VALUERS' JOURNAL

JUNE 1991

- ♦ Commercial rent reviews:
- ♦ A lawyer's perspective
- ♦ A valuer's perspective
- ♦ Economic factors affecting the property cycle
- ♦ Staying interested in your profession
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NEW ZEALAND INSTITUTE OF VALUERS

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1950-1951-0 MonradPalmerston North ,
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1952-1953 L A McAlister, Wellington
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1954-1955 S E Bennett, Auckland
1955-1957-R J Maclachlan,Wellington
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1958-1960 G C R Green, Dunedin
1960-1962-J W Gellatly, Wellington
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R S Gardner (1977)
R L Jefferies (1979)
S W A Ralston (1980)
K J Cooper (1981)
S L Speedy (1983)
A L McAlister (1986)
M E L Gamby (1989)
E T Fitzgerald (1990)

VALUERS JOURNAL

JUNE 1991

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 mode of citation of this volume of *The New Zealand Valuers'Journal* is (1991) N.Z.V.J. June page.

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Editorial Comment

Welfare Benefit Cuts, the Economy and Property

The recently effected Welfare Benefit cuts in New Zealand will have a significant impact on the living standards of welfare beneficiaries and there are likely to be adverse follow-on effects on the whole economy even extending to some sections of the property market.

There was considerable sympathy felt throughout the country for theplight of the rural community a few years ago when the primary industry was restructured through the removal of the Supplementary Minimum Price (SMP) scheme.

The effects of this change in policy were immediate: farm incomes fell dramatically as the industry was forced to meet world market prices and farm values fell just as dramatically. Some farmers were forced to sell or even walk off their farms with the loss of equity they previously held in the property.The casualties of all this were soon forgotten, however, by the public as farm produce prices picked up and farmers were seen to be standing on their own feet and the change of policy was vindicated.

But the increases in primary produce prices have not been sustained in more recent times and because New Zealand relies so heavily on the primary industry for income there have been adverse effects on the whole economy.

During this period the manufacturing industries have become less and less competitive in world terms, not having had the "benefit" of the major restructuring that was forced on the farming industry, with the result that many manufacturing and processing industries have reduced their operations or have closed with the loss of many thousands of jobs.

Consequently New Zealand now has one of the highest levels of unemployment amongst developed nations of the world at approximately 9.1% of the eligible working age population. As as direct result there has been a similarly large increase in the number of people in the country receiving Welfare Benefits to the point where it has recently been stated that there are only 1.6 people who are in full time work compared to the number of social welfare beneficiaries.

These recent trends are having a significant effect on the economy and it has been estimated that $700million will be removed from the economy on an annual basis by the recently implemented benefit cuts.

Since the period of the share market crash in October 1987, it is well recognised that there has been a significant downturn in the property market in New Zealand, particularly in the commercial and industrial markets in the major centres. And more recently this downward trend has been accentuated through business closures and industry rationalisation.

These markets in most of the major centres are so depressed that vacant properties not situated in prime locations are virtually unsaleable and vacant or partly vacant properties that are in prime locations but require refurbishment have suffered considerable reductions in value.

Property investors now clearly require higher levels of return to compensate for the prospects of low or no rental growth and higher risk occasioned by the possibility of business failures and receiverships.

Historical levels of return and value are barely being maintained even by properties that are in prime locations and that are occupied by well established tenants on long term leases.

The residential market in most major centres has also been affected by the downturn in the economy and the current welfare benefit cuts are likely to contribute to some further decline.

As beneficiaries find it increasingly difficult to meet rental accommodation costs, it is likely that many will opt for a greater level of sharing of accommodation to reduce living costs. It is also likely that many younger beneficiaries will return to the family home. These changes could result in much higher vacancy factors in residential flats and houses causing competition in the market and resulting in lower rental levels. Higher vacancies and lower rentals will almost certainly be reflected in reduced prices for residential investment properties.

It is to be hoped that the government policies do have a positive outcome and that the present downward cycle is soon reversed.

Any recovery will rely heavily on the primary produce sector and it may be of some comfort that recent predictions are for increases in world prices for wool, fish, fruit and timber products. Can we hope that the "Long Wave Economic Theory" discussed by M J Riley in his article on TheEconomic Factors Affecting the Property Cycle, published in this issue, begins its upward swing in 1991?

Trevor J Croot

Professionalism/Expediency/ Academia vs PR image

Dear Sir

My pending retirement after 45 years direct association with the Auckland property scene, predominantly as an auctioneer and real estate licensee, prompts the following reflections.

The heading to this letter should notbe a conflict bu t reality suggests the contrary, virtually throughout the business fraternity - valuers operations being no exception.

Scientists postulate: accountants enumerate; lawyers expostulate; developers speculate; politicians manipulate, all within the relative confines of their expertise, whereas a valuer can be expected to evaluate the historic, current and future overall influences essential to sustain domestic and workplace environment of people-at-large.

A warning expressed at the time of the Valuers Act over 40 years ago was the risk of creating an exact valuation science. Modern techniques savour of such risk. A valuer was usually a specialist staff member of a leading Land Agency organisation, on a competitively market-related professional salary. Today, many are independent practitioners or in strictly valuation combinations, confronted with the many traps that relative isolation can engender. The fairly recent move from salary to fee-share must also create another problem (sh! temptation even!). An earlier era would rarely allow the formal report to sustain more than the conclusive evaluation. Current era reports frequently allude to as many as five alternatives. Variable circumstances and/or safety first technique?

Undue cynicism, even sour grapes, from a mere land agent? Soul forgiving confessions of an aging sideliner? Listen to the politicians, value makers, the man in the street. Ignore at your peril as we enter the age of consultancy, property law-offices, deregulation etc. Valuation must remain a profession not an industry, but as for life itself 'a people game'.

Keith C Angus,
Takapuna.

Abridged Editor.

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NZIV Presidential Triumvirate

The new Presidential Triumvirate elected at the April Council meeting are President Alex P Laing, Otago Branch, Senior Vice President John P Larmer Taranaki Branch and Junior Vice President William A Cleghorn, Rotorua/Bay of Plenty Branch.

V Vice President (Senior)

John Patrick Larmer is a Fellow of the NZIV and Councillor for the Taranaki Branch. He is the principal of Larmers, registered public valuers at New Plymouth. John specialises in rural valuation and farm management consultancy.

A President

Alexander Philip Laing is a Fellow of the NZIV and Councillor for the Otago Branch. He is a partner of Ernst & Young at Dunedin and is a director of Dunedin City Forests Ltd. He has previously been adirectorofavaluationpracticein Dunedin and was for many years a sole practitioner as a public valuer and chartered accountant.

A Vice President (Junior)

William Alan Cleghorn is a Fellow of the NZIV and he has been Councillor for the Rotorua/Bay of Plenty Branch for nine years having been a member of that branch committee for 23 years. He is a partner in the Rotorua valuation practice of Cleghorn, Gillespie, Jensen & Associates and had formerly practised as a sole practitioner in Rotorua. Bill is Chairman of the NZIV Education Board and has wide community interests being involved in the administration of numerous education, sporting and political associations.

Fellowship Citations

John Frederick Hudson
Northland Branch

John Hudson is a Registered Valuer and Property Management Consultant based in Whangarei.

John was born in Hamilton in 1940. He went to primary school in Otaki and to secondary school at St Channel's, Masterton. After leaving school he spent five years in the building industry before joining the Valuation Department in Auckland.

After initial training there in 1963 he was transferred to Whangarei as an Urban Valuer. He completed studies through the New Zealand Technical Correspondence Institute for the Valuers' Professional (Urban) qualification and gained registration in 1971.

John was then promoted to the position of Senior Valuer in Hokitika which he held for two years before transferring to Gisborne as Senior Valuer. In 1974, after a year in Gisborne, he joined the firm of Robisons in Whangarei where he is currently a working partner.

Over the last 15 years, John has specialised in Urban, Industrial and Commercial properties with a particular interest in motels and motor lodges. He also specialises in arbitration work and is a member of the Property Management Institute. His extensive clientele include major financial and property development institutions, as well as the Whangarei District Council.

John has been closely involved with the NZIV having served on the Northland Branch committee, including two separate terms as chairman. He has also been a branch examiner for practical and oral examinations.

John was formerly a Lion and is currently involved with the management of activities within the Catholic parish in Whangarei. He is chairman of the building committee and chairman of the Catholic Homes Trust which is developing a retirement village. He is also involved with counselling services.

John is well respected by all members of the Northland Branch. To recognise his attainments in the profession, his services to the Northland Branch and the esteem in which he is held both in the profession and in the Whangareicommunity, the members of the Branch unanimously endorse his elevation to the status of a Fellow of the Institute.

Stephen Nigel Dean
Auckland Branch

Nigel Dean is the Director of Consultancy, Colliers International (NZ) Ltd. (to be Colliers Jardine Ltd.), Auckland.

He started his career in 1965 as a Urban field Cadet with the Valuation Department in Auckland, completing with the Diploma in Urban Valuation in 1967. He was posted to the Wellington office in 1968 and returned to the Auckland office in 1969, rising to the position of District Valuer in Auckland and moving to the Takapuna office until he left the Department in 1985 for private practice.

He joined as a partner the firm of Eyles, Purdy and Co. Registered Valuers, Auckland and has practised primarily in the commercial and industrial field. The firm was taken over by Colliers in 1989.

Born in 1947, Nigel was admitted to the Institute as an Intermediate member in Auckland in 1968, was registered in 1971 and advanced to Associate status in 1972.

He was elected to the Auckland Branch Committee in 1977 and was active on most sub-committees over his period of service to the branch until he resigned in 1985. During that time he was Vice-Chairman in 1980, and again in 1984, having been Branch Chairman for the two-year period 1981/82.

He has been involved as a lecturer and examiner in the Institute examinations, as well as for a time in the Diploma in Urban Valuation at Auckland University, and has contributed articles to *The Valuer's Journal,* Branch newsletter, and participated actively in Branch affairs, Seminars etc. He was a NZIV representative on the Council of Land Related Professions for a number of years from its formation until 1985.

Nigel has specialised in central business district valuations, compensation, ground rentals, asset valuations, is sought after by a wide range of commercial clients. He has acted frequently as an arbitrator and also as an Umpire in valuation disputes, and in giving evidence before tribunals and the courts. He is retained by some leading property investors and tru sts, and is a consultant on a major redevelopment scheme planned for central Auckland.

He is held in high regard for his professional competency and repute by clients and in the commercial community and in his promotion of the profession of valuation.

The Branch Committee recommends that he is worthy of elevation to the status of a Fellow of the Institute in recognition of his service to the profession and the regard in which he is held by fellow members.

Kenneth George Stevenson
Auckland Branch

Ken Stevenson is a partner of the firm Guy Stevenson Petherbridge, Registered Valuers and Property Consultants, operating in South Auckland, being the principal in charge of the Manukau office.

He completed a Diploma in Agriculture at Lincoln University in 1967 and a Diploma in Farm Management in 1968, joining Dalgetys in Whangarei as a field officer in 1969. He was responsible for farm financing and budgeting, as well as valuation, selling and administration. He joined the Valuation Department in Whangarei 1973 and was transferred to the Auckland office in 1973 as a rural valuer.

He resigned from the Department and went into partnership with Don Guy opening their Manukau office in 1978, the firm becoming Guy Stevenson Petherbridge in 1981.

Born in 1945, Ken was admitted as an Intermediate member of the Institute in Auckland in 1969, registered in 1974, and completed the Institute's urban examinations in 1978.

He was elected to the Auckland Branch Committee in 1990 and is currently the Vice-Chairman. He has served on the membership and grading sub-committee. He has been a keen supporter of Branch affairs having been involved as speaker at Seminars and sought after by client and fellow members for his advice on matters affecting rural and fringe land values around Auckland.

Ken has wide experience as an urban and rural valuer, specialising in land with future urban and development potential. He also gained much experience and repute in the assessment of compensation for the Whangarei/Wiri pipeline easements, and in local body rating structures, especially assessments for farm land rating.

The Branch Committee unanimously recommends that he is worthy of elevation to the status of a Fellow of the Institute in recognition of his repute as a valuer, his service to the profession and the regard in which he is held in the community.

Leonard Thomas Green
Rotorua/Bay of Plenty Branch

Leonard Green is a partner in the Jones, Tierney & Green valuation practice in Tauranga and current committee member of the Tauranga B ranch of the NZI V having previously held the post of Chairman for two years. He is currently appointed to the National Executive of the Land Professional Mutual Society Inc.

Born in December 1938, Leonard Green joined the Valuation department as an Urban Field Cadet in 1956 and later served as an Urban Valuer in Hamilton (one year), Whangarei (six years) and Auckland (four years) including three years as Senior Valuer in both Central and South Auckland.

He gained his diploma in Urban Valuation on 5 May 1961, was registered as a valuer in April 1964 and became an associate member of NZIV later that year.

In June 1970 he became District Valuer in Tauranga and Western Bay of Plenty and continued there until resigning to enter private practice in June 1979. He was seconded to the Ministry of Foreign Affairs in 1978 to carry out valuation assignments in the Solomon Islands under the New Zealand Bilateral Aid Programme.

His valuation experience covers the complete urban field and extends well into the rural area. Leonard Green is married with three adult children. He is nominated for advancement to the status of Fellow of the NZIV by the Rotorua/ Bay of Plenty Branch.

Donald Bruce Todd
Wairarapa Sub-Branch of Central Districts

Donald Todd is a Registered Valuer and Farm Management Consultant based in Masterton.

He is a senior partner in the present practice of Wairarapa Property Consultants which he helped found in the early 1980s.

Don was born in Nelson in 1937 and educated at Nelson College. He was awarded a Rural Field Cadetship in 1956 and completed the Diploma in valuation and Farm ManagementatLincoln College in 1960.

Following graduation Don Spent the next five years with the Department of Maori Affairs as a Field Supervisor. In 1965 he was appointed Advisor to the newly formed No 2 Group of the Wairarapa Farm Improvement Club. Although the Club officially ceased to function as such several years ago, Don still maintains an advisory role and capacity with most of his original members, in conjunction with his private practice.

Don was registered as a Valuer in March 1965 and subsequently became an Associate of the Institute in March 1966. He was very active later in developing the Wairarapa Sub Branch and become the first Chairman following its formation and inaugural meeting in June 1970. He was Chairman for two terms and served on the committee right up to only recent times..

Outside of the profession, Don has been actively involved in service clubs notably Round Table. He still retains a great interest if not passion in rugby. He is married with four daughters, one now married.

Don has earned considerable respect in the Wairarapa for his wide professional and practical knowledge, impartiality and integrity.

He has had considerable experience in arbitration and formal litigation cases and his field of practice extends beyond the Wairarapa. He has set high standards in valuation matters which have reflected well on the profession generally.

Donald Todd is well regarded and held in high esteem by his colleagues, and profession and business associates in the Wairarapa.

He has made a significant contribution to the establishment and success of the Wairarapa Sub Branch of the Institute over many years.

The Committee appreciates his considerable contribution to the profession and has much pleasure in unanimously supporting his nomination for advancement to a Fellow of the Institute.

Thomas Ian Marks
Canterbury/Westland Branch

Tom Marks has for the past four years been in practice as a registered valuer

with the Christchurch firm of W E Simes and Co Ltd.

However, he is widely known nationally throughout theprofession because of his earlier Valuation Department employment and more particularly his 18 years lecturing at Lincoln College.

Tom was born in November 1936 at Raetihi in the King Country and educated at Marton District High School and Wellington College.

In 1964 he gained a rural field cadetship graduating from Lincoln College with the Diploma in Valuation and Farm Management in 1958.

Thereafter he had a total of 10 years with the Valuation Department in Masterton, Wanganui, Nelson, Gisbome and Hamilton.

In February 1969 Tom was appointed Lecturer in Rural Valuation at Lincoln College and in 1973 he was promoted to Senior Lecturer, until he retired from the College in 1987.

In 1977 Tom completed the Bachelor in Agricultural Commerce Degree (B Ag. Com).

During his time at Lincoln College Tom was involved in the creation of the B Ag Com in 1971 and the instigator and creator of the B Com VPM dual rural/ urban valuation qualification introduced in 1976.

He lectured at all levels of valuation and was widely respected as a dedicated andeffectivelecturer. Over 1000 qualified valuers have been educated by Tom and many others have indirectly benefited from his input to the profession.

Tom has always been a strong and regular supporter of the Institute and its activities.

In earlier years heservedontheBranch Committees in Gisbome and in Hamilton, while at Lincoln College he was a particularly strong and regular supporter of Canterbury/Westland Branch activities.

He conducted two major Seminars for valuers at Lincoln being "Computer Acquaintance" and "Introduction to Investment Analysis".

He was also closely involved in Lincoln liaising with the Valuers' Registration Board and Education Committee of the Institute.

The Canterbury/Westland Branch Committee unanimously supports this recommendation for advancement to Fellowship status within the Institute.

Report on 1991 Annual General Meeting

The 1991 Annual General Meeting of the NZIV was held on Monday 22 April at 4.00pm at the Christchurch town hall. President R L Jefferies welcomed the Minister of Valuation the Hon Rob Storey, overseas guests including Mr Peter Meeking President of the Australian Institute of Valuers and Land Economists, approximately 120 members of the NZIV and guests. The Minister of Valuation addressed the meeting on regulations for foreign ownership of land in New Zealand and on regulations for the valuing profession.

President R L Jefferies introduced the newly elected President of NZIV Mr A P Laing, the Senior Vice President Mr J P Larmer and the newly elected Junior Vice President MrW A Cleghorn. The minutes of the previous AGM held on 23 April 1990 as circulated were approved as a true and correct record of the meeting, subject to three minor amendments advised by Mr J G Gibson, General Secretary. The matters arising from the minutes noted by President R L Jefferies were the approval and implementation of rule changes adopted at the previous AGM. The President advised that Council had resolved to continue further negotiations with theNZ Society ofFarm Management and the Property Management Institute for a proposed merger of the three institutes.

The recent deaths of Mr M B Cooke and of Sir William Roger who had been an honorary member of the Institute were noted by the President.

The Annual Report and Accounts of NZIV for 1990-91 were adopted by the meeting as circulated and the President commented on some aspects of the accounts. Mr B D Wilson of Karori, Wellington was appointed as auditor.

President R L Jefferies announced the names of members who had been advanced to Fellow of the Institute as J F Hudson, Northland; S N Dean, Auckland; K G Stevenson, Auckland; L T Green, Rotorua/Bay of Plenty; D B Todd, Wairarapa sub branch; T I Marks, Canterbury/Westland.

The President advised the meeting of his recent trip to London to sign the reciprocity agreement between NZIV and RICS and attendance at World Valuation Congress and a TIAVSC meeting.

A Notice of Motion for Rule Change 132A relating to the placement of NZIV records aged 25 *ye*ars or more at the Alexander Turnbull Library in Wellington was carried by the meeting.

President R J Jefferies acknowledged the sum of $60,000 that had been contributed by the Valuers Registration Board for the purpose of furthering education of valuers. The meeting closed at 5.10pm.

The Editor.

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Dr Gerald Brown" a British specialist in :property investment has become Auckland Universitys firstprofessor of property There are now more than 120 students taking de greecoursesin e property departmentwhic was formed only last year

Professor brown has a Eachelor of Ar ctitectue degree wthfirstelasshonours arid. a Master of Arts deg>ee in carpbrate finance froth Liverpool University. He workedfor m internationalfir nofpropertydevelopersand then carried out: ivestn ent research for.:: Richard Ellis international real estate can sultants. He later completeda Phd part., time atLondonBusiness School and Reading: University and before coming to Auckland. was apartter with the Ley Colbeck Partner $hip architects: and surveyors in Ashfo Kent Professor Brown's main research. arid. consultancy interests be in the area of per formancemeasurement and strategic analy., sis of property portfolios and he has recently:. completed a book entitled *Property Invest menu and the Cap ital Markets* which is due to be published shortly.

Report on the April 1991 Council Meeting

The April 1991 meeting of the Council of the New Zealand Institute of Valuers was held at Noahs Hotel, Christchurch on Saturday and Sunday 20-21 April 1991, preceded by an evening forum on Friday 19 April.

The informal forum was chaired by President R L Jefferies who welcomed a full attendance of Councillors. Mr A P Laing introduced the topic of NZIV Residential Standard for Mortgage Valuations and outlined the basis of the proposed practice standards which had now been with members for almost 12 months. Councillors discussed whetheran adopted standard should be voluntary or compulsory and there seemed to be slightly more in favour of compulsion.

Mr W A Cleghorn provided preliminaryresults ofthe Continuing professional Development Survey conducted among members of NZIV but the information to hand had been processed from only approximately half of the survey returns received. The response rate to the survey has been less than 25% of total membership and from those processed so far there appears to be a majority in favour of compulsory Continuing Professional Development.

President R L Jefferies outlined discussions that had taken place between representativesofNZ Institute ofValuers, Property Management Institute and NZ Society of Farm Managers acting as a steering committee to explore the possibilities for a future merger of the three institutes.

He commented on a working paper that had been produced by the steering committee and Councillors gave an indication to the forum of the likely reaction to the proposal from their respective branches.

The Council Meeting was convened at 8.30am on Saturday and President R L Jefferies welcomed the full representation of Councillors and invited guests including members of Executive and overseas delegates Mr Peter Meeking, President Australian Institute of Valuers and Land Economists; Dr George Webb, National Director AIVLA; Mr David Smith, President NZ Institute of Plant and Machinery Valuers; Mr Evan Harris, President Property Management Institute and Mr Jim Findlay President NZ Society of Farm Managers.

Apologies were received from Mr E Horsley and Mr K Cooper.

Advancement to Fellow

The following members were elevated to the status of Fellow of the New Zealand Institute of Valuers:

John F Hudson	Northland
S Nigel Dean	Auckland
Kenneth G Stevenson	Auckland
Leonard T Green	Rotorua/Bayof Plenty
Donald B Todd	Central Districts
Thomas I Marks	Canterbury/ Westland

Council agreed to published Valuers Registration Board decisions dated from 1990 under the auspices of the Education Board. The publication is to be in an unedited printed format distributed to all members of the Institute with the Newsline posting.

Committee Reports Received and Discussed

Executive Committee

MrJ N B Wall, Chairman reported briefly on meetings of the Executive Committee and commented particularly on the teleconference meeting format which as been successful for approximately every second meeting.

