preceding Business Day."

The period so defined as well as giving meaning to Clause 5 was also material to clause 2(c):

"If the Borrower requires Renewal of (any of) the Drawing(s) to be in an Optional Currency (not being the currency in which (such of) the Drawing(s) is outstanding immediately prior to such Renewal) it shall notify the Lender of such requirement not less than five (5) business days prior to the end of the Interest Period."

Finally there is clause 13, headed "Default Interest" around which the dispute about interest centres. It provides as follows:

"(a) In the event of default by the Borrower in payment on the due date of any amount due hereunder the Borrower shall pay interest on such defaulted amount up to and including the day of actual payment at the rate of two (2) per cent per annum above the rate then applicable to (that one of) the Drawing(s) in respeetef-which such amount was payable under Clause 5 of this Agreement in respect of the period (if any) from the date of default to the end of the then current Interest Period for the same *and thereafter* in *respect of each period at the rate of Five and one half (5-1/2) per cent per annum above the cost to the Lender of borrowing such defaulted amount or amounts for such period whichever shall be the higher* and the certificate of the Lender as to such cost shall be final and conclusive and binding in all respects.

"(b) Without prejudice to the foregoing the Borrower shall indemnify the Lender against all costs, losses or expenses (after taking into account any interest paid under this Clause 13) which it may sustain or incur as a consequence of the said default including but not limited to any interest payable by the Lender on funds borrowed to carry the amount in default." *(The emphasis is mine.)*

Default occurred on 13 June 1986 when the sum of NZ$1,050,000 due to be repaid was not paid. As a consequence all amounts borrowed then became immediately due and payable under clause 12(a) of the Loan Agreement. The default had been anticipated and a meeting was held between representatives of the trustees and Natwest and at which the Maori Trustee was present although not then appointed in respect of the Trust itself. On 13 June 1986 Natwest wrote to the Trust Secretary as follows:

"Dear Sir

RE: OKAWA BAY LAKE RESORT TRUST

As agreed by telephone today and as you do not have a telex, we confirm:

a. Receipt of your letter dated 11 June 1986 and enclosed copy of minutes.

2. Your telephone agreement to refinance the facilities as follows:

(a) Loan agreement dated 6 December 1984: This advance is to be drawn in New Zealand dollars at Call, at a margin of 5.5% p.a. over Natwest Lombank's cost of funds - confirmation attached.

(b) Bill Facility dated 12 December 1984: This advance is to be drawn in New Zealand dollars at Call, at a margin of 5.0% p. a. over Natwest Lombank's cost of funds - confirmation attached.

Please find enclosed confirmation for this advance. Please sign and return the enclosed copy of this letter."

The copy exhibited by Natwest is endorsed "Okawa Bay Lake Resort Trust" and signed by the Secretary of the Trust and dated 17/6/86.

It was a part of the Maori Trustee's case that the word "period" in that part of Clause 13(a) emphasised above was a shorthand term for Interest period as defined so that default interest was for periods of 3 months or 6 months as the Trustee chose. I doubt whether that is so burl do not think it necessary to decide the point for the agreed terms of the letter of 13 June seem to me to be unequivocal. The advance was "refinanced" at call at a margin of 5.5% p.a. over the cost of funds. That I think can only mean that the borrower would pay Natwest interest at 5.5% p.a. over the cost to it of all monies on the call market.

The Deed of 16 September 1986 contained provisions for capitalising interest but as the Maori Trustee was unable to meet its provisions within the time stipulated, or within an agreed extension to 31 January 198, the parties, as mentioned, reverted to their previous positions. Natwest's solicitors then told the Maori Trustee that interest would accrue at a fluctuating daily call rate on eh cost of funds plus a margin of 5-1/2% p.a., stating that to be pursuant to clause 13 of the Loan Agreement.

Mr Pidgeon demonstrated the effect of what had occurred. On 19 December 1985 Natwest wrote to the Trust giving details of some currency changes which the Trust mus have requested. It summarised the interest rate on new borrowing as follows:

L-IBOR	4.3125
Margin	2.25
WHT Fee	.3125
	6.875% p.a.

During the period 17 September 1986 to 5 January 1988 the interest rate charge fluctuated between a low of 18%p.a. and a high of 38.5%p.a. This large increase is apparently due to four factors. First, the margin had increased from 2.25% to 5.5%. Secondly, the loans had been brought on-shore and New Zealand interest rates much exceeded those available off-shore. Thirdly, the earlier borrowings off-shore were for three or six months. Those in New Zealand were at call. Fourthly, during the periods mentioned New Zealand call rates were at an unusually high level.

It was part of Mr Pidgeon's submission that the interest provisions empowering Natwest to increase the interest rate under the mortgage only apply if it actually incurred costs on the funds acquired for this specific mortgage and suggested that no such costs were incurred. I am afraid I cannot accept that. If there is one thing clear about the transaction it is that Natwest was onlending. That is expressly stated in the original loan offer of 10 October 1984 and is evident from the subsequent loan agreement. It was first borrowing overseas at three or six months and lending the sums borrowed to the Trust at 2.25% more than it was paying. When the loans were returned to New Zealand Natwest were obliged to repay those from whom they had borrowed overseas and in the place of such monies it borrowed at called in New Zealand charging the call rate paid by it plus the margin of 5.5% p.a.

It may be, and I shall return to this point, that there are some legitimate complaints about the rates charged after default. But the major contentions advanced by the Trust cannot in my view be sustained.

Natwest's Notice

The third and final notice under s.92 of the Property Law Act 1952 was given on 24 December 1987. It is as follows:

"NATWEST LOMBANK (NEW ZEALAND) LIMITED being the Mortgagee under the above-mentioned Memorandum of Mortgage hereby gives you notice that you are in default under the Mortgage as follows:

1. You have failed to pay the sum of THREE MILLION SEVEN HUNDRED AND NINETY THREE THOUSAND NINE HUNDRED AND FORTY DOLLARS AND NINETY THREE

CENTS NEW ZEALAND ($3,793,940.93) such sum being the amount due and payable under the Mortgage, as at 21 December 1987 ("the amount in arrears").

REMEDY

You are hereby required to remedy the said default(s):

a. By payment of the sum of NZ$3,793,940.93; and

b. By payment of interest on the amount in arrears at a fluctuating daily call rate of interest based on the Mortgagee's cost of funds plus a margin of five and a half (5-1/2) per cent per annum as provided in Clause 13 of the Loan Agreement from the 21st day of December 1987 up to and including the date of actual payment of the amount in arrears.

