NEW ZEALAND INSTITUTE OF VALUERS

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EDITORIAL

Unimproved Values

The role that NZIV members have to play in the procedures proposed in the Maori Reserved Land Amendment Bill is significant. The recognition the Bill accords public valuers is cause for celebration of opportunity. There are over 2,200 Maori Reserved Land leases involving 26,000ha of commercial, residential and rural land holdings between Auckland & Southland. The rent review process involving valuers could increase three fold.

The Maori Reserved Land Act (1955) is one of the few remaining pieces of leasehold legislation which prescribes that unimproved value be the basis for the review of annual rent.

There are still valuers within our ranks who were weaned onto assessing unimproved value and many suffered their baptism of fire in the tribunals and the land courts on this contentious issue. Unimproved Value had been a fundamental part of the land legislation of the nation up until the mid 1960's when valuers, lessees and courts, frustrated by its practical difficulties pressed for, and received amending legislation to the Valuation of Land Act. This took place in 1970. It involved a major conceptual change from Unimproved Value to Land Value and though Government removed this bogy from rating and tax valuations nothing was done to change the concept of unimproved values in other land legislation.

In 1968 the (then) Valuation Dept published a research paper entitled " A Critical Study of the Unimproved Value of Land" (68-1). The authors explained that the original concept of unimproved values dated from 1879 when it was regarded as the means of exempting from government taxation a property owners expenditure of capital and labour in improving their land. This was a pragmatic and easily applied approach to give an incentive to land development in the young colony. For the colonial valuer the task was simple because there was a ready supply of marketable undeveloped land.

Unfortunately the developing dominion eventually used up all its available unimproved land. Finding a sale in the 1960's was as difficult as finding Moriori farming moa.

The useage of the words in other land legislation, particularly leasehold, and the lack of clear direction by courts and legislators is what bedevilled the term "unimproved value". As the research paper points out the many uses of the term `unimproved' in connection with land and its value had not followed any uniform pattern of definition. Each use, and user, had tended to seek a legislative, legal or traditional definition that would best provide the solution to the immediate problem - unimproved value really meant different things in different contexts.

The departmental paper devoted a section to unimproved value in relation to ground rents and freeholding prices of leased lands. The intricacies of the application of the unimproved definition to Maori Reserved Land are covered at some length in the paper.

In this issue of the *NZ Valuers' Journal* we publish the most recent legal decision involving unimproved value. There have not been many reported cases over the past 30 years. Judge Archers' preamble to his decision in *Valuer-General v Johnston* provides an insight to relevant case law, up to that date, and he describes some of the inherent difficulties faced by valuers. In *Proprietors of Atihau-Wanganui v Malpas* the Court of Appeal Judges review the principles of ascertaining the values and rule on the situation relating to any indigenous timber trees on the land.

In the September *NZIV Property Digest* Rodney Jefferies drew attention to the emotionalism which has been surrounding the whole question of Maori leasehold reform. He advised valuers to hone upon their own leasehold valuation skills.

If the past is anything to go by valuers will be well advised to consult, study, and keenly debate all the issues before embarking on their first round of the proposed rental reviews.

Kensington Swan

Understanding Certificates of Title

Is a simple search sufficient?

by John W Meads

Introduction

One of the first tasks of a valuer when receiving instructions to value a property is to obtain a search of the Certificate of Title to the property. The purpose of this article is to provide some guidance to valuers in interpreting the information on the title search - and to suggest that in some instances it is not sufficient for a valuer to rely solely on the information on the face of the title. Instead it is often necessary to obtain additional information from the Land Titles Office to provide a complete picture as to matters which might affect the value of the property concerned.

Background

The Certificate of Title to a property will identify it by reference to its legal description and a plan or diagram endorsed thereon, and will contain the name or names of the present registered proprietors. It is the base document for any property in New Zealand, and effectively acts as a Government guarantee so as to confer indefeasible title to the property concerned on the registered proprietor.