Professional Practices Committee

Mr J N B Wall Chairman reported that numerous complaints against members are being received by the Institute but many of the complaints are considered to be frivolous. The committee is concerned that there is no procedure for dealing with frivolous complaints from the public or with complaints from one member of the Institute against another member. Mr J G Gibson, General Secretary commented on the complaint procedures followed by the Law Society in which each District has powers to hold hearings for complaints against practitioners and to prosecute them. Each District may also have a panel of "uncle" members which may be approached on a confidential basis by members for advice on professional matters. Council agreed that the Professional Practices Committee should investigate alternative procedures that could be adopted by NZIV for complaints and disciplinary procedures including a panel of "uncle" members to provide a consultancy facility for members.

Publicity and Public Relations Committee

President R L Jefferies reported on the activities of the Committittee and the work that had been done by the appointed public relations consultants, Consultus. A proposed brochure for distribution to Members of Parliament outlining the role of valuers and the Institute was presented to Council which agreed that the Committee should investigate the possibility of combining resources with the Education Committee to produce a single brochure in place of the two separate brochures proposed by the two respective committees.

Mr G Kirkaldie presented a paper prepared for a proposal to create an "in-house" position of publications officer on the Institute staff. Council agreed that Executive committee should further investigate the viability of such a position being established.

Education Board

MrW A Cleghorn Chairman reported that a second video had been produced by the Board and it was screened for Councillors at the meeting. He reported on his recent trip to Australia to study distance teaching. Mr Cleghorn advised of the preliminary results of the Continuous Professional Development survey being conducted among Institute members where 200 of the total 440 surveys returned so far had been analysed.

These preliminary results indicated a preference for compulsory CPD. He reported on the "Employers Pack" which is being prepared by the Board to provide information for valuer employers on the professional expertise of valuers and services provided by NZIV. Council agreed that the Education Board and the Publicity and Public Relations Committee should liaise on the production of a joint promotional pack.

Mr J G Gibson General Secretary, reported that there has been a positive response from Branches to the Professional Practice Development Seminar survey but there was wide divergence in the requirements for seminar procedure and content. Council agreed that the proposed seminars should be conducted by Branches on a regional basis but the programmes should be arranged and coordinated by the Education Board.

Mr W A Cleghorn replied to criticism of the valuer education, career and employmentbrochures produced by the Board which promote valuation as a career. He explained that the Board recognises there are few employment opportunities avail-

able to valuers currently but that it takes a period of years before students embarking on a valuation course at University are qualified to take up employment positions. If sufficient students are not encouraged to take up the course a shortage of qualified valuers may result in the future.

Services Committee

Mr A P Laing Chairman reported that further development work on Valpak 2 is being undertaken and a Reinstatement Insurance programme is also being developed.

The Committee recommended to Council that the whole of the statistical Grant for each Branch should be paid to the Statistical Officer as a taxable remuneration, that a job specification for Branch Statistical Officers should be drawn up and that Branch Capitation Grants be specifically allocated by the Institute for secretarial remuneration, newsletter publication and a $5 per member grant for education activity. Council agreed that these recommendations should be implemented.

Standards Committee

Mr A P Laing Acting Chairman reported on the completion of the Provisional Standard No 1 *"The Valuation of Residential Properties"* and the Provisional Standard No 2 *"The Valuation of Residential Properties for Mortgage Purposes"* and advised that both provisional standards will each become an adopted standard in due course.

The Committee is currently working towards the production of a Rural Valuation Standard, a review of the NZIV Asset Valuation Standard, and consideration of a Commercial Valuation Standard.

President R L Jefferies reported on the recent TIAVSC meeting held in London that he attended and which was chaired by Mr G J Horsley.

Council agreed that Standards and Guidance Notes will be published from time to time byNZIV with the expectation of compliance by members in accordance with the Code of Ethics.

Editorial Board

Mr W A Burgess, Chairman, advised that Mr Byron O'Keefe had resigned from the Board. Some names for prospective replacement members were suggested by Council and these people are to be approached to ascertain their availability. Council discussed the appropriateness of sponsored lecture tours being promoted by the Editorial Board and agreed that the Board should continue with the programme.

Mr T J Croot, Editor of the *New Zealand Valuers Journal* reported that publication of the journal is continuing satisfactorily and generally close to budget. The production editor Vicki Jayne of Wordsmith Partnership and Devon Colour Printers are producing a good standard of service and the flow of suitable articles and publication material is satisfactory.

However, there is a noticeable lack of contributions from "grass roots" membership who, it is felt, could be producing short articles on interesting or special valuation assignments.

NZIV Services Ltd

Mr J N B Wall the NZIV nominee to the company reported that the enterprise is now a "shelf" company and General Secretary Mr J G Gibson presented the Chairman's Report and Accounts as printed in the NZIV Annual Report.

Council of Land Related Professions (CLRP)

Mr T D Henshaw reported on a meeting he attended as the NZIV representative to CLRP.

Massey University Property Foundation

Mr W A Cleghorn, NZIV nominee to the Foundation reported on its recent activities

Real Estate Valuation and Property Management Education Foundation

President R L Jefferies reported on the recent activities of the Foundation and Mr E E Harris President of NZ Property Management Institute commented on Foundation Funding. Council agreed that the alternate trustee for the foundation be the Immediate Past Present of New Zealand Institute of Valuers.

Westbrook House Body Corporate 66017

Mr J G Gibson, General Secretary, presented a report on the NZIV Unit Title Property in which it was noted that the alterations and renovations to the Institute offices have been satisfactorily completed.

Institute of Plant and Machinery Valuers

Mr D Smith President of IPMV reported on activities of this Institute since its formation under the auspices of the New Zealand Institute of Valuers within the last year. Mr E F Gordon, NZIV Nominee to the IPMV reported on its recent AGM, which he attended, and on its current affairs.

Council agreed that overseas members of IPMV will become Affiliate members of NZIV. Mr E F Gordon was elected for a further term as NZIV nominee to IPMV.

Land Professionals Mutual Society Inc (LPMS)

Mr A L McAlister NZIV appointee to LPMS reported that there is an increasing notification of claimsby members with 11 new claims since 1990 and 34 current open files for claims or alerts. Run-off cover is likely to be provided by the Society in the near future for a retiring principal who ceases to practice as a valuer.

Election of Office Bearers

The following office bearers were elected for 1991/92:

President: Alex Laing, Otago

Senior Vice President: John Larmer, Taranaki

Junior Vice President: Bill Cleghorn, Rotorua/Bay of Plenty

Appointment of Committees

Council appointed the following committees.

Executive Committee: Messrs Wall, Laing, Cleghorn, Burgess, Stone, Henshaw, Kirkaldie and Gordon

Education Board: Messrs Cleghorn, Briscoe, Ms Freeman and two nominees of the Valuer General and one nominee from the Valuers Registration Board.

Services Committee: Messrs Stone, Hargreaves, Gowans, Wall, Sellars and O'Brien.

Publicity and Public Relations : Messrs Laing, Kirkaldie, Brady and Stewart.

Professional Practices Committee: Messrs Wall, Kirkaldie and Gordon. W A Cleghorn is the alternate members

Standards Committee: Messrs Horsely, Larmer, Cooper, Locke, Hilson and Heavey.

Editorial Board: Messrs Burgess, Jefferies, Gamby, Speedy, Ms Freeman, Messrs Young and B aen.

Councillor Representative for Overseas Members: Mr Cleghorn

NZIV Nominees to Valuers Registration Board: Mr DBC Barratt-Boyes, Mr MEL Gamby (subject to availability)

NZIV Nominee to LPMSI: Mr A L McAlister

NZIV Nominee to CLRP: MrD Henshaw

Annual Report and Accounts

The annual report and accounts for 1990 of NZIV were presented by General Secretary J Gibson and were received by Council. Branch accounts were also received by Council. Council appointed a sub-committee to investigate and report back on Branch Funds Reserve levels

comprising Messrs E T Fitzgerald, R V Hargreaves and Alan Stewart.

General Business

President R L Jefferies reported on his recent trip to London to attend the signing ceremony for the reciprocity agreement between NZIV and RICS and his attendance at the World Valuation Congress IV. Council expressed with acclamation their congratulations to Mr Jefferies for the work he had done to achieve the completion of reciprocity agreement with RICS and the Appraisal Institute of Canada.

Mr P S Meeking President of Australian Institute of Valuers and Land Economists reported on reciprocity agreements being pursued by the Australian Institute and on adoption of valuation standards through TIAVSC.

He reported on the property market in Australia which is experiencing a severe downturn, particularly for commercial property in the major cities.

Mr Meeking also commented on the procedures that were involved in the recent merger of the former Australian Institute of Valuers and Land Administrators and the Society of Land Economists. Council resolved that the proposal for a merger of NZIV, PMI and NZSFM be further investigated.

Mr E E Harris, President of NZ Property Management Institute, Mr D Smith President of NZ Institute of Plant & Machinery Valuers and Mr I T Findlay President of NZ Society of Farm Managers each briefly addressed Council on the affairs of their respective Institutes and on the relationship with NZIV.

Valuers Registration Board Visit

The Council meeting was visited by a full representation of the Valuers Registration Board: Messrs H Macdonald, Valuer General, R P Young, P Tierney, D Armstrong and A Stewart. Wide ranging discussions were held on reciprocity agreements, the publication of disciplinary decisions, the investigation of complaints laid by NZIV and the review of the Valuers Act. President R L Jefferies recognised the services of retiring Immediate Past President R E Hallinan who had been a member of Council for more than 13 years.PresidentElect AP Laing expressed the thanks of Council to the retiring President R L Jefferies for his term of two years and made a presentation on behalf of Council to him.

The Editor.

Valuers Registration Board

Statement on Practical Experience Requirements for Registration

This statement updates and replaces the previous statement of the Valuers Registration Board.

All potential applicants for registration as valuers should be aware of the requirements sought of them and as defined in secton 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 another 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 profession of land valuing."

The Board requires evidence of practical experience in order to satisfy itself, firstly, that the value *h*as 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, i.e. 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 or be 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.

In addition to the material required in order to substantiate the amount of practical experience claimed by applicants, the Board requires all applicants to submit a

diary recording 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.

The requirements of the Act are for ,. not less than three years' practical experience in New Zealand in the valuing of land within the ten 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 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 ten 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 ten years, implies that a part-time involvement in the valuation of land over some period up to ten 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. Applicants involved in the fringe valuation work mustprovide to the Board a comprehensive account of all work undertaken so that the Board can make a realistic judgment as to the valuation content.

The Board receives applications from valuers whose valuation work and reports 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 to sell, purchase, lease or otherwise deal in property owned by the organsiation 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.

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 at 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 valuation 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 number 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 arange 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.

H F McDonald, Chairman.

Commercial Rent Reviews A Lawyer's Perspective

by John Marshall

1. Introduction

Until recently the legal profession in New Zealand has for the most part been happy to leave the mysteries of commercial rent review determinations to the valuation profession.

This is reflected in the large number of lease forms which contain rental determination clauses which merely provide for the new rental to be agreed between the parties or failing agreement determined by arbitration.

Rental dispute resolution either by arbitration or by valuers acting as experts tended to focus on questions of establishing an appropriate band of comparable rentals and other market factors without the valuers having to turn their minds to esoteric legal principles

With the introduction to the commercial market place of more sophisticated leasing transactions in the early 1970s and in particular the advent of what has come to be called the "net rents lease" rent review, formulas in leases have become far more complex. Today it is not uncommon for valuers to be confronted by leases which contain exhaustive lists of regards and disregards which valuers are directed to have regard to in assessing anew rental. Somerentreview clauses inserted in leases reflect a remarkable degree of diversity, ingenuity, and in some cases incomprehensibility.

At the same time judgments of the Courts in England and more recently in New Zealand have sown a legal minefield in the path of the valuer as he warily endeavours to assess a "current market rental", "a rent to be agreed between the lessor and the lessee", "full market rent", etc.

The purpose of this paper is to hopefully provide some guidance to valuers making rental assessments in the light of recent High Courtjudgments and changing conditions in the market place.

I think it would be fair comment to say that valuers are guided by conditions in the market place whereas lawyers are guided by legal principles.

What however is the appropriate dividing line between the application of legal principles on one hand and the assessment of conditions in the marketplace on the other?

The judgement in *Mahoney v Modick* is a good example.

2.Construction of Rent Review Clauses

(1) Judges in various Court decisions have been critical of the lack of precision in the drafting of rent review clauses. In the well known case of *United States Holdings Limited v Burnley Borough Council* in the Court of Appeal one of the Judges said this:

"The rent revision clauses which have come up for consideration are immensely varied in their terms. Their draftmanship has been almost uniformly condemned judicially, not without justification."

While such acriticism is valid, there is also no doubt that the Courts in order to achieve a commercially realistic and fair result have seen fit to ignore the literal meaning of words used and give effect to what the Judge perceives to be the underlying commercial purpose of the rent review clause.

> Court judgments-have sown a legal minefield in the path of the valuer as he warily endeavours to assess a 'current market rental'..

(2) A good example can be found in *British Gas Corporation v University Superannuation Scheme Limited* (1986) 1 WLR 398 where the review clause called for an open market rental between a willing landlord and a willing tenant fora term equal to the term of the lease and containing the same provisions "other than as to the yearly rent" as were contained in the lease document. The issue before the court was whether or not the valuer should assume a letting on terms which included provision for further five-yearly rent reviews.

Three possible interpretations of the rent exclusion provision in the clause were before the Court, namely:

i) That it required the valuer to ignore "all" provisions relating to rent in the lease.

ii) That it required the valuer to ignore the provisions relating to quantification ofrent,ietherentpayable immediately before the review date and the provisions for future rent reviews.

John M .....l::'has recently become a partt2 rlitMorrison,Morpeth,solicitors, Auekland and was previously an Auckland partner of Kensington Swan *Barrxsteis and Solicitors. This paper wasp=ented at the Auckland Branch 1 Sem nar.held on 8 August 1990.*

iii) That itrequired the valuer to ignore the rent actually payable before the review date only, leaving the valuer to take into account provisions for future reviews of the rent.

The first construction follows the literal wording of the words used in the clause. The Judge held that words in a rent exclusion provision which require "all" provisions as to rent to be disregarded produce a result so manifestly contrary to commercial common sense that they cannot be given literal effect. In the end result the Judge decided in favour of construction (iii) to the effect that the rent should be assessed on the basis the valuer should take into account the provision for future rent reviews.

(3) The British Gas Corporation judgement contrasts with that in *Pugh v Smiths Industries Limited* (1982) 264 EG 823. In this case the review clause provided for a review by reference to a notional lease for a term equal to the unexpired residue of the term on the basis that the lessee would observe covenants as in the lease but excluding the review provisions. The landlord was successful in his contention that on the first rent review he would obtain a rent appropriate for a 20-year term without reviews. Notwithstanding that this result was mani-

festly harsh so far as the tenant was concerned, the Court was unable to circumnavigate the clear words of the clause. Whilst wording in the *Pugh* case was far more precise than that in *British Gas Corporation,* the niceties of the legal distinctions involved are difficult to comprehend.

3. Principles of Construction

(1) There are various legal principles of construction which Courts will follow in construing a rent review clause. Some of the more significant are as follows:

a) Each rent review clause falls to be construed according to its own words.
b) Words are to be construed according to their literal meaning unless there is found a clear contrary intention or it would lead to some manifest absurdity.
c) The lease document must be construed as a whole.
d) Uncertainties or ambiguities may be resolved against the lessor by reference to *the "contra proferentem"* principle, if the parties common intentions cannot be ascertained.
e) Extrinsic evidence is rarely admitted as an aid to construction where the wording is clear.

(2) First Principle

It is a fundamental principle in the law of contract that each contract falls to be construed on its own wording. The Judge in *British Gas Corporation* said "although each of the deciding cases is a decision on the construction of the lease in question (and therefore not directly authority on the meaning of the lease I have to construe)..."

Consequently whilst Judges will look to earlier judgements for guidance and for the correct legal principles to apply, it is always open for the Judge construing the particular wording of arent review clause, to hold that he is free to adopt the approach he prefers, as happened in the *British Gas Corporation* case.

This principle enables the Courts to cope with changing market conditions because it does not necessarily follow that words used in a lease prepared over 30 years ago will still have the same legal meaning 30 years later.

(3) Second Principle

The "literal meaning" principle is well illustrated by the judgement in *Ponsford v HMS Aerosols Limited* (1979) AC 63 which demonstrates the diversity of judicial opinion given to the literal meaning of the words "reasonable rent". *TheBritish Gas Corporation* case is a good example that the principle will not apply where the literal meaning of the words would produce a manifestly absurd result.

It is a fundamental principle in the law of contract that each contract falls to be construed on its own wording

(4) Third Principle

The third principle of construing the lease document as a whole is well illustrated by the userestriction cases *(Plinth vMott May & Anderson* (1979) 249 EG 1167). Rent review clauses cannot be read in isolation to other relevant provisions in the lease.

(5) Fourth Principle

The fourth principle of *"contra proferentem"* is a principle of construction which provides that any ambiguity shall be resolved against the landlord on the basis that the landlord has superior bargaining power. The principle will not apply against the Crown. Whilst the principle is available for application it seldom is used as the Courts usually have regard to other principles of construction in arriving at a decision. The principle is of assistance however where the words used in a rent review clause are capable of two interpretations both of which are equally sound.

(6) Fifth Principle

The fifth principle that extrinsic evidence is rarely admitted is a principle which many landlords and tenants find difficult to accept. Instructions for preparation of the lease, negotiations over its terms, drafts submitted and amendments made, and exchanges of letters between the parties, are all excluded.

There are certain exceptions to the rule where some extrinsic evidence is permissible to resolve ambiguity or uncertainty in the wording of the document but even in those cases negotiations, draft documents, and direct evidence of the intention of the parties are still excluded.

The only safe course for a valuer to follow is to completely disregard extrinsic evidence where the wording of the rent review clause is clear and in the event of any uncertainty of wording then it is recommended that the valuer seek legal guidance as to what would be appropriate extrinsic evidence to take into account as an aid to resolving the uncertainty of wording in the document.

The only safe course for a valuer to follow is to completely disregard extrinsic evidence where the wording of the rent review clause is clear

4. Objective v Subjective Assessments

(1) The significance of objective versus subjective assessments in relation to rent reviews has been brought home to valuers in a number of recent cases. It has been suggested to the writer by some prominent New Zealand valuers that the distinction between an objective assessment and a subjective assessment is meaningless and that the criteria for assessment are merely what are appropriate factors to regard or disregard in fixing a market rental. Arguably in the *Ponsford* decision the cost of tenant improvements should have been taken into account by the valuer on the grounds that the tenant having paid for the improvements the improvements were the property of the tenant.

It is significant that in the *Ponsford* decision the House of Lords judgement was by a bare majority which itself reflects the diversity of judicial opinion that can and will be encountered.

The legal fact of the matter is that the objective/subjective approach is now firmly entrenched in a series of Court decisions, some of which will now be considered.

(2) The *Ponsford* Decision

The rent review clause referred to a rent that was "reasonable for the demised premises for the appropriate period". The majority of the House of Lords held that the words pointed unambiguously to a reasonable rent assessed on an objective basis for the premises without reference to the particular tenant or a particular landlord or the history of the premises.

The premises included improvements carried out by the tenant at the tenant's expense. The fact that the improvements had been paid for by the tenant was ignored notwithstanding that this led to an unreasonable result since the tenant was paying rent on items he had paid for.

It is interesting to note that the majority of the Judges were not prepared to depart from the literal meaning of the words used in the lease notwithstanding the unjust result.

Where the review clause requires a valuer to assess a "reasonable rent" or a "reasonable rent for the premises" the *Ponsford* decision is authority for the proposition that this will produce a rental figure identical to a valuation on an open market basis. The rental need only be reasonable for the "premises" and not for the tenant.

The valuer can however ignore a rent, that may be obtainable for the premises but that is not right and fair for those

premises or he may reject a "comparable rent" obtained for similar premises as exceptional by reason of special circumstances.

The case of the"special lessee" namely a lessee prepared to pay a higher than market rental for a particular location, was not tobe ignoredinassessing marketrentals but must be treated with caution. There are sound arguments that where the rental determination calls for a "reasonable market rent" then a valuer must disregard freak rents paid by a special tenant.

(3) Thomas Bates & Sons Limited v Wyndham's (Lingerie) Ltd (1981)1 AER 1077

The lease referred to the rent upon review as being "a rent to be agreed between the lessor and the lessee". It was held that as the clause referred to rent "agreed between the parties" and not the rent agreed "for the demised premises" the rent to be fixed was to be the rent which would be reasonable for the particular parties to agree having regard to all relevant circum stances including tenant expenditure on improvements. The result was therefore that the rent to be ascertained in default of agreement would be a fair rent between the parties determined subjectively.

In*Lear vBlizzard* (1983) 3 AER 662 a similar issue arose on the exercise of a renewal option where the renewal rental was to be "a rent to be agreed between the parties or in default of agreement at a rent to be determined by a single arbitrator". It was held that a fair rent was proper and it was to be determined subjectively. A consequence of the ruling in favour of a subjective approach was that the rental effect of certain improvements was to be ignored to the extent that the current tenant, an assignee and successor in title to the original tenant who carried out the improvements, might be found, on evidence to be given to the arbitrator, to have paid for them wholly or in part.

(4) Jefferies vDimock (1987) 1 NZLR 419

The rent review clause provided that rent would be reviewed to "such rental as is agreed upon by the landlord and the tenant and if they cannot agree to be determined by arbitration". The tenant expended a large sum of money on reconstructing the building. The issue that arose was whether in fixing the rent the arbitrator should take into account:

a. The fact that the tenant had spent $279,000 on landlord improvements for which the tenant would receive no reimbursement, and
b. The fact that the tenant had paid for major improvements to the landlord's land butwould in effectbe paying rent on those improvements.

Mr Justice Barker held that the rent review clause was indistinguishable in any material respect from the *Bates and Wyndham and Lear v Blizzard* cases; the review was subjective and required what was reasonable as between the parties to be taken into account, ie the excess expenditure paid by the tenant.

(5) Guidelines

It is suggested that a valuer confronted with the difficult task of ascertaining the legal meaning of clauses where the drafting is somewhat less than precise can have regard to the following guidelines:-

a Market rent objective assessment.
b. Reasonable rent for premises objective assessment.
c. Reasonable rent for tenant to pay or for parties to agree subjective assessment.
d. Rent to be agreed or failing agreement determined by arbitration equates to reasonable rent for parties to agree subjective assessment.