CONSEQUENCES

If you do not remedy the said default in the manner herein required before the 1st day of February 1988 the Mortgagee will have the right to sellthe land described in the Mortgage or to enter into possession of that land."

In order to comply with the Regulations it ought to have stated the amount due but unpaid on the various dates for payment and the interest accrued on them and to have stated the credit for the sum paid by the Maori Trustee. The question is whether the interests of the mortgagor are materially prejudiced, that being the test imposed by s.92(lA) of the Property Law Act.

As to that I think there can be only one answer. Throughout the whole period during which monies have been lent by Natwest to the Trust the parties have been in regular communication. The Trust knew it was in default and has known at all times how interest was being charged. There has not, at least since January 1988, been any prospect that the Trust could repay the monies owing to Natwest. There is not now any prospect. The report by Coopers & Lybrand to the Maori Trustee of 22 June 1988 includes the following paragraphs:

"5. It can be seen that in nearly all areas, actual performance has fallen short of forecast. The most critical factor is the occupancy percentage, which at 44% is wellbelow the projection of 55%. Other components of revenue and expense have been affected by the shortfall in occupancy.

7. Of great concern is the sharp deterioration in results i recent months. Occupancy rates have declined quite seriously, and we estimate that the current annualised level is now around 38%. At that level the hotel will be recording significant operating deficits.

CONCLUSION

20. As already noted, this is a preliminary report which is being sent to you at this stage in order to facilitate your consideration of the available options. However, it is clear to us that:

a. The hotel operation is rapidly going down hill and there appears no hope of adequate surpluses to cover finance charge in he immediate future.

b. The idea of converting part of the hotel into time-share units is not recommended, as it would require you to continue most of the hotel establishment with the strong probability of a substantial reduction in revenue.

c. Conversion of all available hotel rooms into time-share units does appear worthy of consideration.

d. Our tentative estimates show that if a minimum net return of $5,000 per time-share week is attainable over a period of 2 or 3 years, then you could consider paying $3 million or perhaps a little bit more in order to buy out the mortgagees and creditors. A higher offer could be contemplated only if the projected return from time-share sales is significantly higher than our estimate."

Mr Lusty of Wrightson NMA Ltd, to which the now cancelled sale was entrusted, has assessed the value of the resort complex as being of the order of $6million. The total of the sum claimed by the mortgagees in their notices under s.92 of the Property Law Act is $5,793,499. As well there is interest on the Housing Corporation's indebtedness of $1,999,558 at 13% p.a. from 15 January 1988 and on Natwest's claim to $3,793,940 at call rates plus 5.5% p.a. from 21 December 1987. While some of these figures may require adjustment it seems wholly improbable, allowing for the sum of $1 million due to the Maori Trustee, that there could be any surplus for the beneficiaries. And it has been made clear that there is no real prospect of refinancing.

As mentioned, there may be areas in the claim for interest by Natwest which are questionable. There is an admittedly arguable issue about foreign exchange losses (I understand the area of dispute to be in the vicinity of $500,000) and there may be arguable issues on the amount of solicitor's costs incurred by the Housing Corporation and Natwest and charged to the Trust. But even making allowance for those there is no realistic prospect that the beneficial owners of the land can discharge the liabilities upon it so as to retain an interest in it. In the meantime interest is accruing which is not being, and cannot be, paid. For these reasons I am satisfied, whatever defect there may be in the notice given by Natwest, that the Trust and its beneficiaries are not materially prejudice. Their position can only get worse not better.

Those matters also in my view determine where the balance of convenience lies - namely, in sale.

One further point should be added in case it is not already apparent. I have thought it appropriate in this case to go into much of the detail of the issues between the parties. This Court will always regard the exercise of a discretion by a High Court Judge with respect. Here however it is not easy to see what further material could be provided at a trial which was not put before us and which has not been fully argued. We have also had an advantage which he did not, namely, time to consider the matter fully.

I am of opinion that the Maori Trustee has not shown any arguable case such as would justify a restraint on sale. It will be open to him to argue either at trial, or if a sale takes place as a matter of account, the issues between it and Natwest as to interest, foreign exchange losses, solicitor's costs and any other incidental matters.

With the regret that must accompany any direction involving the sale of Maori land I would allow the appeals by the Housing Corporation and Natwest Lombank (New Zealand) Limited and discharge the interlocutory injunction.

Solicitors
Kensington Swan, Wellington & Auckland, for the Appellant Hannah Grant &Y Gilbert, Rotorua, for the First and Second Respondents Bell Gully Buddle Weir, Wellington, for the Third Respondent

IN THE COURT OF APPEAL OF NEW ZEALAND C
A 124/88

BETWEEN THE HOUSING CORPORATION of New Zealand, a body corporate under the provisions of the Housing Corporation Act 1974, having its registered office at Lambton Quay, Wellington, Appellant

AND THE MAORI TRUSTEE, a corporation sole under the provisions of the Maori Trustee Act 1953 of Wellington, as Trustee of Okawa Bay Lake Resort,
First Respondent

AND DAVID HURIHANGANUI WHATA of Rotorua, Surveyor, LOGAN ARTHUR HENRY HALL, formerly of Mourea, now of Ngakuru, Retired Businessman, TE AHO ROGERS (also known as Welsh) of Rotorua, Married Woman, PIRIHIRA CHRISTINE JANET FENWICK of Rotorua, Married Woman, VERBIES MCCAUSLAND of Te Puke, School Teacher, and WHAKAREWA HUNUHUNU of Rotorua, Farm Manager as Advisory Trustees of the Okawa Bay Lake Resort Trust pursuant to Section 438 of the Maori Affairs Act 1953,
Second Respondents

AND NATWEST LOMBANK (New Zealand) Limited, a duly incorporated company having its registered office at Natwest House, 132 The Terrace, Wellington, carrying on business as Financiers,
Third Respondents

AND REGISTRAR OF THE HIGH COURT of New Zealand at Rotorua,
Fourth Respondent

C A 126/88

BETWEEN NATWEST LOMBANK (New Zealand) Limited, a duly incorporated company having its registered office at Natwest House, 132 The Terrace, Wellington, carrying on business as Financiers, Appellant

AND THE MAORI TRUSTEE, a corporation sole under the provisions of the Maori Trustee Act 1953 of Wellington, as Trustee of Okawa Bay Lake Resort,
First Respondent

AND DAVID HURIHANGANUI WHATA of Rotorua, Surveyor, LOGAN ARTHUR HENRY HALL, formerly of Mourea, now of Ngakuru, Retired Businessman, TE AHO ROGERS (also known as Welsh) of Rotorua, Married Woman, PIRIHIRA CHRISTINE JANET FENWICK of Rotorua, Married Woman, VERBIES MCCAUSLAND of Te Puke, School Teacher, and WHAKAREWA HUNUHUNU of Rotorua, Farm Manager as Advisory Trustees of the Okawa Bay Lake Resort Trust pursuant to Section 438 of the Maori Affairs Act 1953,
Second Respondents.

