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The NEW ZEALAND VALUERS' JOURNAL is the official publication of the New Zealand Institute of Valuers. The JOURNAL is published four monthly and the Publications Board welcomes researched articles from qualified individuals concerned with valuation, business management of a valuation practice and property related matters.

Each article considered for publication will be judged upon its worth to the membership and to the profession. The Editor reserves the right to accept, modify or decline any article. Any manuscript may be assigned anonymously for review by one or more referees. Views expressed by the editors and contributors are not necessarily endorsed by the New Zealand Institute of Valuers.

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All manuscripts for publishing are to be typed double-spaced with wide margins, on one side only of A4 sized paper and must be suitable for scanning. Computer disk copies (IBM compatible 3.5") are encouraged.

Original photographs, diagrams, tables, graphs and similar material intended to illustrate or accompany an article should be forwarded separately with the text. Where possible include a table of values used to generate graphs.

Illustrations should be identified as "Figure 1 (2,3, etc)". The approximate places where illustrations are to be inserted through the text should be clearly shown in the manuscript.

A brief (max 60 word) profile of the author, a synopsis of the article and a glossy recent photograph of the author should accompany each article.

Primary (a-level) heads should be typed in all capitals and bold, secondary (b-level) heads with inital capitals and bold and tertiary (c-level) heads should be italicized. Do not number headings.

Footnotes, Endnotes, References andAcknowledgements are to be listed at the end of the article in the following format:

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Code of Ethics

New Zealand Institute of Valuers

(As provided in Rule 120)

Approved by members at the Annual General Meeting of the Institute held on 12 April 1996, and approved by the Minister in Charge of the Valuation Department in accordance with Section 16(3) of the Valuers' Act 1948, on 9 May 1996.

The following is the Code of Ethics of the Institute, and every person referred to in Rule 7, 16, 16A of the Rules of the Institute is bound by this Code. A breach of any of the provisions of this Code may render the person concerned liable to disciplinary action.

1. Professional Responsibility

1.1 The first duty of each and every member is to render service to the member's client or the member's employer with absolute fidelity, and to practise their profession with devotion to high ideals of integrity, honour and courtesy, loyalty to the Institute, and in a spirit of fairness and goodwill to fellow members, employees and subordinates.

1.2 A member's conduct shall at all times uphold the reputation of the Institute and the dignity of the profession and abide by all laws, statutes, regulations and rules relevant to their professional practice.

1.3 Each and every member shall maintain the high standards of the profession and should refer to the Institute, any act or omission of a fellow member they are aware of and which may appear to bring discredit on the Institute or its members.

1.4 No member shall prepare or certify any statement which is known to be or ought to be known to be false, incorrect, misleading, deceptive or open to misconstruction by reason of a misstatement, omission or suppression of a material fact, any deceptive act, or otherwise.

1.5 A member shall exercise the utmost care and good faith to ensure the maintenance of the highest standards in the preparation of statements, reports and certificates, as these constitute one of the most valuable assets of the profession, being relied upon by clients, employers, shareholders, investors, creditors and the public.

1.6 When asked for a valuation of real property, or an opinion on a real estate matter, no member shall give an unconsidered answer. A member's counsel constitutes professional advice which must be prepared to the highest standards of competency and rendered only after having properly ascertained and weighed the facts.

1.7 A member must maintain the strictest independence and impartiality in the performance of the member's professional duties. To this end no member shall:

a) adopt the role of advocate to the exclusion of that independence and impartiality

b) allow the performance of that member's professinal duties to be improperly influenced by the preferences of clients or others as to the result of their professional work

c) rely improperly upon information supplied by clients or others in the performance of their professional duties or

d) act in any other way inconsistent with the duties of independence and impartiality.

2. Responsibility to clients

2.1 Every member shall act towards that member's clients in all professinal matters strictly in a fiduciary manner. Any information of a confidential nature given to the member by a client shall be kept confidential and not disclosed to any other party without the consent of the client. A member shall not be deemed to commit a breach of this requirement by reason of a member answering any question which the member is legally compellable to answer in any judicial proceedings in which the member is called as a witness.

2.2 A member must not accept or carry out any instruction where there is, or may reasonably be construed to be, a conflict of interest and must withdraw from any instruction if such a conflict of interest arises or becomes known after the instruction has been accepted, unless such conflict of interest is fully disclosed in writing to all relevant parties and all such parties agree that the instruction may be accepted or continued by the member.

2.3 A member must inform the member's client or clients of the nature of any business connections, interest or other affiliations the member may have in connection with the service to the client or clients.

2.4 A member should not undertake any work for which the member is not qualified or where the member is in any doubt or ought of be in any doubt as to the adequacy of the member's professional competency and or experience to undertake the work unless such work is completed under the supervision of a person of adequate competence.

3. Professional Fees

3.1 No member shall in respect of the member's professional work levy a fee to the member's client that is other than reasonable in all the circumstances.

3.2 A member shall make known the basis of the member's fee if requested by the client.

3.3 Fees may be negotiated on any mutually agreeable basis. However, no fee shall be contingent upon the reporting of a predetermined value or direction of value that favours the cause of the client, the amount of the value estimate, the attainment of a stipulated result, or the occurrence of a subsequent event.

3.4 A member shall not pay by commission or otherwise any person who may introduce clients to the member.

3.5 A member's charge to the member's client or clients shall constitute their only remuneration in connection with their professional advice.

4. Professional work by members in employment

4.1 A member in employment shall not accept professional work on the member's own account unless with the knowledge and consent of the member's employer or unless the member's employment contract expressly provides such authority.

5. Professional Competency

5.1 As part of maintaining the standards of professional competency referred to under Clause 1.6 and 2.4 hereof every member shall, unless exempted by Council, participate in an ongoing annual programme of Continuing Professional Development in accordance with guidelines published to members from time-to-time by the Institute.

6. Use of member's name and designation

6.1 A member should avoid the use of the member's name by, or personal association with, any enterprise or activity which may bring the member, the Institute,or the profession into disrepute.

6.2 The initials F.N.Z.LV. and A.N.Z.I.V. denoting member's status, and statutory designations "Registered Valuer", as appropriate, are personal to individual members and shall be used only following or immediately in connection with the member's name.

6.3 A member's name and signature must appear on every valuation or report undertaken, together with the approved initials as set out in the Rules of the New Zealand Institute of Valuers indicating their status as a Fellow or Associate and where appropriate the designation of "Public Valuer", "Registered Valuer" or such other designation as the Institute may from time-to-time approve.

6.4 A member acknowledges that when signing reports as the primary professional the member accepts full responsibility for the content of those reports including content that may be the result of inquiries or development by others.

7. Advertising and promotion

7.1 A member may advertise or promote the member's professional services, either individually or collectively, provided that such advertising or promotion complies with the following:

7.1.1 It must not contravene, or be inconsistent with, the other provisions of the Code of Ethics.

7.1.2 It must not contain any reference to a client without that client's consent having been obtained.

7.1.3 The content does not carry the implication of any ability to influence any court, tribunal, regulatory agency, or similar body or official.

7.2 A member when advertising or presenting practice stationery shall not do so in a manner that may be construed as misleading.

7.3 A member is responsible for any advertising or promotion which the member has expressly or impliedly authorised or which is for the member's benefit.

7.4 Neither the Institute crest or logo may be used without first obtaining the approval of the Council.

8. General

8.1 A member shall at all times faithfully observe and perform all the member's obligations under the Valuers' Act 1948, with its amendments and the Regulations thereunder, and the Rules of the Institute.

8.2 A member shall at all times abide by every lawful decision of the Council or of the Committee of the Branch which they are a member of or any general meeting of the Institute or of that Branch.

Kensington Swan

Negligence Claims by Lenders

by John Land and Peter Jones

The 20th June House of Lords decision referred to is reported in full on page 54 of this issue.

SYNOPSIS

The English House of Lords has held that a valuer's liability will be "capped" by the difference between the negligent valuation and a true valuation where the valuation was merely part of the pool of information the lender uses to make its decision.

A valuer's liability will not extend to the additional losses that may result from a decline in the property market.

It is anticipated that New Zealand Courts will find this decision persuasive and follow a similar approach to the calculation of damages for negligent valuations.

The extent of a valuer's liability under the Fair Trading Act, however, remains to be decided.

If a negligent valuation leads to a loan being made on a property then the valuer will not be liable for the lender's full loss but only for the difference between the valuer's valuation and the true value of the property in question. This is the result of a recent English Court decision which is likely to be followed in New Zealand. The case in question is the House of Lords decision in *South Australia Asset Management v York Montague Limited.* The House of Lords decision overturns the decision of the English Court of Appeal in *Banque Bruxelles Lambert SA v Eagle Star Insurance Company Limited.* The English Court of Appeal had given valuers cause for concern by holding that a negligent valuer could be liable for the lender's full loss even if part, or most, of that loss resulted from a decline in the property market.

The House of Lords decision will be welcomed by valuers though some uncertainty remains as to the extent of valuers' liability under the Fair Trading Act.

The Facts of the *Banque Bruxelles* Case

In 1989 Banque Bruxelles Lambert (a Belgium bank with offices in England) entered into three transactions. Under each it lent 90% of the valuation of a commercial property to the purchaser of the property. Valuations for the three properties were all provided by John D Wood.

To persuade the bank to make the loans, it was necessary for 100% insurance cover to be obtained from Eagle Star Insurance Company. The borrowers defaulted on the loans. The individual properties proved to be inadequate securities, partly because they were overvalued by as much as 25% and partly because property prices fell by as much as 50% over the period between the establishment of the loans and the realisation of the securities.

The bank subsequently sued John D Wood for negligence. The insurance company which had been forced to make payment to the bank also claimed against John D Wood in respect of one of the properties.

The Initial Judgment of Justice Phillips in *Banque Bruxelles*

His Honour, Justice Phillips, held that John D Wood had acted negligently in preparing the valuations. There was also no doubt that it owed a duty of care to the bank as it was well aware that the valuations were required to persuade the bank to make the loans to the purchaser. Justice Phillips calculated the valuer's liability at close to £10 million. However, Justice Phillips stated that the bank could not recover the loss it had suffered following the realisation of the securities to the extent that this was the result of the collapse of the property market in 1990. The Judge believed that this part of the loss could not be attributed to the negligence of John D Wood. The primary reason which governed Justice Phillips' decision on this issue was that the bank did not rely on the valuations to provide protection against a drop in the property market.

In summary, Justice Phillips stated:

"Where a party is contemplating a commercial venture that involves a number of heads of risk and obtaining professional advice in respect of one head of risk before embarking on the adventure, I do not see why negligent advice in respect of that head of risk should, in effect, make the adviser the underwriter of the entire adventure. More particularly, whether negligent advice relates to the existence or amount of some security against risk in the adventure, I do not see why the adviser should be liable for all the consequences of the adventure, whether or not the security in question would have protected against them."

Court of Appeal Decision in *Banque Bruxelles*

The Court of Appeal's decision overturned Justice Phillips' finding that the part of the loss attributable to a drop in the market value of the properties could not be recovered. If the transactions would never have proceeded in the absence of negligence, the valuer was liable for all consequent foreseeable losses. Such losses could include a drop in market value.

The rationale for the Court of Appeal's decision was based on the principle that when a lender enters into a transaction in reliance on the advice of a negligent professional, it is then unable to escape from the transaction. As a result of this, it is vulnerable to any fall in the market. The Court of Appeal held that the professional's negligence would be an effective cause of all the losses suffered by the lender.

The Court of Appeal took the opportunity to consider in detail the law relating to the valuer's duty to a lender. The basic principles were:

a valuer is in no sense a guarantor of the lender's investment decision and it is no part of the valuer's duty to advise the lender on future movements in property prices since the valuer's concern is with the current value only; where there was a negligent valuation, but the transaction would have proceeded, albeit on different terms, the appropriate measure of damages is the decrease in value. In the case of a sale, this is the difference between the open market value of the asset acquired and either the price paid or the open market value of the asset, whichever is the lower.

In a "no transaction" situation (where the transaction would not have proceeded in the absence of a negligent valuation), the lender is entitled to the net loss sustained as a result of entering into the transaction. In other words, the difference between what it advanced and what it would have advanced if properly advised (which will always be nil in a no transaction situation). Related expenses of sale and realisation, less amounts recovered, will also be allowed.

The valuer raised an argument that the decrease in market value was a new and intervening cause and so market loss damages should not be recoverable. In response to this argument the Court of Appeal replied:

"since the valuer's negligence caused the lender to enter into the transaction, which he would not otherwise have done, and because he cannot escape from the transaction at will, we regard that negligence as the effective cause

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of the loss which the lender suffered as a result. The market fall cannot realistically be seen as a new intervening cause. The fall in the market could not be seen as breaking the link between the valuer's negligence and the damage which the bank suffered".

House of Lords Decision

On 20 June 1996 the House of Lords released its decision in *South Australia Asset Management Corporation v York Montague Limited* and two other appeals from the Court of Appeal. Lord Hoffman, who delivered the unanimous decision, remarked that the three cases before the House of Lords had two common features. First, if the lender had known the true value of the property he would not have lent. Second, a fall in the property market after the date of valuation had greatly increased the loss that the lender had eventually suffered.

The House of Lords overturned the Court of Appeal decision in *Banque Bruxelles* and upheld the valuers' appeal. Lord Hoffman believed that the Court of Appeal had approached the problem from the wrong starting point. Rather than discussing what the correct measure of damages for any particular loss is, His Lordship believed that you must first go back to first principles and look at the scope of the valuer's duty. The relevant question is: what loss has the lender suffered which falls within the scope of the valuer's duty? It is this question which in turn begs the initial inquiry: what is the scope of the valuer's duty?

In answering this latter question, His Lordship first drew a distinction between the situation where information has been provided and the situation where advice has been given. Where a professional has a duty to advise whether or not a particular course of action should be followed he or she has a duty to consider all the potential consequences of that action. If negligence is proved, he or she will be liable for *all* loss suffered as a result of the wrong course of action being taken. If the duty was, however, merely to provide information the position will be different. In this situation, liability will attach only for the foreseeable consequences of the negligent information.

On the facts before him, Lord Hoffmann found that the purpose for which the valuers had provided the information was to form part of the overall material on which the lender was to decide whether it would lend, and if so, how much. The valuer was assumed to know that the lender's margin would be less if the value has been overestimated. On the other hand, the valuer would not ordinarily know of the other considerations that the lender might take into account. Such factors could include the total amount of money available, how much was needed to be borrowed, and the rate of interest.

His Lordship used an example to illustrate the difference between the House of Lord's approach and that of the Court of Appeal. He stated:

"A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the exhibition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee.

On the Court of Appeal's principle, the doctor is responsible for the injury suffered by the mountaineer because it is damage which would not have occurred if he had been given correct information about his knee. He would not have gone on the expedition and would have suffered no injury. On what I have suggested is the more usual principle, the doctor is not liable. The injury has not been caused by the doctors bad advice because it would have occurred even if the advice had been correct".

The next question for the House to consider was how far the information provided was wrong, which would in turn determine the quantum of damages (if any). Essentially, His Lordship decided that the scope of the valuer's duty must be assessed as the difference between the negligent information provided and the true information that should have been provided. Financial losses falling within these parameters are recoverable; those falling outside are not. In other words, damages recoverable by the lender are "capped" by the amount by which the negligent valuation varied from a true valuation.

The distinction that the Court of Appeal drew between a "no transaction" case and a "successful transaction" case was held to be irrelevant. His Lordship pointed out that every transaction which had been induced by negligence valuation was likely to be a "no transaction" case because the transaction which did occur would no doubt not have occurred in exactly the same form had the valuation been correct.

The Current New Zealand Position?

Not surprisingly, the recent House of Lords decision has not as yet been cited in a New Zealand case. While House of Lords decisions are technically not binding on New Zealand Courts, they are nevertheless highly persuasive and it would seem a fairly safe prediction that the New Zealand Courts would accept the House of Lords decision as good law, particularly at the District and High Court level.

The House of Lords approach may also cast a shadow on the recent New Zealand Court of Appeal decision in Sew *Hoy v Coopers & Lybrand.* In this latter case, the Court of Appeal indicated that it would take an approach that may place full responsibility on professionals for the consequences of negligence acts. The case dealt with the issue of causation of loss and the Court of Appeal asserted that in a suitable case, a negligent auditor could be held liable for losses incurred by a business in continuing to trade following receipt of the auditor's report. Whether such comments will now be coloured by the House of Lords' decision remains to be seen.

Conclusion

The House of Lords decision will be welcomed by valuers and their professional indemnity insurers. The decision indicates that the damages claimable from a negligent valuer will be limited to the difference between the negligent valuation and what the true valuation should have been. For example if a particular valuer values a property at $7 million when its true value at that time should have been $5 million the valuer's liability will be limited to $2 million even if a subsequent decline in the property market leaves the property valued at $3 million. This can be compared with the Court of Appeal's approach under which the valuer would have been liable for the total $4 million loss.

There are some future questions which will need to be decided. The position of interest is still not clarified. Normally interest will be recoverable from the date of loss until the time compensation is made. Where damages are effectively capped, however, is interest included within the capped amount or added to it? One of the parties to the *South Australian* case has apparently obtained leave to clarify this aspect.

Another question is whether a similar approach will be taken to the calculation of damages in claims brought against valuers under the Fair Trading Act 1986. Incorrect valuations can be attacked not just under the law of negligence, but as "misleading and deceptive conduct" under the Fair Trading Act. Under the Fair Trading Act the courts have a broad discretion in deciding how to calculate damages awarded for a breach of the Act. Valuers will no doubt be hoping that when the matter comes before the New Zealand courts the courts, will reinforce the good work of the House of Lords by taking the same approach to the calculation of damages under the Fair Trading Act.

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Valuing the Land

Dr Bryan D Gilling

A purely monetary value was only ascribed to Aotearoa's land with the arrival of European settlers...

We hear a lot about the worth or value the land of New Zealand has to many people. New Zealanders have traditionally craved their own quarter-acre (along with the half-gallons and pavlovas!). But many different values have been placed on New Zealand's land. Those values have changed depending on the race of the valuer, the time of valuation, and usage of the land. The alteration of those values, and the methods by which they were determined, provide an interesting indicator of the ways in which this country has diversified in world view and developed economically and socially.

Pre European

In pre European times, Maori originally valued the land for its productive capacity. They put it to specific uses and Papatuanuku, the Earth Mother, sustained them with vegetables, fruit, implements and materials for shelter. They also had a very strong cultural and spiritual attachment to specific areas of land. The closeness of the link is shown in the use of the word `whenua' which can mean either land (that which sustains life on a long-term basis) or placenta (that which sustains a baby in the initial phases of its growth). The linguistic link was made more tangible in the custom of burying the new-born infant's placenta in the earth at a site of special significance, thus tying the baby to that place thereafter and imbuing the location with a deep emotional and spiritual significance; the baby instantly became a tangata whenua, a person of the land, with a literal umbilical link to that land.

A purely monetary value was only ascribed to Aotearoa's land with the arrival of European settlers; changes in how Europeans then determined that monetary value have reflected the varying ways in which the land was used and the cultural and economic development of the country. Early traders and missionaries usually sought a place for their own sustenance and that of their families and many purchases were modest, but others were on a more ambitious scale. In those pre-Treaty days, the payment could be made in a variety of ways.

Goods in exchange

Sometimes, money changed hands, but often payment was at least partially in kind. Maori immediately realised that money is only a medium of exchange, and that of itself it is useless unless there are goods available to buy with it. Still, for the benefit of the Europeans the value of the payment was often fixed in monetary terms, and then goods to that value were exchanged. One prominent example was Captain William Barnard Rhodes's attempt to purchase all of central and southern Hawke's Bay - what he estimated at over 1.5 million acres - for £150. Only £12 was paid in cash, the rest of the deal comprising 13 x 251b casks of gunpowder, 36 shirts, 36 duck trousers, part of a cask of tobacco, 36 hatchets, 36 garden hoes, 29 iron pots, 12 blankets, 3 cloaks, I coat, 2 boxes, 20 handkerchiefs, 40 knives, and I `piece of print'.'

Through the signing of the Treaty of Waitangi in 1840, along with other assertions of its newly-acquired sovereignty, the Crown took to itself the preemptive right to purchase land, that is, preemptive in the sense of being the only legal purchaser, not merely the recipient of the right of first refusal. From then until 1862, apart from a brief interlude under Governor Fitzroy, only government land purchase officers offered Maori money in exchange for land. Some squatters illegally gave some Maori a cash income by paying rent for pastoral leases, especially in the Wairarapa and Hawke's Bay where they occupied in advance of the purchase officer's arrival. This squatting raised Maori expectations, as they could point to the annual income they could receive from the land and compare it favourably with the one-off purchase payments offered by government officers who would take the land forever. As might be expected, by giving complete control to one party alone, the monopoly drove down the prices Maori were offered for their land. Caught in a bind, if they wished to participate in the increasingly cash-oriented economy and acquire the tantalising array of material possessions Europeans paraded before them, Maori needed money. But the largest asset often the only asset-they had to offer was land. Yet with only one buyer, prices were fixed by the land purchase officer's budget and whim. He might offer more to encourage a quick sale if the land were needed urgently, or to win the support of an influential chief, but not surprisingly, his preeminent duty was to acquire as much land as he could for as little money as he could. Thus, from 1840-1862, the monetary value of Maori land was defined merely as what a government purchase officer could or would pay for it.