5. Profitability of Tenant's Business

(1) The judgement of Chief Justice Eichelbaum in *Mahoney v Modick* (HC Auckland CL65/89) has attracted widespread comment in the media and been greeted with cries of dismay by valuers. This litigation involved the same parties and the same lease as were before the Court in *Jefferies v Dimock.*

On the second rent review under the lease the lessee contended that the subjective assessment of the rent required the valuer to take into account the profitability of the tenant's business. Evidence was given that the profitability of the tenant's business as conducted from the premises had suffered a severe downturn and it was submitted that no increase in rent was justified.

A careful examination of the judgement discloses that certain statements which have appeared in the media are misleading and the fears of valuers are groundless.

The judgement is not authority for the proposition that the profitability of the tenant's business must be taken into account in the assessment. To the contrary the Chief Justice states unequivocally that the financial standing of the respective parties, in the broad sense, must be irrelevant and that the ability of the tenant to pay is assumed.

He held that the financial factors which may permissibly be taken into account are limited to those which a reasonable person would regard as having a connection with the demised premise, or (although generally this will be no different or wider) the relationship of landlord and tenant.

The judgement does not supply any guidance to the valuer as to what financial factors would be relevant, the Chief Justice following the time honoured principle of leaving this to the assessment of the valuer, making the comment "it would be difficult to say more without trespassing on the arbitrator's territory". Examples which easily come to mind however are as follows:

a. Tenant expenditure on improvements.
b. Specialised nature of construction of building.

The judgement in *Email Limited v Robert Bray (Langwarrin) Pty Limited* (1984) Victorian Law Reports 16 deals with a subjective assessment of a "reasonable rental" as applied to a specialised building.

(2) In *WR B arton Limited vLong A cre Securities Limited* (1982) 1 WLR 398 the Court of Appeal held that the tenant's trading records were protected from disclosure, for the success or otherwise of the business carried on was generally irrelevant in "the ordinary case of shop premises".

(3) Generally speaking, the profitability of the tenant's business will always be irrelevant where the assessment is by reference to an open market rent on an objective basis. The exception will be where the premises are peculiarly suitable for a certain business ie hotel, theatre, service station. In these cases it is not the profitability of the "tenant's" business which is relevant but the fact that the premises themselves arepurpose designed as a business and that in the market place rentals are fixed having regard to turnover. Care must be taken by valuers in not extending business profitability into areas where it has no application, particularly where the rent review clause calls for a market rental assessment on an objective basis.

(4) What is of more significance in *Mahoney v Modick* is the statement of the Chief Justice that the ability of the tenant to pay the rent must be assumed.

The significance of this statement lies in the fact that a valuer must disregard the ability of a tenant to afford payment of the rent.

Arguably one would have thought that where two parties are to agree a reasonable rent on a subjective basis, then the

ability of the tenant to pay would be a factor to be taken into account. If a restriction on business use is a relevant factor in a rental assessment then one would have thought that the ability of the tenant's business to pay the rent would also be relevant.

Various of the authorities quoted in the judgement are cases where an open marketrental wasbeing assessed andconsequently questions of profitability were irrelevant.

One possible rationale is that notwithstanding a subjective assessment, the bottom line is that rents reflect changes in the market value of properties and the general purpose of a rent review clause is to reflect changes in the value of money and real increase in the value of property during the term of the lease. In other words subjective assessments are not divorced from market place conditions and therefore if the tenant's business is out of step with the market place because it is no longer an economic proposition in that particular market then this is unfortunate but not a factor which the valuer should take into account.

It is understood that the judgement in *Mahoney v Modick* is being appealed.

6. The Prudent Lessee

(1) The "prudent lessee" approach to rent reviews as laid down in *Drapery and General Importing Co of NZ Limited v. Mayor of Wellington* (1912) 31 NZLR 598 and as more recently refined in *WCC v National Bank of NZ Properties Limited* (1970) NZLR 660 specifically excludes any considerations other than those present to the mind of the lessee. As the Chief Justice comments in *Mahoney v Modick* this approach does not seem to "sit readily with one requiring consideration of all factors relevant to a fair agreement between the particular parties".

(2) The DIC and other decisions are of course concerned with perpetually renewable leases with 21-year review periods the rental being assessed on the basis of unimproved land. The rental formula is laid down in the Public Bodies Leases Act 1969 which calls for a "fair annual rent of the land". A significant factor is that the tenant is not locked in, as once the new rent has been ascertained the tenant can elect not to take a renewal lease. This is of course the exact opposite of the normal renewal lease situation where once the tenant has given notice of renewal a new leasing contract automatically comes into existence notwithstanding that the rent still has to be determined.

(3) It is very difficult it not impossible to reconcile the prudent lessee approach in the New Zealand judgement with the English authorities where a reasonable rent for the premises requires an objective assessment.

> The impact of the user restriction on the rental assessment can be significant.

(4) In *Feltex International Limited v JBL ConsolidatedLimited(1988)* 1 NZLR 668 Henry J held that where the review clause required a rent to be fixed by agreement, no rental criteria being provided, what was required to be assessed was a "fair annual rental and that in its turn brought into play the test of the "prudent lessee". It is perhaps unfortunate that Henry J linked the prudent lessee test to the subjective assessment of a fair annual rental, as the Public Bodies Leases Act refers to the fair annual rental of the "land" and is therefore arguably *a Ponsford* type formula calling for an objective assessment by reference to the open market place.

Having regard to the comments made by the Chief Justice in *Mahoney vModick* it is likely that in future rental disputes relating to ground leases an attack will be mounted on the prudent lessee approach in the light of the more modern authorities.

7. Restrictions on Business Use

(1) Restriction of user clauses are commonly found in commercial leases. The clauses range from absolute prohibitions on using the premises other than for a specific business, to use as offices or warehouse. Recently in Nelson I was given the example of a retail shop lease where the landlord had restricted the use of the premises to the "sale of sunglasses". It was not surprising that the tenant went bankrupt some six months after the commencement of the lease, even if Nelson is the sunshine province.

The more usual restriction is not to alter the use of the premises without obtaining the prior approval of the landlord. In many leases the giving of approval is at the absolute discretion of the landlord. In other leases such as the Auckland District Law Society form consent is not to be unreasonably withheld where theproposed change of use is not in substantial competition with the business of any other tenant, reasonably suitable for the premises, and conforms to Town Planning ordinances.The impact of the user restriction on the rental assessment can be significant.

7.2 In*Plinth v MotMay andAnderson* (1979) 249 EG 1167 the user covenant restricted the use of the premises to that of offices in connection with the tenant's business of "consulting engineers". The lease called for an open market rental assessment and one Judge stated that relaxation of the user restriction was too intangible to be assessed. The result was a rental of £89,200 per annum regard being had to the user restriction as against a rental of £130,400 if no such regard were necessary.

The combination of a tight user restriction and an absolute or restricted prohibition on assignment can produce valuation difficulties, resulting in a reduction of the open market rent as happened in the *Plinth* decision.

(3) In *Burns Philp Hardware Limited v Howard Chia* (1987) ANZ Con R 185 it was held that "the then current annual market rent for the premises" had to be fixed having regard to the user restriction contained in the lease which was not without the consent of the lessor, to use the premises for other than a hardware department store. Consent was not to be unreasonably withheld.

The landlord, like many landlords being a most astute person unilaterally tendered to the tenant a deed poll irrevocably consenting to the tenant carrying on in the premises any lawful business or lawful use. This generous act was promptly declined by the tenant by way of an effective disclaimer letter. It advised the landlord that "we regard the relationship as unchanged until both parties have agreed upon a change".

The Court held that the valuer must take into account the restrictive user provision in the lease but that as the lessor had indicated that consent to a change of use would be freely given, this was a factor which the valuer could take into account when determining the current annual market rent.

(4) The extent of the discounting is of course at the discretion of the valuer. One would think that an absolute prohibition on using premises for other than a specified business use would produce a greater discount than where alternative uses are possible with the consent of the landlord. This proposition however is not necessarily the case as evidenced by the following two examples.

In *Duvan Estates Limited v Rossette Sunshine SavoriesLimited* (1981) 261 EG

364 a discount of 10% (from £7500) was allowed where there was an absolute prohibition not to use the premises for any purpose other than making meat pies and pastries.

In *UDS Tailoring Limited vBL Holdings Limited* (1981) 26 LEG 49 the reduction was also 10% (from £23,761) but there the user restriction was in respect of ready to wear tailors and outfitters, but the lessor could not unreasonably refuse a change of use to one not in conflict with another retail trade of business in the particular building.

Logic would dictate that a greater reduction was appropriate in the former case than in the latter, or is it that valuation is an art form and not a science.

(6) The position may be different however where the rent is to be a market rent and the rent formula calls for "vacant possession". *In Law Land CompanyLimited v Consumers Association* (1980) 255 EG 617 the rent review clause called for an open market assessment, vacant possession and willing lessor and lessee, in accordance with the provisions of the lease. The user restriction required the lessee not to use the premises other than as offices for the association and its associated organisations.

To avoid a nonsensical result the Court held that the valuer was to assume that the open market hypothetical lessee would be entitled to a lease in the form of the existing lease, save that its name would be substituted in the use clause. The decision creates difficulties as there was no attempt made in the case to argue the possibility that the landlord may have consented to a change of use notwithstanding that the user restriction clause postulated that consent might be forthcoming.

What can be stated however is that whilst user restriction clauses are significant in assessing the rent, likewise the wording of the rent review clause can be such as to modify the effect of the user restriction clause particularly where the latter may produce an absurd result.

8. Two Tier Market

(1) A two tier rental market has developed. The rentals being asked by landlords for new tenancies are significantly lower than the rentals payable by existing tenants on a rent review.

There are however differences of opinion as to whether there are two different markets namely new lettings on one hand and mid-term rental reviews on the other. Logic would dictate that there is only one market place particularly where a substantial number of commercial leases provide for the review rental to be a "current market rental".

The suggestion that special discounts to attract new tenants should be disregarded is arguably unsound if such discounts are an accepted feature of the market place.

(2) In Australia it has been held that rent review rentals constitute material relevant to the determination of a current market rental see *BHP v AMP Society* 1986 ANZ Con R658 and *Edmund Barton Chambers Co-op Limited v MLC* (1987) ANZ Con R22.

(3) In the *BHP* case it was held that a valuer is entitled to look at all facets of the market and this necessarily includes new leasing evidence as well as mid-term reviews. The judgement then appears to qualify the use the valuer can make of market information by suggesting that the valuer should ignore special discounts to new tenants in order to attract them into an occupation, but would similarly ignore loadings which might be attached to rentals payable by an existing tenant, such as taking into account factors such as the expense of relocation and corresponding inconvenience resulting therefrom.

The judgement is unusual in this aspect, as in most if not all rent review cases the Courts have been careful not to trespass into the valuer's assessment territory.

The suggestion that special discounts to attract new tenants should be disregarded is arguably unsound if such discounts are an accepted feature of the market place. In the New Zealand marketplace in recent years such discounts are not "special" but are an accepted feature of the market. This being the case it is appropriate for a valuer to take into account rent free holidays, inducement payments, or other concessionary benefits when assessing a current market rental.

(4) A most useful rental determination is that of Mr C P Johns of Chesterton International (Vic) Pty Limited in determining the rental payable pursuant to a lease between St Martins Victoria Pty Limited and Grollo Australia Pty Limited as lessor and Servcorp (Vic) Pty Limited as lessee. The determination is dated the 2nd May 1989 and it takes into account the *BHP* and *Edmund Barton* decisions in arriving at a rental assessment.

Mr Johns stated that it was his view that evidence disclosed by open leasing transactions is admissible evidence on the rent review, particularly in a building where the leasing pattern is established and the vacancy rate is reasonably low. He states that it is necessary in the circumstances to ensure that the granting of rental concessions in one form or another has not been occasioned by a lessor being over anxious or under duress.

He accepted that in the case of new leasing transactions, the actual rent paid should be adjusted where necessary for concessions, but it is the role of the valuer to ascertain whether the resultant level of adjusted rental represents a freely negotiated market transaction, and thereforehow much weight to place on that particular piece of evidence.

In quantifying the discount Mr Johns disregarded the estimated time taken to achieve tenant's fitout. This disregard appears logical as upon any new letting there will be a tenant's fitout period. He then held that any excess rent free period should be allowed as a nett concession. This concession was then calculated by reference to the term of years of the lease. He stated "a concession of say threemonths and a lease term of five years certainly represents a more substantial discount than in a lease providing a term of ten years".

(5) Mr Johns gave an example as to an appropriate method of calculating the required adjustment to new letting rental evidence. The example appears sound and is as follows:

Lease Term:	51 months
Rent Free Period:	3 months
Less Fitout Period:	2 months
Nett Concession:	1 month
Discount Rate:	5.5% p.a.
Cash Flow for First Month:	Nil
Cash Flow for Remaining 50 months	$1 per month
NPV at 5.5% (monthly rests):	44.39
Average Equal Payment Over 51 months 5.5% p.a. (monthly rest) =	0.978
Discount =1 - 0.978	0.022
Percentage Discount Factor:	2.2%

Adjustments on the above basis have been made to new lettings where the nett rent free period or concession equated to one month or more.

(6) Some valuers consider that concessionary benefits should only be discounted over the term of the lease up to the first rent review date. It is suggested that this approach is unsound and will produce a completely unrealistic result. Concessions are clearly linked to the term of the lease, the longer the term the more valu-

able the lease to the landlord and the greater will be the concessionary benefit.

(7) Mr Johns did accept in his determination that the weighting to be given to mid term review evidence is less than should be given to new letting transactions which must attract the strongest weighting.

(8) Ratchet Clause

Where the presence of the ratchet clause has the effect of compelling payment of a rent which is higher than the rent realistically obtainable in the marketplace then the ratchet clause established rental must be disregarded. It is not evidence of a market place rental. The only allowable comparable rentals will be those which themselves satisfy the criteria of being market place rentals.

(9) Confidentiality Packages

It is a practice of some development companies and building owners to clothe concessionary benefits in confidentiality packages so that particulars of concessions agreed cannot be divulged. Such packages are artificially distorting the rental market. Unless full particulars of the package are available to a valuer, the publicly disclosed rental must be disregarded as it is not evidence of a market rental and a valuer cannot assess a total occupancy cost.

(10) Taxation of Concessions

To further complicate matters the Court of appeal in Australia in *Commissioner of Taxation v CR Coolina* (Queensland 1990/ G89) has held that an inducement payment made to a firm of solicitors was taxable where the solicitors' superannuation company leased premises and then subleased the premises to the solicitors. The Court held that as the solicitors were in the business of leasing premises and as their lease of the premises was linked to the service company's head lease of the premises from the landlord, the inducement payment was a receipt of income by the solicitors in the normal course of carrying on their business.

The Australian tax cases in distinguishing between capital and income have applied different principles than those that have been applied by the Courts in New Zealand. It remains to be seen whether the IRD will now attempt to tax some of the concessionary benefits which have been granted in recent years but certainly the *Cooling* decision will encourage the Commissioner to have a go.

In the meantime the best advice that can be given to valuers is to disregard the taxation treatment of concessionary benefits as the result is too uncertain to be taken into account.

9. Post Review Date Evidence

(1) To what extent can a valuer take into account evidence of rents agreed after the review date? In *Segama N V v Penny Le Roy Limited* (1984) EG 74 the Court held that post review evidence is admissible to help establish a valuation as at the review date but that the weight of the evidence would depend on all the factors of the case.

The Judge stressed that the greater the period of time between the fixing of the rent of the alleged comparable and the review date the less reliable the comparison would be. Staleness would go to cogency.

In the *Segama* decision Mr Justice Staughton quoted the following passage from the judgement in *Gaze v Holden* (1983) 266 EG 998.

> "I have come to the conclusion that `a valuation in the usual way' means taking into account events which have happened at the date when the property falls to be valued in this case February 8th 1980 and taking into account not only the actualities at that date but the possibilities in relation to all the circumstances: and that the valuer, as best he can, is to form his own judgement as to how these possibilities and various prospects that are inherent in the then existing situation affect the value of the property as at that date: butheis not entitled to take into account the events which happened subsequently and which resolve how these various possibilities and prospects in fact turn out. To do so would be to introduce into the valuation a species of foreknowledge which would not be available to any willing buyer or willing seller entering into a contract as at the date on which the property falls to be valued."

Post revision evidence is at best crystal ball gazing and probably is only of evidentiary value to establish "trends in the market place", unless it is so close in point of time to the review date as to comprise part of the then market.

Valuers should be exceedingly cautious in utilizing post review evidence.

10. Total Occupancy Costs

(1) The total occupancy cost principle is well established and is essential in enabling a valuer to establish a band of comparable valuations in making a determination.

Until the advent of the nett rents lease the assessment of a total occupancy cost was a simple exercise. Tenants were paying rent plus rates and insurance premiums. Gradually this was extended to include land tax. Today however some tenants in the major cities are paying all operating expenses properly orreasonably incurred by the landlord in respect of its building. In Auckland operating expenses as high as $70 per square metre are being paid in respect of an exhaustive array of charges which would have been completely uncontemplated in the marketplace conditions prevailing 30 years ago.

As a consequence valuers are now faced with the somewhat daunting task of ascertaining what the true cost of occupancy is in respect of any particular tenancy so as to make use of that tenancy as a proper comparable. Apart from the difficulty of accessing the necessary information, I would suggest that there is a problem in the evaluation process.

(2) During my recent New Zealand Law Society seminar on negotiating commercial leases I was critical of lease forms which impose upon tenants an obligation to pay all operating expenses in respect of the landlord's building, and recommended that the expenses payable should be expressly specified in the lease document. My co-presenter Mr Ross Mulholland of Wellington considered that the need to expressly identify the expenses payable was unnecessary as at the end of the day the total occupancy cost approach would resultin the tenantpaying the same amount of monies in any event.

The problem area however is the assumption that every single expense loaded onto a tenant by a lease is a proper expense for a valuer to take into account when assessing the total occupancy cost.

For example the iniquitous sinking fund provision contained in many leases to cover the cost of plant replacement, structural repairs and the like. Prior to the crash of 1987 landlord dominance was such that tenants albeit reluctantly agreed to pay the expense. Since the crash the market place has changed and there are a large number of leases which do not contain a sinking fund payment obligation.

It is suggested that a valuer undertaking a rent review should not take into account any particular occupancy cost unless at the effective date of the review such a cost is recognised in the then market place as a cost which is generally acceptable to a majority of market participants.

The basic exercise being undertaken is the assessment of a market place rental and consequently expenses which are not generally recognised in the current 0

market place should properly be disregarded in arriving at the total occupancy costs of comparable tenancies. Adjustments to the base rent are not the correct answer.

11. Arbitrators V Experts

(1) It has become the practice in recent years for many commercial leases to provide that rental dispute resolutions should not be by way of arbitrations but be undertaken by valuers acting as experts and that umpires appointed should also be valuers. The arbitration process has been criticised as being cumbersome and unduly expensive. It does however afford legal protection to the participant. which is denied to them where the determination is by valuers acting as experts.

(2) The legal protections available in arbitrations are as follows:-

a. The right to legal representation at an oral hearing if necessary.

The arbitration process does however afford legal protection to the participants which is denied to them where the determination is by valuers acting as experts

b. Relevant documents can be produced and orders for discovery made.

c. The parties' own valuers may be called to give evidence.

d. An arbitrator has power to hear legal arguments and can seek independent professional legal advice.

e. Right of appeal to the Court if it can be demonstrated that the arbitrator committed an error which may have affected the determination.

The right of appeal to a Court of Law is probably one of the most important aspects of an arbitration. By way of contrast an erroneous determination by a valuer acting as an expert is very difficult to set aside. A consideration of two recent cases highlights this point.

(3) In *Legal and General Life ofAustralia Limited v A Hudson Pty Limited* (1985) ANZ Con R 108 what was before the Court was a rental determination by a valuer acting as an expert. A duly appointed valuer assessed the current annual open market rental value of the premises and in doing so took into account in the rentable area of the premises an area of 314.4 square metres of mezzanine floor space which had been removed by the tenant at the commencement of the leasing term. There was evidence that the agreement to lease was conditional upon local authority approval being obtained to the removal of the mezzanine floor and therefore arguably the premises leased were not to contain a mezzanine floor.

The Court held that a mistake or error by a valuer is not by itself sufficient to invalidate the determination. For the Court to have jurisdiction to intervene the mistake must be of a kind which shows that the valuation has not been carried out in accordance with the contract. In each case the critical question must always be was the valuation made in accordance with the terms of the contract? If it is, it is nothing to the point that the valuation may have proceeded on the basis of error or that it constitutes a gross over or under value. Nor is it relevant that the valuer has taken into consideration matters which he should not have taken into account or has failed to take into account matters which he should have taken into account. The question is not whether there is an error in the discretionary judgement of the valuer. The question is whether the valuation complies with the terms of the contract.

The end result was arguably unjust as the tenant was required to pay rent for a non-existent mezzanine level in circumstances where the tenant had only contracted to lease the premises conditional on the mezzanine level being removed.

There was no doubt on the evidence before the Court that the valuer had made a mistake.

(4) In *Dawson-Welsh and Another v HinoDistributorsNZLimited* (1987) ANZ Con R 446 the issue before the Court was whether an umpire appointed by the parties had made an error of law in arriving at his decision.

The rent review formula called for the new rent to be 9% per annum of the capital value of the premises. The words "capital value" were defined in the lease to mean the higher of total capital outlay as certified by the lessor's auditor and the valuation of the premises as at the re-valuation date the valuation to be on the basis of a cash sale with vacant possession being given on settlement within 60 days thereof.

The umpire in making his determination supplied his own interpretation of the meaning to be given to the words "capital value" the umpire determining those words to mean the best price at which the property would sell if offered on the open market either with vacant possession or immediately let to a secure tenant for a medium to long term at a market rental value.

The Judge held that the umpire had departed from the precise words of the lease. The umpire considered two principles of valuation put to him by the respective valuers acting for the parties and rejected both in favour of the principle of capitalisation of rental.

The Judge held that the umpire had erred as a matter of law in his approach to the assessment of the capital value.

The Judge commented

"it is apparent that he found difficulty in confining himself to the concept of a cash sale with vacant possession and so he has expanded that expression into something he found more acceptable. In so doing he stepped outside the words of the lease".

The *Dawson-Welsh* decision clearly comes within the criteria laid down in the Legal and General case that the Courts can intervene where the valuation has not been made in accordance with the terms of the contract.