Coram: Cooke P
Richardson J

Somers J

Hearing: 26 July 1988

Counsel: J J McGrath Q C and C J Booth for Housing Corporation
B W F Brown and M A F Gilkison for Natwest
C R Pidgeon Q C and J A Grant for Maori Trustee and Advisory Trustees
No appearance for Registrar (abiding decision of Court)

Judgment: 14 September 1988

Judgment of Richardson J

For the reasons given by Somers J, I would allow the appeals and discharge the interlocutory injunctions.

IN THE HIGH COURT OF NEW ZEALAND
ADMINISTRATIVE DIVISION DUNEDIN REGISTRY
No. LVP110/86

BETWEEN EWAN ROBERT CARR, ROBYN JANE CARR AND GLENIS MARGARET CRUTCHLEY,
Claimants

AND THE MINISTER OF WORKS AND DEVELOPMENT,
Respondent

Hearing: 18, 19, 20, 21, 23, 25, 26 August 1987

Counsel: R J Somerville and F B Barton for Claimants
K Robinson and Miss A Swan for Respondent

Judgment:
10 November 1987

Judgment of Holland, J and Mr I W Lyall

The claimants seek compensation under the Public Works Act 1981 arising from the truncation of the Maniototo Combined Irrigation and Power Scheme created by Order in Council dated 26 June 1975 and subsequently reduced in size by Order in Council dated 8 October 1984.

Although the respondent put the claimants to proof, it became common ground that they were the owner and occupiers in unequal shares of five blocks of land described in the Schedule to their claim and referred to generally as the Alnwick and Fairview block, the Styx Run block, the Styx Farm block, the Brookside block and the Serpentine block. The Styx Run and Brookside blocks are farmed in partnership with another Maniototo farmer.

In 1976 the New Zealand government approved an irrigation proposal for the irrigation of the Maniototo area by damming the Loganbum River and forming a lake at the Great Moss Swamp and enabling water to be taken from the Taieri River into which the Loganbum River flows.There had been a number of proposals for irrigation of the Maniototo area over a large number of years. Originally what was proposed was simply irrigation but in 1977 the Otago Electric Power Board prepared a proposal for a hydro electric scheme to be constructed using the water from the Taieri River to be supplemented and controlled by the lake or reservoir to be created by the Loganbum Dam. Following discussions between the Ministry of Works and Development and the Otago Electric Power Board, a combined scheme was adopted in September 1980. It was proposed that the water would be used for two power stations the principal demand for which was in the winter when there was little need for irrigation and that during the summer water wold meet the irrigation needs of the area.

A Maniototo Irrigation District had been created by formal notice pursuant to the Public Works Act 1928 dated 5 February 1975 and published in the New Zealand Gazette. It defined the District and provided that a basic charge would be payable in respect of all irrigable land commanded by the scheme at $9.10 per hectare but reducible over the first six irrigation seasons of supply. It provided that commencing from the eighth season of supply the prescribed charges were subject to adjustment to conform with actual costs and the relevant pricing formula. The area commanded by the scheme was 20,000 hectares and the area to be irrigated was 9,300 hectares.

The scheme proposed two flows, one on the east side and one on the west side. The brochure produced by the Ministry of Works in 1982 indicated that the number of farms to be serviced was 72 and that the unit flow to farms was 900 to 1200 cubic metres per hour. The type of irrigation was described as mainly border dyking with some spraying. The estimated completion dates in that brochure were for the races including all structures and turns outs to be available on the upper west side by September 1983, on the lower west side by September 1986, and on the east side by September 1987. The estimated costs of the combined scheme at July 1983 were stated to be $57.3 million.

It is common ground that part of the claimants' land was included in the district with areas to be irrigated and commanded by the scheme. The brochure contains no indication of charges to farmers for the supply of water, nor does it contain any indication that the charges provided for in the notice gazetted in 1975 were to be altered.

On 16 December 1983 the Royal Assent was given to an amendment to the Public Works Act 1982 empowering the Governor General by Order in Council to abolish any irrigation district by revoking the Order in Council which constituted it and to reduce the size of any irrigation district by amending any such Order in Council. In the same month the then Minister of Works announced that the scheme would be truncated by eliminating the originally proposed east side race. The area to be irrigated in the total district was reduced from 9,300 hectares to 3,850 hectares. The total cost of the reduced scheme was estimated in 1984 to be $62.2 million. The power generation component of the scheme was successfully completed in July 1984 and the reticulation to the reduced area in the scheme followed some time shortly thereafter.

Section 208A of the Public Works Act as introduced by section 10 of the Public Works Amendment 1983 provides:

"208A.(1) Notwithstanding anything in this Part of this Act, the Governor-General may, on the advice of the Minister given after consultation with the National Authority, by Order in Council:

(a) Abolish any irrigation district by revoking the Order in Council which constituted the district and any amending Order in Council made under section 208(2) of this Act:

(b) Reduce the size of an irrigation district by amending the Order in Council constituting the district, and any amending Order in Council made under section 208(2) of this Act, to redefine the district or exclude any land from the district.

(2) Subject to subsection (4) of this section, on the abolition of an irrigation district or the reduction in size of an irrigation district under subsection (1) of this section, the provisions of this Part of this Act shall cease to apply in respect of the abolished district or in respect of the land no longer forming part of the district, as the case may be.

(3) If any Order in Council is made under subsection (1)(b) of this section, the basic charge and the water availability charge shall not be increased by virtue of that fact, and any subsequent adjustment of either of those charges under section 210 or section 212 of this Act shall be calculated as if the Order in Council had not been made.

(4) The owner and occupier of any land which formed part of an irrigation district, and which is no longer within the district by virtue of an Order in Council made under this section, shall be entitled to claim:

(a) Reimbursement from the Minister for all costs and expenses actually and reasonably incurred by the owner and occupier in anticipation of the land being irrigated, to the extent that the costs and expenses are no longer of any value to the owner and occupier, and

(b) Notwithstanding the provisions of section 60 of this Act, full compensation from the Minister under Part V of this act in respect of injurious affection of the land.