Immigration

A central aspect of the colonial development programme was then moving ownership of land acquired from Maori on to new immigrants. The agencies, both government and private, which onsold the land to settlers then placed new values on it. These values were driven by both expediency and theory. The New Zealand Company settlements had Wakefield's `sufficient price' attached to them. In Canterbury, these sufficient prices were £3 per acre for rural land, £24 per half-acre town section in Christchurch, and £12 per quarter acre section in Lyttelton. Sales at these prices would help the reward the Company's shareholders and also enable the development of the communities. It had the added attraction of making land too expensive for lower-class (and therefore less socially desirable) people to gain entree into the Company's settlements. Elsewhere, the Government used the monopoly given it by its preemptive purchasing rights to fix prices charged. This was established mostly by the need for funding the development of local and national social and governmental infrastructures. Government's perceptions of the balance between these needs changed periodically. The most glaring example was the change from the regime under Hobson, where land had been onsold at huge prices with a tax of £ l per acre to the Crown being included, to Fitzroy's dropping the Crown fee to 10 shillings, and then to a penny an acre. But within a couple of years, much of the earlier regime was restored under Grey. Later in the century, when there was a mixture of private and governmental sales to small settlers, land values were determined a little more by market forces, although given that they were so closely tied to the vacillating government policies on race relations and European settlement there was constant interference by successive ministries.

British origins

Reflecting the colony's British origins, during New Zealand's early years values were generally determined by annual rental value. This was the standard English system, which tried to calculate a property's value on the basis of how much it could be rented for. This may have worked well enough in densely-populated England, where much of the real estate was owned by large landowners (perhaps originally a feudal lord), but in sparsely-settled New Zealand, with the country being only partially even in European ownership, the system was highly inappropriate. Land here was generally owned by the occupier, settler or Maori, and the rental potential was almost impossible to determine. Still, colonial mind sets died hard, and the influence of `Home' died even harder, and it took decades before annual rental value was discarded

" the monetary value of Maori land was defined merely as what a government purchase officer could or would pay for it "

in favour of capital or unimproved value. To this day, Auckland City Council still bases its rates on annual rental value but of course, Auckland is now no longer a lightly-settled collection of smallish farms.

In the 1860s, over three million acres of Maori land were confiscated by the Government. The land's value here was not monetary, but political, as a lever; losing it was a punishment and confiscation was a means of forcing Maori into submission. No distinct economic value was ascribed to it in this process, but the confiscation had the desired political effect and battered down most substantial resistance by Maori to the making available of land for European settlement.

Vested interests

As the country developed a local body infrastructure, the question of funding that through rates developed, necessitating a new layer of valuing activity. These valuations had to be regular and systematic, covering the whole of a local authority's territory, rather than dealing with just a single block for purchase on a one-off, negotiated basis. Each local body, of course, did its own valuing, using adifferentbasis (rental, capital, unimproved and occasionally some other alternative or combination). Furthermore, the valuers were often local farmers or real estate agents with an interest in the result, or a hapless local authority official, whose job was in the gift of the landowners who comprised the authority's council. Not surprisingly, allegations of scandals and corruption abounded. Not until the Government Valuation of Land Department was formed in 1896 were the local bodies able to avail themselves properly of independent government valuers. Even then, whether or not they used those values was left optional and they were charged for the privilege.

Impartiality

And the formation of that department in itself has been a practical example of the government standardising values. No longer do the buyer, seller or tax official operate in a totally unregulated environment. Instead, for a century there have been government valuations providing an impartial and unignorable figure to which all land owners, and those who would tax them, fund them or settle them have reacted to some degree. The systematisation of land valuing is predicated on the assumption that methods can be standardised, an assumption which would have been impossible to make earlier in the nineteenth century and which reflected in itself the relatively settled and homogeneous nature of the country and society from the end of the century.

The last third of the nineteenth century saw the widespread expansion of both government control and, following closely behind, European settlement. The developing governmental structures required finance. Many cash-strapped politicians looked out across the colony and saw private individuals making money from capital gains brought about by the general economic breaking-in of the country as a whole. Borrowing from American campaigner Henry George and Englishman John Stuart Mill, Sir George Grey, for example, advocated the introduction of a land tax. Others bayed for a tax on the `unearned increment'. This was the capital gain made by a landowner at no cost to themselves which accrued when the community as a whole contributed to the whole colony's development. Sir Julius Vogel's public works were the classic example; roads and railways opened up and made economic vast tracts hitherto inaccessible and impossible to farm profitably. The individual farmers paid virtually nothing towards this - `the taxpayer' financed it yet the farmers who now had railway sidings and access to markets found their land multiplying in value far in excess of any contribution they had made personally to government revenues.

Unimproved Values

In order to tax this unearned increment, it was necessary to determine what the value of the land was without any of the improvements carried out by the landowner. Thus the concept of `unimproved value' was born, which was to bedevil valuers for another century. Originally, the method used was to determine the residual value after any improvements had been deducted from the capital or estimated total market value. This was changed in the early twentieth century to being the value of the land if it had been left absolutely untouched while all around it had the present level of development. It is probably no coincidence that this definition was introduced during the Liberals' era, as it accorded well with their desire to break up large estates and make the whole country productive. Speculators who bought vast tracts of land and left them undeveloped to appreciate in value on the backs of their neighbours' efforts would now be taxed as their land rose in value, forcing them either to subdivide and let in more small farmers, or to develop the land themselves.

Problems

However, New Zealand's continuing economic development meant that unimproved value was already in trouble by the First World War, although it lingered for another half-century. The problem was that there were fewer and fewer truly unimproved areas with which properties could be compared. They were cleared, stumped, grassed, drained and so on. Furthermore, the theoretical unimproved value bore no direct relationship to the land's actual market value, as in real life the land could also regress and lose value. For example, open tussock country that was clear, economical pasture in its unimproved state could be allowed to run wild and be covered in gorse or blackberry, or be destroyed by rabbits. The difficulties finally came to a head in the 1960s when on the Taieri plains valuation courts were having to resort to surveyors' notebooks from 1847 to try to determine unimproved value on an area that bore no relation to its original undrained state. Then, in Southland farmers were able to show that every farm had been developed in some way, through clearing, drainage, earthworks, fertilising and soon, and all traces of the primordial past were obliterated. The replacement, which is still with us, is land value, the land as the valuer can see it in the present with all its hidden improvements, excluding only structures.

Taranaki land

It is interesting that unimproved value is still required by some statutes and causing endless headaches in a few isolated situations. The most notable example is in Taranaki, in a hangover from our colonial past, especially the 1860s confiscations. Remaining Maori lands were leased out after 1880 under the West Coast Settlements Reserves Act, and the use of unimproved value is required by statute. These days, Maori owners are trying to regain control of these lands, so the question of the exact nature of the unimproved value has assumed great importance in determining how much compensation Maori owners should pay to leaseholders when they resume the properties themselves. Leaseholders are to be compensated for all improvements made to the land, so arguments rage over whether pre European Maori clearing of the coastal strip is an improvement - do improvements, too, date only from the Treaty? - or whether the farmers' clearing of trees improved or reduced the value of land. The courts have taken the position that clearing was an improvement in the past and has made the land useful for farming. Therefore, the estimated value of the trees that grew there a century or more ago - that were just an obstruction then but which would now be valuable cannot now be deducted by the owners to reduce the amount they owe the leaseholders in compensation.

Through all of this, generally farmers have really wanted to have their properties valued in another way, on the basis of their production. Perhaps this is a relfection of their perception of their own worth to society. But this system would be very difficult to apply in urban areas where very little land is actually productive in any meaningful sense. The system was used for a time in the 1940s when land sales restrictions were tied to 1942 values, determined on productive valuations. This scheme was socially driven, for the benefit of returning servicemen who were to be resettled on farm lands, but it was applied to all property throughout the country for nine years until 1951 and led to endless litigation before numerous tribunals and courts. For it to work, all aspects of a farm's income and costs had to be known and then related to standardised 1942 values for fertiliser, bobby calves etc by region. It also presupposed a mythical average efficient farmer who would use the land in an averagely efficient way. The system has never been much in favour with those beyond the farming community.

Change

Lifestyle and economic changes in the later twentieth century have also thrown up their own complications for valuing the land. As an example, one recent question is that of putting a value on air space. This is a problem that has only really become acute in the last two or three decades, as tall buildings have been built and had a number of different owners. Again, this is an issue that has only really emerged from the middle of this century as New Zealand cities have raised the height of their centres, with high-rise buildings becoming necessary and apartment blocks becoming fashionable.

The value ascribed to New Zealand's land, then, has changed as the country has changed, not just in the obvious terms of the amount of money someone might pay for it, but in terms of the ways in which that value was calculated and the reasons people wanted to know the value. Those changes have come about as New Zealand has evolved in various ways: as it has transferred from Maori to European ownership; as it has grown from a purely frontier colonial society into something more settled and stable; as it has become more economically developed; as it has changed from rural to urban in orientation; and so on. A detailed study of the values placed on New Zealand's land might, therefore, reveal how, all unwittingly, these values provide an insight into the nature of the country's evolution.

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Changing Social Attitudes to Land Ownership

A controversial look at the issue of land rights in Australia, New Zealand and other Pacific Nations.

PJ Mahoney F.N.Z.LV.

This is the first part of a two part series edited from a keynote paper presented by Peter Mahoney at the 1996 Pan Pacific Congress of Real Estate Appraisers, Valuers & Counsellors held in Sydney in April. Space does not permit the publication of the full paper in this issue. The second part which deals with the Australian and Canadian land rights history will be published in the November 1996 issue of the NZVJ.

Meantime, anyone seeking the full paper should contact the author or the editor.

The increasing awareness in Australia, Canada and New Zealand, to the charges of exploitation of cultural and indigenous minorities by the former colonial powers, has highlighted the need to recognise and redress some of the injustices of the past. As a consequence, there is now a shift in the balance of the political and judicial direction on this particular issue towards a position sympathetic to the indigenous minorities.

Before considering the three case examples covered in this paper, it is important to have a brief historical overview of the situation which existed at the beginning of the period of colonisation and which subsequently developed in three specific countries.

The Historical Perspective

As a general rule, it was a widespread custom in the larger islands of the Pacific that man acquired for himself and his family, long term rights to land which he cleared from the bush for his own use. The traditional rule of tenure seldom specified how such rights to the land were lost or disposed of, but rather concentrated on how one acquired such rights.

The arrival of the European in the late 18th and early 19th Centuries, together with the introduction of guns and the white man's medicine of "alcohol", brought a significant change to most of the Pacific nations. In Australia, white settlers forced Aboriginals from their traditional lands and seized land on a vast scale, partly because they were not aware that the Aboriginal recogised rights to land. Similarly in New Zealand, whilst the Maori fought on a tribal basis, they as a general rule did not usually acquire the land of another. However, when English settlers arrived in large numbers, military force was used at times to acquire Maori land when purchase or persuasion proved to be either ineffective or protracted.

Mineral Rights

Some of the earliest changes in the recognition of land rights in this region, in respect of the indigenous minorities, occurred in Papua New Guinea where the Australian laws as then administered, provided that minerals belonged to the Government and those with customary rights to the land had no beneficial right in such mineral deposits. Legislation to this effect was passed and native objections to it were suppressed. However, the discovery of extensive copper deposits at Bougainville highlighted some of the problems of ownership, particularly where extraction rights had been granted to a foreign country without consultation with the recognised land owners. Pressure from the international community and the action of indigenous New Guinean representatives, eventually led to a compromise solution. The land claims of the land owners were recognised to some extent, as they received a small proportion of the mineral revenues.

With the advent of the agricultural economies, more sophisticated recognition of land ownership developed.

Similarly in Australia, mineral rights belonged exclusively to the Crown and this remained unchallenged for many decades. However, during the 1960's and the 1970's, support for Aboriginal land interests, particularly in the Northern Territory and West and South Australia, became more prevalent. As a consequence, changes were introduced to provide the indigenous Aboriginal with the right to acquire legal title to parkland reserved for them by the Government. In addition, they received some of the royalties from extraction of minerals on State Aboriginal reserves.

These were all relatively small changes. Nevertheless, in comparison with the attitude and understanding of land rights which had existed for the preceding 100 or more years, such a change was to prove quite momentous. As a consequence, Australia somewhat reluctantly accepted the fact that before contact with the European, the indigenous Aboriginal people did have some rights to the land, which were unmistakable and legitimate by Aboriginal custom. It was also acknowledged that these rights were alienated by processes which some today consider to have been most unjust. Whilst this proposition is not fully accepted by all in our society, it is well acknowledged that there is a definite change in attitude towards the land rights of indigenous people. This has gained momentum, particularly over the past 20 or so years.

European mindset

One of the major difficulties many Europeans and others have in recognising this and acknowledging the change which has occurred over the past 20 or so years, is an acceptance that traditional tenure and customs usually evolve under circumstances where change is a very slow and gradual process. As a consequence, many people regarded land customs as understood by the European, as having existed forever and as being immutable. This has resulted in some conlfict, particularly in the Pacific islands with the colonisation and Europeanisation of most of the societies and economies. This colonisation resulted in more precise contractual forms of land ownership becoming more evident.

Land tenure in any country is normally the outcome of the historical development of the country. In the South Pacific, this development was influenced mainly by colonisation, which in itself was in complete contrast to the customs and heritage associated with the indigenous tribal or family groups. The ownership concept following colonisation, acquired a degree of precision which was not sympathetic or consistent with the indigenous or tribal understanding of land ownership. In indigenous ownership, there is often not a right or a freedom to dispose of the land, but rather a right of ongoing use and occupation.

The European concept of ownership highlights two main features: the exclusive nature of ownership and the rights conferred with it and more importantly, the rights and power of disposal. The power of disposal, implies by common agreement, a form of sovereignty over such rights. This was a concept completely alien to virtually all of the indigenous tribal groups. However, in the European context, there is a power prescribed by law and this varies with the statutes and customs that succeed one another as a society develops.

Agricultural use

Ownership of land is a concept of fundamental importance and one which is a feature of most societies at a specific stage of development. It should not however, be taken for granted as a universal phenomenon. To comprehend this requires retrospection, with due acknowledgment that the present situation is so different from that of any previous period. For example, in earlier primitive societies of hunting people, the use and inheritance of specific resources was common, although land itself was most commonly held in either a tribal or group basis. The land as such was not the main resource. It was only with the evolution of agriculture that land tenure became a fundamental concept. The land and the social structure, however, were closely inter-linked.

In the feudal system of medieval Europe and England, land which was formerly owned by village communities was transferred to local lords and magnates in return for protection against hostile neighbours and invaders. This act of commendation required the person who commended himself to assume the obligation of serving and respecting his superior. The superior or lord, for his own part, agreed to maintain and protect the person who had commended himself. Often, the lord found it convenient to discharge his obligations by making a grant of land to his new vassal. In this and other ways, much of the land in Western Europe that was formerly owned by groups or village communities came to be owned by local lords.

With the advent of the agricultural economies, more sophisticated recognition of land ownership developed. The division of land and the creation of private ownership was the normal state of affairs in a European society, which evolved from a pastoral to a settled agricultural stage. The evolution of ownership of land and property in English law saw two major periods of change in the 19th and 20th centuries. During this period the law was modified to match far-reaching social changes. The land-owning aristocracy which derived its wealth and powers from feudal times was remarkably durable. In the early 19th century it was still being argued that the great landed families should be preserved by making entail (inalienable inheritance) compulsory. By the mid-19th century, up to two-thirds of the land in the United Kingdom was still controlled by the landed aristocracy, with most of the property secured under marriage settlements.

England in the 19th century, had not evolved into the almost unqualified freedom of North America, where land could be freely acquired and disposed of without encumbrance. There were signs however, of a growing agitation for similar reforms to be introduced. However, the process was relatively slow and it was not until the early/mid 1920's that an act of Parliament finally abolished the last remnants of mineral tenures and simplified land tenure. From that period on, English law enacted two kinds of ownership: "freehold in fee simple" and "leasehold tenure". On the one hand, property in fee simple was generally held to be as near as absolute as one could achieve, whilst on the other hand, English common law maintained the concept that ultimate ownership rested with the Crown. This latter principle is important when one has regard to the understanding of freehold land ownership and the rights conferred particularly in the new world countries of Australia, New Zealand, Canada and the United States.

Land rights

This very brief reflection on some of the historical perspectives and the various societies' understanding of land rights and use, is important when one has regard to the current issue of land rights and indigenous people, where land rights were generally

> *It is the expectation that the Crown will take definite and positive steps towards the redress of proven and established grievances.*

held by groups rather than by individuals.

It has been said that legal institutions do but reflect the condition of any society to which they relate. In this context, it is interesting to note the comment of a Federal Judge in the United States of America, where towards the end of the 19th century he is quoted as follows:

> *"Of the three fundamental principles which underlie Government and for which Government exists: the protection of life, liberty and property, the chi ef of these is property."*

Such a proposition would be considered untenable in today's society, which would undoubtedly reject the concept of property as a specific individual right having such paramountcy. More and more, it is generally recognised that individual property rights are held to be subordinate to the general social interest. In this respect, it can be argued that the process is still far from complete.

Indigenous People

Property rights for indigenous people are a major social issue. Indeed, in my view, they are likely to gain more prominence and a greater level of debate and political attention, becoming one of the major social issues of the new millennium.

In New Zealand, we are currently experiencing continuing debate and on-going dialogue between the Crown and the indigenous Maori people in respect of the Treaty of Waitangi entered into some 156 years ago. At the time the Crown, to achieve effective sovereignty of New Zealand, recognised that there was to be a contractual obligation between the Maori people and the Crown to create a partnership in terms of Maori land rights, Maori ownership and control of specific economic resources.

The elevation of the status of the Treaty of Waitangi over the past two decades has taken many New Zealanders by surprise. For some considerable time the Treaty itself was regarded by many as a mere curiosity. However, legislation of the 1970's and 1980's and subsequent Court of Appeal Judgements in respect of claims for alleged breaches of the Treaty of Waitangi, have now given the Treaty a legal force not previously recognised, or possibly even contemplated.

Similarly in Australia in June 1992, the High Court of Australia handed down a decision which represents one of the most fundamental cases in terms of land issues. The case of Eddie *Mabo & Others v The State of Queensland* (No. 2), represented a benchmark decision in that the High Court of Australia had to consider one of the central historical and judicial issues fundamental to the Australian nation. Canada likewise has experienced an evolutionary change in respect of the land rights of the indigenous Indian people and their right to continued occupation of land. This represented a challenge to the British colonisation of that vast nation and continent, on the assumption that it was "terra nullius" (vacant land).

It is the recent experiences in these three nations and the controversial issue of indigenous land rights, with its impact on changing social attitudes, that I now wish to address.

The New Zealand Experience

The Treaty of Waitangi as signed on the 6th February 1840, represented a contractual agreement between the Crown and the Maori people of New Zealand. The text of the Treaty was in both English and Maori language, signed by the then Governor of New Zealand, William Hobson on behalf of the Crown, and some 39 Maori chiefs (representing approximately 500 tribes) but with the signatures of additional chiefs who did not attend the negotiations subsequently obtained to the Maori text only. It is generally recognised that the Maori text of the Treaty is not a direct word for word translation from the English text. As a consequence, some difficulties in interpretation have arisen and there has been some debate on the meaning of particular words as to which text should be accepted.

The Treaty is best described as creating a partnership between the Maori people and Pakeha for the future Government and prosperity of New Zealand. The Treaty recognised that the Maori people owned land and as a consequence, both the European and Maori entered into an agreement setting out a basis upon which the two cultures would coexist for their mutual benefit.

It has been claimed by some that the Treaty as a whole does not purport to describe a continuing relationship between sovereign states, but rather its purpose was to provide for the relinquishment by Maori of their sovereign status and to guarantee their protection upon becoming subjects of the Crown. As a consequence, the Government was empowered to rule as the recognised authority over everyone living in New Zealand; European and Maori alike. The Treaty granted to the Maori all rights and duties of British subjects, with a guarantee of equality in terms of the law.

The second article of the Treaty is one which in recent years, has given rise to much debate and dissension among many New Zealanders, including both European and Maori.

Article 2 of the Treaty states:

> *"Her Majesty the Queen of England confirms and guarantees to the chiefs and tribes of New Zealand and to the respective families and individuals thereof, the full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they may collectively or individually possess, so long that it is their wish and desire to retain the same in their possession; but the chiefs of the united tribes and the individual chiefs yield to Her Majesty the exclusive right of preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective proprietors and persons appointed by Her Majesty to treat with them in that behalf."*

The English version of Article 2 was expressly clear, but the Maori text refers to the "Taonga Katoa" as meaning that the scope of Article 2 was not limited to lands and property interests, but also extended to all the cultural interests and treasures possessed by the Maori people including the Maori language.

Partnership and redress

In addition to the principles specifically set out in the Treaty in Articles 1 and 3, there are a further two which are inherent, the first of these is the principle of partnership, being an exchange of promises with a view to mutual cooperation for the benefit of all and a fair basis for the two peoples in one country.

The second principle, though not specifically spelt out, is that of redress. It is the expectation that the Crown will take definite and positive steps towards the redress of proven and established grievances.

This latter principle, belatedly accepted and adopted by the

"the Privy Council. found that the Treaty was a valid and binding contract between the Crown and the Maori people"

Crown, to which I will refer later, has led to the establishment of the Waitangi Tribunal.