Where two well qualified valuers recognised as experts in their field are unable to agree a rental, then it is questionable whether the appointment of a third valuer as an umpire will necessarily be appropriate.

(5) It is always open for the parties to a lease to agree that a rental dispute determination be resolved by arbitration notwithstanding that the rent review clause requires the dispute to be resolved by valuers acting as experts. A further possibility and one that has distinct appeal to valuers from discussions I have had with them is to appoint a legally qualified person as the umpire. Where two well qualified valuers recognised as experts in their field are unable to agree a rental, then it is questionable whether the appointment of a third valuer as an umpire will necessarily be appropriate. Where complex legal issues fall to be determined or where there are unusual or novel aspects of the determination to be considered then in many cases it may well be for the umpire to be an appropriately experienced lawyer.

(6) The complexity of the legal cases which are being examined in this seminar today illustrate the problems confronting even the most experienced and expert valuer. In a recent arbitration award one of Auckland's leading valuers, who is present here today in commenting on *theMahoney*

v Modick judgement made the following remarks: "It would be quite improper of me to even commence discussing the legal intricacies annunciated as I am not competent to do so. However, I have read that decision more than once and, with some trepidation, I shall endeavour to precis that which it tells me as a valuer-arbitrator."

I would suggest that there is a clear case to be made out for a legal perspective to be brought to bear in many rental disputes which will then obviate the risk of valuers making mistakes or running the risk of having their determinations appealed to the High Court.

12. Interest on Arrears of Rental Pursuant to Awards

The Courts have held that an arbitrator has power to award interest by implying Section 87 of the Judicature Act 1908 where the arbitration award is akin to an order for the recovery of damages or a debt. See *Sika Plastics Limited v Earthquake and War Damage Commission* (1980) 2 NZLR and *Kenneth Williams v Martelli* (1980) 2 NZLR 596.

There are conflicting views as to the power to award interest where the review clause is silent on the issue of interest. On the one hand there is the view that the arbitration is declaratory of the rent to be paid and until the rent is determined and a debt is due, there is no debt payable upon which interest can be awarded. Sir Clifford Richmond in *theBritannicHouse Award* (1984) and J J McGrath Q C in the *New Zealand Railways Wakefield Street GroundLeasesAward(1989)* have found that the award is declaratory and that an arbitrator has no power to award interest.

The English Court of appeal in *South Tottenham Land SecuritiesLimited vR & A Millet (Shops) Limited and Another* (1984) 1 ALL ER614 has held that in the absence of express provision in the contract, rent arrears arising on the review will first become due for payment on the next periodic rent day following the publication of the award.

Section 87 does not empower an arbitrator to award interest prior to the date upon which the "debt" first became payable and in accordance with the *South Tottenham* judgement this date would be the first rental payment date falling due after publication of the award with the result that the arbitrator has no power to award interest.

Mr Justice Tipping in *the J Matheson & Co Limited v Matheson International Limited Award* (1985) and Mr B Bornholt in the *City of Wellington v NZ Guardian Trust Co Limited* (1989) found that Section 87 does apply on the basis that the arbitrator's award is akin to an order for recovery of a debt and as the lessee was liable to pay the arrears of rent as from the review date then there was power to award interest. The *South Tottenham* judgement was not considered in either of these awards.

There is pending litigation in the High Court at Wellington over this issue in the case of the *Wellington City Council v Company Two Limited* (CP850/88). As at the date of preparation of this paper these proceedings are still pending.

It is suggested that the logic of the *South Tottenham* judgement is most persuasive in holding that the arrears of rent do not constitute a debt due until the first periodic rent payment date following publication of the award.

13. The Land Tax Cases

(1) Land tax is a personal tax imposed on the owner of the land. Failure to recognise it as a personal tax has at times created confusion.

(2) In *New Zealand Breweries Limited v Square Freehold Limited* (1965) NZLR 619 the lease provided that the lessee would pay "all manner of rates, taxes, charges, assessments, impositions and other outgoings whatsoever at any time" imposed upon or payable in respect of the demised premises and whether payable by the owner, occupier, landlord or tenant. Wilson J commented that if the covenant had referred simply to tax imposed upon the demised premises he would hold that the lessee was not liable to pay land tax. However the tenant's liability related to any tax imposed on the demised land or the landlord in respect thereof.

The lessee escaped liability as the landlord owned land in addition to that included in the lease and the Courtwas not prepared to apportion the landlord's total land tax to make it relate to the particular premises.

(3) The *New Zealand Breweries* decision contrasts with the more recent judgement of Tipping J in the *Otago Harbour Board and Port Otago Limited v Reid Farmers Limited* High Court, Dunedin 101/89. The clause in the lease was not significantly different in wording from that in the *New Zealand Breweries* case. The tenant sought to avoid payment of land tax on the basis of the apportionment issue in the *New Zealand Breweries* case.

Tipping J, relying upon *Tooth and Co Limited v Newcastle Developments Limited* 1(966) CLR 167 held that in order to give business efficacy to the clause dealing with land tax he would imply a provision that an apportionment would take place according to the relativity of land values.

> It is a fundamental principle of property law that an interest in land includes all permanent improvements erected on the land

It is impossible to reconcile the *New Zealand Breweries and Otago Harbour Board* judgements but it is suggested that the application by Tipping J of the doctrine of the implied term is sound law. It is understood that the judgement is not being appealed.

(4) Since 1st April 1987 Section 25A of the Land Tax Act provides that for the purposes of the Act when an owner of land owns more than one property land tax is apportioned by law between thoseproperties. Although this section is directed at an apportionment of land tax for purposes of the Land Tax Act the provision may have relevance to landlord/tenant disputes.

(5) Radford and Co Limited v Valuer General (Wellington 1/3/89 LVP 53/88)

Radfords owned the Shoreline Retail Complex in Manners Street, Wellington comprising nine retail shops on the ground lfoor and a small coffee lounge on the first lfoor. The shops were leased for 10-year terms with rights of renewal for a further 10 years. Land tax was not recoverable from the tenants under the leases.

Land value was assessed at $11.8 million by the Valuer General. The owner Radford objected upon the following grounds:-

(a) That the value of the freehold estate was diminished by the leasehold interest.

(b) The leasehold interest should be subtracted from the value of the land in order to arrive at the land value of the freehold interest.

It was held following the approach taken *inLindlay v Valuer General* (1954) NZLR 76 that the valuation roll should be revised to show separate entries of the Radford freehold interest as well as the interest of each lessee.

Each lessee's interest was assessed at $300,000. The Radford freehold interest was reduced to $9,100,000 thereby reducing the liability for land tax. This is a Land Valuation Tribunal decision which I understand is being appealed to the High Court by the Valuer General.

Since *the Radford* decision the Inland Revenue Department in its March 1990 public information bulletin has made the profound statement that "There is no liability for land tax on an interest in land where the lease is of buildings only."

This statement by the IRD is not legally sound. If a tenant leases a factory building it is leasing the land upon which the building is erected. It is a fundamental principle of property law that an interest in land includes all permanent improvements erected on the land. In the Land Tax Act 1976 the words "land owned" is defined as meaning an estate or interest owned in land.

Further, in Section 4 of the Act the term "land value" is defined as meaning the sum which the owner's estate or interest in the land if free from any mortgage or encumbrance, might be expected to realise if offered for sale on such reasonable terms and conditions as a bona fide seller might be expected to impose and if "no improvements" had been made on the land.

The need in this section to expressly exclude improvements being taken into account clearly indicates that land as defined in the Act would otherwise include improvements, ie the buildings erected on the land.

One can only speculate that the misleading advice provided by the IRD is not unrelated to the *Radford* decision.

(6) Land Tax and Section 41

Section 5 of the Land Tax Act 1976 provides that land tax is to be based on the values appearing in the District Valuation Roll, but that where an amended value has been obtained pursuant to Section 41 of the valuation of Land Act 1951 then the amended value shall for the purpose of the Land Tax Act be "deemed" to be the value appearing in the District Valuation Roll.

Requests to Valuation NZ to provide Section 41 valuations have been met with refusal by the Department to supply a valuation on the grounds that any valuation carried out must preserve uniformity with existing roll values and that the valuation carried out would not recognise any change in market value.

This refusal by the Department is not sustainable if regard is had to the wording of Section 41 which clearly provides that valuations can be carried out pursuant to that Section where the District Valuation Roll will not be amended.

Further, if the Department's contention were correct then Section 5(2) of the Land Tax Act would be meaningless as there could never be an amended value which is different from that appearing on the valuation roll.

The commercial leasing market place is not static. Legal and valuation principles change just the same as conditions change in the market place albeit at a much slower pace.

The Department claims that it has a legal opinion sustaining its stand but it has not been prepared to release this opinion in the face of possible litigation. I am aware of one case where Valuation NZ has carried out a Section 41 valuation but in doing so advised the applicant that the values supplied were not to be used for land tax purposes.

Valuation NZ by refusing to provide special valuations is compelling land owners to pay more in land tax than is properly payable and denying to such taxpayers the benefits that Parliament has conferred in Section 5(2) of the Land Tax Act.

I am informed that recently the Department justified its refusal on the grounds that notwithstanding many complaints from solicitors and property owners, no one has yet challenged it in the Courts.

The reason for the lack of challenge has nothing to do with the legality of the Department's position but by reason of the commercial fact that many of the properties where a Section 41 valuation would be of assistance are still the subject of unresolved objections lodged to the last round of valuation reviews.

Consequently, until objections are heard there is little point in a property owner indulging in litigation as the cost effectiveness of the exercise may well depend upon the outcome of the objection.

I have knowledge of one particular case in Auckland where the outcome of the objection was an $800,000 reduction in the land value.

The valuer acting for the objector advised that it would be a pointless exercise to pursue a Section 41 valuation through the Courts as there was no hard market evidence to establish any further decrease in value than that already achieved via the objection process.

With the further reduction in land tax next year and its abolition the year following the cost effectiveness of mounting a legal challenge is further diminished.

14. Supply of Valuation Reports to Tenants

(1) Some valuers are critical of landlords and their solicitors who make available to tenants copies of valuation reports, claiming that this is an unsound tactical move if a rental dispute determination follows.

The other side of the picture is that the tenant's solicitor faced with a refusal to supply the report immediately suspects that the proposed rental is not substantiated by a report.

Further, refusal to supply the report can result in prolonging what could otherwise be a prompt acceptance of the proposed new rental incurring unnecessary expense in obtaining its own valuation.

(2) Valuers should be aware that in the Auckland District Law Society's commercial lease form the landlord if it is to receive payment of an interim rental must substantiate the proposed new rental by a registered valuer's report.

There is no obligation for a copy of the report itself to be provided, merely for the proposed new rental to be substantiated by a report.

(3) It is suggested that valuers in supplying reports to landlords should supply a separate certification of the proposed new rental identifying the property and the date from when the new rental is to take effect.

The certification as distinct from the report itself can then be forwarded to substantiate payment of an interim rental.

15. Conclusion

The commercial leasing market place is not static. Legal and valuation principles change just the same as conditions change in the marketplace albeit at a much slower pace.

No two contracts are identical and as the *Ponsford* decision and other cases illustrate there is a variety of judicial opinion which more than substantiates the claim made earlier in this paper that the rent review cases are a legal minefield for the unwary valuer.

I hope that the comments made in this paper will assist valuers to avoid some of the legal pitfalls lying in the path of market assessments. A

Commercial Rent Reviews A Valuer's Perspective

by R P Young

1. Introduction

(1)This brief paper is a commentary on the paper entitled *Commercial Rent Reviews-ALawyer'sPerspective* presented by Mr John Marshall, Barrister & Solicitor of Kensington Swan, Auckland. Mr Marshall's paper is designed specifically for the education and enlightenment of valuers and we are indebted to him for the time, effort and enthusiasm he has committed to this project. He is well qualified to speak on the subject having recently completed an extensive series of seminars on the same subject for the New Zealand Law Society.

In compiling this commentary I will follow the section numbers and headings adopted by Mr Marshall in his main paper.

(2) The task of fixing and negotiating rent reviews on commercial, retail and industrial property, is one which occupies a large percentage of the working life of many valuers. This has been the case for some years but since the late 1970s and early 1980s the task has become somewhat more shrouded in legal complexities as a result of legal decisions referred to by Mr Marshall as having "sown a legal minefield in the path of the valuer..."

(3) Mr Marshall indicates that the complexity has been caused, or at least compounded, by the relatively recent advent of the net rents lease". It is my view, however, the modern lease places the rent review emphasis very squarely on the "current market rent" ie the objective test. This is a concept with which valuers are very comfortable since our professional education, training and practice is directed towards crystalising and analysing what is happening in "the market".

It is the older leases in which the review wording makes no reference to a "market rent" which have been the subject of almost all of the legal decisions with which we now have to grapple and to understand. These cases have in the main beendirectedatinterpreting whatis meant by "the subjective test"-iereview clauses which simply provide that the rent is to be reviewed at a figure to be agreed between the parties and failing agreement by arbitration.

(4) Mr Marshall is quite correct in his comment that valuers are guided by conditions in the market place, whereas lawyers are guided by legal principles. Indeed, we valuers are often left with the impression that the involvement of the legal profession in the rent review debate very often leads to a result which confuses and confounds the fundamental or basic intention of the rent review clause in a lease.

In his very recent decision, Eichelbaum C J examined submissions on the fundamental purpose of rent review clauses, quoting from *Basingstoke & Deane Borough Council v The Host Group Limited* (1987) which in turn quotes *British Gas Corporation v Universities Superannuation Scheme Limited* (1986). These decisions appear to me to emphasise that those involved must "have in mind what normally is the commercial purpose of such a clause" and:

> "there is really no dispute that the general purpose of a provision for rent review is to enable the landlord to obtain from time to time the market rental which the premises would command if let on the same terms on the open market at the review dates. The purpose is to reflect the changes in the value of money and real increases in the value of the property during the long term"

(5) I strongly suspect that the older leases which do not make reference to a "market rent" nevertheless were drawn up by parties who very strongly had in mind the above-stated intentions. The fact that theseparties now have imposed upon them "the subjective test" is more a result of poor legal draughting than it is of the desire of the parties involved to have the rent ultimately fixed using the subjective test rather than a current market or objective basis.

(6) Nevertheless we are now obliged to live with the effect of the legal decisions and to grapple with the practical outcome of the manner in which these decisions have interpreted the rentreview clauses.

2. Construction of Rent Review Clauses

(1) I have made some comment on this subject in my introduction. Further comment is unnecessary apart from saying that most valuers would beverypleased with *the British Gas* decision and the Court declining to "produce a result so manifestly contrary to commercial common sense that they cannot be given literal effect". Similarly, I am disappointed with the *Pugh* decision noted by Mr Marshall and agree that the niceties of the legal distinctions involved are difficult to comprehend.

3. Principles of Construction

(1) I am, of course, not qualified to comment on these principles as such, but wish to make one or two observations on the practical outcome.

(2) Second Principle

The *Ponsford* case is mentioned here and this decision has caused some concern to valuers, and it has no doubt to lawyers. The effect of this decision was to require the lessee to pay rent on substantial improvements which the lessee had itself paid for. Some commentators (notably authors of papers contained in the W hipple "Commercial Rent Reviews" book) have noted "the injustice perpetrated in *Ponsford v HMS Aerosols Limited*..... Mr Marshall also refers to this injustice.

As far as I am aware, no New Zealand lessor has attempted to secure rent on building or other improvements paid for by a lessee, even when the *Ponsford* decision might have allowedsuchanattempt. I hope that this state of affairs contin-

ues. As a further comment, it seems to me that decisions subsequent to the *Ponsford* case have employed some legal gymnastics in order to avoid following it.

(3) Third Principle

In interpreting and applying the rent review provisions of a lease, valuers must have regard to all of the terms of the lease and not be persuaded to concentrate on individual clauses or provisions in isolation. This point was further emphasised in the *Feltex International Limited v JBL Consolidated cas*e.

(4) Fifth Principle

When acting as arbitrators or umpires, valuers will often be presented with extrinsic evidence. The points made by Mr Marshall are interesting but I have been involved in instances where the lease *h*as been silent or vague on a particular point. A recent case was a situation where a lessee clearly enjoyed naming rights to a building but the lease contract made no reference whatever to naming rights. A prior agreement to the lease did, however, stipulate that the lessee was entitled to naming rights without payment of rent and the lessor did not pursue a claim for a rental on this item.

4. Objective v Subjective Assessments

(1) The objective test presents no unusual difficulty to the valuer. It is required where the lease provides the rent to be reviewed at a "current market rent" or a "fair market rent" or a "reasonable rent for the demised premises" or similar wording which directs the valuer's attention to the "current market". The approach is on all fours with what valuers would regard as the logical market related intention of rent review clauses within any lease contract.

(2) The application of the "subjective test" does however pose problems and opens a whole can of worms in its application.

(3) In the very recent (14 December 1989) judgement of Eichelbaum C J in *Mahoney & Modick* the Judge's instructions to the arbitrator in applying the subjective test are very general and unspecific:

"(i) The Arbitrator should have approached the Arbitration by determining what would be a reasonable rent for the parties to agree in all the circumstances, taking into account all considerations existing at the review date pertinent to the demised premises and the relationship of landlord and tenant, that would have affected the minds of reasonable persons in their position had they been negotiating the rent themselves."

(ii) In answer to the question "must any regard be had to profitability or otherwise of the actual business conducted on the leased premises?", the Judge ruled:

"To the extent that the arbitrator considers it appropriate, having regard to the answer in (i) and the evidence before him."

(4) This decision also states:

"In the end the assessment of the relevance of eeparticular circumstances, and the weight to be given them in the instant case, is for the Arbitrator."

Other legal decisions have similarly strenuously avoided "trespassing on the Arbitrator's territory".

(5) The Eichelbaum decision does however give some useful guidance to arbitrators faced with the application of the subjective test. Notably: "It is not subjective in the sense of permitting the infiltration of fanciful considerations, or ones idiosyncratic to the personalities of the respective parties, but only allows regard to be had to those having a basis of fact, and of a nature that would be perceived as relevant by a reasonable landlord or tenant."

(6) My own view and practice in applying the subjective test is to fall back on the "current market rent" or objective test and vary from that figure only:

(a) If the lessor on the one hand can produce convincing evidence or submissions which would allow one to apply a rent which is higher than the current market rent, or

(b) If the lessee on the other hand can produce convincing evidence or submissions which would reasonably induce one to fix a rent which is lower than the current market rent.

If neither the lessor nor the lessee can produce such argument then I believe the valuer or arbitrator is inevitably thrown back to the assessment of a current or fair market rent.

(7) In applying the subjective test, however, it does now seem quite clear the profitability of the particular lessee can be taken into account. The *Mahoney & Modick* decision simply says: "I conclude however that on a review where the subjective approach is appropriate, one cannot automatically and in all respects exclude regard to the profitability or otherwise of the business which the tenant proposes to conduct on the premises during the currency of the period for which the rental is being fixed."

The application of the "subjective test" does pose problems and opens a whole can of worms in its application.

5. Profitability of Tenant's Business

(1) This factor can clearly be taken into account by an arbitrator and valuer when applying the subjective test.

(2) Mr Marshall notes:

"Generally speaking, the profitability of tenant's business will always be irrelevant where the assessment is by reference to an open market rent on an objective basis. The exception will be where the premises are peculiarly suitable for a certain business ie hotels, theatres, service stations."

I entirely agree with this summary. *TheMahoney& Modickdecision* hasbeen promoted as supporting a contention that the profitability of the tenant's business is a factor to be taken into account even with an objective review.

In this decision the Judge does state that, "such financial evidence may be relevant even with an 'objective' review".

I do not believe that this is a logical or fair conclusion. I believe it is highly dangerous to bring into account the profitability of the lessee's business when applying the objective test, except where the lease contains an absolute restriction on business use. This subject is dealt with later in the paper.

6. The Prudent Lessee

(1) I have long had difficulty in understanding what is meant by "the prudent lessee test" insofar as it provides any guidance or assistance in the rent review process.

I have now come to the conclusion that in fact this statement or collection of words (ie "the prudent lessee test") is meaningless. It has nevertheless been enshrined in New Zealand case law and is commonly referred to.

(2) The "prudent lessee" test is peculiar to New Zealand legal decisions and as far as I am aware does not appear in any English or any other Commonwealth decisions.

It seems first to have appeared in the *DIC* case referred to by Mr Marshall and since that date it has received much attention and elaboration.

(3) I believe that I am not the only person who has difficulty in understanding the meaning and application of this concept. In a very large ground rent arbi-

tration conducted in Auckland in the early 1980s, the sole arbitrator, Sir Trevor Henry, had the following to say on the matter

> "Reference has already been made to the test of the fictitious prudent lessee and to the fact that it is the motives inspiring him which are material. This has been used as a test of relevancy of evidence. Because such a concept excludes any reference to the position of the lessor, a further tag has often been added, namely that the rent must also be fair to the lessor but without defining what this addition is and how it is applied. In my respectful opinion such artificial means of approach are undesirable. The test of relevancy in each case is to be determined upon the true construction of the words used in the particular renewal clause under review."

And later in his award:

> "One further matter on this topic will be referred to. Counsel agree that evidence of events subsequent to the relevant date is admissible. This evidence would not be available to the prudent lessee at the relevant date. It exemplifies a connotation of relevancy wider than the prudent lessee test and supports my view that all matters relevant to the rental value of the land are admissible and that that is the true test."

Sir Trevor Henry's full decision is reported in the *New Zealand Valuer,* December 1982, pp 223-231.

(5) Further reservations about the prudent lessee concept are expressed by Mr Marshall.

7. Restrictions on Business Use

(1) I have already made some comment on this matter. An absolute restriction on business use must of course be read in association with the assignment provisions, the latter in some instances permitting a wider use on assignment than does the main use clause in a lease.

(2) While it is clear that an absolute restriction on use must be taken into account in fixing a rent, it does not automatically mean that the rent so fixed is to be less than a market rent. If the specified use is one of the "highest and best uses" to which the property may be put, then I can see no grounds for arguing for a reduced rent simply on that basis.

The restriction must have an impact on the lessee's ability to pay a full market rent and for this reason the profitability of the business (if properly operated) must constitute relevant and acceptable evidence.

> Logic dictates that there is only one market place.

8. Two Tier Market

(1) Mr Marshall states that there is a two-tier market in existence and comments on differences of opinion as to whether this is a valid or invalid situation.