However it is uncommon to find a title which is so "clean" that it is limited just to a legal description, a plan, and the name of the registered proprietor. It is quite usual to find that a third party, whether it be for example a local authority, a neighbour, or a utilities provider, has some interest in the property which is noted on the title. Alternatively the property you are valuing may have a benefit over a neighbouring property which will likewise be registered against the title. The fact that a third party has an interest of some kind in respect of the property you are valuing may impact adversely on its value. On the other hand if the property you are valuing has the benefit of an interest in another property, it may enhance the value of the subject property. It is the thesis of this paper that valuation reports often pay scant regard to the detail of interests which are recorded on the relevant Certificate of Title. Such interests are often simply noted by the valuer without further comment but with a disclaimer built into the valuation report to the effect that it is an assumption of the valuer that there are no unusual or onerous restrictions, easements, covenants or other matters affecting the title which would adversely affect the value of the property concerned. As valuers you should ask yourselves whether this approach is appropriate.

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Understanding the Title

A typical Certificate of Title will have a number of interests noted on it. Not every entry on the title will have an impact on the value of the property concerned. For example, a mortgage would not ordinarily impact on its value nor would the presence of a matrimonial property claim. However it is necessary for valuers to have a proper understanding of all interests noted on the title in order to be able to arrive at a reasonable assessment of its market value. It is not the intention of this paper to exhaustively summarise every type of interest which could be noted on a title. The paper will focus on the following interests which are most likely to have some impact on value.

Rights of Way

A right of way is the most common form of easement. It is the right to cross another person's property, normally as a means of access to or egress from your own property, on the basis that without such right you will be a trespasser. The right of way is most likely to be created by Easement Certificate pursuant to Section 90A Land Transfer Act 1952 which establishes a procedure whereby a right of way is recorded on the relevant titles at the time of the titles being issued following the deposit of a subdivisional plan, but not actually created until subsequent transfers are registered. The Easement Certificate or formal grant of the easement (if not established under the Easement Certificate procedure) will set out the terms and conditions of the right of way, whether there are any particular restrictions on its use, and whether there are any provisions as to shared costs of maintenance. If valuers fail to go behind the entry on the title and obtain a copy of the base document which creates the right of way, they could be ignoring a vital piece of information such as the responsibility of the property owner concerned to contribute towards the costs of maintenance, and hence overlook a component which could be relevant in establishing the property's value.

Other Easements

Whilst a right of way is the most common form of easement there are numerous other types. An easement is "a right annexed to land to utilise other land of different ownership in a particular manner ... or to prevent the owner of the land from utilising his land in a particular manner" (Halsbury's Laws of England). An owner of a fee simple estate granting an easement over or in respect of some part of his or her land creates in favour of another person the right to interfere with the unrestricted use and enjoyment of the owner's land. An easement might reduce the value of the interest held by the owner in the fee simple depending on the degree of interference permitted by the particular easement. Alternatively the easement might increase the use or enjoyment of land having the benefit of the easement and hence the value of that particular land.

A very common form of easement is an easement in gross in favour of a utilities provider eg a power supply easement in favour of the local supplier of electricity or a transmission easement in favour of a telecommunications supplier. Most common types of easements (other than rights of way) are:

- right to convey or drain water
- right to drain sewage
- right to convey electricity
- right to convey gas
- easement of support
- party wall easement
- easement of light and air
- carparking easement
- easement for pedestrian access
- eaves encroachment

Restrictive Covenant/ Land Covenant

It is quite often the case that a vendor of a property reserves certain rights to him or herself, particularly in a situation where the vendor is subdividing his or her property and selling off part of it. Those rights are often reserved in the formal transfer of the land being sold or alternatively are created against the title in the form of a land covenant. Sometimes the interests are recorded in a Memorandum of Encum-

No effort was made in the valuation report to provide details of that covenant.

brance. It is strongly recommended to valuers that whenever your title search records the existence of a restrictive covenant, a land covenant, or a Memorandum of Encumbrance, you obtain from the Land Titles Office a full copy of the document creating or recording the interest which is being protected or reserved. The writer of this article recently received a valuation report in respect of a property where a prospective purchaser of the property had commissioned the report. The valuer in his report noted in passing that the title was subject to a restrictive covenant. No effort was made in the valuation report to provide details of that covenant. A search of the document creating the restrictive covenant revealed the presence of a significant height restriction which effectively prohibited any significant redevelopment of the property. Given that no details were provided by the valuer of the restrictive covenant, the credibility of the particular valuer's report was somewhat questionable in the writer's mind. Valuers may take the view that matters related to restrictive covenants and the like are properly the province of the solicitor rather than the valuer. However surely an interest such as a height restriction could have an impact on the value of a property.