In the early years, the British Government adhered strictly to the Treaty of Waitangi, insisting that the then appointed Governors observe its terms and conditions to the letter of the law. For some time the Maori people generally prospered and benefited from the trade with the growing number of pakeha settlers. Some of the indigenous Maori even expanded their trading fleets of canoes and personal vessels to undertake Trans-Tasman trade, with many prospering as a result. However, from the 1850's onwards the situation changed somewhat. Under the New Zealand Constitution Act of 1852, the then Governor Grey proclaimed self-government in New Zealand, which took effect in January 1853.

From 1860 onwards, the Government came under increasing pressure from the growing number of pakeha settlers to obtain land. Under self-government, many of these new settlers had achieved positions of control in both central and provincial Government. By 1860 the Maori/European population was approximately in balance, but within the next decade, the Maori population had declined markedly relative to the European immigrants. By 1870 the indigenous population had diminished to some 37,000, as compared with the then burgeoning European population of approximately 250,000.

Fee simple title

The 1860's also witnessed the establishment of the Native Land Court. It was composed of European judges, but with Maori "assessors" in some cases. Its task was to determine according to Maori custom who the owners of the Maori land were. The Court awarded an English title: a fee simple estate, undivided and held as a tenancy in common with other owners in the land, Since any member of the group could apply to have his interest determined by the Land Court and could, more importantly, sell the interest, customary controls by the group over the land were eroded. Individuals sold their interests either to the Crown, or to European settlers, who would then apply to the Court to have their proportionate interests divided out. In this manner, millions of acres of land were lost by the Maori. Various legislative amendments from 1900 attempted to moderate the worst aspects of this land alienation and fragmentation.

Raupata

The early 1860's also witnessed a continuing surge in European immigration and Maori unrest in the Taranaki and Waikato following disputes on land sales. In the Waikato the Chiefs refused to sell their land to the Government and it was taken from them by force, whilst in the Taranaki, the Government of the day sought to deal with a Maori leader who had no title to the land in question and refused to listen to the legitimate owners who had protested that the Maori leader had no right to treat with the Government over the land. After a period of passive resistance to Government survey parties, the Maoris were attacked. The Suppression of Rebellion Act and the Land Settlement Act were subsequently passed, which led to large scale confiscation of land formerly held by Maori. The "raupata" (confiscation) claims are a particular problem and an issue which has yet to be fully dealt with.

The Suppression of Rebellion Act was particularly punitive to the Maori people. They were deprived of their land and property, and in many instances were reduced to poverty. At this time the colonial Government did not give the same credence or adherence to the Treaty of Waitangi as its predecessor British Government. In 1865 the Native Land Court was established in an attempt to identify all Maori land, and to allocate this land to groups of owners not exceeding 10. As a consequence, Maori land became concentrated in the hands of certain families rather than tribes, with the result that it became easier for the European to negotiate and buy Maori land than was the case where land was formerly held under a tribal structure. Indeed at the time, the tribe had no legal status and as a consequence, it could not hold property nor sue in the Courts.

Treaty issues

In 1877 the Treaty of Waitangi was ruled by the then Chief Justice of New Zealand to be "a simple nullity". Some 16 years later in 1893, the Native Land Acquisition and Settlement Act was passed which gave the Governor widespread powers to take Maori land for settlement, irrespective of whether it was the wishes of the joint owners to sell or not. Compensation was paid at well below market rates and as a result, by 1900 some three million acres of land had been acquired under this Act.

In 1901 the Privy Council in the United Kingdom ruled in Nireaha Tamaki v Baker (reported in NZPCC 371) that the Treaty was not "a simple nullity" as previously decreed by the Chief Justice. Rather, the Privy Council found that the Treaty was a valid and binding contract between the Crown and the Maori people. The same Privy Council decision contained an interesting reference to American authorities as follows:

> *"Certain American decisions were quoted in the course of the argument. It appears from the cases referred to and others which have been consulted by their Lordships that the nature of the Indian title is not the same in the different States, and where the European settlement has its origin in discovery not in conquest, different considerations apply. The judgements of Marshall C J are entitled to the greatest respect although not binding on a British Court."*

In the following year, the European settlers passed the Land Titles Protection Act of 1902 which nullified the decision. Some five years later in 1907. New Zealand advanced from the status of a colony to that of a dominion.

The Public Works Act of 1908 which followed, provided the Crown with authority to take land for public works with rights of objection and compensation for the pakeha (European), but no such rights were granted to Maori land owners. The Native Land Act of 1909 also gave express authority to the Governor General to take Maori land for roads and railways, but with no compensation to be paid.

During the latter part of this century, the issue of legislation being passed which appeared to be in violation of the principles of the Treaty of Waitangi was being questioned in the Courts. A decision of the Court of Appeal *NZ Maori Owners v Attorney General* [198711 NZLR 641, include some pertinent comments as follows:

> *"Finally, the Treaty has never been legislatively adopted as domestic law in New Zealand. Any reading of our history brings home how different the attitudes of the Treaty partners to the Treaty have been for much of our post 1840 history: on the one hand, relative neglect and ignoring of the Treaty because it was not viewed as of any constitutional significance or politi-*

" *one can only ponder whether the parties to the signing of a treaty in 1840 ever contemplated the prospect of inalienable rights to the air waves* "

cal or social relevance, and on the other, continuing reliance on Treaty promises and continuing expressions of great loyalty to and trust in the Crown. It is only in relatively recent years and as reflected in the Treaty of Waitangi legislation itself' that the lagging partner has started seriously addressing these questions........Much still remains in order to develop a full understanding of the constitutional, political and social significance of the Treaty in contemporary terms and our responsibilities as New Zealanders under it."

Two notable events which focused public attention on this issue related to Maori claims in respect of: the Raglan Golf Course in the Waikato and Bastion Point in Auckland City. The Raglan property was a former Maori tribal meeting ground (marae) which had been acquired by the Crown for defence purposes. However, in lieu of an airfield being developed on the site as planned, it had subsequently been transferred to a local golf club. Also in the late 1970's, a large area of land in metropolitan Auckland Bastion Point, overlooking the Waitemata Harbour was the focus of considerable controversy and civilian unrest relating to the Maori occupation of a large public park. The Maori occupiers were forcibly removed from the land which had traditionally been their marae and tribal meeting ground.

In respect of both of these claims, the land was subsequently returned to the Maori claimants following negotiations with the Crown.

The Treaty of Waitangi Act 1975

This Act which was passed by the New Zealand Parliament in October 1975, was "to provide for the observance and confirmation of the principles of the Treaty of Waitangi, by establishing a Tribunal to make recommendations on claims relating to the practical application of the Teaty and to determine whether certain matters are inconsistent with the principles of the Treaty".

Pursuant to the Treaty of Waitangi Act of 1975, the Government established the Waitangi Tribunal which is intended to be a vehicle for resolution of disputes involving breaches of the Treaty of Waitangi which fell outside the judicial system.

The composition of the Waitangi Tribunal is of significance, for it is chaired by the Chief Judge of the Maori Land Court, whilst the members on the Tribunal have a definite racial balance in favour of Maori. Though there has been some discussion regarding the composition of the Tribunal, it is generally recognised that for the Tribunal to have credibility with Maori, it must be clearly demonstrated that justice is seen to be done in the eyes of the offended Maori claimants.

Significant features

The three significant features of the Waitangi Tribunal are as follows:

- Only Maori may bring claims before the Tribunal. Maori is defined as a person of the Maori race or any descendant of such a person.
- There is a wider ambit of matters which the Tribunal may consider.
- The Tribunal is empowered to consider matters dating back to the signing of the Treaty (as a consequence of an amendment to the original Act).

The express power of the Waitangi Tribunal however, is limited in that it may inquire into claims submitted to it, but it does not have authority in itself to provide any relief or redress. Rather, the Tribunal will make recommendations to the Crown having regard to the circumstances of a particular case.

Generally, the practice of the Government has been to accept the Tribunal's recommendations and it is generally expected that it will continue to do so, particularly where speed and urgency is to be given to claims and recommendations. Whilst the legislation only empowers the Tribunal to make recommendations which do not involve any transfer of land held by Europeans, and the Crown will not act to resume land in private freehold ownership, this situation is far from clear, with some private land owners claiming to have been adversely affected by some Tribunal recommendations. Compensation can be recommended and paid in such instances, or if the land is still owned by the Crown then such land may be returned to the tribes who have been adversely affected by earlier breaches of the Treaty.

Crown lands

One of the more contentious issues of the present time relates to land owned by the Crown but leased out under long term pastoral leases. The real concern of many of these European leaseholders - relatively small in number, occupying high country leases in the South Island and other Crown land leases in Taranaki and elsewhere, is whether the Crown will acquiesce and negotiate the surrender of these leases and transfer the land to the respective Maori tribes that have pursued claims before the Tribunal and received favourable recommendations.
It is in the implementation of the Waitangi Tribunal recommendations on which the present and future Governments will have to eventually focus their attention and hopefully, provide a resolution for at least the principal, if not all claims.

I believe it is fair to comment that many New Zealanders (perhaps both Pakeha and Maori alike) do not necessarily fully understand the implications of the claims under the Treaty of Waitangi and the recommendations of the Waitangi Tribunal. Many genuinely believe that freehold land in private ownership could still be the subject of a Government's proposal to settle some of the outstanding claims. Whilst this is not the intention of the Act, dependent upon the social and economic pressures of the day, the then Government may decide to change the Act which could permit the acquistion of an individual land owner's interest whether it be leasehold or freehold.

Air and water claims

One of the more intriguing claims to be considered by the Waitangi Tribunal was the claim to the transmission of radio frequencies in the air waves. This claim went to both the Court of Appeal and then the Privy Council, where it was rejected. There are however still claims before the Waitangi Tribunal in respect of the rights of access to river, lake and ocean frontages, as well as actual use of water in some of the rivers and lakes.

In respect of the former, one can only ponder whether the parties to the signing of a treaty in 1840 ever contemplated the prospect of inalienable rights to the air waves. Similarly, some observers find it difficult to comprehend that the water which passes through our lakes and rivers having circulated through the atmosphere, can constitute a property interest, in terms of a treaty, designed and executed some 150 years ago.

As previously indicated, the elevation in the status of the Treaty *there is a stated special and spiritual relationship of the Maori people and indeed of all indigenous races, with mother earth*

of Waitangi has surprised and in some instances, annoyed some New Zealanders. The Waitangi Tribunal legislation of 1975 and 1985 and the implications of the Court of Appeal Judgement of 1987, *New Zealand Maori Council v Attorney General* and subsequent developments, have aroused opposition from some quarters, who argue that the Treaty is too old or outmoded to be taken seriously and it is not relevant to the 21st century. On the other hand, it is claimed by some Maori academics and leaders, that the basis of the Treaty of Waitangi provided the justification for the British annexation of New Zealand and paved the way for statutes under which the Crown created title to former Maori land, by way of freehold and leasehold property. Some Maori leaders, for their part, genuinely claim that the Treaty signified a partnership between the Crown and the Maori people and that the contract itself was founded on the premise that each party would act reasonably and in the utmost good faith towards the other.

The lands owned by Maori, were held by them tribally and communally. The communal right, as it then existed was recognised by the Crown under the Treaty. The Treaty confirmed Maori ownership of all land with the implied acceptance of the features of tribal ownership and paramountcy. These include the holding of land as a community resource, together with subordination of individual rights to maintain tribal unity and cohesion.

Traditional concepts

Without endeavouring to pose as an expert on the traditional significance of land to the indigenous Maori, it is now generally well recognised that the traditional concepts of Maori land ownership are as follows:-

- the use of the land for growing food and providing shelter
- the cultural significance of the land In this context land provided the roots of the Whakapapa or genealogy of the people. In other words, it was the source of their identity.
- the Maori people identify themselves as the "Tangata Whenua". The term "Tangata" means people, the term "Whenua" means ground, placenta, whilst "Hapu" means pregnant and the people of that place. This connection of the person to the land is epitomised by the relationship of the person with mother earth and the source of the strength and mana of the people. It is this relationship between the person and mother earth that explains some of the aspects of the social order associated with the Maori society.

Therefore, there is a stated special and spiritual relationship of the Maori people and indeed of all indigenous races, with mother earth, as being basic to their existence and to all their beliefs, customs and traditions.

The alienation of much of the land formerly held by Maori - which occurred through two main processes: confiscation following "rebellion" by the native land owners, and alienation following establishment of the native Land Courts in the 1860' s, has given rise to much of the dissension which has developed among successive generations of Maori. This must be addressed for the New Zealand nation to continue to develop and advance as a united single people, but with an understanding of differing cultural standards and customs.

Negotiation

In an attempt to redress some of these injustices and inequalities which followed the signing of the Treaty of Waitangi, the Crown has over the past decade or more, endeavoured to negotiate with the Maori leaders and representatives an appropriate basis of compensation in settlement of outstanding Treaty claims. It is important to recognise that the claims are lodged solely against the Crown, i.e. the state, and not against private persons or corporations.

In 1987 the Court of Appeal found in favour of the New Zealand Maori Council, in that the transfer of Crown lands to State Owned Enterprises without consideration of Maori (native) land grievances would be inconsistent with the principles of the Treaty of Waitangi. It was held, that such an action was unlawful in terms of the State Owned Enterprises Act. As a consequence, we have seen over the past decade serious attempts made by successive Governments to negotiate land deals with the various Maori tribes in an effort to resolve many of these long-standing issues.

The process is far from complete and will likely continue for many decades. To some misinformed New Zealanders, some of the settlements reached represent a sell-out or surrender to a growing vociferous minority for Maori sovereignty.

What is generally recognised however, is that the issue will certainly not lapse, but rather successive Governments will continue to address this issue, albeit at a pace and level of urgency depending upon the social pressure and political momentum. It is also fair to comment that there is a widely held belief (probably principally by Pakeha) that irrespective of the settlements made under the Treaty of Waitangi Act, ongoing demands will be maintained by some of the more strident Maori activists.

To be continued...

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The Maori Reserved Land Act 1955:

A Background to Proposed Changes

by Judith Callanan B.B.S. (V.P.M.), Dip.Bus.Admin.

In practice every tribe member had an equal right to the land but never considered it to be something that could be taken from them.

Introduction

Maori land is characterised within three types; Customary, Freehold and Reserved. Maori Reserved land is land that was set aside by the Government specifically for Maori use. The area set aside was to be one tenth of the total, however a considerable amount of this `reserved' land was then taken back by the Government for hospitals, schools, public buildings and roads, or as a result of war. The reserved land was set aside during the period of 1840 - 1860s and was administered by the Crown in trust for the Maori owners. Pressure was then exerted by the settlers on the Crown to lease the reserved land. Around the turn of the century the settlers leasing the reserved land wanted a stability of tenure, whereas the Maori owners wanted the settlers (whose leases had expired) to be put off the land, as per the agreement. A meeting was held, where the Maori's objections were noted, but when the second reading of the West Coast Settlements Reserve Bill was read in 1892, the lessees were given a perpetual right of renewal. Three years later the perpetual right of renewal was extended to all reserved leases under the Native Reserves Act 1895. Finally in 1955 the Maori Reserved Land Act (MRLA) was introduced to consolidate all the previous Acts relating to reserved land and to standardise the lease terms and conditions, as the lease terms varied throughout the country.

The rental under the MRLA is based on the unimproved land value which is the value of the land as if no improvements had been carried out on it.

Problems raised

The problems that have evolved from the Maori Reserved Land Act (MRLA) are predominantly that the Maori owners do not have the right to occupy their own land because of perpetual leases, and the rental is only reviewed every twenty one years. The Maori owners feel there has been a lack of consultation between the government and themselves, regarding the administration and terms of the leases attached to their land. The tenants are objecting to changes because their leases state a prescribed rental for a 21 year period, and a perpetual right of renewal. Many lessees have farmed their land for generations and don't want to give up their leases.

History

New Zealand land prior to 1840 was held by the Maori in what is believed to be `communal' title. "The commonly accepted view of traditional land tenure is that hapu and whanau groups were allocated the right to use predetermined areas of land according to the specific and general needs of the individual and group. Assigned rights of use and occupation were generally acknowledged by all individuals. Not even a chief could lawfully occupy or use any part of a designated holding without the observation of formal custom and the consent of the individual or group." (Mulholland 1994 pg 180) The ownership of that land was held by one of the following ways:

1. By the tribe who had been occupiers for many generations, or
2. By a tribe which had fought and won the land from another and were now occupying the land, or
3. By a gift from either a friendly or hostile tribe. This gifting process was usually related to a war, or
4. A claim could be made to land which had not been previously occupied. - taunaha whenua.

No land tenure records were kept and no boundaries officially surveyed off. The boundaries of land for a tribe were distinguished by land marks, for example, from one mountain ridge in the east to the river on the west, and similar identification to the north and south.

The Chief of the tribe did not have the right to sell or exchange land, but rather the whole tribe had equal shares in the land. Each member of the tribe had the right to occupy, cultivate and hunt on the land. In practice every tribe member had an equal right to the land but never considered it to be something that could be taken from them. The food grown by the families within the tribe were shared by the tribe.

For the Maori people, the land is part of their heritage and culture. The lessee however, also has strong ties to the land through the development process and ongoing use. "In many instances lessee families have occupied the land for generations. Theirs are the improvements. They pay an annual ground rent. They have developed strong feelings of proprietorship for the land and perhaps an unconscious feeling of resentment of Maori ownership of the freehold interest." (Brown, 1993)

The Waitangi Tribunal 1975, has been set up to settle land claims that have been brought forward by the Maori owners. This tribunal is investigating all claims regarding the legal ownership of the land and whether the land was taken or bought without any fraudulent activities. It then makes a recommendation to the government. Any claims regarding the `one tenth' land that was meant to be reserved for Maori and was subsequently retaken by the Crown can be taken to the Waitangi Tribunal.

Land Tenure

The land tenure for Maori is now split between customary land, Maori freehold land and reserved land. Maori freehold land is the most predominant, and is held under thejurisdiction of the Maori Land Court. There is only a small amount of land still held as customary land. Reserved land totals about 28,000 hectares.

The Maori freehold is currently the predominant form of land ownership. "The current extent of Maori freehold land is 1,317,517 hectares according to the 1983 Department of Statistics Year Book. This represents 5% of New Zealand. Most of the Maori freehold land is in the North Island, where it forms a band across the centre of the island and makes up 11 % of the total land area." (Asher 1987 pg 50) Maori freehold land can be owned by either Maori or Pakeha. A report by the Royal Commission of the Maori Land Court in 1980 defined Maori Freehold land as:

"For the purposes of our enquiry we will take Maori freehold land to mean that land which comes under the jurisdiction of the Maori Land Court, though we recognise that in certain instances the Court has jurisdiction over General land. "

The Maori land became very fragmented, with smaller blocks scattered throughout the country. Incorporations were set up to bring together fragmented land into one title held by a single legal entity and to include all owners with an interest in the block of land. The incorporation has a management committee who specialise in the management of land. Each owner has shares in the incorporation which can be bought and sold. An incorporation can be set up where at least two or more people own one block of land.

The major incorporations set up in New Zealand that deal with MRLA are:

Paraninihi-Ki-Waitotara - Taranaki

Mawhera - West Coast

Wakatu - Nelson

Palmerston North Reserves - Palmerston North

The proposals are all subject to the overriding principle that owners and tenants could come to different arrangements at any time by mutual agreement.

Wellington Tenths - Wellington

Pukeroa - Oruawhata Trust

The Mawhera has the largest number of leases, followed by Wakatu and then Paraninihi ki Waitotara. The majority of Maori Reserved land (in land area) is held in Taranaki, which was previously held under the West Coast Settlement Reserves Act 1892. The Taranaki land consists of approximately 20,000 hectares being 70% of the total reserved land in New Zealand. The West Coast Settlement Reserves Act of 1892 makes the Taranaki reserved land a little different from the rest of the Maori reserved land. As part of the West Coast Settlement Reserves Act in 1892 the lessee, to obtain the right of perpetual renewal, had to surrenderhis lease andpay in cash to the Public Trustee (the then administrator of the leases) the value of all improvements which would otherwise have reverted to the lessor on the expiration of the term of the lease.

All reserved land including the land formerly under the West Coast Settlement Reserves Act 1892 is now administered under the Maori Reserved Land Act 1955 and allows for perpetual leases, and a prescribed rental. A perpetual lease is a lease which can be renewed at the end of each 21 year period into perpetuity. The perpetual nature of the leases was introduced by the Native Reserves Act 1895 which was introduced without consultation with the Maori owners. Prior to the change the leases were terminating, with terms of up to fifty years, and with 21 year rent reviews. Maori Reserved Land Act leases are very similar to Glasgow leases.

Traditionally a lease of land could provide a safe and steady income stream for the lessor, therefore the returns achieved for the lease should be only marginally higher than those expected from safe investments such as Government Bonds. The security of the lease has been jeopardised in recent years with the high inflation and therefore higher rental payments on renewal putting a hardship upon the lessee to pay the increased rentals. The twenty one year rent review period causes problems for both the lessee and the lessor. The lessee has the benefit of the lower rental for the years leading up to the next rent review however rentals can jump at renewal by up to 4000 percent causing hardship to the lessee to pay the new rental. The lessor has lost the benefit of the rent for the period leading up to rent review time.

The proposed changes indicate that the lessee will be given the first opportunity to purchase the freehold interest, subject to the Te Ture Whenua Maori Land Act 1993, but the question is raised as to whether the lessee will be able to afford this option. The current valuation methodology means that the lessees' interest and the unimproved land value may be more than the freehold value. The lessee may therefore be better off to leave the lease and buy an equivalent freehold property elsewhere.