(2) In my own experience and subject to the following two qualifications, a two-tier market does not exist in the Auckland Central Business District. I also believe that there is no justification for such a state of affairs. Logic indeed dictates that there is only one market place.

The two qualifications are summarised as follows:

a. Where a ratchet clause operates in a lease, it is quite possible that on rent review this clause will prevent a rent from dropping to a current market level. In this case the lessee will continue to pay a rent in excess of the market rent but that rent cannot logically be accepted as an expression of the market. This situation is beginning to happen in the Auckland CBD on some office accommodation.

b. In the prime retail portions of Queen Street, Auckland, a definite two-tier market exists. This has resulted because rents reviewed by agreement or arbitration (normally the latter) have fixed rents at a level well below current market level and new lettings are at a much higher level.

(3) The situation summarised in subparagraph 2 above can be fairly easily demonstrated both by the extremely high prices which retailers will pay to take an assignment of an existing lease, and by high rents paid on new lettings.

These cases (ie new lettings and high "key money" or assignment prices) are sometimes dismissed by valuers as representing the "goodwill" component which a lessee must pay in order to secure retail premises in prime locations. Such arguments demonstrate a lamentable lack of understanding of basic economics.

(4) Later in his paper Mr Marshall deals with inducements paid to a lessee in order to secure a leasing and the manner in which those inducements must be discounted. I wholeheartedly agree that such inducements should be discounted in order to arrive at a current market rent. By the same token, a payment made by a lessee in order to secure a lease is effectively the reverse of an inducement and should similarly be taken into account in determining or crystalising what is the current market rent demonstrated by that particular transaction. To suggest that retail space should be treated in a different manner to office space is quite illogical.

(5) Under this section of his paper Mr Marshall examines the manner in which an inducement to a lessee is discounted in order to arrive at a market rent. The example is taken from a Melbourne "Rental Determination" which in effect is an arbitrator's award.

In Auckland most valuers use a very similar method to discount inducements. Leases here are normally 8,12 or even 15 years duration and the rent free period or cash inducement is discounted over the full term of the lease usually at an interest rate of about 12% (close to the money market rate) and not at the lower rate of 5.5% used in Melbourne. The logic in using a money market rate is that the effective investment demonstrated by the inducement is a terminating and non-escalating investment and should therefore attract the same yield as do other terminating and non-escalating investments (eg Government stock and the like).

(6) The mathematics in making this calculation are very simple. A simple NPV programme is used. If for example there is a 12-month rent free period in a nine-year lease then the net present value of the cash lfow is calculated using monthly payments in advance, clearly with no payment for the initial 12 months. The valuer then ascertains whatrentwouldberequired from the inception of the lease to produce the same net present value over the same period. Clearly, to produce the same net present value a lower monthly rent would be paid since it is received by the lessor from day one.

If the inducement takes the form of an upfront cash payment to the lessee then the NPV programme is simply calculated with the cash payment being an initial negative factor (cash outflow) against which the positive rental cash flows are offset to produce a net present value over the term of the lease. The calculation is then run without the negative cash payment but with a lower monthly rent to produce the same net present value.

In my opinion this is the only logical and sensible way to analyse an initial market letting which involves an inducement to the lessee. Any alternative analysis based on an arbitrary adjustment does not stand up to scrutiny, either in logic or mathematic analysis.

(7) I agree with Mr Marshall at his paragraph 8.6 - such an approach is indeed quite unrealistic, involving as 0

it does an automatic assumption that rents are going to increase very substantially on the first rent review. Everyone knows that this will not happen and therefore such an approach does not stand up to market logic.

9. Post Review Date Evidence

(1) Mr McGough will elaborate on this topic and refer you to the 1956 New Zealand decision ofJudgeArcher,Poverty *Bay Catchment Board v Forge and others.* The only comment I wish to make is that in the *Forge* case the specified date of valuation was 22 February 1954 and the Judge accepted evidence supported in part by three sales which took place after that date. These three sales however took place in February, March and May of 1954 ie very close in time to the relevant date of the valuation.

10. Total Occupancy Costs

(1) It is now well established valuation practice that in undertaking the comparative exercise, the comparison is based on total occupancy costs.

(2) This means that, all else being equal, buildings which experience unusually high operating costs will experience the fixing of corresponding lower basic rents so that the total occupancy cost paid by the lessee is identical to that of identical office accommodation in other buildings. It is of course accepted that no office accommodation is identical to other "comparable" space so that further adj ustments need to be made for other locational and physical characteristics.

(3) Mr Marshall highlights the problem of some buildings having lease contracts which require the payment of operating expenses which are no longer acceptable in the current market.

In these circumstances the rent reviews should clearly take this point into account and discount the basic rent to the extent that the operating expenses are inflated above those in buildings where the operating expenses are now commercially acceptable.

11. Arbitrators v Experts

(1) The main commentary on this topic will be covered by Mr McGough and I will not elaborate except to comment on the points raised by Mr Marshall in his paragraph 11.5.

(2) Mr Marshall promotes the appointment of legally qualified persons as umpires. I agree with this course of action "where complex legal issues fall to be determined". However, where the issues to be resolved are principally valuation arguments then I would strongly resist the appointment of a lawyer, accountant or other professionals.

(3) I have experienced some rather poor decisions on valuation matters, brought down by Courts and legal arbitrators, simply because the author of these decisions clearly did not understand the valuation arguments or principles involved and was not able to grasp the impact of the main valuation evidence.

I believe that many lessors or lessees will promote the appointment of a legal Umpire where only valuation matters are to be resolved, for the simple reason that such an umpire may be more inclined to "split the difference" than would a valuer umpire who is likely to have a better *grasp* of the valuation issues involved.

12. Interest on Arrears of Rental Pursuant to Awards

(1) The matter of interest is well covered by Mr Marshall and I am not qualified tocomment further. However, I would like to raise a further and similar matter which is often put to umpires or sole arbitrators. This is the question of the award of costs in favour of one party or the other.

(2) Where a lessor or lessee is aggrieved by alleged time delays, frivolous conduct or other inappropriate action on the part of the opposite party, a claim is often made for the costs of the arbitration to be awarded against the party alleged to be in default.

I have been advised by several lawyers competent in this area that it is highly dangerous to award costs against either party as a form of penalty. I am however uncertain on the law relating to this aspect and would appreciate further comment by Mr Marshall.

13. The Land Tax Cases

(1) Mr Marshall's paper was written prior to Budget night, 24th July 1990. The abolition of Land Tax in that B udget means that this section of the paper has little ongoing relevance or interest.

14. Supply of Valuation Reports to Tenants

(1) Sadly, I must express the view that the supply of a valuer's complete report by a landlord to a tenant is not a practical move at the present time. This is because too many lessors, lessees, valuers and lawyers regard the rent review processes a benefit match, the perceived beneficiary normally being the lessee.

(2) The actions of many valuers demonstrate that they often have not the slightest interest in fixing "a fair market rent" or"current market rent". Theirprime interest is getting the best deal they can for their particular client.

(3) In this climate, to divulge to a lessee, and thereby to a lessee's valuer, the lessor's valuer's entire report, evidence and calculations, is to inviteareport which does not in fact address the issue of a fair market rent but simply proceeds to take advantage of any perceived weakness or grey area in the lessor's valuer's evidence.

(4) In the meantime, I accept the suggestion that valuers, in supplying reports to landlords, should supply a separate certificate of the proposed new rental as suggested by Mr Marshall.

The "Current Market Rent" Discounting of Inducements

Having read Bob McGough's commentary I note his reservations about accepting a mathematical discounting of lessee inducements in order to crystalise a current market rent from this type of market transaction. Since the practice of granting inducements is now almost universal in the Auckland office market, it is impossible to arrive at an equivalent "current market rent" without some form of discounting.

I do not accept Bob's reservations about the validity of applying these discounted rents in the rent review process and hope my views may be clarified by the following simple illustration.

Let us examine the position of a lease of an office floor granted at $300 per square metre per annum for nine years, three-year rent reviews and with either.

A. A 12-month rent free period, or

B. A lessee inducement equivalent to $300 per square metre in cash.

A. $300 per square metre per annum, 9 year lease, 12 months rent free: Cash flow of rent per square metre:
Months 0-11: $0
Months 12-107: $25
Net present value at 12% = $1,416
If the rent free period was not granted then both lessee and lessor would be in exactly the same financial position over the 9-year period if the rent from Day 1 is $20.81 per square metre per month or $249.72 per square metre per annum ie a discount of 16.76% on the face or contract rent of $300 per square metre per annum, ie the net present value of $20.81 per square metre per month over 9 years at 12% _ $1,416.

B. Rent $300 per square metre per annum, 9 year lease, this rent paid from Day 1 with a cash inducement of $300 per square metre to the lessee.
Cash Flow:
Month 0: $275 negative

Months 1-107 inclusive: $25
Net present value at 12%: $1,401

If no cash inducement was paid then both the lessee and the lessor would be in exactly the same financial position over the 9 year period, if rent from Day 1 is $247.20 per square metre per annum ie the net present value of $20.60 per square metre per month over 9 years at 12% = $1,401.

Future Rent Reviews on the Same Lease

The likely position is that there will be no rental increase on the first rent review ie the "pure" market rent will in all probability be less than $300 per square metre per annum which the lessee is already paying. We are of course assuming the existence of a ratchet clause.

If after six years, comparable space is being leased at $390 per square per annum with 12 months rent free, this discounts to $324.60 per square metre per annum with no rent free period using exactly the above net present value method.

The rent on this lease will then be reviewed from $300 per square metre per annum to $324.60 per square metre per annum.

The lessee is not receiving a second incentiveaspropoundedbyBob McGough at Paragraph 4(d). (see following article) The lessee is, at all times, paying the "current market rent" as is required by the lease contract.

The current market rent at the inception of this lease is not $300 per square metre per annum but $300 per square metre per annum discounted by the effect of the 12 months rent free period (or cash equivalent). At the six-year review date the current market is not $390 per square metre per annum, but is $390 per square metre per annum discounted by the effect of the 12 months rent free period. All the lessee is being asked to do is to pay a "current market rent".

Clearly, on rent review, a rent free period or a cash inducement cannot be incorporated within the review negotiation unless by arrangement between the parties which is unlikely. It is therefore necessary to discount these items out of the market transaction in order to distill or crystalise the effective "market rent".

If anyone can propound a more logical method then I will be very happy to hear about it. There are clearly refinements which can be made one can build in a projection of rental growth (if that is likely to take place), and play around with the rate of interest. However, these are simply refinements on the above method which I believe will not make much difference to the final answer in most cases. A

Commercial Rent Reviews A Valuer's Perspective

by R M McGough

My task today is to comment on a very cogent, easily understood resum6 of the legal principles to be observed in those portions of a lease document which are relevant to the valuer in carrying out a rent review. I could very easily just say that I agree with most of John Marshall's paper but to make it more interesting I will adopt a slightly devil's advocate stance.

John Marshall has made the appropriate comment to the effect that lawyers tend to be guided by legal principles and valuers, the marketplace. That is true and it is equally true to question the appropriate dividing line between the application of legal principles on the one hand and the assessment of conditions in the market place on the other.

However, never let either lawyers or valuers forget the persons most vitally concerned by the philosophical debate, namely the parties. Rent review procedures can be likened to a game. The rules, in the form of a lease contract, are written by lawyers and the valuer's role is to play the game in accordance with those rules. I fear that in some cases, the parties can become but paying spectators watching the paid professionals play.

There is no doubt that a drastic change in the market has brought about a dramatic increase in rent settlements by arbitration rather than negotiation. As an opposite though, it is fair to say that there has been an equally significant move by parties to dispense with the rules and make their own arrangements in line with the market. I thus observe that while the legal niceties are of intense interest to us, the players, we need to recognise that because of the market the paying spectators may not put in an appearance at the game. Having said that, once the game has commenced the rules must be strictly adhered to.

Construction of Rent Review Clauses

All valuers/arbitrators should learn by rote the Principles of Construction set out in Section 3 of John Marshall's paper. I would ask you to also remember that those principles are set out in order of priority.

For myself, I have found a disturbing trend of late towards the introduction of extrinsic evidence relating to the circumstances of the parties both at the time of their entering into the lease and as at the date of review. By their signature, the parties have agreed to the terms and conditions of the contract and it is not open to suggestion that the rules should now be changed because altered market conditions make the result seemingly unfair. By mutual consent, the parties are perfectly at liberty to change the rules they have previously agreed to but it is not open to either the valuer or the lawyer to endeavour to seek something that does not comply with the lease terms. 0

John Marshall points out in the Second Principle that words are to be construed according to their literal meaning. There is, however, a qualification to that rule as pointed out by Holland J in *GUS Properties Ltd v Government Life Insurance Corporation* reported in a December 1987 issue of the *Valuer's Journal.* That qualification is to the effect that the words are to be given their literal meaning unless specific words have been held to be given a specific meaning by the Courts. It is thus incumbent on the valuer to be aware of those decisions.

Reference is also made to the fact that a literal reading of the words used, can lead to an absurdity. Ponder on this wording with which I have recently been confronted:

> *"The valuers so nominated shall... ointly determine the rental of comparable premises as at the particular review date."*

Why on earth would parties want valuers to determine rents on comparable premises rather than their own?

An argument can be put forward to the effect that in some cases, there might be justification for a lawyer input into rent review decision. However, on reading that clause, there is equal justification for greater input by the valuer into the drafting of the rent review provisions in the first place.

Objective v Subjective Assessments

The difference between the two approaches is now well established and I would commend you to Section 4.5 of the paper which sets out the guidelines. However, in my experience, over 90% of cases would result in the same answer to the test subjective or objective. I refer you back to the Third Principle of Rent Review Construction. Rent Review clauses cannot be read in isolation to other relevant provisions in the lease.

Unfortunately, the advent of the subjective test has resulted in what I shall call the "whataboutme" approach. TheCourts have clearly laid down that the subjective approach requires consideration of matters affecting the parties - plural not singular. That comment is best discussed under the headings which follow.

Profitability of the Tenant's Business

I agree with John Marshall that a careful study of the decision ofEichelbaum C J in *Mahoney v Modick* discloses that statements relating to that case in the media have been misleading. The decision merely states that under the subjective test the profitability of the business cannot automatically be excluded and then goes onto comment "that it would be difficult to say more without trespassing on the arbitrator's territory". To say that some factor cannot automatically be excluded is quite different from saying that it must automatically be included.

Despite that, consideration of the profitability of the business is not novel to the valuation profession. It is often used as but one of the methods available in considering appropriate market rentals on specialised uses such as motels, hotels, service stations, etc which, regardless of the legal tests to be applied, are properties with physical characteristics that make them quite unsuitable for any other use. The use of turnover in those special circumstances, thus tends to become a matter of fact as a method of valuation, rather than a matter of law. I would comment though, valuers have always been conscious of distinguishing between a particular lessee's profitability and that which might be capable of achievement.

Restriction as to Use

I believe that Peter Young covers this heading more fully but can I put to you two opposite extremes as to the effect of the use clause:

1. A use restricted to that of a supermarket. The only reliable evidence will be that of supermarkets be the test subjective orobjective. I would suggest to you that given the restricted use, turnover can also be of assistance in making subjective adjustments thatare necessary in order to take into account locational and physical qualities.
2. Premises used as a department store, but the use not restricted to that particular form of retailing. I would suggest to you that comparable evidence of all forms of use capable of being accommodated within the premises become admissible but the turnover of the use which the tenant wishes to utilise the premises, would be largely irrelevant.

The Prudent Lessee

Like John Marshall, I have always had difficulty in linking the prudent lessee test to a subjective assessment which requires consideration of matters affecting parties in the plural rather than the singular. All I can say in commenting on the *Feltex* case is that the answer seemed fair.

Two Tier Market

The major cities in New Zealand have experienced a very sudden reversal from a landlord driven market to one where tenants hold the reigns. It is probably fair to say that during the period of doubt between early 1988 and early 1989, a two tier market may have been in existence. Hopefully, valuers are now recognising the market situation.

I certainly do not subscribe to the view that rent reviews should be stacked on rent reviews with blinkers shutting out market conditions in the form of new lettings. However, I would put to you a tempering of the alternative approach of blindly adopting only new lettings at the levels indicated by the result of perfectly logical mathematical adjustmentforthe incentives provided. I put to you the following propositions:

1. Surely it is appropriate to consider rent review evidence if the negotiations can be shown to have taken the market situation into account. I thus find difficulty in accepting that review evidence should be ignored, simply because it is a review. It is the quality of the evidence that is relevant.
2. I find it difficult to accept new letting evidence which is the result of a letting by a lessor under duress. For example, assignments by tenants wishing to be rid of a contractual obligation would, to me, constitute evidence of doubtful quality.
3. Hopefully, there will be few who subscribeto the view that incentives should be discounted over other than the full term of the lease. I have no difficulty in accepting both the mathematical logic and the methods outlined in John Marshall's paper. What does concern me is that in some cases in Auckland, the result of such an analysis can result in an apparent discountas high as20% to 25%. Let me take, as but an example, a $200 per square metre contract rental which, by logical mathematical calculation, results in an analysed $150 per square metre effective rent after taking into account the incentives.
4. (a) Assuming that the lessor is not pressed, would that lessor have leased the property for $150 per square metre with no incentive? I would suggest that in most cases they would not. The capitalisation of the contract rent of $200 per square metre results in a very significantly different property value than does $150 per square metre. While the valuer's approach may spread the incentive over the full lease term, the effect on the value of the property to the lessor is nil once the rent freeze period is up.

   b. The market evidence would appear to show a preference by tenants toan incentive, be it arentfree

period or partitioning assistance. It allows the tenant to become established following which they seem prepared to recognise that rent levels will not be less than $200 per square metre.

c. Assuming the existence of a ratchet clause, the analysed rent of $150 per square metre is on the basis that the effective rent from the first review date be $200 per square metre. Rent reviews have no such built in guaranteed increase.

d. Let me now assume that the ana lysed $150 per square metre rental is due for the first review and the market is still offering incentives to the same order. Would not the analysis of the market at the review date effectively give our analysed $150 per square metre tenant, a second incentive when it has already had one.

e. Having said that, could there be a difference between a rent revision on aright of renewal, as opposed to a mid term review. It seems to me that a renewal is effectively a new lease and the sitting tenant could well argue an incentive as a persuasion to stay. Does, however, a rent review entitle a sitting tenant to a level of rent indicated by the analysis of lettings where there is an incentive to take upanew lease?

f. Partitioning incentives: Unless not very clearly covered in the lease contract, which I doubt, I can foresee mighty arguments being put forward in future rent reviews as to whether lessor-provided partitions should, or should not, be taken into account.

Frankly, I do not know the answer to those questions but they do make the discussions interesting because, to my knowledge, none of the questions I have put to you have been really tested.

Post Review Evidence

The *Segama* decision sets the matter out well and I would also refer you to an even earlier decision of Archer J in *The Poverty Bay Catchment Board v Forge* reported in September 1956 issue of The *Valuer.* At page 36:

"It is common ground that the market price of land in the Gisbome district was rising at the specified date and that it has continued to rise from that date until the present time. Valuers who are now required to value Mr Forge's land as at 22 January 1954, had the benefit of later information concerning this rising trend in values, which was not available to buyers or sellers of land at the specified date. A valuer now valuing the property is entitled to have regard to all relevant facts within his knowledge, including information as to sales subsequent to the specified date for valuation, but should use that information only for the purpose of determining the market value of the land at that date. It follows that though a valuer is entitled to make use of facts disclosed by subsequent sales, he is not entitled to assume that such information was available to buyers and sellers at the specified date."

It seems to me that Archer J in 1956 said much the same as Staughton J in 1984.

Total Occupancy Cost

The total occupancy cost approach is, in my opinion, the only sound basis of comparison. However, I find difficulty in accepting John Marshall's contention that expenses not generally recognised in the current market should be disregarded. It seems to me that parties can agree to whatever they like but if the total occupancy cost approach is adopted, it follows that the higher the expenses, the lower will be the lease rent and vice versa. I certainly agree that tenants entering into new leases should be very careful not to agree to generalised outgoings devoid of any caps, thus giving the lessor an open cheque.

..Expert determination presents extreme danger to both the parties and to the expert with the arbitration approach to be much preferred

Arbitrators v Experts

From my readings, the move away from arbitration to expert determination has been based on the erroneous assumption that a supposed expert should know what he is up to, should be left to do his thing and both a quick and cheap resolution will be achieved.

In my opinion, expert determination presents extreme danger to both the parties and to the expert with the arbitration approach to be much preferred.

Danger to the Parties

1. There does not appear to be any requirement on an expert to give the parties the right to be heard. I find that quite untenable.
2. Under the BOMA style lease, each party can appoint one valuer to act as an expert and accordingly seems to preclude the introduction of second opinion.
3. Because of the potential risk for an expert, such determinations could well result in parties being given decisions without reasons. I find any system which encourages non-speaking awards to be also untenable.
4. The parties appear to me to give up the right to legal representation.
5. In the case of the BOMA style lease, only a valuer can make the final determination and it does not necessarily follow that other disciplines should be excluded when particular circumstances may warrant a determination by a more appropriately qualified person.
6. The right of appeal to a Court of Law appears to be rather limited and as a valuer/arbitrator, I find this untenable. After all, a District Court decision can be appealed to the High Court which can be appealed to the Appeal Court which can be appealed to the Privy Council.

Expert determination might thus give the appearance of being quick and cheap but it seems hardly in accordance with the rules of natural justice.

Danger to the Expert

a. As an arbitrator under the Arbitration Act of 1908, I have no fears whatsoever of a speaking award being taken to the Courts and referred back for reconsideration on the grounds that the lease interpretation may have been incorrect. That is quite different from "misconduct" in its widest sense.

b. As an opposite to that, I have grave fears that when acting as an expert, the only recourse to the parties is to take an action in negligence. Neither the trauma nor the expense, even if held to be correct, is worth taking that risk.

c. In my view, the risk of an action for negligence seems to be significantly increased if the expert does not give the parties the right to be heard and is increased again, by the giving of a speaking award. Neither of those approaches appear to me to be the slightest bit professional but are encouraged by that system.

In my opinion, expert determination is dangerous to both the parties and the experts should be discouraged. Indeed, it was a submission by the Institute to the Law Commission on the review of the Arbitration Act that parties opting out of the Act should have no recourse to the Courts whatsoever. 0

Economic Factors Affecting the Property Cycle

by M J Riley

By the time you read this (mid 1991), if the theory is correct, a lot of clients (and valuers) will be feeling very down and wondering if New Zealand can ever come out of its present predicament.