This aspect was considered by the Court of Appeal in the 1992 case of *Underwood v Bevin* [1992] 3NZLR 129. In that case the Court of Appeal had to consider a Memorandum of Encumbrance in favour of the Auckland City Council which set out a number of conditions which had to be satisfied before any building on the relevant site could be undertaken. In the course of its judgment the Court considered a suggestion that the presence of the Memorandum of Encumbrance did not adversely affect the value of the property. The Court rejected this argument and said that "the view that such encumbrances would have no effect on the value is, on the face of it, so contrary to what appears to be the common sense of the situation that without something put forward to justify it, it does in our view cross the threshold of credibility".

Given the significance that the content of a Memorandum of Encumbrance or a restrictive covenant might have on the value of a property, valuers who proceed to complete their report without obtaining full details of these interests surely do so at their peril.

Consent Notice Pursuant to Section 221 (1) Resource Management Act 1991

These apply where the local authority has imposed conditions in giving a subdivision consent. If the conditions are to be complied with on a continuing basis by the subdivider and all subsequent owners after the deposit of the subdivision plan, the local authority can issue a consent notice and have it registered against the title or titles to the relevant properties. The consent notice will most likely contain some restrictions on the full use and enjoyment of the land concerned, for example specifying minimum standards for any building, or requiring earthworks to be carried out in a certain manner. Again it must surely be important for a valuer to have a full understanding of the nature of the local authority conditions of consent before completing the valuation report.

Time and Cost Factors

Valuers are often placed under considerable time pressure by their clients to complete valuation reports. Many valuers will not welcome the thought that a second visit to the Land Titles Office may be important and that additional time will need to be taken to scrutinise the details of documents registered against the relevant title. Similar arguments are raised when it is suggested that a prudent valuer should always obtain a Land Information Memorandum (thought in that instance the cost is often prohibitive). However it is submitted that it is preferable to be thorough and that a client will not thank you if you do not reflect relevant details recorded against certificates of titles when finalising your valuation advice. It is quite common of course for valuers to provide disclaimers and there are certain disclaimers which prudent valuers should insert into their reports. However the more a disclaimer seeks to disclaim, the more it will be strictly construed against the valuer if challenged in Court, and if the disclaimer defeats the whole purpose of the valuation it is likely to be set aside.

Conclusion

It has often been said that valuation is an art not a science. However an artist will not succeed unless his tools of trade are fit for their task. The thesis of this paper is that a valuer could fail in his or her task unless he or she includes amongst the necessary tools of trade all information readily available from the Land Titles Office being information which is publicly available. You need to have an understanding of that information. You need to be prepared to go behind the face of the title search as part of the task of assembling all the necessary facts relating to the property before embarking on your particular task. As Peter Mahoney has said in a previous article in this Journal; "As valuation is a matter of considered opinion ... then it is absolutely essential that the opinion so derived be based on verified and confirmed facts".

“...the more a disclaimer seeks to disclaim, the more it will be strictly construed against the valuer if challenged in Court...”

ABOUT THE AUTHOR

John Meads has an L.L.B. and is a partner in the Wellington office of Kensington Swan. He specialises in commercial and property work.

The Practical and Property Related Implications of Current and Future Treaty Claims and Settlements for New Zealanders

by Belinda Clark, Director of the Office of Treaty Settlements

Historical Overview

Although the topic focuses on the present day and practical implications of claims, the whole business needs to be looked at in context, and should begin with an overview of the history of the European settlement of this country, and of some of the circumstances which gave rise to the Treaty claims.