Government Decision 1994

The Government in 1994 published its proposals for a resolution to the inequalities produced under the Reserved Land Act 1955.

These proposals are:

- *The legislation amending the MRLA 1955 will be a fall-hack position which will apply to those leases where the owners and lessees cannot reach a mutually acceptable negotiated settlement.*
- *All perpetually renewable Maori reserved land leases will terminate at the end of the current term plus two further periods of twenty one years. When a lease terminates, the owners will either pay lessees for the improvements at valuation, or lessees and owners will come to a different arrangement by mutual agreement.*
- *Compensation of between 1.85% and 2.9% of the unimproved value of the land will be paid to lessees as compensation for the loss of perpetual right of renewal. This will occur as soon as possible after legislation is passed. The issue of any compensation to owners.forpast losses may be considered through the Treaty of Waitangi claims process.*
- *Where the house is the principal place of residence, both existing urban and rural residential leases and their surviving spouses will be granted lifetime occupancy rights. The lease will then expire three months after the death of the lessee or the lessee's spouse, whichever is later.*
- *The "existing" lessee is the lessee holding the lease on the date the legislation reforming the lease is introduced. This right will not be transferable to others by will, gift or sale of the lease.*
- *Once legislation has been passed there will be a three year delay before market rents are phased in over the .following four years.*
- *Following the first review to market rent, rents will then be reviewed every seven years.*
- *Valuation New Zealand will establish benchmarks of the ratio which the unimproved value bears to the land value of each leasehold property, the benchmarks to be agreed to, where possible, by owners and lessees.*
- *Current lessees will be granted the right of first refusal to purchase land classified as general land under Te Ture Whenua Maori Act 1993 at the current market or arbitrated value if offered for sale by the owners. Owners' ability to sell their beneficial interests in the land in accordance with Te Ture Whenua Maori Act 1993 will remain unaffected.*
- *Owners will be granted the right of first refusal to purchase the lessee's improvements in the land at the current market or arbitrated value if offered.for sale, unless the proposed sale is to the lessee's spouse (including common law partner) or child.*

The proposals are all subject to the overriding principle that owners and tenants could come to different arrangements at any time by mutual agreement. There are already cases where mutual agreements have been reached, in particularin the commercial area.

Valuation of Leasehold

The valuation of a leasehold property can be undertaken to value either the lessee or the lessor interest, or both. The lessee has value through the improvements on and to the land, any benefit in the rent till the next review date, and a benefit in the right of perpetual renewal. It is the benefit in the right of renewal which is a contentious issue. The lessor's interest is the combination of the benefit in rental to be obtained till the next rent review, plus the reversion of the freehold value.

Lessee's Benefit

The lessee's benefit in the land is calculated as follows:

(i) the benefit in the right of renewal;

PLUS

(ii) the benefit in the rent.

PLUS

(iii) value of improvements.

There is conflict in the methodology used to value the lessees benefit in the right of renewal. "There have been many attempts to explain mathematically the basis of such "Right of Renewal" values, and to provide a formulae to use in valuations. In all cases these

If there is fair compensation for loss of property rights there is no injustice. "

formulae fail to fully explain the factors involved and do not provide a foolproof basis for valuation. This is especially so where different rent review periods are found in practice, and because leasehold valuation defies mathematical precision." (Jefferies 1989) The most common mathematical formula used to value the right of renewal is;

$$\frac{\text{Market Rent \%} \quad \text{Contract rent \%}}{\text{Market rent \%}} \times \text{Freehold market Value}$$

The alternative method of valuing the right of renewal is based on analysing sales and applying a market based percentage of freehold land value. This percentage will vary depending on the region, and generally falls between 15-35%.

There is a different school of thought that is advocated by Professor R.J.Townsley (1974) in a paper presented to the New Zealand Institute of Valuers' conference, which says that if the rental is set correctly at renewal then there should be no adjustment for the right of renewal. Townsley (1974) sets out a mathematical formula where a rental rate is applied to the market rental to take into account the length of the lease.

Any value assigned to the perpetual right of renewal is therefore only a factor of `goodwill'. The lessee's interest in the land has historically sold for prices below freehold value in most regions.

The issue of the renewal in perpetuity is central to the concerns of both parties. Both parties wish to resolve the problems but the issue of compensation and the level it is to be set at, is crucial.

The rental benefit is calculated by the present value of the difference between current market rental and contract rental, for the unexpired term.

Lessor's Benefit

The lessor or owners benefit is valued as follows:

(i) Calculating the benefit in rental over the remaining years till the next rent review.

PLUS

(ii) Calculation of the reversion of the freehold discounted to today's dollars.

The addition of the lessees and the lessor's interest should not exceed the freehold value.

The benefit in rent is calculated by taking the present value of the contract rent for the remainder of the term. The reversion value is calculated by taking the capitalised market rent, less present value of the difference for the number of years till the next review.

Compensation

The issues of concern regarding the compensation level to the lessee, is firstly the low percentage being offered, and secondly the date to which the unimproved value will be set. If the land value is taken at a date prior to the 1991 Marshall report the compensation is going to be considerably greater than if it was taken on the actual date of introduction. This compensation issue is being compounded as each day of uncertainty goes by.

"Compensation was raised by both parties with respect to:

- loss of income;
- loss of opportunity;
- loss of security;
- losses on improvements;
- losses related to affinity and cultural attachment to the land." (Marshall, 1991 pg43)

The Marshall report (1991) conclusion with regard to the compensation issue is: *"It is the view of the Review team that in exercising any option the Crown must acceptfull responsibilityfor compensating losses incurred by both Maori owner and lessee.*

Reported in Wai 27, Vol 1 *The Tribunal considered it rather ironic that a little over 100 years later, when Maori are seeking to reverse the position, the present day tenants urged the Tribunal to respect their rights and their guaranteed land transfer title. The lessees indeed do have a valuable right and are entitled to be heard and to be compensated for any loss. "*

Compensation to the lessee should be at least equal to any loss realised between selling a lease with a perpetual right of renewal and a terminating lease.

The improvements upon the land are to be compensated based on their full market value to the property as a freehold, however there is no assistance available from the government if the lessee wants to purchase the freehold. There will be costs incurred by both the lessee and the lessor in valuation expenses and costs of transfer which may need compensating.

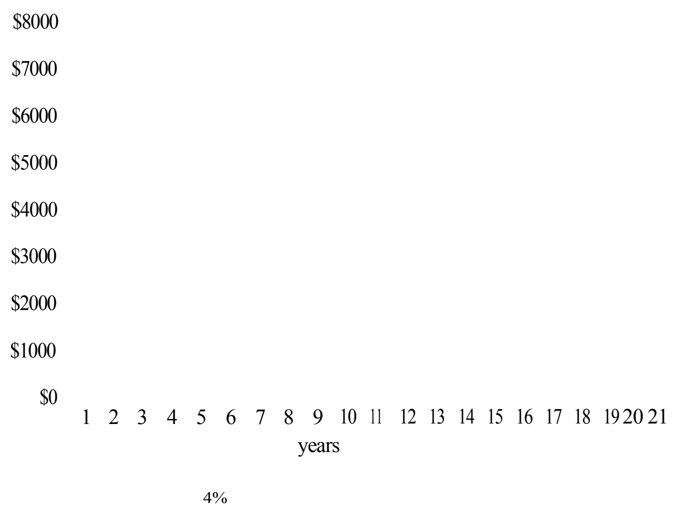
The compensation proposal for loss of perpetual lease terms is between 1.85 and 2.9% of unimproved value, depending on when the lease is to expire.

If there is fair compensation for loss of property rights there is no injustice.

The Crown has estimated that the total compensation package, including a provision for the assistance for the Maori owners to purchase the lessees improvements, at 1991, is around $300 million.

Rental under the MRLA has been set at 4% for residential and 5 % for rural leases, whereas the market rental may be different. This will create uncertainty for both the lessee and the lessor in returns obtainable. The current rent on residential leases using Council Glasgow leases and arbitrated Maori leases is between 6 and 6.25% of land value, (not unimproved land value). The difference between the prescribed rental and market rental has only recently surfaced, as up until the current review period the prescribed rentals have been a good indication of the market rental. "A new 21 year lease term for most West Coast Leases in Taranaki commenced 1 January 1990 and the prescribed rental of 5% was a full market rate at that point". (Larmer 1995) With rising inflation rates over the last twenty years, this has seen an increase in market rents causing a gap to occur between market rental and prescribed rental. The following graph (Figure 1) illustrates the difference between the current market rental for residential leases of around 6% and the

Figure 1: Seven Year Review



"Since the European came to New Zealand there have been disputes over land ownership"

prescribed rental of 4%, with 21 years right of renewal.

If we compare the expected returns using market rents with reviews every seven years on a land value of $35,000 compounding at 10 % per annum, with the current 4 % for 21 years it can be clearly seen that the owner is at a financial disadvantage, and the lessee has a rental advantage (refer Figure 2).

The internal rate of return achieved by the owner (lessor) is currently around 7% pretax. This compares very favourably with other investment forms, considering the safety of the income being received and the low risk. This figure has been based on a 4% residential prescribed lease over a 21 year period with land value growth compounding at 5% per annum. The proposed changes will see a much better return to the owner of around 10% pre tax. This figure is computed by again using a5% growth rate but a 6% rental being renewed every seven years.

Figure 2: Lease Value

$5000
$4000
$3000
$2000
$1000
$0
$25,000 $35,000 $45,000 $55,000 $65,000 $75,000
Unimproved Value
4% f 6%

Conclusion

There have been extensive reports undertaken to resolve the MRLA issues. The proposals are currently before the government. Since the European came to New Zealand there have been disputes over land ownership. The perpetual Maori leasehold land has a history which has evolved since the 1800s and culminated with the MRLA of 1955. For much of this time the Maori owners of the land had not been adequately consulted and informed on the changes or proposals.

Both the lessees and the lessors acknowledge that an injustice may have occurred and want the matter to be resolved. The resolution of the problems relating to rental rates, review period and the change from a perpetual lease to a terminating lease, rest to a great extent on the level of compensation being offered, and how the changes will be implemented.
As each day goes by the level of uncertainty for all concerned increases and doesn't help in the resolution of the issues. Within the proposal is a strong recommendation that any mutual decision made between the lessee and the lessor overrules any legislation.

There are strong feelings by both parties that no further injustices are caused and that the matter is resolved equitably.

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DCF Valuations: Are they obsolete?

Rodney L Jefferies F.N.Z.I. V.

While DCF valuation techniques have only relatively recently been adopted by the valuation profession in New Zealand, newer methods such as real options analyses are poised to make DCF techniques out of date. This paper examines DCFs in the light of these new techniques and the likelihood of their adoption by the profession.

DCF methodology under attack

New valuation methods take time to be adopted by the profession and this is particularly true of our profession in New Zealand. Take DCF (discounted cash flow) valuations for example - only recently have they been more widely promoted and adopted' whereas in the United States DCFs have been the standard technique for appraising investment real estate for over 10 years2•'. Simarly in Australia4,' and the United Kingdom' DCF valuations are only now being promoted as the more rational valuation technique to apply to commercial properties such as CBD office/retail investments. Professional valuation organisations are scrambling to issue guidelines' or valuation standards and to promulgate these so that DCFs may be properly understood and consistently applied.

However, we now read of new valuation and investment analysis techniques which will supersede DCF techniques. The latter, it is claimed, fails to correctly analyse investment opportunities. The latest, real option analysis, "is the proper analysis framework for investment decisions" - claims a reviewer' of a book" on this technique (Dixit & Pindyck, 1994) "Investment Under Uncertainty".

By pronouncing the death and burial of DCFs as the paradigm for investment decisions in the USA", where does it leave us in this part of the world who are just getting to grips with the DCF technique?

For the writer, who has just spent the best part of his year's sabbatical researching, writing, giving papers12,11 on and promoting DCFs14 the question arises as to whether I have been wasting my time and effort while encouraging valuers to do the same. I think not!

A review of the limitations, advantages and durability of DCFs

Firstly, let us look at the limitations of DCF valuations compared to the potential use of real option analysisj5 as an alternative methodology; secondly, consider the essential advantages of DCFs over conventional valuation techniques; and thirdly, why DCFs will be around for a long time despite the apparent superiority of real options analysis.

Limitations of DCFs v real option analysis

Firstly, the most recent criticism levelled at DCF models is that, normally implemented, DCFs ignore the option to wait, ie to hold back from investing today in the probability that the profitability of investing later may be more optimal.

In New Zealand there are no new CBD office buildings being built in our main cities similarly in Australian cities - due to the aftermath of the overbuilding in the mid 1980's boom and the continuing over-supply of office space. Carrying out a residual land valuation based on current and forecasted office rentals produces a negative land value, or on a DCF analysis produces a negative net present value or an internal rate of return that is unacceptably low or even negative. But we valuers know that the land is not worthless. It still has a potential value for future office development once the office supply dries up, rents rise and potential profitability for office development returns to the market causing land values to recover and even to boom again16.

This observation suggests that investors are indeed currently deferring development and that our valuation techniques are not specifically adapting to such a phenomenon. CBD land values in such a current situation consist of the present values of an interim use of land coupled with a future series of uncertain real options to develop land for office/retail or other central city uses (ie apartments, hotels, etc.). Reality seems to fit the real option pricing theory as being rational and reasonable. The problem is that the future is so uncertain that conventional valuation techniques are unable to provide satisfactory or defensible answers.

Real option analysis may well hold a key to more accurately providing valuations in such situations of future CBD uncertainty - but is also an applicable methodology in any situation where future uncertain cash flow forecasts with various probabilities exist.

An example: DCF v real options approach

A very simplistic example may help to contrast the two techniques: take a vacant CBD site which is currently used for parking and generates a net cash flow of $0.3m p.a. Assume a speculator is offering to buy this site for a current use return at a capitalisation rate of 9% p.a. The developer has designed and costed an office building for the site for its assumed highest and best use, averaging an outlay of $8.Om per year over three years (totalling $24m for building, fees & holding costs excluding capitalised opportunity [or interest] costs). A Crown Agency tenant is prepared to commit now to take a lease of the whole building at completion at an estimated non-induced market rental of $2.7m p.a on a net lease basis. An investment trust is prepared to purchase it on completion with the tenant in place at a capitalisation rate of 9% p.a. Let us further assume that the developer is prepared to proceed if he can achieve an internal rate of return (IRR) of 12% p.a (calculated annually in arrears) and is confident that there is a 60% probability that market rentals will be 20% higher on completion than the preagreed rent to the Crown Agency and a 40% probability that market rentals will be 5% lower. Assuming (simplistically) that there are no other alternatives, what can the developer afford to pay for the land and thus create evidence of current land value?

a) The minimum price the developer can buy the land for is $0.3m capitalised @ 9% _ $3.3m.

b) On a DCF residual land valuation basis, assuming immediate erection of the building for the Crown Agency with the guaranteed buy-out on completion, the maximum price the developer can afford to pay is: $2.7m p.a capitalised @ 9% p.a= $30m less future value of costs of $8.Om p.a accumulating interest @ 12% p.a (x 3.3744) = $27m, giving a future land cost of ($30m $27m) _ $3m, which when discounted back over 3 years at 12% p.a gives ($3m x 0.7118) _ $2.13m present value which the developer could afford to pay. The developer can either pass up the opportunity, or buy at a minimum of $3.3m and accept a lower expected return than the hurdle rate of 12% p.a internal rate of return (resulting in an IRR of 7.65% p.a.). Sensibly, on a traditional DCF decision making basis, the developer will let the speculator buy the site and valuers will believe that too much was paid for the land as it is unsupported by a residual valuation approach.

c) However, the developer has recently employed a property graduate from university who does a very simplistic real option pricing calculation as follows: if the market rental goes up by 20% by completion the rental will be $2.7m x 120% = $3.24m p.a and (assuming returns remain unchanged) the property could be sold for $3.24m capitalised @ 9% p.a. = $36m, less the accumulated costs of $27m giving a future residual land value of $9m which when discounted back over 3 years at 12% p.a gives ($9m x 0.7118) $6.4m which the developer could afford to pay if that was 100% probable. However applying a probability factor of 60% to that gives a risk adjusted affordable price of ($6.4m x 60%) $3.85m. Alternatively, if the market rental goes down by 5% by completion the rental will be $2.7m x 95% = $2.565m p.a. and (assuming returns remain unchanged) the property could be sold for $2.565m capitalised @ 9% p.a = $28.5m, less the accumulated costs of $27m giving a future residual land value of $1.5m which when discounted back over 3 years at 12% p.a. gives ($1.5m x 0.7118) $1.07m which the developer could afford to pay. Applying the residual probability factor of (100% - 60%) 40% to that gives ($1.07m x 40%) $0.43m. Thus, in total, the developer could afford to take into account the uncertainty and not bid up to the possible maximum value of $6.4m but to the sum of the probabilities i e (60% x $6.4m) + (40% x $1.07m) = $3.85 + $0.43m = $4.28m. As this represents a reasonable risk the developer decides to go ahead and take the university grad's advice, bids against the speculator for the land and ends up paying say $3.85m to acquire the site and further takes on the risk and uncertainty in building without a tenant in place, to face the market as the building approaches completion". Valuers take this new sale as truly indicative of a new (higher) price level for CBD land as a respected (and well advised) developer and not a speculator bought it!

Relevancy

The above example simplifies a lot of things such as whether the developer can get development funding without a tenant and buy-out in place. There is also uncertainty in capitalisation rates, building costs and escalations. Alternative types and sizes of development which may be more economic, or securing the site now, but delaying building a year on the probable expectation that rents will rise even greater at the end of four years! These are complications which, if reasonable parameters are quantified, can be incorporated into a real option pricing model.

Real estate investment, especially new developments, is typically irreversible, ie. once commenced it has to be seen through to completion or cannot be reversed without significant sunk transaction, physical building or holding costs. There is usually some scope for flexibility in timing the investment. Waiting may clarify some uncertainties such as rising rents or a competitor choosing whether or not to build.

DCF investment analysis, as typically applied, only derives a net present value or an IRR (internal rate of return) based on period zero, ie at the beginning of the investment period assuming immediate commencement of the investment. Once the positive decision criteria have been reached (ie a positive NPV or IRR above the hurdle rate is indicated) investment is assumed to take place. However, it maybe that by waiting, a more profitable and optimal investment may have been possible and more desirable! That's the essence of where the protagonists of real option methods claim superiority!

Investment in property is a long-life one, involving large capital sums and with new developments long gestation periods of cash outlays before cash inflows return an acceptable profit. Valuing the option to wait could be critical as to whether to optimally invest now, in a later period or not at all. There is an implicit option to wait imbedded in any real estate decision and to the extent that DCFs as typically used as valuation tools ignore this important aspect, their use may lead to over or underoptimal present values.

Reliance on DCF valuations by market players may act to amplify the upward and downward oscillations in the `boom' and `bust' property market cycles. Reliance on real option analysis based valuations has the potential to dampen or `shock-absorb' the effects of such cycles as with increased uncertainty the value of waiting and the value of keeping open future real options are likely to increase with their effect being able to be measured and reflected in present values.

Advantages of DCF valuations

Secondly, when properly executed, DCF valuations require the valuer to explicitly forecast future cash flows and to establish an appropriate discount rate that is applied to determine *present value.*

The treatment is different to investment analysis to the extent that the initial outlay is not included so as to arrive at *a present value* not *a net present value.* The discount rate used is that which a typical purchaser would require having regard to the type of investment and risk compared to alternative investment in other assets. It is that rate which is closest to that offered by alternative investments in assets of equivalent risk.

The best evidence of property investment discount rates are those required by current actual market investors. These are determined by similar DCF analyses of the forecast cash flows of properties which have sold - to solve for the expected discount rate or IRR. Where such evidence is unavailable or difficult to obtain, a valuer can use, as a proxy for an expected specific property discount rate, one built-up from (typically) a risk-free or gilt-edged rate such as government stock. This process adjusts for real estate market risk, forecast income growth, expected inflation, negotiability, liquidity, specific property & tenant risk and other relevant factors that distinguish the expected property return from investment in other assets. There are a number of sophisticated methods to assist in this task such as the use of WACC (weighted average cost of capital) and CAPM (capital asset pricing models) - though in practice most valuers use a good lacing of intuition and experience in settling on the appropriate rate.

Compared to conventional overall capitalisation techniques ie initial or passing income capitalised at an over-all rate or ARY (all risks yield [in UK]), DCF valuations are more explicit and informative to investors. Some types of property, especially multi-tenant properties where there is a mixture of over- and under-rented space coexisting with a variety of tenancy terms, are unable to be adequately valued by conventional capitalisation techniques. For these DCF valuation is the only current alternative effective technique.

There are a number of other advantages of DCFs over traditional methodologies, such as adequately allowing for required future capital expenditure on upgrading etc. These advantages are expanded upon in the author's NZIV CPD Monograph "DCF Valuation Techniques & Spreadsheet Applications". The ease of use of DCFs has been greatly increased with the advent of modern personal computers and customised spreadsheets or other off-the-shelf software packages. The above mentioned monograph is designed to help valuers come to grips with and provide the required skills while bringing some uniformity, rather than rigid standards, into the use of DCFs in valuation practice.