So, if things are picking up and looking rosy, skip this and move onto the next article.

If not, then as a possible way of explaining everything that is happening to property and its value, ladies and gentlemen, would you please welcome .....*The Long* Wave *Economic Theory.*

This theory was developed in the 1930s by a Russian, Mr Nicolai D Kondratieff (at the time he was Director of the Conjuncture Institute of Moscow).

He was given an all expenses paid holiday at Club Med Siberia for his efforts in publishing it by the Socialist Government of the day, so it was very meaningful to him. Unfortunately, until recently, the theory has gone largely ignored by many and is only now coming into favour.

Basically, Mr K believed that economies run in cycles with an average of about 60 years, like an economic biorhythm. To find this, he studied a lot of economic series from countries such as England, France and the USA with Bond and Commodity prices, as well as wages and foreign trade.

After smoothing out the cycles with a duration of nine years or less, he discovered two complete cycles and the beginning of a third. The first cycle began in the late 1780's (Industrial Revolution), rose until mid 1810 before falling again in the mid 1850s.Itroseagainuntilaround 1875, then fell to the late 1890s, began rising again to about 1920 and was starting to fall as he studied it. (See fig 1 opposite)

His discovery led him to believe that people are a bit like lemmings. Regardless of Government intervention, this cycle will fulfill itself. Whatever they might try to do, the role of government is limited to trying to smooth out the problems in the

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Commercial Rent Reviews.....from previous page

Rent Reviews - The Most Appropriate Umpire

At 11.5 of his paper John Marshall quite rightly raises the issue of the possibility that in some cases, it may well be appropriate for the umpire to be an experienced lawyer rather than a valuer.

In a minority of cases, there could be merit in that argument but there is nothing to stop a valuer/arbitrator being given the assistance of legal counsel for one or both parties and neither is there anything to stop a valuer seeking independent legal advice, provided the decision remains his/her own and not that of the advisor.

In a very difficult case, I can also see merit in the formal approach of valuers sitting as arbitrators, with a lawyer as umpire. Usually, however, unless the amounts involved are significant, the cost of such an approach is prohibitive.

In the final analysis, it is the real issue that determines the most appropriate umpire but I do not think that valuers should be fearful of undertaking the task. While conscious of the obvious fact that as a valuer, I may not be competent in the law, I am also conscious of the fact that most Court determinations strongly resist the temptation to interfere with matters of fact to be determined by the valuer.

There is no doubt that valuers/arbitrators are now required to have a far greater knowledge of the legal implications involved in interpreting lease documents. However, I find it difficult to accept that given that knowledge, the valuer is not up to the task even though I accept that when the issue becomes legal majority and valuation minority, then it should be horses for courses.

I would reiterate that acting under the Arbitration Act, having a determination appealed to the High Court does not represent to me a risk. Why be frightened of that prospect? That being so, why be frightened of giving a speaking award as opposed to either a non-speaking award or an annexe which stipulates that such document does not form part of the award.

The preceding comments do not apply to expert determination.

In the end, the most appropriate umpire must depend on the prime issue. However, I see a trend towards emphasis on legal principles to the detriment of quality in valuation evidence.

Interest on Arrears

I admit to no competence in this area and leave you to the advice of Mr Marshall. I would, however, say this as a layman. It seems to me that the review of rent is the only certain item requiring renegotiation within a lease term. It is thus a very basic right and one which should not, in my opinion, be removed for fear of awards of interest or cost.

Land Tax

Thank heaven the problem is going away.

Supply of Valuation Reports to Tenants

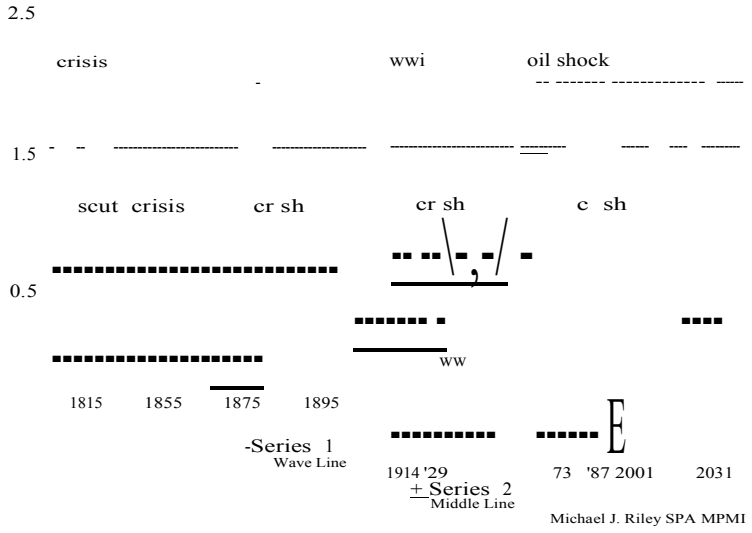
I am firmly opposed to the supply of reports to either party. Exchanged, yes. Supplied, no.

There is considerable merit in John Marshall's suggestion that a certificate of valuation be supplied to the client, particularly where the lease calls for the lessor's asking rent to be based on a Registered Valuer's assessment.

Conclusion

Over recent years I have found lease interpretation in conjunction with the case law to be an intriguing and fascinating aspect of a valuer's work. I would hazard the guess that in my earlier days, life was much more simple and, in many cases, the lease was only perused in order to get the correct date and who was responsible for what. I would, however, caution against the valuer making interpretation of lease contracts, a means to push a barrow. A

Figure 1.
The Kondratieff Wave in History



downturns and control the euphoria in the good times. For me, the theory is becoming increasingly credible. At the moment, New Zealand is about at the trough of a fourth wave.

The important effect of this (and the reason that Kondratieff was sent to the salt mines) is that governments are absolved from blame and credit for the turning points of the cycles.

As stated above, they can only try to make things better but they can't prevent them. Kondrateiff would have said that Rogernomics could not have pulled New zealand away from the downturn and Richardsonomics will not be the panacea that we yearn for, either.

Chanting Hare Krsna would be at least as useful as either of these finance packages in terms of stopping the economy from sliding. Things take time to work through.

The Long Wave is made up of three basic components. The first is the period of the Upswing. This takes about 25-30 years to complete and it represents rising prices, accelerating inflation and rising interest rates (as a result of the former items).

At the top of the cycle, there is galloping inflation, speculation in shares, rapidly rising commodity prices and possibly land booms.

After the peak has run through, it is followed by a weak downturn, then a "level" plateau which lasts for about a decade. Businesses and people feel generally economically satisfied during this phase. Everything appears to be in balance and it seems as if this is an easy-going "Golden Age" which is going to last forever but nothing in nature can stay the same for very long. It must change and it does...

The final phase, the downturn, begins with a sudden and surprising impact. The "golden Age" was merely the calm before the storm, because a Depression is upon the people.

Often this final phase is actually quite short, but because of its speed and depth and the effects it has, it is the most noticeable and most feared of all of the stages in the cycle.

Fig 2. shows an approximation of a single phase of the cycle. Surrounding the Long Wave are a 10-year cycle (the Juglar cycle) and a 40-month (Kitchin) cycle; however they merely explain short-term events.

Many people have tried to provide an explanation for this scenario. At first it was thought that the volume of gold being extracted was the causebecause there was a good direct relationship between the supply of gold and the Long Wave cycle. Later, it was decided that the relationship was inevitable, since its value is mainly as a currency and so many gold deposits become worth prospecting as the value of currencies rise.

Other possible contenders were: Monetary and Fiscal policy but why would they dictate such a rigid cycle?

Wars werean option,but WWII spoiled the trends. Commodity prices certainly move in line with the cycle, but like gold, probably as a result of it, rather than the cause.

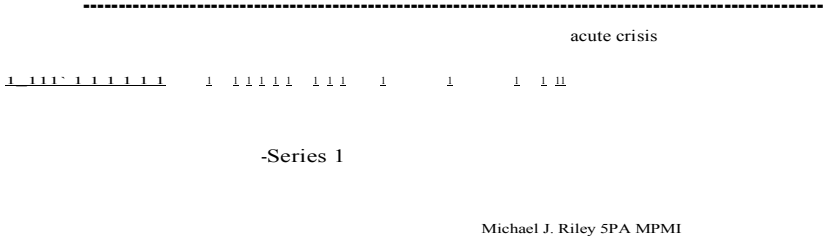
The most plausible theories are because of investment attitudes. Dr Ravi Batra, in his book *The Coming Depression of 1990* sums it up best with his explanation of an unequal distribution of wealth.

If you give 20 people $100 each, in a week's time five will have $200, 10 will still have $100 and the other five will have nothing.

Cycles start with a reasonable distribution of wealth among everybody. Some people are entrepreneurs and set up companies, others become workers and work for the companies in order to make money to buy things that they make.

0

Figure 2
Idealised Kondratieff Wave



So really, the company and the employee should have a close relationship each depends upon the other. But the company needs to make profits, both to fuel itself and to provide the shareholders with an income. The profit share varies in relation to the risk of the capital invested. The required return on capital increases with inflation.

As a result, the proportion of the companies earnings that go to the wage earners varies as we go through the cycle. Not only that, some companies simply don't operate efficiently and "lose" money along the way. Because money and life has been "easy" for some years, the economy as a whole tends to operate inefficiently.

The downturn occurs when there isn't enough of the proportion of wealth in the hands of the consumer species to fund the producers. Dr Batra suggests that in America in 1986 the richest 1% of the Americans had more as a group than the entire bottom 90%.

Credit comes into vogue, as companies offer an easy way to buy the products. Without credit sales, a lot of them would go broke.

But the interest on the credit forces the real price of the products even higher in proportion to the share of wealth that the consumer has. Effectively, he/she is paying for goods today with earnings not yet received.

When the imbalance between seller and buyer wealth becomes too great, we have reached an impasse which forms the downward "third" phase of the cycle. The highly-geared companies go broke, liquidate and cause losses for their creditors - both companies and lending institutions.

The workers from the liquidated companies are laid off and so the consumer spending power is further eroded, liquidation sales and "Giffen goods" erode the ability to compete profitably, forcing the other companies and lending institutions into difficulty and liquidation.

Tax receipts go down, welfare goes up and the government itself must retrench staff and increase the taxes of those with jobs, but this only exacerbates the problem.

The cycle is only broken when the balance of wealth shifts back to a manageable level.

At the first stages of the downward trend, the balance of wealth is too unstable to allow a recovery, but in the later stages, entrepreneurs appear and either produce the goods that are needed at a reasonable price, or else buy up the surplus plant/equipment or liquidated companies cheap, thus reducing the costs of production. Things get better when people as a group decide that they aren't going to get worse.

There are positive gains after a downturn. It helps get an economy back to an efficient keel again, causes people to realise the simple pleasures of life and, perhaps most importantly, encourages innovation and cheaper ways of manufacturing goods and services.

Some people in trade groups who have been laid off now won't regain their former positions because of technological changes as a result of the downturn.

It seems, with the Kondratieff cycle, that the whole process takes around 60 years to complete.

My own computer analysis of the cycle suggests that the beginning of phase 1 of the present cycle occurred around 1943, which was the turning point of WWII (1929 was the acute crisis point but the cycle does not turn there). 1958 was the middle of the prosperity phase, which lasted until around 1973, which was a crisis phase at the peak of the cycle. Readers will remember the oil shock around this time.

From 1973 to 1987 was the plateau, when things seemed fine but were grossly imbalanced, and 1987 marked the collapse into phase 3, the final stage of the cycle.

The bottom of this cycle should occur at about 2001, when the beginning of the next prosperity phase begins. Things will probably get "better" in the sense that they cease to getworse well before then, but we shouldn't expect easy times until after the cycle turns.

Whether we can look to the last Depression, say "we are here" and point to some stage or year as a *Herald* cartoon did when its caption read, "Remember to turn your clocks back to 1932", remains to be seen.

Certainly, the Government economic policies do compare well with those implemented at that time and if New Zealand is at an equivalent point in the cycle to 1932, then that should be about as bad as it's going to get.

After 1932, firms began to take on staff again and the trough stabilised, so let's hope that 1991 will bea repeat of this. There is one other mystery factor that I would like to mention, though...

Over the years the world has gone from village economy to global economy. Is it possible that this Depression is not about individual countries all having problems at the same time, or is this truly a world-wide problem?

Has the balance of the wealth shifted this time to countries such as the oil-rich nations, or Japan and Asia, and will the rest of the world have to suffer until they lose it again.

Perhaps an article in the *Valuers Journal* in 54 years' time, when the world is again in turmoil, will enlighten us with the answers. A

The Long Wave Economic Theory

"The downturn occurs when there isn't enough of the proportion of wealth in the hands of the consumer species to fund the producers"

Staying Interested in Your Profession

New & exciting valuation opportunities the publicfindustry will demand and pay for in the future

by J S Baen & C S Croft

To many, the term "Standards of Practice" implies a "cook book" or formula approach to the valuation profession and a misapplied concept of routine, day in and day out boring methodology. Often we project the illusion of a repetitive process that is a gross misrepresentation and over simplification of how exciting our valuation profession can be.

First of all each subject property represents a multitude of variables that contain hidden attributes and potential for economic gains and/or losses. The insight and challenge for the competitive valuer is to unlock the economic puzzle, decipher order where only chaos appears on the surface, or conversely, to find economic pitfalls where low risk and order appears to be the case to the untrained eye. Valuers are paid (and most often underpaid for this service) to look beyond the superficial with a trained eye and question the validity of what appears on the surface to be the obvious. Rent concessions, tenant improvement allocations on rent reviews, and valuing "Sick Buildings" are only a taste of the variety and challenge of assignments facing valuers in the 1990s.

At recent BOMA (Building Owners and Management Association) meetings held in Wellington and Auckland, a panel made up of several commercial bankers addressed the delegates about the future and trends in the mortgage market. At both locations there were different groups of "banker" panelists who categorically attacked valuers for not predicting a fall in property values and poor performance of commercial properties three years in advance.

Placing the "blame" during a financial fiasco is a human trait and a tendency that is a natural response for irresponsible, crippled and wounded young officers (bankers) to do while their foot soldiers (valuers) are out in front fighting with bayonets. The negative comments in our opinion were unfounded, unfair and reflected on unfortunate attitudes that must be corrected.

There is one thing for certain, the valuers did their duty, accomplished the task of providing valuations in a rising market and stood behind their professional estimates of value...that were valid opinions on the day the reports were signed. Comparative market and income analysis based valuations were the order of the day and were what the banker/clients asked for in their letter of engagement "to determine the market value of building `X' on a certain date for a professional fee of $Y."

The "clients" purchased Morris Minors and got what they paid for which is a fabulous deal in this world where so often one doesn't get "value for money".

Now the surviving bankers say what they really wanted was a financial feasibility forecast for the investment in the various properties.

Professional valuers please take note. After substantial losses have taken place in the banks, it appears substantial increases in your level of service above a valuation report may now be required and your only questions should be:

1. How to conduct a thorough financial feasibility study?
2. How much are the clients willing to pay for this major upgrade in service and data collection that will be required?

For a review of how far beyond a "market valuation report" a "financial feasibility study" extends, may we list a few components and features of the latter:

1. Effect of future changes in financing and Inland Revenue Service tax rates/ policies on the viability of the subject property.
2. Inventory of existing (completed), under construction, planned and available raw land (properly zoned) that will, can, could or might compete with the subject property in a five-year period.
3. Historic and five-year projected absorption rates and rental rates for similar properties in the market.
4. The financial stability and viability of any preleased tenants.
5. The width and breadth of a region's economic diversification and/or reliance on one or more types of industries complete with sensitivity and risk analysis.
6. Collection and interpretation of meaningful socio-economic trends and data for the area.
7. Competitive market analysis and cost/ benefit analysis of "high-tech, smart" buildings in markets that may not be willing or able to pay required increased rental rates as required to offset initial capital costs.
8. To assess the financial ability and stability of the proposed owner/developer and evaluate the management/ marketing capabilities of parties involved with the project. This has long been a "weak" factor that has often been assumed to be "adequate".

As anyone can ascertain, the com-

mon practice of valuers estimating market value and recommending the "appropriate" level of debt to be placed on a building is realistically impossible without the above work being completed.

What are the options?

1. Valuations can be conducted and services priced as usual, but make it perfectly clear to the client that the estimated market value is not a forecast, but a value in time (one day) subject to changes in the market. In this case (and we believe it has been the practice and where the "blame" falls), the mortgage officer then must taken on the full responsibility of business and market risk in his loan approval process.
2. Valuers must learn to conduct, and appropriately price, complete financial feasibility reports that include all data, notes and research bound between the front and back covers of the report such that any reasonable reader can understand how the conclusions were derived.

Today there certainly is a wide difference between what the customer is willing to pay for (a Morris Minor) and what they want (a Mercedes Benz), but there should be absolutely no misunderstanding about which model they have ordered in the letter of engagement.

The Exciting Future

Financial feasibility reports are only the tip of the iceberg as for the challenges and diversity of valuation topics that are on the horizon.

More professionalism, research, provocative thought, and education will be required to develop the required skills, intellectual capacity and ability to solve some of the following valuation topics

"Valuers attacked for NOT predicting a fall in property values ..three years in advance."

and concepts. Congratulations! The future is here, you are in an exciting profession, and the importance of your professional services should be ever growing.

The recent trend toward accounting firms creating high level valuation positions is a preview of the growing respect and importance being placed on the valuation of assets on balance sheets and audit reports. It may also be that these "new" valuers will play important roles in reviewing other valuers' work on a very professional and impartial basis.

All signs point to everyone doing excellent work or risk the loss of business and/or referrals from major accounting firms and/or their clients. Periscopes up!

Valuation Topics to Ponder

1. Water rights for power, drinking and irrigation as they affect property values.
2. Fishing rights valuations in the coastal zone.
3. Valuation of reserve areas based on new court rulings.
4. Hunting and fishing rights along the Queen's Chain changes in property values if public access is restricted.
5. Measuring the economic value of waste water effluent rights utilised for irrigation water and nutrients.
6. Treaty of Waitangi and possible land claims in valuations today contingent valuation reports Maori land claims.
7. Valuation of "Sick Buildings" and "Cured Buildings" the Stigma Factor, how to choose an appropriate discount rate.
8. The effect of below market interest rates on valuation of Housing Corporation qualified housing does EZ Financing at below market financing terms (affordability) drive the lower end of the housing market?
9. New valuation/accounting/audit relationships and demands on the profession will valuer's notes become formalised and part of reports? Willprofessional fees increase accordingly? (Professor Stuart Locke is doing excellent work in this area.)
10. Valuation of the consents of various kinds as proposed in the Resource Management Bill.
11. Land sales inclusive/exclusive of GST - beyond available data.
12. Valuing a property that is subject to a building permit/zoning change.
13. Valuation of time share holiday home interests - retail/wholesale/resale. Is there a market?
14. Valuation of damages to public and private property due to environmental accidents and deliberate dumping over land and water.
15. Placing a value on various multiple use rights of Crown land.
16. Sale of state-owned assets - partitioning the components of property, plant and going concern values and allocation for tax purposes.
17. Valuation of projects that are subject to wetland development constraints.
18. Controversies and client demands for shortform residential/commercial summaries part of a full report, but not a replacement?
19. Pricing valuation service to compensate for time and legal liability and new additional supporting documentation requests.
20. Effect of different known earthquake risks/fault lines on economic value of properties versus market value.
21. Valuation of antiquity sites and structures which "warrant" historic status.
22. The role of property management assessment in commercial valuations are assumptions of "good management" enough?
23. Valuing profitable submetering of electricity to commercial tenants role in the valuation report?
24. Rural land valuation when known contaminantorresidualsarepresentin the soil DDT, toxic wastes-from A(Aas in arsenic) to Z (Z as in zoology of micro-organisms TB/ brucellosis/foot and mouth disease, etc).
25. Adjusting historic comparable sales for proposed and/or implemented changes in tax laws and interest rates.
26. The valuation of airline landing slots and terminal space at the world's busiest airports.
27. Measuring the macro market effects of community concessions on attracting/keeping industry in an area (or how companies can hold a town hostage and warp a "free market" real estate economy).
28. Valuing commercial buildings in Hong Kong considering the political uncertainties of the 1997 timetable.
29. The evolution and development of valuation methodologies and ad valorem tax systems in Eastern Europe and the Soviet Union. A shift to a free market without comparable sales or market rent histories.
30. Projecting the impact of a balanced budget on regional and national real estate markets higher taxes, lower spending by Government has 0

The Meaning of Value in Real Estate

by R R Fraser

Valuation, the problem solving imperative, outlined by Whipple (1990)' puts the process squarely in the ifeld of scientific endeavour. B eforeproper embarkation in the sea of science however, the meaning of value should be explored, for possible ways to re-define it to make it a sharper more useful tool in the quest for solutions to real estate problems.

Valuing property is the process involved in estimating monetary value; for example, to assist in consummating a sale. Value, however, is a word of many meanings. Logic might indicate that only one type could indicate the economic significance that could be attached to property but the word is used in many different ways. Ring (1970)2 lists the following types: Economic, Stable, Appraised, Potential, Book, Sound, Fair, Real, True, Depreciated, Warranted, Face, Cash, Capital, Exchange, Sales, Salvage, Intrinsic, Extrinsic, Tax, Use, Rental, Speculative, Reproduction, Nuisance, Liquidation, Mortgage loan, Improved, Insurance, and Leasehold.

Of these different "values" several are in common use and some in occasional use. "Market Value" is one of the former; though a commonly accepted standard, but in many circumstances untenable, it is the price arising where the seller and purchaser transact freely as business people on an equal footing, aware of the advantages and disadvantages, present demand, and other factors likely to affect land price, or as follows:

> "...I conceive it sold then,...by voluntary bargaining, between the [seller] and a purchaser, willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration..... both to be perfectly acquainted with the land, and cognisant of all circumstances which might affect its value, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood, as then appearing to persons best capable of forming an opinion of a rise or fall for what reason soever in the amount which one would otherwise be willing to fix as the value of the property." 3

The definition has been modified to that followed by the International Assets Valuation Standards Committee and endorsed as a standard (for public Company reporting) in Australia by the Australian Institute of Valuers and Land Administrators:

> "...the price at which an interest in a property might reasonably be expected to be sold at the date of valuation assuming: (a) a willing seller, and a willing buyer; (b) a reasonable period within which to negotiate the sale, taking into account the nature of the property and the state of the market; (c) that values will remain static during that period; (d) that the property will be freely exposed to the open market; and (e) that no account will be taken of any higher price that might be paid by a purchaser with a special interest" 4

Other parts of the world, USA and UK for example, have similar definitions derived partly from courtdecisions and partly by interaction of members of the large appraisal/valuation societies.5.6 The major assumptions in the definitions are as follows:

- willing buyers and sellers;
- a reasonable period to negotiate a sale;
- based on highest and best use
- parties are prudent and knowledgeable;
- the land market is in equilibrium;
- ignore sales to special interest purchasers.