(5) Every claim for such reimbursement shall be made, determined, and paid in accordance with Part V of this Act as if it were a claim for compensation; and the provisions of that Part, so far as they are applicable and with the necessary modifications, shall apply accordingly."

The claimants are owners and occupiers of land which formed part of the original irrigation district. They are no longer within the district by virtue of the Order in Council made on 18 October 1984 confirming and validating the truncation of the Maniototo Irrigation District Scheme as announced by the Minister the preceding December.

The claim for compensation in this circumstances was properly brought before the Land Valuation Tribunal. It was represented to the Tribunal that this present case is a test case being the first time that section 208A of the Act has been before a Court, and further that the claimants had brought proceedings against the Crown claiming damage at common law. By consent this claim was removed by the Land Valuation Tribunal to be determined by the Administrative Division of this Court. It was originally proposed that the claim for compensation should be heard together with the claim for damages in the general jurisdiction of this Court. For various reasons which are not now relevant to this judgment that proposal was abandoned and the claim has proceeded as being solely a claim for compensation under the Public Works Act 1981.

Difficulties arise in determining what is meant by section 208A(5), particularly because Part V of the Act provides procedure and rules for

compensation where land has been taken for the purposes of public works or has been damaged as a result of the exercise of some power under the Act which usually meant some physical interference with the land. The provisions of Part V are not readily adaptable to providing for compensation for the failure to perform some physical act relating to land. It is unfortunate that when section 208A was introduced into the Act providing for abolition or amendment of irrigation districts with compensation greater detail was not given to the basis on which that compensation was to be awarded.

The scheme was introduced under the provisions of the Public Works Amendment Act 1960 which provided for a preliminary notification by the Minister that he considered the construction of water supply works was warranted. Following this notification a poll was to be taken of those ratepayers in respect of the areas of land intended to be in the proposed irrigation district. If more than 60% of those ratepayers were in favour of the construction of the water supply works then the Governor General by Order in Council could constitute an irrigation district, specify the irrigation charge and specify the water quota and the terms of condition of supply.

In the present case a poll was held prior to the Order in Council in 1975 and there was 100% vote in favour. As a result of the creation of the scheme the owners or occupiers of land in the district were required to make payment to the Ministry when water was first made available and this appeared to be payable whether the water was used or not. When water was fully available the Act provided that the owner or occupier was "entitled to receive from appropriate supply points, at such rate of flow and for such periods as may from time to time be determined b the Minister the water quota in each irrigation season for each hectare of land commanded by supply points ...until the water supply works are at the discretion of the Minister abandoned, discontinued, or disposed of by the Minister". Provision was also made for the supply of extra water.

It is quite clear from the evidence that the claimants, like all farmers in the district scheme, considered that, from the time of the Order in Council in 1975 until the Minister's announcement in December 1983, the irrigation scheme would go ahead and that water would be available to them as promised. Substantial costs were expected to be incurred by each farmer in border dyking or in the purchase of sprays with appropriate connections and pipes. Permanent works on the farm such as earthworks, concrete structures and pipes were to be funded on the basis of one for one subsidy by the Minster of Works.

In a circular to farmers in October 1974 the Ministry of Works described the scheme which contained a compulsory charge of $9.10 per irrigated hectare and provided for a charge of $2.60 per thousand cubic metres for all water supplied. Extra water would be charged at $5.20 per thousand cubic metres. In a report to farmers in the scheme dated February 1983 the Ministry of Works estimated that water would be available in September 1986 along the east side main race to Waipiata. That would service the land of the claimants to be irrigated an commanded by the scheme. It is clear that representatives of the Ministry of Works and the Ministry of Agriculture and Fisheries urged all farmers to press ahead with their on-farm works to ensure that they were ready to receive and use the water as soon as it was available. It was no doubt because of this that Parliament decided that when it authorised the truncation of a scheme there should be some provision for compensation.

Before considering the particular claims of the claimants and the submissions of the respondents as to quantum it is necessary to consider the basis on which compensation is to be assessed. Under the statutes in force at the time of the Order creating the scheme in 1975 there was no specific statutory provision relating to truncation or abolition of any scheme. That statutory provision came in 1983 by the provision of section 208A which has earlier been set out. It came into force on 16 December 1983 and both parties have treated that date, which approximately coincided with the public announcement by the Minister of the truncation, as being the effective date for compensation notwithstanding that it was not until 8 October 1984 that the necessary Order in Council giving effect to the Ministerial announcement was promulgated. We see no reason to depart from the parties' view as to the appropriate date.

Council for the respondent has, in his submissions, carefully analysed the provisions of Part V of the Public Works Act 1981 with a view to persuading us that the words used in the various sections included in that part should be interpreted as governing the overall provisions of section 208A and thus severely restricting any claim to which the claimants may be entitled under the Act. We do not consider that this is the correct approach. The question must first be considered in the light of the compensation provisions of section 210A itself which clearly provides that the provisions of Part V are to apply: "so far as they are applicable and with the necessary modifications...".

The primary function of the Court is to determine what is meant by Parliament by the words it has used in section 208A and in particular the compensation contemplated under subsection (4). Some difficulties arise in considering the provision in accordance with the ordinary principles of compensation under the Public Works Act in that it provides for compensation for the government doing nothing and not altering or physically affecting the land of the claimants in any way. The compensation provisions in Part V relate to the acquisition of a claimant's land or damage to the land from the exercise of a power, and injurious affection to a claimant's land as a result of the taking of other land or the construction of a public work. It is accordingly not surprising that some of the statutory provisions for compensation in Part V do not easily adapt to the compensation contemplated by section 208A.

Nor, however, are we persuaded by the argument advanced on behalf of the claimants, that in order to give effect to section 208A, it is necessary in considering a claim for injurious affection, to substitute "the truncation or abolition of an irrigation scheme" for the words following "resulting from" in section 60(l)(b) or perhaps ore appropriately substitute those words in section 63

(1) (a) for"the construction (but not the maintenance or operation) of a public work". In general, counsel for the claimants submitted that the words set out above should in all cases in relation to Part V be substituted for reference to acquisition or construction of works throughout the whole part.

We have been referred to earlier authorities but there is some danger in relying on those authorities in so far as they do not relate to the Public Works Act 1981. Section 63 of the Public Works Act 1982 may not contain new law but is a new provision. Section 60 is in quite different terms from those contained in its predecessor section 42 of the Public Works Act 1928. Section 60 specifically contains a reference to no other provision being made under this or any other act and would accordingly not appear to control or affect the provisions of section 208A.