The basic calculations required for a DCF valuation are simple applications of the "functions of a dollar" or compound interest and should enable the checking of a well prepared and set out DCF valuation by a hand-held calculator. The in-built financial functions or formulae in modern spreadsheets take all the hard work out of the calculations. User friendly utilities that come with these software programs such as "Goal Seek", "Solver', "Q&A" and others allow the user to quickly find answers to *what if* questions by altering assumptions, forecasts or other subjective inputs. Sensitivity tables can be quickly generated, with charts readily created to visually illustrate the different projections made and the respective results. Judgement then needs to be applied so as to indicate to the client the most likely outcome and thus the present value.

The CPD Monograph referred to extensively deals with the required "nuts & bolts of DCF", definitions, relevancy and presentation of DCFs in valuation reports. In essence, DCFs are a modern valuation method which every valuer should be competent in carrying out for investment property valuations and should know when the technique is applicable and relevant. Awareness of the common errors in technique and pitfalls in DCF execution which the monograph deals with should assist the valuer in achieving confidence in applying, checking and knowing when to rely on this method of valuation. There is no excuse for any valuer not to be *au fait* with the technique.

Durability of DCFs

Thirdly, durability has two connotations, one being how long a specific DCF valuation will last and the other being how long we are likely to use DCFs as a valid valuation technique.

A specific DCF valuation is likely to have a longer useful life to a client than a conventional valuation using a simple capitalisation technique as it provides a pro forma budget for judging expected future cash flow performance against realised returns. This, of course, can come back to haunt the valuer if the forecasts prove to be materially inaccurate or unfounded - unless there have been significant changes in extrinsic factors that were unforeseeable at the time of the valuation.

However, valuers are not, and should not predict the future. It is inevitable that forecasts will not match reality, but the DCF forecast allow management to identify those components of realised cash flow that contribute to deviations from expected outcomes made at the date of investment and should lead to improved ongoing management decisions. For the valuer it allows income and expense forecasts to be revised or fine tuned when valuations are being updated and they are thus more useful to the client.

The second durability connotation is of more concern in this paper given that the protagonists of the recently developed real option methodology relegate DCFs to the grave!

An examination of real option techniques, however, shows that the method still relies on the principles of discounting to present values of the future value of options for alternative potentials, based on forecast cash flows which require discounting at a required rate of return. The essential difference between DCF and real options models is that different future potentials are assigned *probabilities* due to their uncertainty over time within specified constraints or limits. Stochastic processes[18] and dynamic optimisation techniques involving advanced calculus are used to crunch the numbers to derive a present value (or a net present value in investment analysis).

Herein lies the real difficulty - valuers generally are unlikely to come to grips with the required mathematical skills in the foreseeable future. Those skilled in these quantitative processes and numeric skills are likely to be financial economists and highly trained econometricians - only some of whom will apply their skills to real estate.

That is not to say that these techniques will not be learnt and used by some valuers, but are likely to remain in the academic world for some time until they are tested, found relevant, teachable and incorporated into valuation teaching and CPD programs. It is in this area that the writer hopes to carry out research. If user-friendly software versions of real option valuation models can be developed for use in real estate valuation and investment analysis then real option analysis techniques may become more widely used and accepted in the valuation profession.

Conclusion

DCF valuation models will, in the writer's opinion, inevitably be around and used well into the 21st century. DCFs are not yet obsolete and are likely to remain one of the mainstays of investment property valuation methodologies in the foreseeable future. We may need to specify their limitations and assumptions more emphatically accepting they are not necessarily providing fully comprehensive conclusions or valuations. Though real option valuation techniques promise to provide useful insights into investment analysis and may well improve the optimal decision making process in real estate development feasibilities, their practical usefulness in the valuation profession will be limited. Those who can grapple with and master the mathematics of the stochastical processes required for their implementation will be able to provide increased sophistication in academic property research and provide valuation methodologies for future valuation `quants' (those who rely on quantitative skills). But in New Zealand, (and from my recent research in Australia, Europe and the United Kingdom) DCFs are not yet ready to go into the grave - perhaps over my dead body!

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14. Supra, Footnote I.

15. This brief article will not attemlt to explain "real option theory" for that readers will need to study Dixit & Pindyck (supra).

16. Latest reports are for some new office towers to be completed in Sydney in 1977 "Building a new Sydney - New construction boom emerges"; Australian Property News, Vol 24, March 14, 1996.

17. A few calculations will show that if the rents do go up 20% as optimistically forecast then a profit over costs of $3.6m will result and a IRR of 20.52% achieved; whereas if rents go down 5% as pessimistically forecast then a loss of $3.9m will result and only a 1.81 % IRR achieved - resulting most likely in the redundancy of the Uni grad!

18. Defined as "..ways of quantifying the dynamic relationships of sequences of random events" in Taylor Howard M & Kadin Samuel, (1994); An Introduction To Stochastic Modeling; Academic Press, San Diego, California.

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REFI REED PAPER

Predictive Accuracy of Machine Learning Models for the Mass Appraisal of Residential Property

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University of Ulster

For property tax assessment the use of mass appraisal techniques has become widespread throughout the world. Such techniques tend to rely primarily on multiple regression models. Given that there are patterns of value inherent within rational property markets, this paper utilises advances made in artificial intelligence which excels at learning such underlying patterns.

A case study is used to test the efficacy of an artificial neural network model at predicting the most probable selling price of residential property. Results are then tested against actual sale prices to determine the variance and the model performance using internationally recognised statistical measures such as the coefficient of dispersion and coefficient of variation.

Introduction

The appraisal of real estate is often considered either an art or a science or at a more realistic level a combination of both. The scientific approach advocates the use of statistical techniques which provide a more explicit and objective understanding of the appraisal process (Renshaw, 1959; and Pendelton, 1965; Bland, 1984; Mark and Goldberg, 1988; and McCluskey and Adair, 1994). Whereas, the art in appraisal according to Millington (1994) places emphasis on the knowledge and experience of the appraiser. The combination of information technology, inferential statistical techniques and the intuitive skills of the appraiser must be considered a distinct advantage in terms of providing a more subjective and analytical basis to the appraisal process.

One of the most significant advances in terms of mass appraisal has been the development of multiple regression analysis (MRA) as a tool for the prediction of value (see Brown, 1974; Gloudemans, 1981; Smeltzer, 1986; Fraser and Blackwell, 1988). Multiple regression provides a statistically sound approach to estimating for a sample of fairly homogeneous properties how selling price is related to the selected determinants of value. Although multiple regression alleviates some of the problems associated with traditional appraisals ie subjectivity, it is however, not free from criticism. There are several methodological problems associated with the use of multiple regression, the principal one being the difficulties in meeting the mathematical assumptions underlying the models. Other problems include function form miss-specification, multicollinearity and heteroscedasticity (Brunson et al, 1994). In addition, since the regression model demands multivariate normality, it is generally the case that the variables being used need to be transformed. In undertaking such data transformation the model may achieve a more acceptable performance, but with a net loss in relation to taxpayer understanding and level of explainability.

Other mass appraisal techniques currently in use include adaptive estimation procedure and expert or rule induction systems. It is not the purpose of this paper to provide coverage of these techniques but if readers wish further details the following references would be informative reading, (Carbone and Longini, 1977; Boyle, 1984; Schreiber, 1985; and Whitted and Opfer, 1993).

REFEREED PAPER

Recently, artificial neural network (ANNs) models have been applied with varying degrees of success to real estate appraisal problems (see Do and Grudnitski, (1992); Tay and Ho, (1994); Borst, (1995); Evans et al, (1995); and Worzala et al, (1995)). It is generally accepted that MRA represents the standard mass appraisal methodology against which the performance of other techniques is compared. These papers have all contributed to the research mass in terms of the effectiveness of ANNs as against MRA. While accepting these findings, this paper does not attempt yet a further comparison but rather accepts a priori the potential usefulness of ANNs within the mass appraisal field. The paper argues, that model performance based on derived errors should ideally be complemented with an investigation of other statistical measures of performance such as coefficient of variation and coefficient of determination.

FIGURE 1: STRUCTURE OF AN ARTIFICIAL NEURAL NETWORK

bias
neurode
ao \
connection weights

output (dependent
£(S) variable)
O
S;=la,W;
back propagation
of error

The aim of this paper is therefore to develop a predictive model for estimating the most probable selling price of residential property utilising a neural network paradigm and to consider the variability in the error results by applying statistical techniques.

Artificial neural networks

An Artificial Neural Network, is a discrete branch of artificial intelligence which builds upon the accepted theories of understanding what intelligence is and how to make machines more useful. It takes its name from the network of nerve cells in the brain. Traditional neuroscience has identified two key functions of the brain: first, the ability to learn from experience and second, the ability to create internal representations of the world in the form of internal data maps. Neural networks utilise a parallel processing structure that has a large number of processing elements and many interconnections between them. Figure 1 illustrates atypical structure for an ANN. On the left are the inputs (neurodes) to the processing unit. Each interconnection has an associated connection strength or weight, denoted as w_o, w..,........w... The processing unit performs a weighted sum of the inputs and then uses a nonlinear threshold function (usually a sigmoid function) normally utilising a learning algorithm such as back propagation to compute its output. The calcu-

REFEREED PAPER

VARIABLE	INPUT NEURODES	DESCRIPTION
Selling price	1	
Location	1	Postal district
Size		Gross floor area
Bedrooms		Number
Class		Detached or semi-detached
Age	1	Number of years since built
Type	3	House, bungalow, chalet
Heating	5	Full (electric, solid fuel, gas, oil) and part heating
Garage	3	Single, double or none
Total number of input neurodes	17	

lated result is then denoted as the output of the network.

ANN's are not programmed but rather they `learn' by example. A network is presented with a training set of data from which it can learn the underlying pattern. The most common approach to training the network is to process input data with its associated output, in other words property characteristics including the known sale price. The forward pass through the network will result in the connection weights being applied in order to produce an output. This output, in terms of a calculated value will in all probability differ from the actual value. The numerical difference between the generated value and the actual value is then fed into a function which calculates an amount which each weight must be changed to make the network output incrementally closer to the actual value. This process of weight alteration is carried out in the direction of the output to the input, a process which is termed back propagation. The ultimate objective is to minimise the error between the output of the network and the actual desired result. The network will continue to train until it has achieved a predesignated level of acceptable error (determined by the user) or the default error threshold (determined by the software). At this point the network applies its learning algorithm to a previously unseen holdout data set. Results produced can then be analysed to examine the correlation between the generated output value and the actual sale price.

In training the network overfitting can sometimes be a problem. This occurs when the network has been `over-trained', when instead of learning from the training data, the model memorises the training set. The presence of overfitting can be detected when the results of processing the holdout sample are analysed. Usually the results are significantly poorer than one would have expected. In recognising the serious problem of overfitting most software packages incorporate a feature which prevents the neural network from overtraining.

Data

A research project was undertaken to investigate the potential of applying a neural network approach to determine the capital value of residential property in Northern Ireland. The data was supplied by the Valuation and Lands Agency which has statutory responsibility to undertake general revaluations and to maintain the valuation list of all ratable property in Northern Ireland. To facilitate this work the Agency has developed a comprehensive database of property and market information. The data consisted of 416 residential properties sold over a period from August 1992 until August 1994. Figure 2 (page 44) shows the distribution of the sale prices for the whole data set. The sample was divided randomly on a 10:1 basis between the training sample and the holdout sample. This resulted in 375 properties being used to train the neural network and 41 being used to interrogate the network. Earlier work on data sets divided on a 2:1 and 4:1 basis demonstrated that the more data available to the neural network for learning the better were the results. Hence, it was decided to train the network on a larger data set but retain a reasonable sized holdout sample to be able to statistically verify the results.

The geographical location chosen for the study provided a representative sample of building types rather than a totally homo-

FIGURE 2: DISTRIBUTION OF SALES PRICES FOR THE WHOLE DATA SET

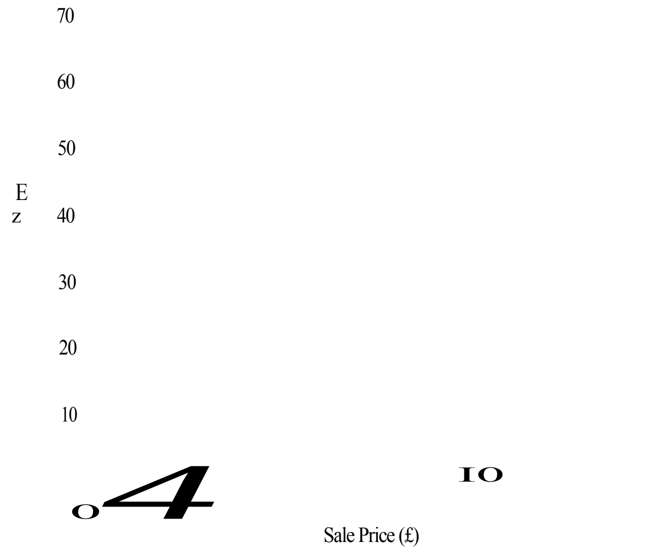


TABLE 1: NUMERIC DATA FOR WHOLE DATA SET

Data element	Minimum value	Maximum value	Mean
Sale price	£9,900	£130,000	£41,075
Floor area	64m2	277m2	110m2
Bedroom	1	5	2.92
Garage	none	2	0.53
Age	pre-1919	post-1990	1980
Sale date (range)	August 1992	August 1994	-
Heating	0	1	-

geneous group of properties. The variables to be included were as follows; price (dependent variable), location, transaction date, size, number of bedrooms, dwelling class, dwelling type, age, central heating type and garage.

Results

The ANN was programmed to work in dynamic mode i.e. allowing it the freedom to determine its own topology in learning the underlying pattern, rather than having the user force a particular topology on the network. The optimum structure was found to be a four-layer network incorporating two hidden layers, the first having 13 neurodes and the second 5 neurodes.

Test 1

The network was first trained on the learning sample of 375 sales and then the holdout sample of 41 properties was presented to the network. The results in terms of predicting the selling price in comparison with the actual price of the 41 properties produced the following;

mean percentage error	4.84%
mean absolute percentage error	15.7%
Predictive accuracy'	72%

These results were not particularly encouraging as the percentage errors were outside the typical range that would normally be achieved by manual appraisals. The raw data was examined and it was found that several sales were `suspect', possibly not arms length transactions, sales of public owned properties to sitting tenants or relating to properties in poor condition. Also a number of sales related to farm dwellings in which it was highly likely that some farmland was included with the house. It was decided to remove these suspect transactions and rerun the model, the total number of transactions was reduced to 379 (with 37 sales being removed). This gave on a 10:1 ratio a training set of 342 properties and a holdout sample of 37. This also had the effect on the distribution of sale prices as follows;

Whole data set

Minimum sale price	£25,000
Maximum sale price	£77,000
Mean sale price	£43,579
Mean floor area	107.26m2

Holdout data set

Minimum sale price	£28,773
Maximum sale price	£64,823
Mean sale price	£43,006
Mean floor area	I15.94m2

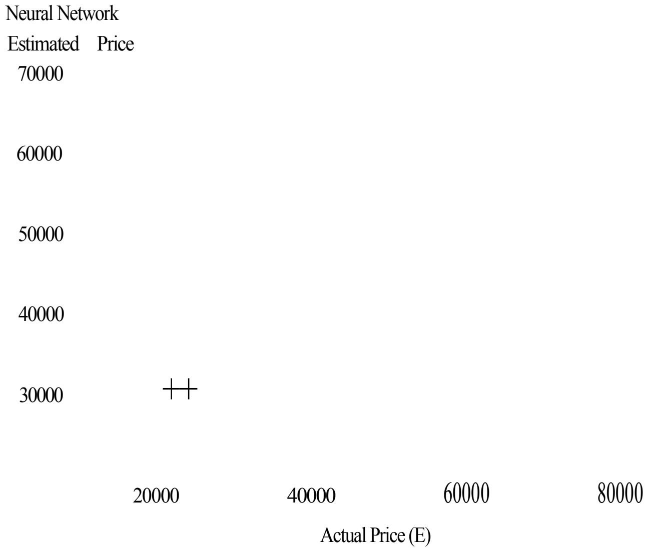
The results were as follows;

Test 2

mean percentage error	0.96%
mean absolute percentage error	7.75%
Predictive accuracy	93.6%

These results were more encouraging and demonstrated the importance of ensuring that the raw data be verified and a thorough quality control check made. Figure 3 shows graphically the relationship between the actual sale price and the price estimated by the neural network.

FIGURE 3: NEURAL NETWORK ESTIMATED PRICE AGAINST ACTUAL PRICE

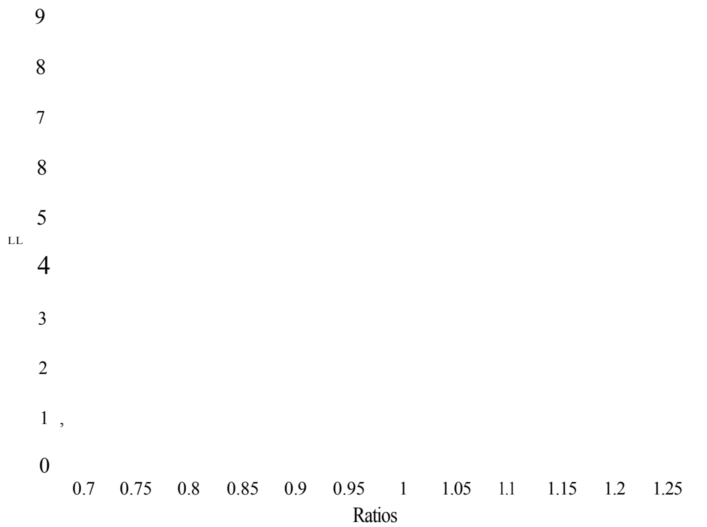


Performance measurement

On the assumption that there is an efficient market in terms of buyer and seller behaviour it can be assumed that the prices achieved are normally distributed about the mean and therefore one can apply a number of statistical tests to consider the validity of the results. Analysis of the holdout sample for the Test 2 was utilised as it produced the best results in terms of error minimisation.

It was decided to consider two of the more important tests of variability, namely the coefficient of dispersion (COD) and the coefficient of variation (COV). Both of these tests would give a good understanding of the relative performance of the model. The coefficient of dispersion is considered to be the primary measure of assessment variability (IAAO, 1990). It gives the average absolute deviation from a measure of central tendency. In this case it was decided to use the median, as in the instant case it gives a better description of the data. The IAAO suggest that a COD of 10% or less indicates that the model has achieved an acceptable level of performance. Test 2 gave a COD of 8.02% which would tend to support the view that the ANN has been able to learn the underlying pattern of values across property types but also reflecting time and locational differences. The second statistical measure, the coefficient of variation was also calculated as a further means of describing the variation in error between the predicted and actual sale prices. The model achieved a COV of 10.08%, again an acceptable level of variance. If one can assume that the assessment ratios conform to normality then one can with a degree of certainty state that two-thirds of the predicted values are within one standard deviation or 10.08% of the mean. Figure 4 illustrates the distribution of the assessment ratios (the assessment ratio is the result of dividing the predicted price by the actual price) for the holdout sample.

FIGURE 4: DISTRIBUTION OF THE ASSESSMENT RATIOS FOR THE HOLDOUT SET



Conclusions

Mass appraisal techniques are now widely applied in ad valorem property tax systems as an efficient and cost effective means for the appraisal and reappraisal of real property. Multiple regression based approaches would tend to form the main techniques in use as they have the dual capabilities of both explanation and prediction. However, as noted earlier in the paper regression is not without both conceptual and practical problems. The aim of this paper was to consider a predictive model based only on those variables which property tax assessment authorities have readily available or are relatively easy or inexpensive to collect. An artificial neural network model was chosen as it has the capability of being able to learn any underlying patterns inherent in data. A]-though it is almost impossible to have a completely efficient real estate market, if one assumes that the parties to any transaction act rationally then a priori it can be further assumed that prices are efficiently determined. Given, that this is the case, inherent within the residential market will be patterns of value directly and indirectly related to the attributes of the property. Neural networks excel in determining these patterns and through building an internal representation of the data produce a realistic output.

One of the advantages of ANNs is their ability to cope with complicated nonlinear relationships, without the need to impose linearity by using data transformations. In addition, as Do and Grudnitski (1992) state, neural networks seem particulary well suited to finding accurate solutions in residential appraisal which is often characterised by complex, nonlinear, noisy and partial information. On the other hand, one of the disadvantages, though becoming less of a problem as software continues to develop is that of the `black box' nature of ANNs. However, in terms of developing a predictive model, the need to have a detailed explanation of how the model determines the output is of less significance. It is the stability of the model in achieving realistic and acceptable results which is important. This is an aspect highlighted by Worzala et al (1995) as being a significant problem with artificial neural networks, in that different packages when processing the same data under identical circumstances achieved different results. They suggest that a 'handle with care' tag should be attached to ANNs when being applied to real estate appraisals. However, it is hoped that this paper, along with continued research, will result in ANNs being accepted as a further technique or tool to assist the mass appraiser.

Notes

1. Predictive accuracy is measured as the absolute difference between the networks' predicted output price and the actual price, divided by the difference between the minimum price and the maximum price contained within the whole data set, and finally expressed as a percentage.

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RE LRLF'D PAPER

The Impact of Valuation-Smoothing on New Zealand Commercial Property Risk

by Graeme Newell, John MacFarlane and Arthur Harris

With commercial property performance series being largely based on valuations and not market transasctions, the presence of valuation-smoothing causes property risk to be underestimated. Using New Zealand commercial property series over the 1980-95 period, it is found that the valuation-smoothed property risk estimates need to be increased by approximately 50% to more fully reflect the actual risk.for New Zealand commercial property returns.