Value according to the above assumptions is defined for circumstances which are artificial (what ought to be done) its actors are fictional the reasonable period to negotiate may be impossible to determine properties are rarely developed to their highest and best use. The definition insists that all transactions are the outcome of identical processes. Inherent artificiality and limiting conditions produce an estimate of value confined to that of "what ought to be for an economic man".

Classical economists defined "economic man" as one motivated by pure economics in the search for the biggest profits 8 However he is perhaps best described as "...a bargain hunter, who never pays more than he needs or gets less than he could at the price: 9 As such economic man has much in common with what the law knows as the "reasonable man of ordinary prudence", sometimes known as the man on the Bondi traml0; the unnamed individual. A small speck in a crowd.

There is yet another assumption, apparent in the International Assets Valuation Standards Committee definition. It is to ignore the price paid by some special interest purchasers. Murray (1969) points to court decisions where high priced sales were ignored by courts as evidence of value where purchasers paid high prices because of "extreme need", "whim" or "extravagance" 11 Blue blood roots notwithstanding, an intending seller would have considerable reason to grieve, should a servant valuer not bring to his attention the possibility of purchaseatahigher

from previous page

important market implications.

31. The potential effect of zero inflation on mortgage default rates and home ownership trends. Would long-term interest rates really drop far enough or fast enough to avoid financial disaster?

32. Valuation of properties in the distant suburbs. When considering implications of significantly higher petrol prices.

33. Projecting the effect of higher oil prices on distant suburban home values over time. Time/value and travel expense.

34. Valuation of air space for clear radio wave transmissions.

35. Valuation of outer space satellite orbits which are in very short supply. A

price. Likewise property trust unit holders, whose unit price is based on annual valuation of property portfolios, will have values set in place using the same definition 12 The value figure is susceptible to the influence of the avoidance of consideration of a special purpose buyer. The situation begs the question of whether the same arguments could be used to justify ignoring a low sale to secure a higher value than otherwise justifiable. Why should itbe any different? The principle is the same.

In effect the provision gives a license to completely ignore a sale which may be a market leader. As such it may be the best candidate for representation of worth. Intellectually then, the qualification that a value conclusion ignore information from a special interest purchaser is untenable in a definition whose aim is all embracing."

Assuming conditions that may not be true (and adjusting for them) places valuation in the reasoning-from-dogma category that most fields of investigation have abandoned. Scientific endeavour renounced such aposition many years ago [1a] Though called a science, valuation is apparently just a pretender. Science insists on rigorous examination and sifting of evidence to reach a conclusion. Rejecting a particular event, high or low, just because it is different is abhorred. Such action introduces bias which scientists, including the class of scientists that valuation ostensibly belongs (social science) reject. Anything that explicitly biases outcome may be comfortable in the ring of chicanery but has no place whatever in science. Inherent therein are self-evident implications for professionalism.

There is a proviso of the foregoing however. It is that scientists do sometimes discard what they term "outliers", an information piece which is so distinctly different from some sort of norm, that it presents a very strong suggestion of error in measurement. They do so in association with full disclosure, though,

Even if valuation is more art than science, like a painting, the chance for comparison with a Van Gogh, Turner or Roberts, should be embraced rather than discouraged. Artists tell us that the far reaches of the spectrum of art are needed as measures of the ultimate. Similarly the whole spectrum of sales (or rentals, or income potentiality) must be examined for clues to value.

In *Bell Hotels Ltd v Motion* (1935),15 acting on the advice of an expert in valuation of hotels a party sold their hotel. After a short period of time it was resold for a much higher price. The first vendor sued the expert valuers and were successful in recovering their losses. Under the presently approved definition of value the valuer could have claimed that the party to whom the hotel was finally sold was a special interest purchaser and thus outside the realm of the valuation task. On those grounds the valuers would have successfully defended the original valuation. Is this fair?

In the circumstances how can a profession of so-called expert valuers condone the exclusion of one or more potential buyers? The answer is they cannot if they wish to be true to the professions. The only conclusion possible, that justifies endorsement by valuers of exclusion of a special purchaser, is that it limits the task and thus possible claims for compensation for negligence. However, to maintain it on such flimsy grounds is reprehensible in those clamouring for greater professionalism.

Valuers are social scientists and like other scientific analysts should be endeavouring to find ways to widen the net that gathers information, not restrict it. To the extent that they fail, they fall below the standards required of those in pursuit of scientific truth.

Use

A critical premise in valuation is defining use. The use which earns the most money has been called the "highest and best use". Only few use land to its maximum. What transpires is that people use land to a level that satisfies their particular monetary or other goals. This explains why there are beef cattle enterprises in localities more economically suited to wheat, sheep raising businesses in localities best suited to cattle, single dwelling houses on land zoned for duplexes, houses on land zoned commercial, etc. The alternate uses are something less than "highest and best"; sometimes very much less.

Highest and best use, Graaskamp (1972) asserted, was developed by economists. In that context it included costs to society as well as the owner. However, when the appraisal profession adopted it they conveniently abandoned any reference to social mores (traditions, habits) of aesthetics, ethics, or externalities.16 Externalities are economic impacts, positive or negative on the surrounding land parcels or an effect on a whole community. An example wouldbeadevelopment that maximises its owners' wealth but results in an increase in public sector costs and therefore shire rates. A development that damages the value of an adjoining or nearby property by adversely affecting views overwaterisanotherexample. When highest and best use was adopted by valuers it is very likely that the social effects on value were omitted in ignorance of their importance to the definition.

Graaskamp (and others, including particularly Ratcliff") thus preferred"most probable use" as representing the use most likely to prevail given the constraints. In fact Graaskamp described highest and best use as moribund and obsolete particularly "...in a decade when the public is re-establishing its control of land use."18

Most probable use deals with the actions (or predicted actions) of real actors in the market who may not be so informed or skilled. They build to what they believe will be the most profitable given their subjective analysis of the risks.

What happens on sale (with regards to price) is the goal of valuation. Thus what the market believes will happen will influence market conduct and then (and only then) become of predictive and prophetic significance.19 Moreover, this is in spite of what the best expert valuer can forecast of ultimate use.

Highest and best use as visualised by the valuer may not be the same use as envisaged by the developer. Whose use should be relied on- the prophetic valuer or down to earth developer putting his money on the line? The developer of course. If valuers are in the business of trying to predict what will happen, it is better that they rely on what has or is being done, than what the detached beholder (valuer) can imagine. Highest and best use in the circumstance must give way to most probable use, a concept based on market perceptions of what is probable.

Most Probable Value

Re-defining "highest and best use" to "most probable use" leads the way to replacement of market value with most probable price. Each piece of land is different and even similarly situated land may have vastly different current uses and different future use potential. Besides, an important player in land use decisions, the proprietor, is by nature subjective. Subjects (people) are variable in the way they do things behold the way people act, the way they dress, and what they achieve.

Implying that he who can pay the highest price is the most appropriate user of the site has its genesis in the era when entrepreneurial real estate development skill was the sole determinant of land use. To repeat an earlier point it is obsolete now that public agencies have re-asserted control (Graaskamp, 1972). More than

ever then land use predictors must take site-external factors into account. Highest and best use as defined in days of yore no longer fits current land use realities. Relfection of reality in a market based definition of value is impossible if the key question of use is dealt with by such an antiquated standard.

Feasibility within constraints of the subject, his/her peculiarities of satisfaction, expertise, time, resources and political context produces an income level (and hence value) that is almost always less than the maximum attainable. The conceptual change in assumption from maximum to less than maximum results in a land value estimation likely to be closer to the market than one based on use of maximum alone. Congruence with the cut and thrust of the market is the aim. He might be a willing seller but he's not willing at any price. There may be a willing buyer but like the seller, not at any price. The concepts taken together dictate a revised version of the land value standard. Ratcliff (1972)20 coined the phrase "most probable price" for it.

The profession of valuers, blithely following father's footsteps, prefers the normative, how-it-ought-to-be-approach to market value. However, most probable price, derived as it is from most probable use, is rooted in the logic of the real estate market. The valuation profession needs to use it to help counter inroads to the profession, especially at the high priced end, by accountants and others and "...each of us has to lift his game and review critically a great deal of conventional wisdom." (Whipple, 1990) 21

There are market and assessment inefficiencies. Even if the market was perfectly efficient the difference in property description would still create the impossible problem of determining comparability and adjusting for differences. Combine this with subjectivity of buyers and sellers and there is a cauldron of uncertainty. There is then no escape from uncertainty in predicting value. The term most-probable-price explicitly recognises market uncertainty and thus gives the estimate of value more credibility.

Economic man (and perhaps the Bondi tram man and the man in the crowd as well) has severe limitations as a satisfactory concept in economics, however, because according to the economists, it takes no account of man's other motivations such as the non-economic goals of security and freedom 22 If economic man has faltered then the normative (Spencer) definition of value falters (even fails) too.

Squirrell (1985) discredits the Spencer definition, especially its insistence on maximisation, as a satisfactory basis for real estate investors assumptions.23 Speedy (1991) too supports the general use of most probable value but out of necessity acts as if it were the legal (normative) approach that he supported.24X

A later theory in economics, "rational expectations", builds on economic man a greater degree of predictability. In the process use is made of sophisticated tools (eg mathematical models) to help refine the basis on which decisions are made and is more about actions than intentions to act 2 The basis of market value as a normative definition of value, is economic man in action. Rational expectation theory is a natural outgrowth or refinement of economic man just as most probable price is a concept which grew from the incongruities, improbabilities and potential errors inherent in the fiction of market value. Market value was the start. Mostprobable price is not only the improved model but it is practical in a way market value is not.

Conclusion

The word value is imprecise in its raw form, a fact recognised across the whole valuation profession. The courts, and probably as a consequence most valuers, prefer a normative (Spencer) type definition. However it has serious deficiencies as a tool for assessing value. Its approach is to assume a beautiful world whereprices paid in the real estate market are perfect indications of worth. Economic man on the Bondi (Wellington) tram is at work never paying more than he should nor getting less than he ought.

Economists have enlarged their economic man to give him "rational expectations", a man with powers and sophistication sufficient to observe the market. The valuation profession should accept a similar mantle of reality too. What is needed is "most probable price", a definition whose subject is that real man with rational expectations making the occasional suboptimal decision, some brilliant ones and some poor ones, but always having available and using as necessary the required analytical tools. The net overall effect is value based on land developed as developers do it; to something less than the guru determined level. The resulting value ("mostprobable value"), as aconsequence of less intensive development than possible, is less than maximum.

It is however all very well to advocate change to mostprobable price as the basis of valuation, since the question it begs is, will it result in better valuations.

While utilising all the facts and analysing them scientifically will produce better conclusions if done right, a change in the definition as proposed, introduces an element of flexibility that could subvert the aim. Though it is concluded that overall benefit will accrue from a change it must be subject to the following: the proposals firstly be subject to searching and open debate in the public arena and a conclusion reached thereby that it is desirable to change. Enhanced publicly perceived credibility from such a process could begin a self-generating increase in esteem and expertise, both assisting in clawing back the business lost to the profession from the pseudo real estate analysts who think the only expertise required for proper valuation is familiarity with spreadsheets, cash flows, and lease terms. In the process most-probable-use and most-probable-price would become entrenched in the profession and gradually spread to the courts and thereafter the legislators.

Problem solving is the aim, scientific method is the means but value like a boat in the sea of science must be refitted and enlarged to meet the needs of its passenger clients.

FOOTNOTES:

1. RTM Whipple Valuations: A Problem Solving *ImperativeNewZealandValuerslournal* (June 1990) 14-24
2. A A Ring The *Valuation ofReal Estate* Englewood Cliffs: Prentice-Hall (1973) 6
3. Isaacs J. in the Spencer case, High Court of Australia 1907 5 C.L.R., 441.
5. Australian Institute of Valuers and Land Administrators. *Guidance Notes* with *Background Papers on the Valuation of Fixed Assets and Certain Other non-eurrentAssetsforReportingPurposesCanbena:* Australian Institute of Valuers & Land Administrators. (c1988) Guidance Note 3.
5. Amer. Inst ofReal Est. App. The AppraisalofReal Estate Chicago: AIREA (9th Ed 1987) 19.
6. UK Chartered Surveyors (and like bodies in other countries in the European Economic Community) are signatories tomaterialcontainedinthedocument referred to in 2 who like the Australians are part of the International Assets Valuation Standards Committee. The definition given is therefore endorsed by by them.
7. Highest and best use is the use which produces the highest income and therefore the highest value. See Paul F Wendt Real Estate Appraisal: Review and Outlook. Athens: Univ. of Georgia Press (1974) 160
8. D M Bensusan-Butt *On Economic Man: A Essay on the Elements ofE.conomicTheory* Canberra: ANU Press (1978) 123
9. John Eatwell, Murray Milgate & Peter Newman The New Palgrave: *A Dictionary of Economics* London : Macmillan (1987) Vol 2 54.
10. John G Flemming The *Law of Torts Sydney:* The Law Book Co (7th Ed 1987) 97.
11. JFN Murray *Principles and Practice of Valuation.* Sydney: Commonwealth Institute of Valuers (4th Ed 1969) 71
12. National Companies and Securities Commission: addition to Policy Statement no. 121 dealing specifically with Unlisted Property Trusts (August 11 1990).
13. A sale cannot be ignored unless it is abso-

Compiled by Leonie Freeman

What's Available in Property Management Systems

by L Freeman

If you are contemplating the purchase of a property management system or at the very least trying to identify and find out more information surrounding these software packages, the greatest difficulty is actually identifying what types of systems are available and whether they are suitable for you.

It is for this reason that I describe some information regarding one such property management system which is available for sale. I have not seen a demonstration copy of this programme and cannot therefore provide any recommendations on its suitability, usefulness and adequacy. The following extract is merely provided as a source of information.

If anyone else has comments on their own software programs for property management or other, please do not hesitate to provide some written comment to the editor.

The software package now discussed is called the Property Management System (PMS). This is a commercial property management package for property managers and accountants. It is designed for ease of use and runs on IBM or compatible hardware. PMS is supplied with a comprehensive user manual. A prompt line is displayed on the screen at all times, indicating which function keys are available. Context sensitive help is available on the screen throughout the system. PMS incorporates a database and accounting modules. The following is a brief description of each of the main system modules.

Leonie Freeman M.Com(VPM) is a registered valuer workingforDarroch & Co in Auckland and has been responsiblefor setting up their computing and research systems in New Zealand and Australia,

PMS Database

The database features easy to use enquiry screen and makes access to historical information a simple task. The system stores property details including physical description, rent roll/budget, legal details, valuations, mortgages, suppliers and contractors. Lease details can also be held, such as a rent review and maintenance diary, notes on rent charges and insurances. Financial details of tenants, contact names and details are easy to access.

An interface to the PMS accounting module is also provided.

The software offers comprehensive reporting on rent reviews and maintenance due, vacancies, tenancy and rental schedules. It also has the ability to prepare user generated report for one-off requirements or regular use.

PMS Accounting

The accounting module includes a rent/debtors ledger with automatic posting of rents due and apportionment of operating expenses over a multi-tenanted property. Open items accounts means thatpayments received can be allocated to specific invoices.On the reprint side, the system will print statements, overdue notices and reports and all standard debtors ledger reports.

Customised financial report layouts can also be developed and there is a data export utility to transfer data to a spreadsheet package.

The creditors ledger provides similar open items accounts, so thatpayments can be made to specific invoices. Creditor reporting is also available.

The general ledger is formatted in a lfexible accounts structure, including BOMA codes and batch posting of trans-

Footnotes..continued from previous page

lutely clear that no similar transaction is likely to occur. The purchase of farmland at well above prevailing values of land for use as a buffer zone for a mineral processing plant is an example of a situation where a valuer could be justified in ignoring high sales (the 1970s purchase by Alcoa of farmland in the vicinity of the Pinjarra Alumina Processing Plant, just South of Perth, W.A. is a particular example). When the declared buffer zone was in place, protestations of any kind could not influence a purchaser to pay the previous price. Information such as the size and extent of the buffer zone would be a publicly discoverable fact from environmental imperatives laid downby controlling authorities and would form the basis for evidence that the buying spree had ended. Likewise potential purchasers cannot be ignored without facts leading to an irrefutable conclusion that other buyers would not be of the same mind.

14. Alchemy is the pursuit of the conversion (transmutation) of base metals into gold. Spirits and black magic notwithstanding it was a serious endeavour in the middle ages but became discredited by the eighteenth century. Its demise was achieved through the efforts of those who sought and discovered scientific facts that proved the impossiblity of converting one metal to another. They were the precursors of present day scientists.

15. *Current Property Law* (1952) 403; *Current Law Yearbook* (1952)194; P M North, Values: A Study in Professional Liability *The Valuer* XIX:2 (April 1966)101.

16. J A Graaskamp: A Rational Approach to Feasibility Analysis. *Appraisal Journal* XL:4 (Oct 1972) 519.

17. R U Ratcliff *Valuation forReal Estate Decisions* Santa Cruz: Democrat Press (1972).

18. J A Graaskamp. (1972) 519.

19. This relies heavily on, and is partly a paraphrasing of R U Ratcliff. (1972) 308-309.

20. R U Ratcliff Ibid. passim.

21. R T M Whipple Ibid 15.

21 Christine Ammer& Dean S Ammer*Dictionary of B* usiness *and Economics* New York: Macmillan (1977)130.

23. M D Squirrell Uncertainty in Real Estate Decisions *The Valuer* XXVIU:5 (Jan 1985) 379

24. Speedy *S-PersonalComnwnication (Feb* 1991) "My p ersonal approach is to view the W illing Buyer-Willing Seller concept as a legal approach (privately) agreeing with Graaskamp, but playing along with the legal definition out of necessity. I personally ivew 'value' as being the most probable selling price viewing it in my mind as the central point of a hypothetical 'bell' curve, whose standard deviation will vary with the reliability of the evidence. I say hypothetical , because there is no way you could come up with the number of buyers to hypothetically bid fora property, except in your imagination. My bell curve is skewed sideways, because I really cannot envisage many (if any) buyers paying above my final figure. But I have been long enough in the business to know that under the right marketing conditions, the right buyer can sometimes be found to pay a premium."

25. Speedy S. Property Investment: Inflation Edition Wellington :Butterworth (2nd Edition 1980) 112.

26. Douglas Greenwald and others *The McGraw-Hill Dictionary of Modern Economics* New York: McGraw-Hill (3rd Ed 1983) 360.

27. Michael Carter & Rodney Maddock *Rational Expectations: Macroeconomics for the 1980s?* London: Macmillan (1984) 13.

actions from the rents, debtors and creditors ledgers. Other facilities include the charging of management fees, a payment-to-owners facility in addition to standard general ledger reports. The powerful report writer enables the user to prepare owner's reports as well as report on financial details by owner and by property.

Portfolio performance analysis is also available.

Features include:

Overdue rents can be picked up one day later. Up-to-date details are available in the event of a dispute-owner, property, tenant and lease details are all in one place.

Ascertaining leases due for review in the coming few months so that the tenant is given the required period of notice.

Using PMS, the manager can at any time print a report of lease reviews due within a selected period, and scheduled maintenance. The PMS management-due report lists all management due within a specific period, with the party responsible (owner or tenant).

Incoming invoices for operating expenses may be automatically apportioned among all tenants who are liable, and the property owner.

Different types of operating expenses may be apportioned at different rates, the apportionment calculated by PMS may be over-ridden by the user on individual creditor invoices. An invoice may be printed for each tenant. Tenants may be charged a regular budgeted amount for operating expenses, with the actual operating expenses invoices held for a "wash-up". This wash-up may be carried out at any time, at the end of the financial year, or when a lease expires.

PMS will calculate the amount of the resulting invoice or credit note and print this with a reconciliation summary for the tenant.

The above provides some very broad and summary information surrounding the Property Management System (PMS).

If your require any further information or are interested in receiving a demonstration copy, please ring or contact Warren Tobin at Financial Systems Ltd, 161-163 Jervois Road, Herne Bay, Auckland. Telephone no (09)789-069, fax (09) 789-565. A

Opening Windows to Increased Productivity

by T Proctor

ave you heard your colleagues discussing something "Gooey with a Whizzy Wig" and wondered what was going on? They are probably talking about the world of Windows and the revolution it has meant in efficiency and ease-of-use for the ordinary business computer user. The buzz-word of the moment in the computer world, GUI, refers to a Graphical User Interface and the other phrase that goes with it WYSIWYG, stands for What You See Is What You Get. In other words, instead of having to learn a whole range of commands for differentprograms, you can work with pictures that represent choice and have the same kind of menu for all your programmes. When you make changes, you see on the screen exactly what is going to be printed out.

The original IBM Personal Computers (and other makes that follow the IBM format known as clones) worked in a single-tasking environment more jargon that just meant they could really only do one thing at a time. Working with the standard Disk Operating System, or DOS for short, was like having a small desk that would only handle one type of work. If you wanted to type, you ran your word-processor. If you suddenly had an idea relating to that financial project you were working on, you closed down the word-processor and started up your spreadsheet. Your word-processor may have had a basic facility to type a table of numbers or bring in information from a spreadsheet, just as you could type a simple memo in your spreadsheet if necessary, but there was no easy way to use the best program for each job as you needed it and yet jump quickly form one to another, and also link the different files together so that a change to one would update the other.

But now the Windows family has put a whole new way of working with desk-top computers at the finger tips of the average office user. As the name suggests you can have a number of different windows open on your computer screen at the same time, layered or stacked one behind the other one running a spreadsheet like Microsoft Excel, another a word-processor such as Word for Windows or ProWrite Plus. If you want that table of financial analysis from your spreadsheet right here in your report, you highlight the section and use a simple menu command to copy it from one file to the other. You can even set up dynamic links so that if tomorrow you change some numbers, your report will be updated to reflect those changes as soon as you open it. In addition, the screen layout is much the same from one Windows software program to another so once you have learnt one, you can easily find your way around another.