From our consideration of the 1983 Amendment Act we believe that Parliament recognised that it was legislating to authorise the government to depart from a promise solemnly made and which in many cases might have been acted upon. Although Parliament is, of course, supreme, and can by an act of Parliament override contractual or quasi contractual obligations, we do not find it surprising that Parliament intended to make some provision for compensation. The problem is the extent of that compensation.

It may well seem to be anomaly for the government on the one hand to increase the value of land by the creation of an irrigation scheme and then to provide compensation to the owner of that land for the subsequent decrease in value to its earlier value when the scheme is abandoned. Nevertheless it is not inconceivable that Parliament may have intended fully to compensate farmers for what it was taking *away,* even although it had substantially been the donor in the first place.

Mr Somerville submitted that in order to award full compensation as defined in subsection (4)(b) it was necessary to contemplate that the land should be valued immediately prior to the truncation of the scheme and immediately thereafter and the difference should be paid by the government to the owner by way of compensation. He recognised, however, that the provisions of the Act in this regard did not stand alone. Because of the use of the word "and" immediately following subsection (4)(a) he submitted that the threshold test was proof of the incurring of expenses or costs in anticipation of the land being irrigated, but that once those expenses or costs were established full compensation should then be paid under the injurious affection provision for the difference in value prior to truncation and immediately thereafter.

We have reached the conclusion that this submission cannot be supported. In effect it contends for a provision for damages once the threshold test of some incurring of costs and expenses in anticipation of irrigation is established. Had that been the intention of Parliament we consider that it could much more clearly have been spelled out and there would have been no need for any provision to determine the compensation in accordance with Part V of the Act, even allowing for necessary modifications. The fact that counsel had to make this concession that there must be a threshold test of costs or expenses incurred before a claim could be made in respect of the diminution in value of the land in respect of truncation reveals the weakness in his argument. Why should the farmer who has dug one drain receive compensation for the loss of value to his land because of the unavailability of irrigation and the farmer who has not taken any physical action receive nothing?

With the exception of a decision of the Court of appeal in *Cockburn v Minister of Works & Development* (1984) 2 NZLR 466, it has always been necessary to establish damage affecting the land by reason of physical interference with it or physical interference with any lawful right or interest of the owner of the land before compensation is allowed for injurious affection.

In *Cockburn's* case the Court of Appeal held that the owner of the land which had been subject to a notice of intention to acquire for some years and which was subsequently withdrawn was entitled to compensation for the loss of his right to subdivide which existed at the time the notice to acquire was given but which was not available to him when the notice to acquire was withdrawn. That case appears to us to be clearly distinguishable. There, as a result of the notice to acquire remaining in force for some period, the value of the land had depreciated and the value was not restored to its previous value by the withdrawal of the notice to acquire. The limitations of *Cockburn's* case were demonstrated *by Luoni v. Ministry of Works* (1987) 1 NZLR 20.

In this case the value of the land as a result of the truncation merely reverts to its value prior to the "promise" by the government to create an irrigation scheme which temporarily increased its value. The only other differences in value relate to the inflation or deflation of land values generally and do not arise from either the introduction of the irrigation scheme or its truncation.

We were at first sight sympathetic to the claimant's submission for injurious affection as meaning the difference in value prior to truncation and the value immediately thereafter because of the specific provision in subsection (4) (b) for injurious affection. Nevertheless, it is not difficult to conceive the possibility of there being injurious affection a a result of the works carried out by the owner in anticipation of the land being irrigated for which that owner is entitled only to reimbursement for his costs and expenses. In this case the cost of restoring the land to its former state or its planned state may be an instance. Subsection (b) provides that not only is the owner entitled to these costs and expenses but if the work carried out in anticipation of the irrigation has injuriously affected the land then the owner is entitled to compensation in that regard also. We are accordingly of the view that the claimants are not entitled to compensation for the difference in value of the land arising merely from the truncation of the scheme.

Counsel for the respondent submitted that in any event the claimants were not entitled to claim for injurious affection because of the provisions of section 62 (1) (e) of the Act which provides that the amount of compensation should be assessed in accordance with specified provisions of which paragraph (e) provides:

> "The Tribunal shall take into account by way of deduction from that pat of the total amount of compensation that would otherwise be awarded on any claim in respect of a public work that comprises the market value of the land taken and any injurious affection to land arising out of the taking, any increase int he value of any land of the claimant that is injuriously affected, or in the value of any other land in which the claimant has an interest, caused before the specified date or likely to be caused after that date by the work or the prospect of the work."

We do not consider that if on the one hand the claimants are entitled to the difference in value of the land prior to truncation and after truncation, they should be deprived by section 62(l)(e). Such a conclusion would not be allowing proper weight to be given to the specific provision in section 208A(5) that the provisions of Part V were to be modified where necessary. In view of our conclusion to the meaning of injurious affection this issue does not arise but for the purposes of record we make it clear that we have considered the submission and rejected it. We likewise are not required to consider the application of section 63(1)(c) but we doubt if this would have barred the claim if it were otherwise valid.

Counsel for the respondent submitted that the Court should take a narrow view of the term "costs and expenses" in section 208A(4). He submitted that the phrase should be construed in a composite manner and be restricted to money actually paid out as distinct from a loss incurred. He emphasised that the provision was for "reimbursement" and submitted that the use of that word lent force to his submission that compensation should only be awarded in respect of monies actually paid out. We do not accept that submission. In the particular case before use it relates to the claim by the claimants' employees who were entitled to their wages in any event. We see no reason to construe the words "costs" and "expense" a meaning the same thing. "Expenses" clearly contemplates monies paid out but costs can be incurred without actual expenditure. With respect to counsel's submissions, we consider that it would be absurd if a farmer were entitled to recover the cost of work carried out on contract but unable to recover the cost of the same work carried out by employees who presumably would otherwise have been profitably employed in some other direction.

We accept his submission that the provision of the words "and reasonably" after the word "actually" imports an objective test of opinion or judgment and that a claimant is not entitled to costs and expenses incurred unless those costs were incurred reasonably in anticipation of the land being irrigated. In this particular case we do not consider it unreasonable for the claimants to have anticipated that the scheme would proceed until the Act authorising its truncation was passed and the Minister made a specific pronouncement, notwithstanding the fact that the problems attached to the scheme and its high cost had become general knowledge for some months prior to the Ministerial announcement. We are also of the view that that date was not an immediate cut off and that some costs and expenses might be compensatable even although they were actually incurred after the date of the announcement of thetmncation. That is a matter of fact where reasonableness will be the operative test. We also point out that the legal truncation did not *take* place until a long while after the Minister's announcement.