Introduction

One of the traditional advantages cited for the inclusion of property in a mixed-asset portfolio by institutional investors has been property's low risk or volatility compared to the other asset classes (eg. shares, bonds), and the resulting risk-reduction and portfolio diversification benefits of property in the overall investment portfolio.

With property performance generally being based on valuations and not market transactions, there is a consensus view amongst property researchers and market participants that the resulting estimates of property risk are too low and do not fully capture the actual risk of property (Geltner, 1989; Giliberto, 1990; Hartzell and Webb, 1988; Lusht, 1988; Ross and Zisler, 1991). This understated property risk is believed to be largely attributable to the valuation process and the presence of valuation-smoothing or appraisal-smoothing in the aggregated property return series. The underlying inefficiency and structure of the property market may also contribute to this understated property risk.

As such, institutional investor concerns over understated property risk and assessing how much of the investment portfolio should be in property remain as key strategic issues in asset allocation by institutional investors. The purpose of this paper is to use the Jones Lang Wootton (JLW) New Zealand property indices and examine the issue of valuation-smoothing. More appropriate property risk estimates for New Zealand commercial property over 1980-95 will be presented by accounting for the presence, of valuation-smoothing in the New Zealand property series.

Impact of Using Valuation in Performance Analysis

The major international "benchmark" property indices are:

- USA: Russell-NCREIF property index
- UK: Investment Property Databank (IPD) property index
- Canada: Russell-Canadian property index
- Australia: BOMA property index.

Unlike equivalent performance indices for shares and bonds, these international property performance indices are based on valuations. The major consequence of using a valuation-based property performance index is the introduction of valuation-smoothing in the aggregate level property return series. Valuation-smoothing occurs for two reasons.

First, at the disaggregated level, the valuation of individual properties is often the result of a "tyranny of past valuations", which is largely attributable to a lack of access to current market sales

(Geltner, 1989). This results in implicit smoothing by individual valuers.

Second, individual property returns are collected at various times throughout the six monthly reporting period, resulting in a non-synchronous data averaging effect. Also, valuations on many individual properties are only updated annually. This results in those properties not revalued in a given six-monthly period being represented in the index at the same value as in the previous six-month period.

The impact of this valuation-smoothing is that property risk is significantly understated. As such, the overall conclusion regarding valuation-based data is that valuation-based returns are useful for estimating the risk characteristics of property, provided the data is corrected for valuation-smoothing (Geltner, 1991).

This area of valuation-smoothing has developed into a major field of property research in recent years. This has seen several approaches and techniques developed to correct for the amount of valuation-smoothing resulting from the valuation process. The available options include:

(1) adjusting property risk estimates upwards (Webb and Rubens, 1988);

(2) adjusting capitalisation rates (Wheaton. and Torto, 1989);

(3) adjusting equity REIT series (Giliberto, 1990);

(4) using hedged REST series (Giliberto, 1993);

(5) using transaction-based series (Fisher, t a], 1994);

(6) using transformed "derivative" return series (Blundell and Ward, 1987; Fisher et al, 1994; Ross and Zisler, 1991); and

(7) developing property risk formulae that directly incorporate valuation-smoothing (Newell and MacFarlane, 1994, 1995a, b). The analyses in this paper utilise the technique of Newell and MacFarlane (1994) in obtaining more appropriate estimates of property risk for a six-monthly property series.

Estimating Property Risk

The standard investment analysis formula to calculate annual risk from six-monthly risk is given by:

* Annual risk = x 6 - monthly risk (1)

The important fundamental assumption in equation (1) is that the returns series is uncorrelated, with non-significant serial correlation structure. While this assumption is reasonable for transaction-based stock market returns, it is highly unlikely to be appropriate for valuation-based property returns. This is reflected in the strong evidence of valuation-smoothing shown in the significant serial correlation structure in many of the major international property return series (Geltner, 1989; Macgregor and Nanthakumaran, 1992; Newell and MacFarlane, 1994, 1995a, b).

The modification to equation (1) to account for the presence of valuation-smoothing resulting from the correlated returns in the property returns series has been shown by Newell and MacFarlane (1994) to be given by:

* Annual risk 12 x 6 monthly risk x *h(l+p)c +(l+,u)I(l+p)]'* (2)

where:

Ft = average 6-month return,

a = 6-monthly risk, and

p = correlation between 1st and 2nd six month returns

TABLE 1: NEW ZEALAND PROPERTY PERFORMANCE: 1980-95

Investment characteristic	NZ office	Auckland office	Wellington office	NZ industrial	Auckland industrial	Wellington industrial	Shares	Bonds
Average annual return	13.9	14.3	13,2	16.1	17.3	12.2	16.6	14.6
Risk (%)	11.41	10.74	12.74	6.37	6.61	7.88	29.79	6.00
Risk/return ratio	0.82	0.75	0.97	0.40	0.38	0.65	1.79	0.41
Property: shares volatility ratio	38%	36%	43%	21%	22%	26%	n.a.	n.a.
Serial correlation								
P6M	.85*	.86*	.79*	.83*	.80*	.74*	.34	.11
P 12M	.70*	.70*	.65*	.60*	.60*	.57*	-.21	-.27
P18M	.46*	.48*	.42*	.40*	.39*	.44*	-.16	-.00
P24M	.32	.35	.26	.27	.26	.27	.04	.28

*:serial correlation is significantly different to zero (P<.05)

Data Sources

The New Zealand property returns series used in this study are the JLW New Zealand commercial property indices. These "total return" property indices are reported six monthly over the June 1980 June 1995 period for:

- office property: composite, Auckland, Wellington
- industrial property: composite, Auckland, Wellington.

These property indices are time-weighted and chain-linked, with individual property performance information supplied by over 10 major NZ institutional investors.

To enable an effective comparison of New Zealand property with shares and bonds, the following performance series are utilised:

- shares: NZSE40 Gross Index
- bonds: CS First Boston Government Bond Index.

Analysis of New Zealand Property Risk: 1980-95

Original "Valuation-smoothed" series

Table 1 presents the average annual return and risk for the JLW NZ six-monthly property series over the 1980-95 period. While shares (16.6%) outperformed the various office and industrial property series (except Auckland industrial) over this period, the risks for both office and industrial property (6.37%-12.74%) were well below that seen for shares (29.79%). This risk for property was found to be consist-

TABLE 2: NEW ZEALAND PROPERTY RISK ANALYSIS: 1980-95

Investment characteristic	NZ office	Auckland office	Wellington office	NZ industrial	Auckland industrial	Wellington industrial
Conventional annual risk	11.41	10.74	12.74	6.37	6.61	7.88
Modified annual risk	16.75	15.82	18.55	9.43	9.83	10.93
Volatility adjustment factor	1.47	1.47	1.46	1,48	1.49	1.39
Property: shares volatility ratio	56%	53%	62%	32%	33%	37%
'Annual risk"	17.56	16.67	19.29	9.81	10.16	11.40

ent with the "traditional" investor expectation that the risk for property should be somewhere between that of bonds (6.00%) and shares (29.79%). Industrial property was seen to have a lower risk profile than office property.

How extensive is this problem of valuation-smoothing in these commercial property indices, and what is the resulting impact in understating New Zealand property risk? Evidence of valuation-smoothing in the valuation process is shown in the significant serial correlation structure in the various property return series. Serial correlation shows the correlation between current returns and the returns in prior periods. As shown in Table 1, each of the property series showed significant serial correlations for 18 months.

These significant serial correlations are in marked contrast to the insignificant serial correlations for the NZSE40 and the CS First Boston Government Bond series also shown in Table 1, and reflect the difference between a valuation-based property series and a transaction-based financial asset performance series. This serial correlation structure for New Zealand property, shares and bonds is similar to that detected in the equivalent valuation-based property performance series in the US, UK, Canada and Australia (Newell, 1994; Newell and MacFarlane, 1994, 1995a, b).

Further evidence of valuation-smoothing is shown in Table 1 in the low risks and low property-to-shares volatility ratios for NZ commercial property. Extensive surveys of market participants in the USA (Giliberto, 1992; Hartzell and Webb, 1988) have indicated a property-to-shares volatility ratio of 60-65% as being more realistic. In each case, the NZ property-to-shares volatility ratios were in the range of 21-43% and below this 60-65% "benchmark" level. It should be noted that the New Zealand results, while being lower than expected, are still above those typically seen in the U.S. (25%) and the UK (18 %) (Newell and MacFarlane, 1995a, b). The equivalent property-to- shares volatility ratio for Australian commercial property is 49% (Newell and MacFarlane, 1994). Clearly valuation-smoothing is significant in each of the NZ property indices. This needs to be accounted for to obtain higher but more appropriate estimates of property risk for use by New Zealand institutional investors in asset allocation decision-making.

Incorporating valuation-smoothing into property risk estimates

Using equation (2), Table 2 presents the modified property risk profiles after accounting for valuation-smoothing in each of the office and industrial property series. In each case, the conventional property risk estimates need to be increased by a volatility adjustment factor of nearly 1.5 to account for valuation-smoothing and obtain more appropriate New Zealand office and industrial property risk estimates. These property risk increases of nearly 50% constitute a major increase in volatility, with the necessary property risk adjustment being similar for both office and industrial property, as well as across the Auckland and Wellington office markets. The necessary risk adjustment for Wellington industrial property was slightly below that needed for Auckland industrial property. All of the resulting property risks are still between the risk for bonds (6.00%) and shares (29-79%), as is the "traditional" investment expectation. Similarly, the consequences of using these modified risk profiles is seen in increased property-to-shares volatility ratios for the various property series. Each of the office property-to-shares volatility ratios are now more consistent with the recommended 60-65% level.

A further check on the appropriateness of these increased property risk estimates is obtained by comparing them against the respective end-of-year "annual" risk estimates, as shown in Table 2. Only marginal differences between these two property risk estimates existed, ranging from differences of 3.2% (Auckland industrial) to 5.1% (Auckland office). This overall consistency between these risk estimates reinforces the validity of these increased property risk profiles.

For comparative purposes, it should be noted that the degree of valuation-smoothing and the necessary volatility adjustment factor required for Australia's

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TABLE 3: INTER-ASSET CORRELATION MATRIX: 1980-95

	NZ office	Auckland office	Wellington office	NZ industrial	Auckland industrial	Wellington industrial	Shares
Auckland office	.99						
Wellington office	.99	.97					
NZ industrial	.87	.88	.85				
Auckland industrial	.85	.85	.83	.99			
Wellington industrial	.80	.81	.78	.92	.85		
Shares	.30	.36	.20	.23	.23	.25	
Bonds	.08	.06	.10	-.09	-.10	-.05	.14

BOMA property series is approximately 1.4 (Newell and MacFarlane, 1994). This indicates that the degree and impact of valuation-smoothing in the New Zealand and Australian property performance series are reasonably similar. Significant property risk increases are also required for the equivalent USA, Canadian and UK property series (Newell, 1994; Newell and MacFarlane, 1995a, b), namely:

- USA: Russell-NCREIF series: 1980-93 (quarterly)
  volatility adjustment factor = 1.9
- Canada: Russell-Canadian series: 1985-93 (quarterly)
  volatility adjustment factor = 2.0
- UK: IPD series: 1987-92 (monthly)
  volatility adjustment factor = 3.5.

The property series timeframe and frequency of performance reporting will also influence the necessary property risk adjustment. The above results further reinforce the need to adjust for valuation-smoothing in all major international valuation-based property performance series.

Investment Implications

The applicability of the portfolio diversification and risk-reduction benefits of New Zealand property is amply demonstrated by examining the correlation between New Zealand shares and bonds, and each property type as shown in Table 3. Correlations between property and shares ranged from .20 to.36, and from . 10 to. 10 for the correlations between property and bonds.

These low inter-asset correlations indicate significant risk-reduction and mixed-asset portfolio diversification benefits for New Zealand investors. These low correlations reflect the attractive investment feature of the counter-cyclical nature of New Zealand shares and bonds, and property markets and are in marked contrast to the high correlations (and hence cyclical behaviour) of the New Zealand office and industy property markets. These inter-property sector correlations ranged from .78 to .99.

The use of asset allocation models by institutional investors for examining indexed-asset portfolio scenarios has become an increasingly popular tool with the availability of sophisticated asset allocation computer packages. The key input elements in these asset allocation models are asset class returns, asset class risks and inter-asset class correlations. Clearly, the need for accurate estimates of these asset allocation parameters is crucial to ensure the effective use of these tools in strategic investment decision-making by institutional investors.

This paper has shown that the New Zealand valuation-smoothed property risk estimates need to be increased by a factor of approximately 1.5 (or 50%) to account for valuation-smoothing and more fully reflect the risk of New Zealand property returns. With asset class risk estimates being one of the fundamental inputs in asset allocation models, the consequences of using these substantially increased New Zealand property risk estimates need to be carefully assessed and the asset allocation implications examined.

The obvious consequence of increased property risk in asset allocation models is to reduce the recommended level of property in the institutional investor's indexed-asset portfolio. Is this good news or bad news for New Zealand property and valuers? We strongly believe this is good news, as this is still a better option than the strategic downgrading of property as a valid asset class in an indexed-asset portfolio, due to the investment portfolio manager's lack of belief in the risk characteristics of property.

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LEGAL Du(ISION

South Australia Asset Management Corporation v York Montague Limited. United Bank of Kuwait PLC v Prudential Property Services Ltd. Nykredit Mortgage Bank v Edward Erdman Group Limited.

HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

SOUTH AUSTRALIA ASSET MANAGEMENT CORPORATION (RESPONDENTS)

V

YORK MONTAGUE LIMITED (APPELLANTS)

UNITED BANK OF KUWAIT PLC (RESPONDENTS)

V

PRUDENTIAL PROPERTY SERVICES LIMITED (APPELLANTS)

NYKREDIT MORTGAGE BANK PLC (RESPONDENTS)

V

EDWARD ERDMAN GROUP LIMITED (FORMERLY EDWARD ERDMAN AN UNLIMITED COMPANY) (APPELLANTS)

ON 20TH JUNE 1996

Lord Hoffmann

My Lords,

The three appeals before the House raise a common question of principle. What is the extent of the liability of a valuer who has provided a lender with a negligent overvaluation of the property offered as security for the loan? The facts have two common features. The first is that if the lender had known the true value of the property, he would not have lent. The second is that a fall in the property market after the date of the valuation greatly increased the loss which the lender eventually suffered.

The Court of Appeal decided that in a case in which the lender would not otherwise have lent (which they called a "no-transaction" case), he is entitled to recover the difference between the sum which he lent, together with a reasonable rate of interest, and the net sum which he actually got back. The valuer bears the whole risk of a transaction which, but for his negligence, would not have happened. He is therefore liable for all the loss attributable to a fall in the market. They distinguished what they called a "successful transaction" case. in which the evidence shows that if the lender had been correctly advised, he would still have lent a lesser sum on the same security. In such a case, the lender can recover only the difference between what he has actually lost and what he would have lost if he had lent the lesser amount. Since the fall in the property market is a common element in both the actual and the hypothetical calculations, it does not increase the valuer's liability. The valuers appeal. They say that a valuer provides an estimate of the value of the property at the date of the valuation. He does not undertake the role of a prophet. It is unfair that merely because for one reason or other the lender would not otherwise have lent, the valuer should be saddled with the whole risk of the transaction, including a subsequent fall in the value of the property.

Much of the discussion, both in the judgment of the Court of Appeal and in argument at the Bar, has assumed that the case is about the correct measure of damages for the loss which the lender has suffered. The Court of Appeal began its judgment with the citation of three well-known cases stating the principle that where an injury is to be compensated by damages, the damages should be as nearly as possible the sum which would put the plaintiff in the position in which he would have been if he had not been injured. It described this principle as "the necessary point of departure." I think that this was the wrong place to begin. Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation. A correct description of the loss for which the valuer is liable must precede any consideration of the measure of damages. For this purpose it is better to begin at the beginning and consider the lender's cause of action.

The lender sues on a contract under which the valuer, in return for a fee, undertakes to provide him with certain information. Precisely what information he has to provide depends of course upon the terms of the individual contract. There is some dispute on this point in respect of two of the appeals, to which I shall have to return. But there is one common element which everyone accepts. In each case the valuer was required to provide an estimate of the price which the property might reasonably be expected to fetch if sold in the open market at the date of the valuation.

There is again agreement on the purpose for which the information was provided. It was to form part of the material on which the lender was to decide whether, and if so how much, he would lend. The valuation tells the lender how much, at current values, he is likely to recover if he has to resort to his security. This enables him to decide what margin, if any, an advance of a given amount will allow for a fall in the market, reasonably foreseeable variance from the figure put forward by the valuer (a valuation is an estimate of the most probable figure which the property will fetch, not a prediction that it will fetch precisely that figure), accidental damage to the property and any other of the contingencies which may happen. The valuer will know that if he overestimates the value of the property, the lender's margin for all these purposes will be correspondingly less.

On the other hand, the valuer will not ordinarily be privy to the other considerations which the lender may take into account, such as how much money he has available, how much the borrower needs to borrow, the strength of his covenant, the attraction of the rate of interest or the other personal or commercial considerations which may induce the lender to lend.

Because the valuer will appreciate that his valuation, though not the only consideration which would influence the lender, is likely to be a very important one, the law implies into the contract a term that the valuer will exercise reasonable care and skill. The relationship between the parties also gives rise to a concurrent duty in tort: see Henderson v. Merrett Syndicates Ltd [1995] 2 A.C. 145. But the scope of the duty in tort is the same as in contract.

A duty of care such as the valuer owes does not however exist in the abstract. A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply. He must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered. Both of these requirements are illustrated by Caparo Industries Plc v. Dickman [1990] 2 A.C. 605. The auditors' failure to use reasonable care in auditing the company's statutory accounts was a breach of their duty of care. But they were not liable to an outside take-over bidder because the duty was not owed to him. Nor were they liable to shareholders who had bought more shares in reliance on the accounts because, although they were owed a duty of care, it was in their capacity as members of the company and not in the capacity (which they shared with everyone else) of potential buyers of its shares. Accordingly, the duty which they were owed was not in respect of loss which they might suffer by buying its shares. As Lord Bridge of Harwich said, at p. 627:

> "It is never sufficient to ask simply whether A owes B duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless."

In the present case, there is no dispute that the duty was owed to the lenders. The real question in this case is the kind of loss in respect of which the duty was owed.

How is the scope of the duty determined? In the case of a statutory duty, the question is answered by deducing the purpose of the duty from the language and context of the statute: Gorris v. Scott (1874) L.R. 9 Ex. 125. In the case of tort, it will similarly depend upon the purpose of the rule imposing the duty. Most of the judgments in Caparo are occupied in examining the Companies Act 1985 to ascertain the purpose of the auditor's duty to take care that the statutory accounts comply with the Act. In the case of an implied contractual duty, the nature and extent of the liability is defined by the term which the law implies. As in the case of any implied term, the process is one of construction of the agreement as a whole in its commercial setting. The contractual duty to provide a valuation and the known purpose of that valuation compel the conclusion that the contract includes a duty of care. The scope of the duty, in the sense of the consequences for which the valuer is responsible, is that which the law regards as best giving effect to the express obligations assumed by the valuer: neither cutting them down so that the lender obtains less than he was reasonably entitled to expect, nor extending them so as to impose on the valuer a liability greater than he could reasonably have thought he was undertaking.

What therefore should be the extent of the valuer's liability? The Court of Appeal said that he should be liable for the loss which would not have occurred if he had given the correct advice. The lender having, in reliance on the valuation, embarked upon a transaction which he would not otherwise have undertaken, the valuer should bear all the risks of that transaction, subject only to the limitation that the damage should have been within the reasonable contemplation of the parties.

There is no reason in principle why the law should not penalise wrongful conduct by shifting on to the wrongdoer the whole risk of consequences which would not have happened but for the wrongful act. Hart and Honore, in Causation in the Law, 2nd ed. (1985), p. 120, say that it would, for example, be perfectly intelligible to have a rule by which an unlicenced driver was responsible for all the consequences of his having driven, even if they were unconnected with his not having a licence. One might adopt such a rule in the interest of deterring unlicenced driving. But that is not the normal rule. One may compare, for example, The Empire Jamaica [1955] P. 259, in which a collision was caused by a "blunder in seamanship of ... a somewhat serious and startling character" (Sir Raymond Evershed M.R., at p. 264) by an uncertificated second mate. Although the owners knew that the mate was not certificated and it was certainly the case that the collision would not have happened if he had not been employed, it was held in limitation proceedings that the damage took place without the employers' "actual fault or privity" because the mate was in fact experienced and (subject to this one aberration) competent. The collision was not therefore attributable to his not having a certificate. The owners were not treated as responsible for all the consequences of having employed an uncertificated mate but only for the consequences of his having been uncertificated.

Rules which make the wrongdoer liable for all the consequences of his wrongful conduct are exceptional and need to be justified by some special policy. Normally the law limits liability to those consequences which are attributable to that which made the act wrongful. In the case of liability in negligence for providing inaccurate information, this would mean liability for the consequences of the information being inaccurate.

I can illustrate the difference between the ordinary principle and that adopted by the Court of Appeal by an example. A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee.