Windows programs are designed to be used with a special pointing device known as a mouse. You can move an arrow-head around the screen pointing to a menu name to select it, or clicking a button marked I in order to type italic text. If you change to a different typeface or a larger font size, you see the change immediately,. Windows comes with a number of office tools such as a pop-up calculator and a clock that you can place in the comer of your screen. There is an electronic notepad so that you can make a note of an idea that springs to mind and later paste it into a report or letter, or refer to it when working on a spreadsheet. Hundreds of powerful applications for the Windows environment are available in every major categ ory from electronic mail to business graphics and project management to desk top publishing. For the tired executive there are also a number of games which have a practical application in that they provide the new user with experience in using a mouse and the Widows menu system.

Research by an American company I with a group of novice computer users states that GUI users *worked faster an*d *worked better* (completed more of their tasks accurately) than those using the standard Character User Interface (CUI) and therefore had *higher productivity* than their CUI counterparts. GUI gener-

This is the first in a series of articles provided by Financial Systems, an Auckland baseddealer who specialises in computer based solutions for the Corporate Market. The author, Tooki Proctor, is the Training Manager for Financial Systems Ltd.

ates *higher output per work hour* and *higher outputperemployee.* GUI users also expressed *lowerfrustration* and perceived *lower fatigue* after working with microcomputers, and were better able to self teach and explore than those working the the character based environment.

Support staff at Financial Systems Ltd certainly have experience of this last point. Although I teach an Introduction to Microsoft Excel twice a month, I never tire of the classes because the students find the programme so much fun.

There was one notable morning when I could hardly persuade the students to leave at the end of the session. They knew their own new machines were not ready for them at the office and they were reluctant to stop experimenting with the wonderful graphic features of the package. Certainly creating charts and adding colours, patterns and arrows hardly seems like serious work, yet the impact of a presentation using graphics will remain in the audience's mind far longer than a presentation based on the spoken word.

Our company offers regular training in Excel and Pagemaker and we support a number of other Windows programs including Word for Windows, the graphics packages CorelDraw and Microsoft Powerpoint, a powerful forms design system called JetForm Design and a personal information manager names PackRat.

Much of our in-house material and most of our presentations are produced with these programs.

Those of our own staff who have no secretarial training use the Windows environment for preference, and they and our customers report that they are usually happy to experiment until they find the solution they require, whereas in a a character-based environment frustration soon builds up when the user knows they have made a mistake but do not know how to solve it. The American study referred to earlier concludes that GUI gives a greater return on information technology investment than CUI, because the user masters more capabilities, becoming more self sufficient and confident and requires less training and support. While I don't want to talk myself out of a job, I am always delighted when our clients choose Windows products because I know they will share my enthusiasm for this new way of working. A

'.Temple,. Barker and Sloane, Inc of Lexington Massachussetts: *The Benefits of the Graphical User Interface* Spring 1990.

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ProWrite Plus is a trademark of the Software Publishing Corporation.

PageMaker is a trademark of the Aldus Corporation.

CorelDraw is a trademark of the Corel Systems Corporation

JefForm Design is a trademark of the JetForm Corporation

PackRat is a trademark of Polaris Software.

What's Available in Hardware

by L Freeman

ne factor you can always be sure of with computers is that things e cang. Something you bought six months ago is now probably obsolete and replaced by some new, faster, fancier system or machine that they tell you will do everything you want except talk (and even that is probably not too far away). The following comment focuses on what is available in Laserjet printers.

A Laserjet printer in itself is not new. They have been available for a number of years, but at prices of $7,000 to $8,000 and above, have usually been outside the scope of small businesses.

Hewlett Packard and other distributors have introduced in the last 12 months their personal Laserjet printer, or a IIP. It is not as large or quite as fast as their larger printers but has comparable levels of presentation and quality.

The IIP prints at four pages per minute (compared to the larger printers at approximately eight pages per minture) and has the option of two bin capability. The price for this Laser printer is retailing in the vicinity of $3,000 to $3,500.

Bits `n Bytes, a computer magazine, provided some comments in an article relating to this particular printer. These were exceedingly positive. Installation and setting up, they say, is easy and simple manuals are provided. As well as the capability for A4 sheets there are four different envelope sizes which can be accommodated. A total of 250 sheets can be placed in the dual bin trays at any one time.

The control panel for the printer is extremely simple, with only two indicator lights and six keys. A two line display provides status information and manual selections whenever something is being changed.

The IIP has 512kB memory and can be expanded in 1 megabyte or 2 megabyte steps up to a miximum of 4.5mB. For graphics intensive use, memory expansion is a must.

It is noted that if complex graphics pages are printed out, the time for printing can be up to four mintues per sheet.

The printer is reported to be extremely quiet and fonts provided include Courier in both portrait or landscape mode in 10 pitch or 12 pitch. If any other fonts are required, optional font cartridges or downloadable macros and scaleable fonts have to be considered.

Bits `nBytes final comment was that in essence the TIP is a compact, quiet, high quality Laser printer which provides high quality presentation for a comparatively low price.

I also note for your information that the Hewlett Packard IIP is not the only smaller personal laser printer on the market. Toshiba, Star, Brother and Canon and perhaps others all offer similar levels of presentation, quality and price for laserjet printing.

If you are interested in improving and enhancing your presentation of reports but have always been put off by the exorbitantprice of the largerLaserprinters, these designated "personal type" laser printers may be worth thinking about A.

Legal Decisions

IN THE HIGH COURT OF
NEW ZEALAND
(ADMINISTRATIVE DIVISION)
WELLINGTON REGISTRY
M.NO 551/87

UNDER the Land Valuation Proceedings Act 1948
IN THE MATTER of a determination of the WellingtonLand Valuation Tribunal

BETWEEN The Valuer General
Appellant

AND ALFRED KOHN FAMILY TRUST and SOUTH BRITISH GUARDIAN TRUST of Wellington
Respondents

Coram: Greig J
I W Lyall, additional member

Hearing:
24 October 1990
Counsel: Marilyn Wallace for Appellant
BC Bornhold for Respondents

Judgment; 10 December 1990

JUDGMENT OF THE COURT

This is an appeal against the decision of the Wellington Land Valuation Tribunal dated 8 September 1987. The Tribunal allowed the objection of the respondents to the valuation of the property which is generally described as the Quay Point Development, having a frontage to Lambton Quay and The Terrace in Wellington.

The respondents had objected to the roll values, as revised by the Valuer-General as at 1 July 1984, in respect of four freehold properties, all within the Quay Point Development.

In the result, there being no disagreement with the capital values, these were confirmed by the Tribunal but the land values of each lot, as they appear on the roll, were adjusted downwards and the value of improvements was then consequentially adjusted upwards in each case.

The grounds of appeal are that the Tribunal erred in that it:-

1. failed to assess the value of each lot as a separate rateable property, and
2. failed to give proper consideration to relevant comparable sales evidence presented by the appellant.

The appeal is brought pursuant to s 26 of the Land Valuation Proceedings Act 1948 which provides that the appeal shall be by way of rehearing.

Such rehearing proceeds on the basis of the record of the evidence and other material placed before the Tribunal. By virtue of s 28 of the Valuation of Land Act 1951 the onus of proof of any objection rests with the objector.

The site of the properties comprises 2244 square metres with a frontage of some 36.05 metres to Lambton Quay and 37.67 metres to The Terrace, and an average depth of 62.35 metres.

It is in a part of Lambton Quay which is one of the most desirable retail locations in Wellington. The property site was originally, we assume, a number of different titles which were amalgamated into the ownership of the Trusts which are collectively described as the Kohn Family Trust.

The amalgamated titles were first subdivided into two separate freehold titles, being Vol18C Folio 554 and Vol 18C Folio 555 for Lots 1 and 2 of DP 50268, together with various party wall rights, the titles then being owned as tenants in common in equal shares by the Kohn Family Trusts.

There are three buildings on the site. The first of these is Quay Point, a two-level retail shopping centre with a frontage to Lambton Quay and no ordinary frontage to The Terrace. That was completed in or about 1980.

Above the shopping arcade and fronting on toLambton Quay is a six-level office tower known as Westpac Merchant Finance House. It was completed in or about March 1983. Fronting The Terrace is a nine-level office tower with two levels of basement carparking known as NZIG House.

The land is now divided into four titles, Lots 1, 2, 3 and 4 of DP 53407. One of the titles, being the Quay Point retail arcade and for Lot 1, is owned by the Kohn Family Trust.

The other three titles are owned by the second respondent, South British Guardian Trust.

Lot 1, Quay Point, is a freehold title on ground level with a frontage to Lambton Quay extending back a depth of some 33.45 metres. It has no boundary downwards but has a boundary upwards where Lot 3 begins, being the Westpac building, for the length of the frontage but to a depth of only 18.48 metres.

That Lot 3, which is also a freehold title, has a plane boundary commencing at 10.25 NCD, but continuing within its lateral dimensions upwards without any boundary.

Lot 1, therefore, has behind Lot 3 an extension upwards again without limit. Lot 2 is an area again at ground level without boundary downwards. It is described as an amenities services block and carpark.

It has been excavated at the rear to a considerableextentatLambton Quay level but is immediately behind Quay Point and has no frontage to Lambton Quay. It has no practical frontage to The Terrace. Its upward boundary is where Lot 4, NZIG building, commences.

Lot 4 has the same lateral dimensions as Lot 2 but commencing variously at 23.20 NCD, 26.00 NCD and 30.20 NCD. Lot 2 contains access ways, lift shafts and other service facilities which connects Quay Point Lot 1 to Lot4, allowing access and rights between the others.

There is a complex of interlinked rights and obligations, easements, rights of way and other encumbrances which join the buildings and titles together for practical use. These are fora term of 999 years from December 1982.

They provide, among other things, restrictions on the redevelopment of each building and obligations to restore and reinstate buildings when damaged. As between Lot 1 and Lot 3 there are reciprocal rights of support but there are no rights of support as between Lot 2 and Lot 4.

These two titles are in the same ownership of the South British Guardian Trust and so while they remain in that ownership no such support rights are required. The title to Lot 1, though for part of its area has no boundary upwards, is restricted by a right to light in favour of Lot 3 and the buildings thereon so that there is no means of practical use of that part of that title.

The Tribunal opined that the scheme over these four lots was a unique development "carrying with it certain advantages to each of the lots arising principally from the gaining of access to two street frontages with resulting pedestrian traffic flow and also the gaining of certain carparking rights, but also bringing with them a closely interwoven set of responsibilities and restrictions arising from rights of way, party wall, power, water and gas reticulation and support and service easements."

We agree with those observations. It is to be noted that each of these titles is a freehold title and although limited in some respects by strata boundaries are not strata titles or unit titles in any common acceptance of those terms.

On its review the appellant fixed the capital values of each of the lots and assessed the land value and the value of improvements in respect of each lot.

The registered proprietors objected to those valuations, accepting the capital valuations and there remains no dispute about those, but objecting to the land values and seeking a reduction of these.

The key contention of the objectors is not that the four properties should be valued as one whole but rather by adopting a technique proposed by the objectors' valuer, the value of each of the properties should not exceed the sum which might have been realised had there been the sale of the land without improvements as one entity.

It is agreed, on both sides, that if the whole of the land was valued without improvements then it would be $4 million.

The objectors say that the individual land values of the properties should not exceed $4 million.

The rationale of the objectors' valuer's contention is that, in the particular circumstances relating to the properties with their interdependent and inter-related easements, they would be worth less than the value of the land and can be worth no more than the value of the land viewed as one entity. The Tribunal agreed with that proposition, saying that:-

> "We see that there are certain advantages accruing to each lot but we also see very considerable disadvantages arising from the way in which each owner is locked into a mutual dependency relationship resulting in the potential for having to accept a measure of inflexibility and obsolescence which would notbe present in other schemes. "These factors combine to form a matrix of restraint on each owner and we find Mr Stewart's conclusions as to the effect on land value which stem from his long experience in valuing commercial properties in Wellington city to be valid.
>
> "Given that the Quay Point development is a modem building with a frontage to Lambton Quay and The Terrace, it has been designed to its optimum division into four titles, has no doubt been done in the most appropriate way in the circumstances. Mr Stewart adopts $4,000,000 as the total land value. It is therefore a matter of assigning appropriate land values to the individual titles to total $4,000,000."

The Tribunal then proceeded to consider each of the lots and then to fix a value therefor.

The land values, in their three forms, are as follows:

The Valuer General's 1984 Revision		The Objector's Valuer's Land Values		The Tribunal's Decision	
Lot 1	$2,250,000	Lot 1	$2,000,000	Lot 1	$2,000,000
Lot 2	775,000	Lots 2 & 4	1,250,000	Lot 2	500,000
Lot 4	850,000	Lot 3	850,000	Lot 4	650,000
Lot 3	925,000			Lot 3	850,000

The crux of this appeal, or what is pivotal to this appeal, is the meaning and application of s 8 of the Act. Section 8 is as follows:

> "8. (1) A district valuation roll shall be prepared for each districtby the V aluer-General, and shall be in the prescribed form, and shall set forth in respect of each separate property the following particulars:
>
> "(a) The name of the owner of the land, and the nature of his estate or interest therein, together with the name of the beneficial owner in the case of land held in trust;
>
> (b) The name of the occupier;
>
> (c) The situation, description, and area of the land;
>
> (d) The nature and value of the improvements;
>
> (e) The land value of the land;
>
> (f) The capital value of the land;
>
> (ff) Where applicable, the special rateable value or the rates postponement value of the land;
>
> (g) Such other particulars as are prescribed.
>
> "(1 A) An annual value valuation roll shall also be compiled by the Valuer for any district of a territorial authority where the annual value rating system is in force, and shall in the prescribed form contain for each separate property the following particulars:
>
> (a) The name of the owner;
>
> (b) The name of the occupier;
>
> (c) The situation and description of the property;
>
> (d) The annual value;
>
> (e) Where applicable, the rates postponement value or the special rateable value, as the case may require;
>
> (f) Such other particulars as may be prescribed.
>
> "(2) For the purposes of this section any land that is capable of separate occupation may, if in the circumstances of the case it is reasonable to do so, be treated as separate property whether or not it is separately occupied."

What we think is essential in the preparation of the district roll is, first of all, to identify the separate properties. That phrase is not defined but it must be the case that separate occupation is one aspect of that. Subsection (2) necessarily implies that separate occupation and the c apability of separate occupation are two of the ways in which the separate property can be identified.

Other matters which the appellant submits, we think correctly, to be among criteria for that identification include separate ownership, different or distinct land tenure, separate land use and the availability of separate title.

Once the property has been identified as being a separate property then it is to be valued and the particulars, as described in s(8), are to be provided for each separate property.

It is not, we think, appropriate to make a single valuation of separate properties, which may be contiguous, as if one joint site, whether they have been previously amalgamated as one or can be in some way treated as being unseparated by some

common feature or connection. It is not appropriate to apportion a single value of two or more separate properties or to attempt to put a cap or maximum value because of the assumption or fiction of conjunction of the properties because of the past or the future.

Lots 1 and 3 are each plainly separate properties. Though they are linked in support and other ways they are separately owned, separately occupied, separately used, distinctively used as between retail and office use and, though adjoining at a plane above ground level, are quite discrete.

Lots 2 and 4 are, we think, quite different. There is no right of support by easement or other contract. Lot 2 is a service and amenities area and can have little use or occupation otherwise. They are in common ownership.

We think that, in the terms of subs (2), although these are capable of separate occupation and in theory separate ownership, it is not reasonable to treat each of them as separate property.

We conclude that Lots 2 and 4 should be treated as one property and valued accordingly. As we understand it, neither the appellant nor the respondent object to that.

As has already been noted it was not the respondent's contention that the properties should be valued together and the Tribunal acknowledged that. But what was done was to consider, as the Tribunal said, "whether the sum of the separate land values of the four individual parcels can reasonably be said to exceed the land value of these properties if viewed as one holding".

We think that that is in error. It happens in this case that the properties were once owned jointly, albeit in two lots and two separate titles, and were no doubt occupied for a time by Quay Point alone as one. But that can be no reason to maintain against the separation which has occurred the past tenure and amalgamation of the property.

If that was so it would be appropriate, if not necessary, to value the parts of a subdivision of land as if they were still a part of the whole no matter how long since the subdivision took place and how many separate owners had owned each individual lot.

Likewise it might be possible to say that the land or separate properties should be looked at as if they were to be amalgamated because that was an appropriate or more economic way to deal with them.

The fact that these properties are inextricably linked by easement and other contingent reservations and obligations does not, we think, destroy the separateness of the properties and that, indeed, is acknowledged by the parties and the Tribunal, but it cannot as a result mean that they ought to be treated as one property for the purpose of putting a cap on the value of each.

We conclude that the Tribunal did fail to assess the value of each lot as a separate property and to fix the land value accordingly.

It then becomes necessary to consider the proper value of those separate land values, and here we come to the second ground of appeal that the Tribunal preferred the valuation technique and opinions of the objector/respondent against those of the Valuer-General.

The Valuer-General based his valuation on comparable sales. These were a number of properties which had been sold in recent times. They were all freehold properties in which land only was sold, or could be readily computed, after deducting the demolition costs. The properties had been purchased for demolition and redevelopment.

There was one property which was of closer comparison, being a development of an 18-level office tower above another development in Lambton Quay. From these were calculated values, these were time adjusted and then applied to the separate properties with what the valuer proposed as appropriate adjustments to take account of the particular area and its value, in light of the retail and other uses and developments in Lambton Quay, but subject to the various other rights and encumbrances arising from the scheme of ownership between them.

Although it was suggested in argument the valuer for the appellant had comparatively little experience, there is nothing in the evidence or the manner in which he dealt with his valuation or the questions that were put to him on it, which leads one to doubt his integrity or ability in applying his valuation techniques.

The valuer who appeared for the objector/respondent is one of very long and wide experience in commercial and other property valuation in the Wellington district in particular. He based his opinion, in substance, on a capital rate of return and on the basis that a subdivision or strata development lessens the value of a property because the purchaser or developer seeks a greater return than on an unencumbered freehold title. The basis upon which he came to his valuation, as described in his evidence-in-chief, is as follows:

"7. These values were assessed capitalising the actual net and potential net income while the apportionment to the land value was assessed by dividing the building area for plot ratio purposes by the normal plot ratio allowance and applying to that the per metre rate current for land at the time."

As to the subdivision or strata development, it was his opinion that:-

"19. In the eyes of the market generally such forms of ownership are considered inferior to single ownership and prices paid generally reflect this."

He rejected any suggestion that there was any premium attaching to title of the nature of this case. What he said was:

"26. The main reason for this is that the market still perceives unit titles as inferior to freehold and somewhat akin to leasehold title. This perception has been heightened by the more rapid rate of obsolescence in existing buildings brought about by technological changes and a rapid increase in land values.

27. These changes have led to a development cycle of 60/80 years in the 60s being replaced by a development cycle of 25/30 years in the 80s and 90s and the need of purchasers to obtain full access to permit the redevelopment or refurbishment of the site within the foreseeable future."

The objectors' valuer did not make any express reference to comparable sales although it must be plainly implied in his evidence that he was well aware of sales of retail and commercial properties and that his capital rate return basis is founded upon a sale price from which he deduces a capital rate on land and therefore the value of land.

The examples which he referred to were all of unit titles in multifloor strata buildings. It is our understanding that these included mostly single floors or parcels of several floors which were not necessarily contiguous.

Those examples are to be compared with the subject properties which include two towers, each an entire structure, and one being clearly independent of its separately titled sub-strata support. It

seems that the key to his opinion is to be deduced from the statement that he made that:

> "33. It costs no less to develop a building such as Panama House for unit entitlement as for freehold but in my opinion the risks are higher under unit entitlement as once one floor is committed the options of the developer are restricted."

This is not a case where there is a premium value being given to the titles. What was done by the appellant was to value each separate property. That differs from a value based on the previous ownership or the state of the property site as it was before or as it might be if it was treated as a single global separate property.

The fact that the sum of these separate values is greater than the value of the whole on that alternative basis does not seem unreasonable.

It is not unknown that a smaller lot on its own may command proportionately a better price and have a greater value than the whole which requires a greater capital outlay to develop and leaves a smaller number of potential purchasers.

The Tribunal, having concluded that the method proposed by the objector was acceptable, then started its consideration of the valuation assessment on the premise that the total must not exceed $4 million. It became, of necessity, a matter of apportioning within that.

It seems that the evidence of comparative sales or capital rate of return or any other bases were of less importance than the nature and comparative benefits and detriments applying to each of the lots within the whole to attribute and apportion the $4 million total among each of them.

We think that the evidence given by the Valuer-General, as the basis of the valuation, is sound, based on appropriate valuation principles and commonly accepted methods. It has not been shown that the methods used and the result therefrom are wrong.

What was done rather was that the objector's valuer chose a parallel or opposite course, advancing an entirely independent view, but we find, based on a less comparable set of properties and buildings than the Valuer-General used. This must be a case where the objector has failed to meet the onus upon him to show that the valuation is wrong. What he did was to try to show that the basis of valuation was in error but we concluded that that was wrong.

We prefer, in any event, the valuation evidence given by the Valuer-General and adhere to that.

It then becomes necessary to assess the land values, retaining the capital values as before.

Lot 1

With its frontage to Lambton Quay and the availability of pedestrian access to and from The Terrace, it is clearly the most valuable of the lots. The valuation calculations of the Government Valuer ranged between $2,059,200 and $2,221,000 for the land. It was then rounded up to the sum of $2,250,000.

We think that that was an unjustified and too generous rounding up and that the appropriate figure for that lot is $2,200,000.

Lot 3

We accept the valuation put forward by the Valuer-General.

Lots 2 and 4

We combine these as a single separate property. The Government Valuer dealt with these separately and thus put a valuation which, when added together, gives a valuation which must be too high for this property. We consider that the appropriate land value, having regard to rights and encumbrances attaching to it, is $1,250,000.

We therefore allow the appeal and fix the values as follows:

Lot 1	
Capital Value	$8,000,000
Land Value	$2,200,000
Value of Improvements	$5,800,000
Lots 2 & 4	
Capital Value	$7,800,000
Land Value	$1,250,000
Value of Improvements	$6,550,000
Lot 3	
Capital Value	$4,500,000
Land Value	$ 925,000
Value of Improvements	$3,575,000

We make no order as to costs. A

The Tribunal Decision was reported in the December 1989New Zealand Valuers Journal Editor.

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