We part company again with the submissions of counsel for the respondent, however, when he submits that the words "no longer of any value to the owner" mean that if any of the cost or expense has resulted in some value to the owner then no claim for compensation can be supported.

The simple answer to this submission is the provision of the words "to the extent that". It is quite clear that the section provides for some notion of apportionment in the event of the costs and expenses resulting in some value to the owner but not full value to the owner. We accordingly reject the submission of counsel for the respondent that the onus is upon the claimant to establish that the cost or expense or the portion of the cost or expense, which they seek to recover have lost all value to them by reason of the truncation. We turn now to consider the specific claims made in these proceedings.

At the commencement of the hearing counsel for the claimants informed us that following a pretrial conference between the valuers to be called on each side the following matters were now common to both parties:

(a) The total area of all properties of the claimants involved in the claim is 8549.8966 hectares.

(b) The valuation of the claimant's interest in those properties immediately prior to the announcement that the irrigation scheme was to be truncated was $2 million.

(c) That the total amount of water received by the claimants from private water rights was 5-1/2 cusecs being an average figure throughout the year from the following sources:
   (i) Sowbum 4 cusecs
   (ii) Taieri River 1-1/2 cusecs
   (iii) Cambridge Creek nil.

(d) That the amount of land of the claimants which might have been capable of being irrigated from water received from the Ministry of Works scheme is 614 hectares. (It later transpired in the course of evidence that this area was not accepted by the respondent.)

Many of the difficulties in assessing compensation in this claim arose from the fact that the claimants had had the land transferred to them only a few years prior to the truncation and the management of the farm had been taken over by Mr E R Carr as recently as 1982. He was a young man who had attended Lincoln College to commence a degree in agricultural commerce but had diverted to study agricultural engineering at the Agricultural Engineering Institute. His studies included technical matters relating to spray irrigation. Following his completion of this course he travelled overseas and returned in 1982 to take over the family properties which had been conservatively farmed for many years. When Mr E R Carr took over management the Ministry irrigation scheme was a fait accompli and was well advanced. He decided to manage the farm properties on a much more intensive basis involving development not only from the Ministry irrigation scheme but from betteruse of the private water rights attached to the properties. After obtaining advice and an irrigation plan from the firm of Independent Irrigation Consultants Ltd he embarked on such a development programme which contemplated expenditure of $430,000. For this purpose the claimants sought and obtained a loan from the Rural Bank for $335,000.

It is a matter of speculation what programme would have been adopted had the Ministry irrigation scheme not been introduced but that is not a matter requiring determination in this case as the Act contemplates that the claimants shall receive reimbursement for all costs and expenses actually and reasonably incurred in anticipation of the land being irrigated to the extent that the costs and expenses are no longer of any value. We are quite satisfied that all the costs and expenses related to the proposed development were reasonably incurred in anticipation of the Ministry irrigation scheme, until the announcement of truncation. We are equally satisfied that the claimants would have adopted a development programme involving better irrigation facilities even if the Ministry scheme had never been introduced. We are also satisfied that a substantial proportion of the costs and expenses incurred or to be incurred by the claimants in carrying out the development scheme which they adopted are of full value to the claimants even although they have been deprived of the rights to water which they anticipated from the Ministry scheme.

None of the many witnesses called on either side was able to state with any certainty the exact state of property development as at 12 December 1983

following the Ministerial statement. Even from evidence of an aerial photograph of the main homestead property taken on 2 January 1984 the experts were unable to agree as to the then stage of development.

A substantial proportion of the evidence from the experts on each side was related to the claimants' allegation that the truncation of the irrigation scheme resulted in a diminution of value of the claimants' property from $2 million to $1,700,000. We have decided for reasons expressed earlier that section 208A does not allow for an award of compensation in this regard. As we have heard all the evidence and submissions relating to this issue we have considered it appropriate to assess the figure for compensation which would have been awarded in the event of the claimants being entitled to such a difference in value.

Two valuer witnesses for the Crown contended that there was no loss of value to this substantial property due to truncation. Mr Laing, a valuer called for the claimants, contended that the fact of truncation reduced the overall value of the property from $2 million to $1,700,000 mainly by reason of injurious affection, although partly due to loss in value of certain improvements carried out relating to irrigation totalling $23,000.

The evidence persuades us that up until the date of announcement of the truncation of the scheme local farmers were convinced that irrigation water from the proposed east race of the scheme would shortly be available and that as a result of irrigation it was reasonable to assume that the carrying capacity of land similar to that of the claimants might increase from six stock units on dry land without irrigation to 15 stock units on irrigated land. Although the claimants' property has already a real benefit in substantial water resources available from the Sowbum and Taieri River water rights, there is substantial expense involved in maintenance and reconstruction of old races to ensure supply. The right available from the Cambridge Creek source is practically unobtainable because of difficulty of maintenance of a very long race at a very high altitude. There is also evidence that the claimants' rights to the water might be challenged by other occupiers. We are accordingly of the view that there was a diminution in value of the claimants property arising by truncation of the east race of the irrigation scheme and the consequent reduction and lack of certainty of water available for irrigation to the claimants' land.

The Ministry had indicated that it would supply water sufficient to irrigate a border dyked area of 80 hectares which by spray irrigation could cover 120 hectares, although such a method entailed operational costs including electric power, labour, plant running costs and depreciation. This water was to be supplied at no cost to the claimants for two seasons which charges levied then increasing up to the seventh season following original supply. It was, however, clear prior to truncation that the water charges would be substantially increased at some date and a prudent farmer or potential property purchase would have certainly heeded such information.

The scheme provided for a maximum entitlement to each individual of 240 hectares on a border dyke basis. We are persuaded on the evidence of Mr Reid of the Ministry that there was a reasonable chance that further water would have been made available to the Alnwick-Fairview property of the claimants, even although the overall plan scheme was not intended to provide a surplus supply. We are also satisfied that although no agreement was reached there was a reasonable probability of an advantage to the claimant's land by permitting the claimants to use the east race for carrying the water to which they were entitled from the Taieri to be taken by the claimants from the east race further down and to enable them better to use that private right. There were apparent advantages to the Crown in this in that the Crown would have gained further potential water resource for electric power generation and increased water flow in an area of the main race where there was little fall.