Historians tell us that there were several motivations behind the Treaty of Waitangi. The British wanted a declaration of British sovereignty. The Treaty was designed to facilitate settlement and land purchases with the Crown being given a pre-emptive right to buy all land Maori offered for sale. It was also intended to provide order and regularity, including protection for Maori from degradation and exploitation by unruly British subjects (e.g.. sealers and whalers and convicts escaping from Australia).

The provision for Crown pre-emption raises an important aspect of the Treaty, that is the differing Maori and British understandings of each of the three articles. The English and Maori version of the Treaty are not translations of each other. One reason for that is that it was not possible to translate concepts particular to one culture into the language of the other.

In Article II of the English text the Queen guaranteed to the chiefs "the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries. . ."; the Maori text gives the Chiefs "rangatiratanga" over their lands, villages and all their taonga. For Maori "rangatiratanga" signified much more than the "possession" referred to in the English text. It has most commonly been translated as chieftainship or sovereignty.

Article II in the English text also contains the cession to the Crown of the right of pre-emption in the purchase of land. British officials interpreted this as an exclusive right to purchase Maori land. In the Maori version, the word "hokonga" does not accurately convey this concept of pre-emption. As experienced merchants, Maori would not have agreed to only being able to sell to one buyer. The right being accorded was probably understood more as a right of first option; not as the exclusive right to buy (which meant that for most of the period between 1840 and 1862 Maori could not sell land privately) which was later to become a further source of ill will, particularly when the Crown resold the same land soon after for a vastly greater price. In addition land couldn't be "sold" in the common law sense, an alienation could at best only be for a particular purpose. The English language concepts of sale and fee simple had no Maori equivalent. Accordingly behind many early historical "sales" so-called, are completely different expectations, with Maori in some cases not intending land to be out of their hands forever.

The rationale of Crown land purchases in the period shortly after 1840 was that the Crown would purchase land at a cheap rate, but would ensure that Maori had adequate reserves set aside to guarantee their present and future prosperity. The arrival of settlers would provide trading opportunities for Maori. As the colony developed, financed by the Crown's profit from on-selling land to settlers, Maori would be well placed to participate in the emerging economy. Whilst Maori might retain only a portion of their original land holdings the value of that portion would multiply in value. Maori would accordingly be better off.

This policy had also been behind many New Zealand Company land purchases as well as Crown purchases. NZ Company purchases in Wellington and Taranaki provided that ten percent of all land was to be set aside for Maori. Hence the name of the claimant group The Wellington Tenths Trust.

Another instance was the Crown purchase of most of the South Island, in a series of large blocks, between 1844 and 1860. Adequate reserves were to be set aside for Maori. That is what the Crown promised but the details were not set down. The Crown invited Maori to trust it to honour this promise. Ngai Tabu sold their land at very low prices in reliance on that promise.

What Went Wrong?

If this scheme had worked, it was, on the face of it a classic "win win" scenario. So what went wrong?

For various reasons, the promised "adequate" reserves were never set aside. What reserves were set aside tended to be poor land and in remote areas, far from any developing economic infrastructure. In other words, the promised quid pro quo for the low land purchase prices was not delivered. The Crown did not keep its side of the bargain.

This did not bite immediately as Maori continued to occupy large areas of alienated land for some time after sale. Initially, Maori showed considerable innovation in producing food and other goods for trade. However, as more settlers arrived, Maori began to be pushed off the land. Far from being participants in the developing economy, Maori began increasingly to be excluded and marginalised as the goodwill of the Crown began to fade in the face of settler pressure for more land.