On the Court of Appeal's principle, the doctor is responsible for the injury suffered by the mountaineer because it is damage which would not have occurred if he had been given correct information about his knee. He would not have gone on the expedition and would have suffered no injury. On what I have suggested is the more usual principle, the doctor is not liable. The injury has not been caused by the doctor's bad advice because it would have occurred even if the advice had been correct.

The Court of Appeal summarily rejected the application of the latter principle to the present case, saying:

> "The complaint made and upheld against the valuers in these cases is ...not that they were wrong. A professional opinion may be wrong without being negligent. The complaint in each case is that the valuer expressed an opinion that the land was worth more than any careful and competent valuer would have advised."

I find this reasoning unsatisfactory. It seems to be saying that the valuer's liability should be restricted to the consequences of the valuation being wrong if he had warranted that it was correct but not if he had only promised to use reasonable care to see that it was correct. There are of course differences between the measure of damages for breach of warranty and for injury caused by negligence, to which I shall return. In the case of liability for providing inaccurate information, however, it would seem paradoxical that the liability of a person who warranted the accuracy of the information should be less than that of a person who gave no such warranty but failed to take reasonable care. Your Lordships might, I would suggest, think that there was something wrong with aprinciple which, in the example which I have given, produced the result that the doctor was liable. What is the reason for this feeling? I think that the Court of Appeal's principle offends common sense because it makes the doctor responsible for consequences which, though in general terms foreseeable, do not appear to have a sufficient causal connection with the subject matter of the duty. The doctor was asked for information on only one of the considerations which might affect the safety of the mountaineer on the expedition. There seems no reason of policy which requires that the negligence of the doctor should require the transfer to him of all the foreseeable risks of the expedition.

I think that one can to some extent generalise the principle upon which this response depends. It is that a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action. He is responsible only for the consequences of the information being wrong. A duty of care which imposes upon the informant responsibility for losses which would have occurred even if the information which he gave had been correct is not in my view fair and reasonable as between the parties. It is therefore inappropriate either as an implied term of a contract or as a tortious duty arising from the relationship between them.

The principle thus stated distinguishes between a duty to provide information for the purpose of enabling someone else to decide upon a course of action and a duty to advise someone as to what course of action he should take. If the duty is to advise whether or not a course of action should be taken, the adviser must take reasonable care to consider all the potential consequences of that course of action. If he is negligent, he will therefore be responsible for all the foreseeable loss which is a consequence of that course of action having been taken. If his duty is only to supply information, he must take reasonable care to insure that the information is correct and if he is negligent, will be responsible for all the foreseeable consequences of the information being wrong.

I think that this principle is implicit in the decision of this House in Banque Keyser Ullmann S.A. v. Skandia (U.K.) Insurance Co. Ltd. [1991] 2 A.C. 249. Some banks had lent a large sum of money on the security of, firstly, property which the borrower had represented to be valuable, and secondly, insurance policies against any shortfall on the realisation of the property. When the borrower turned out to be a swindler and the property worthless, the insurers relied upon a fraud exception in the policies to repudiate liability. The banks discovered that the agent of their broker who had placed the insurance had, by an altogether separate fraud, issued cover notes in respect of non-existent policies for part of the risk. This had come to the knowledge of one of the insurers before a substantial part of the advances had been made. The banks claimed that the insurers were under a duty of good faith to disclose this information and that, if they had done so, the banks would have so distrusted the brokers that they would have made no advance and therefore suffered no loss.

Lord Templeman (with whom all the other members of the House agreed) dealt with the matter in terms of causation. He said that assuming a duty to disclose the information existed, the breach of that duty did not cause the loss. The failure to inform the lenders of the broker's fraud induced them to think that valid policies were in place. But even if this had been true, the loss would still have happened. The insurers would still have been entitled to repudiate the policies under the fraud exception. Lord Templeman could only have dealt with the case in this way if he thought it went without saying that the insurers' duty to provide information made them liable, not for all loss which would not have been suffered if the information had been given, but only for loss caused by the lender having lent on a false basis, namely, in the belief that insurance policies had been effected. If that had not been the principle which the House was applying, the discussion of whether the non-existence of the policies had caused the loss would have been irrelevant. I respectfully think that the underlying principle was right and that it is decisive of this case. The Court of Appeal distinguished Skandia on the ground that the insurers could not have foreseen the borrower's fraud. No doubt this is true: it shows that the rule that damages are limited to what was within the reasonable contemplation of the parties can sometimes make arguments over the scope of the duty academic. But I do not think it was the way the House actually decided the case. Lord Templeman's speech puts the matter firmly on the ground of causation and the analysis makes sense only on the footing that he was concerned with the consequences to the lenders of having lent without knowing the true facts rather than with what would have been the consequences of disclosure.

The principle that a person providing information upon which another will rely in choosing a course of action is responsible only for the consequences of the information being wrong is not without exceptions. This is not the occasion upon which to attempt a list, but fraud is commonly thought to be one. In Doyle v. Olby (Ironmongers) Ltd. [1969] 2 Q.B. 158, Lord Denning M.R. said, at p. 167:

> "The defendant is bound to make reparation for all the actual damages directly flowing from the fraudulent inducement. The person who has been defrauded is entitled to say: `I would not have entered into this bargain at all but for your misrepresentation... "

Such an exception, by which the whole risk of loss which would not have been suffered if the plaintiff had not been fraudulently induced to enter into the transaction is transferred to the defendant, would be justifiable both as a deterrent against fraud and on the ground that damages for fraud are frequently a restitutionary remedy.
The question of liability for fraud does not arise in this case and I therefore confine myself to two observations. The first is that although I have said that fraud is commonly thought to be an exception, Hobhouse L.J. seems to have expressed a contrary view in the recent case of Downs v. Chappell when he said that the damages recoverable for fraudulent misrepresentation should not be greater than the loss which would have been suffered "had the represented, or supposed, state of affairs actually existed." In other words, the defendant should not be liable for loss which would have been a consequence of the transaction even if the representation had been true. This, as I have said, is what I conceive to be in accordance with the normal principle of liability for wrongful acts. But liability for fraud, or under section 2(1) of the Misrepresentation Act 1967 for a negligent misrepresentation inducing a contract with the representor, has usually been thought to extend to all loss suffered in consequence of having entered into the transaction. We have received written representations on Downs v. Chappell, which was decided after the conclusion of the oral argument, but since the issue in that case is not before the House, I prefer not to express any concluded view.

My second observation is that even if the maker of the fraudulent misrepresentation is liable for all the consequences of the plaintiff having entered into the transaction, the identification of those consequences may involve difficult questions of causation. The defendant is clearly not liable for losses which the plaintiff would have suffered even if he had not entered into the transaction or for losses attributable to causes which negative the causal effect of the misrepresentation.

The measure of damages in an action for breach of a duty to take care to provide accurate information must also be distinguished from the measure of damages for breach of a warranty that the information is accurate. In the case of breach of a duty of care, the measure of damages is the loss attributable to the inaccuracy of the information which the plaintiff has suffered by reason of having entered into the transaction on the assumption that the information was correct. One therefore compares the loss he has actually suffered with what his position would have been if he had not entered into the transaction and asks what element of this loss is attributable to the inaccuracy of the information. In the case of a warranty, one compares the plaintiff's position as a result of entering into the transaction with what it would have been if the information had been accurate. Both measures are concerned with the consequences of the inaccuracy of the information but the tort measure is the extent to which the plaintiff is worse off because the information was wrong whereas the warranty measure is the extent to which he would have been better off if the information had been right.

This distinction was the basis of the decision of this House in Swingcastle Ltd. v. Alastair Gibson [199112 A.C. 223. Simplifying the facts slightly, the plaintiffs were moneylenders who had advanced UK stg 10,000 repayable with interest at the rate of 37%, rising in the event of default to 46%, on the security of a house which had been valued at UK stg 18,000. The valuation was admittedly negligent and the property fetched only UK stg 12,000. By that time arrears of interest had increased the debt to nearly UK stg 20,000 and the lenders claimed UK stg 8,000 damages. This House held that the lenders were not entitled to damages which represented the contractual rate of interest. That would be to put them in the position in which they would have been if the valuation had been correct; a measure of damages which could be justified only if they had given a warranty. In an action for breach of a duty of care, they could not recover more than what they would have earned with the money if they had not entered into the transaction. As there was no evidence that they would have been able to obtain the same exorbitant rate of interest elsewhere, the claim in respect of arrears of interest failed. The Court of Appeal in this case referred to a large number of authorities but I think that, with the exception of one decision of the Canadian Supreme Court, none of them is concerned with the Caparo question of the kind of damage which falls within the scope of the duty of care. This is perhaps not surprising, because it is unusual to have a case in which a plaintiff has suffered foreseeable loss in consequence of entering into a transaction in reliance on inaccurate information where the loss is not a consequence of the inaccuracy of the information. For example, in Baxter v. F. W. Gapp & Co. Ltd. [1938] 4 All E.R. 457 (Goddard L.J.); [1939] 2 K.B. 271; [1939] 2 All E.R. 752 (Court of Appeal) a lender advanced UK stg 1,200 on the strength of a UK stg 1,800 valuation. The property realised only UK stg 850 and, as MacKinnon L.J. subsequently pointed out, there was no evidence that it had been worth any more at the date of the valuation. The consequence of the valuation being wrong was that instead of having a contingency margin of UK stg 600, the lender was from the start unsecured to the extent of UK stg 350. In those circumstances it is not surprising that Goddard L.J. awarded him the whole of his loss, which was well within the UK stg 950 discrepancy in the valuation. In Swingcastle Ltd v. Alastair Gibson [1991] 2 A.C. 223 this House, for the reasons I have explained, disapproved of the fact that Goddard L.J. and the Court of Appeal awarded the plaintiff interest at the contractual rate instead of the return he could have obtained on some alternative use of his money. But the decision to award the whole loss, however it might be calculated, did not on the facts offend against the principle which I have stated. In the Court of Appeal, Mr. Heald K.C. for the valuers argued, in my view correctly, that the measure of damages should be, as Sir Henry Strong C.J. said in Lowenburg, Harris & Co. v. Wolley (1895) 25 S.C.R. 51, 57 "the loss occasioned by the overvaluation." This decision of the Canadian Supreme Court, is the one exceptional case to which I have referred in which the point had arisen. MacKinnon L.J. pointed out that since there was no evidence that the overvaluation had been less than the whole loss suffered, the point was immaterial. He made no adverse comment on Lowenburg Harris & Co.

The other cases cited by the Court of Appeal and counsel for the respondents fall into two categories.

The first comprises those cases concerned with the calculation of the loss which the plaintiff has suffered in consequence of having entered into the transaction. They do not address the question of the extent to which that loss is within the scope of the defendant's duty of care. The calculation of loss must of course involve comparing what the plaintiff has lost as a result of making the loan with what his position would have been if he had not made it. If for example the lender would have lost the same money on some other transaction, then the valuer's negligence has caused him no loss. Likewise if he has substantially overvalued the property so that the lender stands to make a loss if he has to sell the security at current values, but a rise in the property market enables him to realise enough to pay off the whole loan, the lender has suffered no loss. But the question of whether the lender has suffered a loss is not the same as the question of how one defines the kind of loss which falls within the scope of the duty of care. The Court of Appeal justified its view on the latter question by an appeal to symmetry: "If the market moves upwards, the valuer reaps the benefit; if it moves downwards, he stands the loss." This seems to me to confuse the two questions. If the market moves upwards, it reduces or eliminates the loss which the lender would otherwise have suffered. If it moves downwards, it may result in more loss than is attributable to the valuer's error. There is no contradiction in the asymmetry. A plaintiff has to prove both that he has suffered loss and that the loss fell within the scope of the duty. The fact that he cannot recover for loss which he has not suffered does not entitle him to an award of damages for loss which he has suffered but which does not fall within the scope of the valuer's duty of care.

The distinction between the "no-transaction" and "successful transaction" cases is of course quite irrelevant to the scope of the duty of care. In either case, the valuer is responsible for the loss suffered by the lender in consequence of having lent upon an inaccurate valuation. When it comes to calculating the lender's loss, however, the distinction has a certain pragmatic truth. I say this only because in practice the alternative transaction which a defendant is most likely to be able to establish is that the lender would have lent a lesser amount to the same borrower on the same security. If this was not the case, it will not ordinarily be easy for the valuer to prove what else the lender would have done with his money. But in principle there is no reason why the valuer should not be entitled to prove that the lender has suffered no loss because he would have used his money in some altogether different but equally disastrous venture. Likewise the lender is entitled to prove that, even though he would not have lent to that borrower on that security, he would have done something more advantageous than keep his money on deposit: a possibility contemplated by Lord Lowry in Swingcastle Ltd v. Alastair Gibson [1991] 2 A.C. 223, 239. Every transaction induced by a negligent valuation is a "no-transaction" case in the sense that ex hypothesi the transaction which actually happened would not have happened. A "successful transaction" in the sense in which that expression is used by the Court of Appeal (meaning a disastrous transaction which would have been somewhat less disastrous if the lender had known the true value of the property) is only the most common example of a case in which the court finds that, on the balance of probability, some other transaction would have happened instead. The distinction is not based on any principle and should in my view be abandoned. The second category of cases relied upon by the respondents concerns the question of whether the plaintiff's voluntary action in attempting to extricate himself from some ifnancial predicament in which the defendant has landed him negatives the causal connection between the defendant's breach of duty and the subsequent loss. These cases are not concerned with the scope of the defendant's duty of care. They are all cases in which the reasonably foreseeable consequences of the plaintiff's predicament are plainly within the scope of the duty. The question is rather whether the loss can be said to be a consequence of the plaintiff being placed in that predicament. The principle which they apply is that a plaintiff's reasonable attempt to cope with the consequences of the defendant's breach of duty does not negative the causal connection between that breach of duty and the ultimate loss. This is the principle of which, in the sphere of physical damage, The Oropesa [1943] P. 32 is perhaps the best-known example.

I need mention by way of illustration only one such case. In McElroy Milne v. Commercial

Electronics Ltd. [1993]1 N.Z.L.R. 39, a solicitor negligently failed to ensure that a lease granted by his developer client contained a guarantee from the lessee's parent company. The result was that the developer, who had intended to sell the property with the benefit of the lease soon after completion, found himself in dispute with the parent company and was unable to market the property for more than two years, during which time the market fell. The New Zealand Court of Appeal held that the developer was entitled to the difference between what the property would have fetched if sold after its completion with a guaranteed lease and what it eventually fetched two years later. The solicitor's duty was to take reasonable care to ensure that his client got a properly guaranteed lease. He was therefore responsible for the consequences of his error, which was producing a situation in which the client had a lease which was not guaranteed. All the reasonably foreseeable consequences of that situation were therefore within the scope of the duty of care. The only issue was whether the client's delay in selling the property negatived the causal connection between that situation and the ultimate loss. The Court of Appeal decided this question on orthodox lines by asking whether the client had reacted reasonably to his predicament. County Personnel (Employment Agency) Ltd. v. Alan R. Pulver & Co. [1987] 1 W.L.R. 916 and Hayes v. James & Charles Dodd [1990] 2 All E.R. 815 are examples of similar principles of causation being applied by the Court of Appeal in England.

I turn now to the various theories suggested by the appellants for defining the extent of the valuer's liability. One was described as the "cushion theory" and involved calculating what the plaintiff would have lost if he had made a loan of the same proportion of the true value of the property as his loan bore to the amount of the valuation. The advantage claimed for this theory was that it allowed the lender to claim loss caused by a fall in the market but only to the extent of the proportionate margin or "cushion" which he had intended to allow himself. But this theory allows the damages to vary according to a decision which the lender made for a different purpose, namely, in deciding how much he should lend on the value reported to him. There seems no justification for deeming him, in the teeth of the evidence, to have been willing to lend the same proportion on a lower valuation.

An alternative theory was that the lender should be entitled to recover the whole of his loss, subject to a "cap" limiting his recovery to the amount of the overvaluation. This theory will ordinarily produce the same result as the requirement that loss should be a consequence of the valuation being wrong, because the usual such consequence is that the lender makes an advance which he thinks is secured to a correspondingly greater extent. But I would not wish to exclude the possibility that other kinds of loss may flow from the valuation being wrong and in any case, as Mr. Sumption said on behalf of the appellants York Montague Ltd., it seems odd to start by choosing the wrong measure of damages (the whole loss) and then correct the error by imposing a cap. The appearance of a cap is actually the result of the plaintiff having to satisfy two separate requirements; first, to prove that he has suffered loss and secondly, to establish that the loss fell within the scope of the duty he was owed.

Mr. Sumption offered instead a more radical theory. He said that the court should estimate the value of the rights which the lender received at the date of the advance. If, by reason of the negligent valuation, they were worth less than the amount of the loan, the lender should be entitled to recover the difference in damages. But the calculation should be unaffected by what happened afterwards. This, he said, was "usually the best way of excluding that which is extraneous and coincidental." The trouble is that it throws out not only the bathwater of the extraneous and coincidental but also the baby of the subsequent events which were the very thing against which the lender relied upon the valuation to protect himself. Mr. Sumption was prepared to modify the rigour of his theory to the extent of allowing a glance at a subsequent change in the value of the personal covenant. The court was not obliged to take the borrower to be the prosperous tycoon which everyone thought him to be at the date of the valuation but could have regard to the fact that he had afterwards been shown to be a fraudulent bankrupt. He allowed this concession on the ground that the reason why the lender had taken security in the first place was in case the personal covenant should turn out to be worthless. But Mr. Sumption was inflexible in excluding consideration of subsequent changes in the value of the property. I think that this is inconsistent with the grounds upon which the concession was made and that the obvious need for the concession undermines the whole theory. A fall in the value of the property may also be something against which the lender relies upon the valuer to protect him. A lender, for example, may advance UK stg 500,000 on property valued at UK stg 1 million to allow an ample margin for a fall in the market and other contingencies. If the property was actually worth only UK stg 550,000 it does not seem fair that he should have no remedy for the loss which he suffers when its value subsequently falls to UK stg 350,000. If the valuation had been correct, a UK stg 200,000 fall in market value would have caused him no loss at all.

Mr. Sumption attempted to justify a valuation at the date of breach of duty by saying that it would be wrong if the damages could be different according to when the trial was held. Leaving aside the retort that this is bound to be a consequence of his concession on the value of the personal covenant, I think that there is no such general principle. On the contrary, except in cases in which all the loss caused by the breach can be quantified at once, the calculation of damages is bound to be affected by the extent to which loss in the future still has to be estimated at the date of the trial. In actions for personal injury, it is common for a trial on the quantum of damages to be deferred until the plaintiff's medical condition has stabilised and the damages can be more accurately assessed. There is however a limit to the time for which the parties can wait. So the assessment of damages will often be different from what it would have been if the trial had taken place later. This result can be avoided only by postponing the trial until the plaintiff is dead or (as Mr. Sumption's theory would entail) confirming the damages to the loss which at the time of the accident he appeared likely to suffer, irrespective of what actually happened. Neither of these solutions has appealed to judges or legislators.

It is true that in some cases there is a prima facie rule that damages should be assessed at the date of the breach. For example, section 51(3) of the Sale of Goods Act 1979 provides that where there is an available market for goods the measure of damages for non-delivery is prima facie the difference between the contract price and the market price of the goods at the time when they should have been delivered. But the purpose of this prima facie rule is not to ensure that the damages will always be the same irrespective of the date of trial. It is because where there is an available market, any additional loss which the buyer suffers through not having immediately bought equivalent goods at the market price is prima facie caused by his own change of mind about wanting goods which he ordered: compare Waddell v. Blockey (1879 4 Q.B.D. 678. The breach date rule is thus no more than a prima facie rule of causation. It is not concerned with the extent of the vendor's liability for loss which the breach has admittedly caused.

As a matter of causation, however, it seems to me impossible to say that the loss was caused by any decision of the lenders not to go into the market and realise the value of the rights which they had acquired at the date of the advance. They did not know until some time afterwards that the valuations were wrong and in any case there is no available market for single mortgages on development sites. The actions of the lenders were, as in McElroy Milne v. Commercial Electronics Ltd. [1993] 1 N.Z.L.R. 39, a reasonable response to the situation in which the lenders found themselves and did not therefore negative the causal connection between the breach of duty and the ultimate loss.

Before I come to the facts of the individual cases, I must notice an argument advanced by the appellants concerning the calculation of damages. They say that the damage falling within the scope of the duty should not be the loss which lfows from the valuation having been in excess of the true value but should be limited to the excess over the highest valuation which would not have been negligent. This seems to me to confuse the standard of care with the question of the damage which falls within the scope of the duty. The valuer is not liable unless he is negligent. In deciding whether or not he has been negligent, the court must bear in mind that valuation is seldom an exact science and that within a band of figures valuers may differ without one of them being negligent. But once the valuer has been found to have been negligent, the loss for which he is responsible is that which has been caused by the valuation being wrong. For this purpose the court must form a view as to what a correct valuation would have been. This means the figure which it considers most likely that a reasonable valuer, using the information available at the relevant date, would have put forward as the amount which the property was most likely to fetch if sold upon the open market. While it is true that there would have been a range of figures which the reasonable valuer might have put forward, the figure most likely to have been put forward would have been the mean figure of that range. There is no basis for calculating damages upon the basis that it would have been a figure at one or other extreme of the range. Either of these would have been less likely than the mean: see Lion Nathan Ltd. v. C. C. Bottlers Ltd., (Privy Council April 1996).