The principal basis on which the claim for $300,000 was made by the claimants was the evidence of Mr Laing and Mr Carr, and others to some extent, that the carrying capacity of the properties would be increased to 22,000 stock units with the development of both the private irrigation scheme and the irrigation from the Ministry of Works scheme. The evidence of Mr Laing was also influenced by valuations of other properties in different irrigation scheme districts but we did not consider those comparisons in entirely different districts to be of great assistance. According to the evidence of Mr Laing the property had, a s a result of changes of management introduced by Mr E R Carr, increased its carrying capacity at the dat of truncation from 8,000 or 9,000 stock units to 12,000 stock units. He considered that the development of the property without Ministry of Works water wold be restricted to 15,000 stock units instead of the total of 22,000 stock units which could be carried with the Ministry of Works water.

We are not satisfied that the property was capable of carrying 22,000 stock units with the benefit of the Ministry of Works water sufficient to allow spray irrigation of a total of 500 hectares together with water from the private water irghts. The weight of evidence is that the property would have acquired a carrying capacity of between 18,000 stock units and 18,500 stock units. We have reached the conclusion that the maximum carrying capacity likely to be achieved was 18,000 stock units, particularly because the evidence shows that stock production per head at present is somewhat lower than the district average, although we recognise that the present production level may be due in part to the rapid increase in stock numbers following the development programme.

If a claim were able to be supported for injurious affection arising solely from the fact of truncation of the scheme was consider that the land value would be injuriously affected to the extent of $115,000 made up as follows:

Reduction in land value to part of block D for the allocated water for 120 hectares at $550	$66,000
Compensation for the change of gaining further water for irrigation from the Ministry of Works scheme 30 hectares @ $433 say	$13,000
Reduction in land value due to the loss of the chance to receive increased water from the Taieri rights, 60 hectares @ $600	$36000
	$115,000

A substantial proportion of the claimants' claim for costs and expenses incurred is concerned with development carried out on hill country by way of fencing, oversowing of grass and clover seed and also topdressing. Not only have we heard considerable evidence and extensive submissions from counsel for both parties but we have made inspection of parts of the overall property, although in common with at least some of the valuers we have made no inspection of the Serpentine Run block. However, it is clear from the evidence that no improvements have been made to this block by way of development. The extent of new and substantial fencing made on hill and run country and the considerable effect of oversowing of cocksfoot and clovers has been appreciated by us, although we recognise that our inspection was only over a sample area and made in a period of limited growth.

Despite persuasive argument by Mr Laing and Mr Carr, we have not been persuaded that the property has become substantially more unbalanced due to the truncation and the loss of what seemed a certain supply of water to spray irrigate 120 hectares together with the chance of further water gain from additional grants and a firm expectation of improved supply from the Taieri watertight. We arenot convinced that the amount of oversowing and topdressing carried out, when regard is had to the quantity and quality of feed provided, has been more than adequate for the property once full irrigation development is completed to easy country from private water right sources alone. In this respect we prefer the evidence from both valuers for the Crown as well as the evidence of Ms Lawson, an agricultural consultant with the Ministry of Agriculture and Fisheries with experience in this district.

Should further topdressing and seeding of hill run country be undertaken then there may come a time when available feed will provide a surplus beyond the stock numbers able to be wintered but we are not persuaded that hill and run country development has yet reached such a level as to provide surplus good grazing which cannot be utilised because of lack of winter country and source of winter forage. Although the value of the hill and run country development is unlikely to reach its cost as at 12 December 1983 when the rural property market as in decline, we do not consider that that failure to reach cost is to any extent due to the development of the land in anticipation of the Ministry of Works irrigation scheme, but is a natural consequence of development works generally which do not automatically increase value of property by the same amount as the money spent. The claimants have retained the full value of this development work.

A claim is made in respect of a large implement and sheep cover shed built in 1982 and covering some 430 square metres erected at a cost of some $22,000. We are satisfied that this building is somewhat overscale for the likely future overall potential property carrying capacity and that such additional expenditure as was incurred by the building being larger than necessary is an actual and reasonable expense incurred in anticipation of the land being irrigated and is no longer of full value to the claimants.

There is a further claim in respect of the cost of construction of two large new sets of sheep yards on Alnwick-Fairview and the additional development of original yards on the property in preparation for increased stock and stock work anticipated once the east race was complete and water was made available. We are satisfied that more was spent on the construction of sheep yards than is justified in vie of the lower carrying capacity of the property without Ministry of Works water and that allowance should be made for compensation essentially in respect of one of these sheep yards which is surplus to requirements.

Although we have already held that fencing constructed on hill and run country will remain of full utility on realisation of the property's existing potential from full use of irrigation from private water sources, there is substance to the claim for compensation for costs and expenses incurred with fencing work on the easy irrigated country of Alnwick-Fairview.

There was a considerable lack of precision as to the amount of fencing work complete and in place at 12 December 1983. We have received considerable assistance from the aerial photograph of 2 January 1984 although even with this evidence experts at interpretation of such photographs had differing opinions as to certain features and their identification. We have also considered

the plan introduced in evidence by Mr Robertson which was said to be a copy of the property plan on permanent data held by the Valuation Department and last updated in May 1983 on inspection by the Department for purposes of revising valuations in the Maniototo County. All other evidence presented was from recall and memory or gleaned from another person's recall of the situation at the time an records which were in themselves imprecise.

For reasons which we have earlier expressed we do not consider that the date of 12 December 1983 should be considered too precisely and that the claimants should not be deprived of compensation for fencing and associated work carried out immediately after notice of truncation in accordance with earlier planning. Further problems arise because we consider that the claimants may have proceeded to carry out some of this work by way of removing certain fences with a view to establishing a new subdivision layout to suit spray irrigation contemplating the use of the private right irrigation water supply without regard to the Ministry of Works water.

From plans furnished in evidence there is shown "actual" watering system on Alnwick-Fairview on one plan and "proposed" on another plan which contemplated not only the use of private water rights but also Ministry water from the proposed east race. It is clear that Mr Carr, both prior to truncation and after, intended to irrigate the northern part of Alnwick with Sowbum water so covering the blocks noted on those plans as A, B and Lower C. The blocks denoted D, E and Upper C have been irrigated by wild flooding from Taieri water right source and it seems that these blocks were to have the advantage of the proposed east race of the Ministry by gain in extra rights from the scheme and the chance of an increase in Taieri water quantity should this water have been introduced into the east race. The plan referred to indicates that the proposal was to combine Ministry and Taieri water. Mr Reid, who gave evidence on behalf of the Ministry, assured us that it was intended that the two water sources be supplied to different areas on the property with Ministry water only to D block and E and Upper C blocks having only the chance of gaining Taieri water if it was introduced to the east race.