By 1860 Maori were faced with increasing pressure on what lands they had retained. Large parts of the country such as the Waikato, the Bay of Plenty and most of Taranaki had, at that time, been largely untouched by colonisation. Settler pressure for more land was building, and Maori, now aware of the implications of colonisation, were actively resisting further land sales. War broke out. Following this, the 1860s saw large scale government confiscation of Maori land in the affected areas, ostensibly because Maori in these areas were alleged to be "in rebellion" against the Crown. These lands are called raupatu lands; raupatu - lands taken in forced confiscation or conquest. The loss of these lands, nearly 3.5 million acres altogether, has been very bitterly felt by Maori, not only because the lands were taken ("paid for in blood") but because the Crown said they were taken for anti-Crown activities whereas most iwi were only defending their lands not attacking the Government. In Taranaki, 1,244,300 acres were taken in this way; 1,217,437 acres in the Waikato; in Eastern Bay of Plenty 140,000 acres were confiscated and 214,000 were taken in Tauranga and 375,000 in Mohaka-Waikare. While about 25% of the confiscated lands were eventually returned, there were frequent injustices regarding who they were returned to.

Native Land Court

The mid 1860s saw the advent of the Native Land Court. The settler government had decided that Maori communal land ownership was not beneficial to either Maori or Pakeha development. The Native Land Court's role was to facilitate subdivision of communally owned land into individual land titles. The effect, and the intent, of the legislation establishing the Courts was to open up more land for sale to settlers and to break down Maori tribal social structures. For Maori, the process worked something like this:

- individual Maori had to apply to the Native Land Court for an individual piece of land from within the tribe or sub tribe's communal land holding.
- Maori who did not apply missed out if an application had already been made by a member of their tribe or from

...the process of European settlement led to a massive transfer of propertyfrom Maori to Pakeha... "

within their rohe because the Court only decided on the basis of evidence before it and did not take into account the possibility of competing claims or the rights of non applicants.

to be heard, Maori often had to travel long distances to a court venue and incur expenses for travel, food, accommodation and legal representation. (Attendance at the Court was crucial because of its practice of not considering anything other than evidence physically given before it.) Such expenses were often covered by loans from land speculators, on somewhat disadvantageous terms.

- Maori had to pay the costs of surveying for the subdivision of the land. As Maori tended to lack cash resources, the costs of survey were secured by liens over individualised land. These items were forfeited for these unpaid survey fees.

Some Maori, of course, voluntarily sold their individual land holdings. A large proportion of other Maori lost their land anyway, as a result of expenses incurred in securing title, or to pay off costs of surveying.

By the end of the century, one way or another Maori had lost most of their land; by 1911 Maori owned approximately 7.1 million acres out of 28.4 million acres in the North Island, as well as some small scattered reserves in the South Island. About half of this, however, was leased to Pakeha on terms very unfavourable to the Maori owners; lands under the control of the Native Trustee were put into perpetual leases at peppercorn rentals - beneficial owners were powerless to affect these arrangements. A not insignificant proportion of what remained was compulsorily taken during the 20th century for various public works. A number of the claims in the Waitangi Tribunal allege that Maori land taken for public works was not compensated to the same extent that non-Maori land was, and that excessive areas were taken taking into account the nature of the public works intended. In some cases the Crown took land without affording Maori owners an appropriate level of consultation.

The Treaty Settlement Process

To summarise that brief history, the process of European settlement led to a massive transfer of property from Maori to Pakeha, on terms that were generally very disadvantageous to Maori and indeed, in some cases, was against their will. In addition, alienation of land contributed to the destruction or destabilisation of Maori social and economic structures.

It is these historical injustices that the Treaty of Waitangi settlement process is designed to redress. Under this process, Maori may bring claims for proven historical breaches of the Treaty and seek redress from the Crown. The level of redress is not aimed at compensating the full extent of loss. The land grab that occurred was so extensive that such an approach would not be affordable. However the level of redress is designed to be at a level that is fair, taking into account factors relating to extent of loss, and factors relating to affordability.

The Government has said it wants to see all major Treaty claims settled by the end of this century - five years away. The Office of Treaty Settlements was set up on 1 January 1995 to give impetus and focus to that objective. Its primary function is to negotiate and implement Treaty settlements.

Practical and Property Implications

What are the practical and property implications for New Zealanders?