1 turn now to the facts of the three cases. In South Australia Asset Management Corporation v. York Montague Ltd. the lenders on 3 August 1990 advanced UK stgII million on a property valued at UK stg 15 million. May J. found that the actual value at the time was UK stg 5 million. On 5 August 1994 the property was sold for UK stg 2,477,000. May J. quantified the loss at UK stg 9,753,927.99 and deducted 25% for the plaintiff's contributory negligence. The consequence of the valuation being wrong was that the plaintiff had UK stg 10 million less security than they thought. If they had had this margin, they would have suffered no loss. The whole loss was therefore within the scope of the defendant's duty. It follows that the appeal must be dismissed.

In United Bank of Kuwait Pic. v. Prudential Property Services Ltd. the lenders on 19 October 1990 advanced UK stg 1.75 million on the security of a property valued by the defendants at UK stg 2.5 million. The judge found that the correct value was between UK stg 1.8 and UK stg 1.85 million. It was sold in February 1992 for UK stg 950,000. Gage J. quantified the lenders' loss (including unpaid interest) at UK stg 1,309,876 and awarded this sum as damages.

In my view the damages should have been limited to the consequences of the valuation being wrong, which were that the lender had UK stg 700,000 or UK stg 650,000 less security than he thought. The plaintiffs say that the situation produced by the overvaluation was not merely that they had less security but also that there was a greater risk of default. But the valuer was not asked to advise on the risk of default, which would depend upon a number of matters outside his knowledge, including the personal resources of the borrower. The greater risk of default, if such there was, is only another reason why the lender, if he had known the true facts, would not have entered into the particular transaction. But that does not affect the scope of the valuer's duty. I would therefore allow the appeal and reduce the damages to the difference between the valuation and the correct value. If the parties cannot agree whether on the valuation date the property was worth UK stg 1.8 million or UK stg 1.85 million or some intermediate figure on the date of valuation, the question will have to be remitted to the trial judge for decision on the basis of the evidence called at the trial. In Nykredit Mortgage Bank Plc. v. Edward Erdman Group Ltd. the lenders on 12 March 1990 advanced UK stg 2.45 million on the security of a property valued by the defendants at UK stg 3.5 million. The correct value was said by the judge to be UK stg 2 million or at most UK stg 2.375 million. The price obtained on a sale by auction in February 1993 was UK stg 345,000. His Honour Judge Byrt Q.C. quantified the loss (including unpaid interest) at UK stg 3,058,555.52 and gave judgment for the plaintiffs in this sum.

The lenders submit, as in the United Bank of Kuwait case, that they were misled not only as to the value of the security but also as to the risk of default. They say the duty of the valuers according to the terms of the particular contract was not confined to advising on the price which the property could be expected to fetch in the open market. The value of the property lay in its potential for development and the usual method of calculating such value is to consider what the proposed development would be worth when complete and to deduct the estimated cost of the work and a reasonable profit for the developer. The difference is the value of the undeveloped land. The letter of instructions to the valuers, dated 22 February 1990, said that the property was being considered as security for a mortgage advance and then asked: "Would you please provide a report and valuation as to the open market value..." The letter was apparently in the bank's standard form, because it went on to say:

"In preparing your report, please comment on the following, if applicable:

7. The current rental value and its relationship with the present income, and give your opinion as to the lettability of the property in the open market or, if unlet, please comment on the viability of the proposed rental income.
8. The completed value (if a development project) and a commentary regarding the potential saleability.

10. The estimated development costs, and a commentary as to whether the costs quoted are realistic."

The proposed loan was for "an initial term of 12 months": the loan was to finance the purchase of the land and the lenders expected that they be paid off when the borrower obtained finance to carry out the development. The borrower was an off-the-shelf, single asset company.

The reason why the valuation was wrong was that the valuers had overestimated the costs of the development. Thus the information which the report provided under each of the heads I have quoted was also wrong. The lenders say that if the valuers had not been negligent they would have appreciated that the proposed development was not viable. As the borrower was a single-asset company, a default was virtually inevitable. The prospect of some other lender refinancing the project was zero: the lenders were likely to be locked into the loan for an indefinite period and therefore exposed to market fluctuations for longer than they had reason to expect.

The main thrust of these submissions is also concerned with what would have happened if the valuer had provided accurate information. This, as I have said, is not the basis of the valuers liability. In any case the comments requested in the bank's standard letter were not in my opinion, as a matter of construction of the contract between bank and valuer, independent items of information on which the bank was entitled to place reliance separately from the open market valuation. They amounted to an exposure of the valuer's calculation, so as to enable the bank to form a view as to how accurate they were likely to be. But the valuer would not in my view have incurred any liability if one or more of his comments had been wrong but (perhaps on account of a compensating error) the valuation was correct. The contract did not therefore impose a different liability from those in the other cases.

I would therefore allow the appeal and substitute for the judge's award of damages a figure equal to the difference between UK stg 3.5 million and the true value of the property at the date of valuation. The judge appears to have been inclined to fix the latter figure at UK stg 2 million. The reference to UK stg 2.35 million was based upon a concession made by plaintiff's counsel on the basis that for the purposes of calculating the damages according to the principle adopted by the Court of Appeal it did not matter one way or the other. However, if the parties cannot agree upon the figure, it will also have to be remitted to the judge for determination on the evidence adduced at the trial.

Lord Goff of Chieveley

Lord Jauncey of Tullichettle

Lord Slynn of Hadley

Lord Nicholls of Birkenhead

Lord Hoffmann

Membership Advancements

Citation for Life Membership

PETER EDWARD TIERNEY

Peter Edward Tierney is a Registered Valuer and a Fellow of the New Zealand Institute of Valuers. He is presently a senior partner in the firm of Jones Tierney & Green, a substantial valuation and land consultancy practice in Tauranga in the Bay of Plenty.

Peter completed his Diploma in Valuation and Farm Management at Lincoln College in 1952. He was the gold medalist in that year. He became a registered valuer in 1959, Associate Member of the New Zealand Institute of Valuers in 1965 and received a citation for Fellowship in 1975.

He was Councillor of the New Zealand Institute of Valuers from 1972 to 1976 for Waikato and again from 1978 to 1982 for Bay of Plenty. Peter was Vice President of the NZIV in 1978 and became President from 1979 to 1980.

He led a New Zealand delegation to the Pan Pacific Conference of valuers in Tokyo in 1978, and was Deputy Leader to the Melbourne Congress in 1981. He has presented papers at seminars throughout New Zealand and overseas.

Peter was a member of the Valuers Registration Board from 1984 to 1996, being Deputy Chairman from 1990.

Peter joined the Government Valuation Department in 1953, working in Rotorua, Tauranga and Hamilton, becoming District Valuer in charge of Rotorua and Tauranga from 1965 to 1969 and subsequently Supervising Valuer for the central part of the North Island.

He was Chairman of the West Coast Settlement Reserves Appeal Committee which is responsible for the adjudication of the values of Maori land in the Taranaki District, Peter became a public valuer in 1976. He has achieved prominence in the valuation industry throughout New Zealand for his expertise in rural and forestry matters.

He has been recognised throughout his career as being a leader with an incisive mind, setting high standards and taking a prominent role in Institute matters.

He has had a strong effect on the Institute and its affairs. He has been a guide and mentor to a large number of valuers through his responsibilites with Valuation New Zealand and his roles as Councillor and Member of the Valuers'Registration Board. He has been a very valuable member of his profession.

Citation for Fellowship

PHILLIP ALLEN CURNOW

Phillip Curnow is a registered valuer and principal partner in the Waikato firm of Curnow Tizard. Born in the Nelson District he attended Nelson College before commencing a career in valuation with Valuation New Zealand in Christchurch in 1972. There he gained his valuers professional examinations, was registered, and advanced to Associate status of the New Zealand Institute of Valuers in 1979.

Transfers within Valuation New Zealand took him to Hokitika and Timaru before, in 1981, he moved to the Waikato and private practice. In 1987 he and Geoff Tizard established the firm of Curnow Tizard which now operates a widely based practice from Hamilton.

Phillip has maintained a close association with a full range of urban valuation work and has expressed a high degree of capability specialising in compensations, commercial, and industrial valuations. Additionally he has become increasingly involved with arbitration procedures and has recently been appointed as a Fellow of the New Zealand Institute of Arbitrators. He has also served as Secretary and been on the Committee of the New Zealand Property Institute.

Throughout his career he has actively supported the valuing profession and its members and after serving for many years on the Waikato Branch of the Institute he was elected Chairman in 1992. He is held in high regard by his peers and the community he lives and works in. The Waikato Branch had no hesitation in recommending his advancement as a Fellow of the New Zealand Institute of Valuers.

Citation for Fellowship

MICHAEL ASHTON CLARK

Michael Clark is a partner in the firm of Seagar & Partners Ltd and located in their South Auckland Office. Born in Papakura in 1958 and educated at Rosehill College, Michael joined the firm of Mahoney Young & Gamby and gained a Diploma of Valuation at Auckland University. After spending four years with that firm he had a brief time with Valuation New Zealand and in 1980 joined Chris Seagar in Papatoetoe as his first valuer employee.

Michael is a very well regarded Auckland valuer with extensive experience in the valuation of commercial property and in particular assessments on service stations, motels and going concerns. For a number of years he was a lecturer at Carrington Polytech for those taking the course in Real Estate. He has also spoken at local branch seminars and is currently the Deputy Chairman of the Branch Committee. He gives his time freely to the younger members of the profession in assisting with their continuing professional development.

Michael has a passionate interest in Formula 1 Motor Racing and to a lesser extent motor racing in general. He is well regarded in this field with an encyclopaedic knowledge of Formula 1. He is a regular writer for car magazines and has completed numerous radio interviews.

Michael is married to Sandy and they have three girls. He has recently bought a small rural holding at Drury and it is rumoured he is looking to buy a ride-on-mower to practise his repressed Formula I driving skills!

The Auckland Branch was unanimous in supporting the nomination of Michael Clark for the award of Fellowship in recognition of his services to the valuation profession and the high esteem he is held by other members.

Citation for Fellowship

STEPHEN ALLAN FORD

Allan Ford has been involved in the valuation profession for 25 years.

Like many of his contemporaries he attended Lincoln College gaining a Diploma in Agriculture, followed by a Diploma in Valuation and Farm Management. On completion of his studies he joined the Valuation Department and worked in the Hamilton office for four years before embarking on the obligatory "couple of years overseas experience". On returning to New Zealand he rejoined the Valuation Department in Hamilton, and was then appointed Senior Valuer in the Rotorua office. In 1984 he joined a valuation practice in Whakatane, where he remained for two years before returning to Hamilton and establishing the firm of Ford Valuation where he is the Director. The work conducted by the firm specialises in a wide range of valuation and property consultancy throughout the Central North Island.

Allan has been a member of the NZIV since 1974, and was advanced to Associate status in 1977. Throughout this time he has played an active role within the Institute at both the local branch and national levels and has made a significant contribution to the profession. In 1992 he was elected councillor for the Waikato-King Country Branch and since then has been heavily involved in council affairs, including serving on the marketing committee.

Allan is a member of a local Rotary Club, and has also served on the Board of Trustees of the Hamilton West Primary School for a number of years, including a period as Chairman.

Allan is married to Debbie and they have three daughters. He enjoys sailing as well as some fishing, running and cycling.

Allan has the respect of his peers within the valuation profession, both at a local and national level. The Waikato Branch had no hesitation in recommending his advancement to Fellowship as recognition of his service to the valuation profession and the regard in which he is held.

Citation for Fellowship

DAVID RAMSAY SMYTH

The Waikato-King Country Branch of the Institute was unanimous in its recommendation that David Smyth be advanced to Fellow of the NZIV in recognition of his service as a valuer to the public and the business community at large, and for his service over an extended period of time to the profession itself.

A family farming background in Wairoa led him to Lincoln in 1962 where he gained a Diploma of Agriculture in 1963, and subsequently his Dip.V.F.M, in 1965. David was registered as a valuer in 1968, and was advanced to Associate status in 1968.

His first employment was with the then State Advances Corporation in Rotorua and during the years 1966 to 1977 he variously worked in Rotorua, Te Kuiti, Whangarei and Auckland. In 1977 he returned to the land and purchased a hill country property at Waiterimu where, with his wife Anne, they farmed on their own account and developed a valuation practice based largely on the North Waikato.

In 1981 he returned to more active professional practice and joined Landcorp, and subsequently the firm of Archbold & Co.

Throughout his career David has consistently played an active part in the profession. In Northland he served on the Committee and was the Branch's Chairman.

In Auckland he served on the Committee, acted as an examiner, and was its Vice Chairman, and in the Waikato he also served on the Committee and for two years was the Chairman. In 1991 he was appointed to the Land Valuation Tribunal and remains in that position. In addition he has consistently supported and contributed to the affairs of the Institute and its members.

Other activities in the community have included membership of the Farm Management Society, Chairman of the Waiterimu School Commitee, and Chairman of the Ohinewai Branch of Federated Farmers. Some extramural activity around golf clubs is also rumoured.

David and Anne currently live in Hamilton and continue with their active careers in the Waikato.

Citation for Fellowship

ADRIAN JOHN BRADY

The Wellington Branch Committee of the Institute was unanimous in supporting the nomination of Adrian John Brady for the award of Fellowship as recognition of his outstanding service as a valuer to the public, the business community and the Institute of Valuers.

Adrian was born in 1947 and educated at St Patrick's College, Wellington. Upon leaving school Adrian worked for Valuation New Zealand in Nelson, Dunedin and Wellington. Adrian completed his examinations, was registered as a valuer and advanced to Associate member status in 1973 and began employment with Gellatly Robertson and Co. Adrian was to rise to the position of a partner and director and saw the company grow to a New Zealand wide company now known as Robertson Young Telfer. In 1992 Adrian elected to commence a new venture and opened his own company of A. J. Brady Ltd. Later through 1993 and 1994 Adrian successfully studied for and completed an M.B.A.

Adrian has shared his experience learned through his M.B.A. with the Institute and was the primary architect of the Institute's Business Plan published 1994 and 1995. The Business Plan has been a most significant document for the Institute as it faces the future. With Adrian's considerable input the Institute has been able to focus to a far greater degree than before on its role, goals, future priorities and direction. Adrian has always been an active supporter and member of the Wellington branch. Adrian was first elected to the branch committee in 1979 and continued to serve as a committee member through to 1983 when he was elected as Branch Vice Chairman.

The following year Adrian was elected as Chairman and held that position for the years 1984, 1985 and 1986.

Adrian has also served on the Institute's Publicity and Public Relations Committee from 1989 to the time it was disbanded in 1 995. Adrian was then appointed as a member of the Focus Group and continues in that capacity to the present time. This is a very time consuming task which is focused on the active promotion of the Institute for the benefit of all members.

Adrian has contributed thought provoking articles to the Institute, some of which have been published in the Valuers' Journal. Those articles have been designed to achieve the elevation of the standing of the Institute and its members in the public forum and have been well received.

Adrian has been selfless in promoting the Institute and in being willing to share his knowledge for the benefit of members as a whole. This attitude extends to Adrian's conduct in business as he constantly promotes high standards to the general public and business community. Adrian is a respected senior member of the valuation fraternity in Wellington and on a New Zealand wide basis.

Adrian is married to June, has four boys and has had an active participation in Toastmasters, rugby refereeing and competing in triathlons.

Citation for Fellowship

ALAN JAMES STEWART

Alan Stewart was born in Christchurch in 1947, attended Christ's College 1960-1964 and graduated from Lincoln University with a Diploma in Agriculture in 1968 and a Diploma in Valuation and Farm Management in 1969. Dual qualification as a valuer was achieved when he completed the NZIV Professional Urban examinations in 1977.

Alan commenced his professional career in the Rural Bank at Timaru and Dunedin in the three years from 1970 until he went overseas until 1975. On his return he joined the Valuation Department in Christchurch until 1981 when he took up a sole charge position as a valuer in the real estate company, Binns Barber & Keenan Limited.

In 1980 Alan joined the Christchurch valuation business of Robertson Young Telfer Limited as a Director. In 1991, with Roger Hallinan, he formed the valuation consultancy firm of Hallinan Stewart Limited. In April 1995 the firm joined with Simes Limited, a multi-faceted real estate company in Christchurch.

Although principally regarded as a highly competent and very well respected, experienced rural valuer, Alan's dual qualification enables him to value urban property in an equally competent manner.

Alan was registered as a valuer in 1973 and became an Associate member of the NZIV in 1977. Alan's service to the profession is impressive including a period as a committee member of the Canterbury-Westland Branch of NZIV, culminating in service as Branch Chairman. In 1990 Alan was elected Branch Councillor and continues to represent the Branch on the Council of NZIV as well as serving on the Council sub-committees of marketing and education.

Alan is married to Jan and they have two daughters and a son.

The Canterbury-Westland Branch Committee unanimously supported the recommendation for advancement to Fellowship status within the Institute.

Property & Land Economy Institute of New Zealand Inc.

1996 National Property Conference

5 & 6th September, Wellington Parkroyal

Theme: 2020 Share the Vision

Brief Outline of Programme:

Thursday 5th	Opening Tour of Parliament Lunch at the Beehive Keynote Speaker Land Settlement Debate AGM Streets of Wellington Dinner
Friday 6th	Breakfast with a View The Asian Market What's in a Return Legal Workshops Information Technology President's Dinner
Saturday 7th	Golf Tennis

For further information: Michelle L. Wickens, Conference Consultants & Management Ltd, PO Box 6175, Wellington. Phone 04-472-7420, Fax 04-472-7426.

NEW ZEALAND INSTITUTE OF VALUERS

Incorporated by Act of Parliament

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Chief Executive Officer & General Secretary John G Gibson

NEW ZEALAND INSTITUTE OF VALUERS

Past Presidents

1938-1940	N H MACKIE, Palmerston North
1940-1943	G B OSMOND, Auckland
1943-1947	A W A SWEETMAN, Auckland
1947-1949	0 F BAKER, Christchurch
1949-1950	J A WILSON, Dunedin
1950-1951	0 MONRAD, Palmerston North
1951-1952	L E BROOKER, Wellington
1952-1953	L A McALISTER, Wellington
1953-1954	W G LYONS, Palmerston North
1954-1955	S E BENNETT, Auckland
1955-1957	R J MacLACHLAN, CBE, Wellington
1957-1958	V W COX, Napier
1958-1960	G C R GREEN, Dunedin
1960-1962	J W GELLATLY, Wellington
1962-1964	S MORRIS JONES, Wellington
1964-1966	M B COOKE, Christchurch
1966-1968	D G MORRISON, QSM, Whangarei
1968-1970	A R WILSON, Napier
1970-1971	J M HARCOURT, Wellington
1971-1974	R S GARDNER, Auckland
1974-1976	G M NIEDERER, Invercargill
1976-1977	L M SOLE, Rotorua
1977-1978	E J BABE, CVO, Wellington
1978-1979	P G COOKE, Nelson
1979-1981	P E TIERNEY, Tauranga
1981-1983	R M McGOUGH, Auckland
1983-1985	R M DONALDSON, Timaru
1985-1987	G J HORSLEY, Wellington
1987-1989	R E HALLINAN, Christchurch
1989-1991	R L JEFFERIES, Auckland
1991-1993	A P LAING, Otago
1993-1995	J P LARMER, Taranaki

Life Members

Admitted from the Inception of the Institute

...any Fellow or Associate who has rendered pre-eminent service to the Institute over a long period... "

G B OSMOND (1947)
O F BAKER (1956)
E EGGLESTON (1956)
J G HARCOURT (1957)
O MONRAD (1957)
STACE E BENNETT (1958)
N H MACKIE (1959)
L E BROOKER (1961)
J W GELLATLY (1963)
G C R GREEN (1965)
S MORRIS JONES (1968)
J BRUCE BROWN (1970)
M B COOKE (1970)
R J MacLACHLAN CBE (1970)
W A GORDON (1975)
D G MORRISON QSM (1976)
J D MAHONEY (1977)
E J BABE CVO (1982)
M R MANDER QSO (1985)
R M McGOUGH (1987)
A L McALISTER (1988)
S L SPEEDY (1990)
R P YOUNG (1993)
J N B WALL (1995)
P E TIERNEY (1996)

Honorary Members

Admitted from the Inception of the Institute

"...who has rendered such services to the Institute as in the opinion of the Council entitle him/her to the distinction... "

A D THOMPSON (1952)
J P McVEAGH (1953)
H H BUNCKENBURG (1953)
SIR WILLIAM RODGER (1954)
N H CHAPMAN (1963)
D W SPRING (1963)
JUDGE K G ARCHER (1968)
J S H ROBERTSON (1975)
M ALDRED, R ALDRED (1976)
JAB O'KEEFE (1980)
F B HUNT (1984)
L W NORTH (1988)
W K S CHRISTIANSEN (1990)
J S BAEN (1990)
S M LOCKE (1990)
G R BROWN (1992)

John M. Harcourt Memorial Award

E J BABE CVO (1975)
R S GARDNER (1977)
R L JEFFERIES (1979)
S W A RALSTON OBE (1980)
K J COOPER (1981)
S L SPEEDY (1983)
A L McALISTER (1986)
M E L GAMBY (1989)
E T FITZGERALD (1990)
G J HORSLEY (1992)
W A CLEGHORN QSM, JP (1993)

Young Professional Valuer of the Year

MARCUS JACKSON (1993)
LEONIE M FREEMAN (1994)
ROBERT J CAMERON (1991

NEW ZEALAND INSTITUTE OFVALUERS