Mr Can said he had removed certain subdivision fences by December 1983 and had embarked on a new subdivision layout suited to the use of travelling rotary spray irrigators so as to proceed to maximise the use of water from both private sources and from the Ministry. He was following a farm plan prepared by Independent Irrigation Consultants for the irrigation development of which the first stage utilised private water but in order to complete all three stages required the supply of Ministry water. Prior to 1982 when Mr Can took over management, the water from the private water rights and races was spread over some 120 hectares by use of contour races and wild flooding. Mr Can considered that there were substantial benefits to be obtained from spray irrigation systems in respect of which he was particularly knowledgeable and proceeded to alter both internal subdivision fencing on the lower easy land on Alnwick-Fairview and also to eradicate contour races suited to the previous watering system but which were an impediment to the spray system. We are not satisfied on the evidence that any fence alterations were made on block Din the southwest part of Alnwick-Fairview as at the date of the announcement of the truncation, nor at that time had alterations been made to subdivision fencing on block B on the northwest part of Alnwick.

It is clear from the aerial photograph and from the evidence of the claimants and others that some fences had been removed from blocks Upper C and Lower C and from E block, the areas affected lying about the Fairview homestead at the southern end of the property. It is also clear that certain parts of the new subdivision layout were in place although there is lack of agreement as to what extent newly erected fences used materials salvaged from removed fences and as to the stage of completion of some of the new and re-erected fencelines. We have taken a liberal view in this regard and consider that as the proposed east race was to pass through the area where work was carried out and there was a reasonable prospect of additional water from the Taieri water right available from that channel that this work was done and the cost and expenses were actually and reasonably incurred in anticipation of water from the Ministry of Works irrigation scheme. This conclusion is supported by the view of Mr Robertson, a government valuer, and MrMoore, a private valuer and farm management consultant called on behalf of the Crown who stated it was his very clear view that should compensation be legally claimable then the items claimed in respect of removal of contour races and of original internal fencing were compensatable. We have been influenced by their opinions as to the extent of reimbursement appropriate. Although Mr Robertson did not take the matter further, Mr Moore expressed the opinion that as a matter of logic if the cost of fencing and race removal were reimbursable, then when the irrigation scheme water became unavailable reinstatement of original fencing pattern and water contour races to allow for the original use of the private raced Taieri water by way of wild flooding to the southern end of the property round the Fairview homestead was a factor to be considered and compensated for.

We were not originally of the clear view that if costs of removal of fencing and races were recoverable then it automatically followed that the cost of reinstatement was equally reimbursable so as to return the property to its condition prior to the work being carried out. However, both valuers for the Crown expressed this to be their view and Mr Laing's evidence was that the cost of work done in regard to redevelopment of this area of the property was lost because of the truncation. We regard this cost of reinstatement or restoration as both a cost incurred and as injurious affection in the narrower sense adopted by us.

As we have previously stated, precise calculation is impossible because there can be no accurate assessment of what the position would have been if there had never been any suggestion of the Ministry of Works scheme. We have accordingly adopted the liberal view that a claim may be made both for the cost of removal of certain original internal fences and the construction of pans of the new fences together with reinstatement to a pattern suitable for wild flooding irrigation. Likewise, in respect of the removal of contour races and regrassing together with reinstatement and regrassing.

However, as it is clear that the Ministry water entitlement wold cover 120 hectares by spray irrigation, and we have allowed for an enhancement up to 150 hectares, we consider that the Ministry of Works water would be wholly used on D block below the country road as that block is of 200 hectares in extent and was apparently planned to have 150 hectares receiving water below the proposed east race. It follows that should the scheme have proceeded there would have been no extra irrigation water available from that source to supply land in C and E blocks above the county road.

Although we have allowed for a possible increase from the Taieri water ate from 1-112 cusecs of private water to 2-1/2 cusecs, the claim as to loss of development monies in altering original fencing and contour wild flooding races must be limited to the maximum anticipated area redeveloped which could benefit from the possibility of that increase Taieri water rate to the extent only of the additional amount of water which might be gained.

Blocks C and E are stated to contain 150 hectares which theoretically might be spray irrigated with 2-1/2 cusecs of Taieri water. The gain of additional water can affect only 40% of that area and we accordingly consider that only 40% of any development work followed by redevelopment to revert to a wild flooding irrigation scheme can be the subject of this compensation awarded assuming that there was a 100% chance of gaining one additional cusec of water by using the Taieri water right. As this chance was not certain, we accordingly reduce the quantum of development loss from 40% to 33-1/3%.

By allowing partial compensation for development undertaken on blocks C and E on this basis, some allowance has been made as to the doubts placed in our minds as to Mr Can's intention by his seemingly conflicting statements made in evidence. On p 17 of the transcript he says:

> "We are now in the process of having to relocate contour race systems to distribute what water we do have for those blocks to maximise benefit of the water"

which indicates to us that he was required to undo his partially completed development at December 1983 so as to reinstate a wild flooding system. Later at p 34 of the transcript he says:

> "For any area outside D block area the design was to utilise our own water."

In this statement he appears to be referring to the irrigation plan adopted by him.

In the end we are satisfied that some compensation is appropriate for development work carried out on blocks C and E in anticipation of the Ministry of Works scheme.

We make the following award in respect of costs and expense actually and reasonably incurred in anticipation of the land being irrigated to the extent that such costs and expenses are no longer of any value to the owners and in respect of injurious affection arising from the works carried out on behalf of the claimants:

Additional costs because of unwarranted size of implement and sheep covered shed	$4,000
Additional costs for surplus sheep yards	$8,000
Removal of original fences 4.5km	$6,500
Fence re-erection to proposed layout 2km	$7,000
Removal of re-erected fences 2km	$3,000
Fence re-erection to original layout 4.5km	$13,500
Removal of contour races	$18,000
Reinstatement of contour races	$27,000
	$75,000
Allow 33-1/3%	$25,000
	$37,000

The total award of compensation is accordingly $37,000 to which allowance must be made by way of interest to reach present day values. Counsel for the respondent indicated to the Court that although the respondent did not accept that the adjustment to allow for present values as stated by the majority judgment in *Drower v Ministry of* Works *& Development* (1984) 1 NZLR 26 was of universal application, that nevertheless settlements had been made for claimants under this Act on that basis and that the respondent wold not oppose an award in accordance with those principles. We do not imagine that the parties will have difficulty in applying those principles to the figures given above and the sum of $37,000 is to be adjusted to present day values from 12 December 1983 on that basis. In accordance with the request of counsel questions of costs are reserved for further argument if agreement cannot be reached.

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Crown Solicitor, Dunedin, for Respondent

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