Just as breaches of the Treaty frequently comprised a transfer of land from Maori, so will the process of redress frequently involve a transfer of land back to Maori. Not all breaches of the Treaty involve land - some involve access or income rights; inadequate compensation or punitive treatment for example. Conversely, not all land transferred out of Maori hands is the subject of a Treaty claim. Nonetheless transfer of property rights will be central to many settlements.

The reasons for this are founded in Maori attitudes to land. Land is not just a source of income or a means to make a living. It is a link with ancestors, a source of identity and therefore also the basis for the social and political organisation of whanau, hapu and iwi. Some say that without a turangawaewae, you cannot be Maori. These realities have led Maori to seek land as the primary form of redress, "Land was wrongfully taken by the Crown, and so land should be given back by the Crown" was the basis on which the Waikato-Tainui claimants, for example, sought redress. Having established that land is, generally speaking, the settlement asset most desired by Maori we then face the problem that the Crown does not own enough land to give back to make exact reparations. Some iwi face a situation where there is hardly any Crown land left in their robe areas. So that even if the Crown wanted to give it all back, and there were no other considerations to meet, it couldn't. Accordingly cash and other assets are also used in settlements.

Meanwhile, the Government has acted to facilitate the return of government-owned land to Maori in Treaty settlements, by preserving its landholdings under a variety of mechanisms specifically designed to protect land for use in possible settlements:

- all surplus government owned land must go through what is known as the "Protection Mechanism". Under this mechanism, all surplus Crown land is advertised prior to being placed on the market. Maori have the opportunity to notify an interest. If Maori can show that the site is sacred or "wahi tapu", then the site will be withheld from sale for return to the appropriate Maori group. If Maori can show that the site is important and would help facilitate a settlement, it may be withheld from sale and held for use in a future settlement.
- where claims are well advanced, the Crown may establish a land bank. Maori in such claim areas may identify particular surplus government land that they want as part of a future settlement, and place it in the land bank. There is a fiscal cap for each land bank, which claimants must bear in mind when deciding whether to request a property to be brought into the portfolio. The Office of Treaty Settlements manages the properties pending the settlement of the claim they are connected with.
- for surplus Crown properties in the areas affected by raupatu, a Crown Settlement Portfolio has been established. Rather than go through the protection mechanism described above, Crown properties will be purchased by the Office of Treaty Settlements from the controlling agency as soon as they are declared surplus, and held in readiness for future settlements. When settlement of a raupatu claim is reached, those properties not involved in the settlement package will be placed on the market. In the meantime, they are managed by the Office of Treaty

...new injustices, to Pakeha landowners, will not be the price of remedying historical injustices. Today's generation did not sign the Treaty.

Settlements, usually under short-term leases.

additionally, State-Owned Enterprises' land is covered by a protective regime. When land was transferred from the Crown to State-Owned Enterprises in the late 1980s a protective "memorial" was placed on the title of each piece of land. These "memorials" mean that the land is liable to be resumed to Maori claimants, as part of redress, by a binding recommendation of the Waitangi Tribunal. Any future purchaser of such State-Owned Enterprise land acquires that land with knowledge of that possibility.

By these mechanisms the Government seeks to reconcile two imperatives, one of which is to realise capital from surplus land as quickly as possible, and the other which is to protect land holdings so that land is available where appropriate for settlements.

Inevitably the Protection Mechanism for Surplus Crown Land means a delay of 3 - 4 months or more before land is released for sale. During this time vendor agencies may lose the use of capital. However, this is a relatively minor downside compared to the problems which could arise if land, which was of specific significance to claimants and which they were hoping to have returned in a settlement, has been disposed of not long before settlement.

Non-surplus land owned by the Government may also be used in a Treaty settlement, as occurred with Waikato-Tainui. In effect, such land may be transferred to Maori but subject to a lease back to the Crown. Maori become the landlord, the Crown becomes the tenant.

Maori may also be given a preemptive right to buy, at market rates, Crown land that becomes surplus in the future. This was also part of the Waikato-Tainui settlement.

Currently, the Office of Treaty Settlements holds in excess of $58 million in its land portfolio. More land will be added over time. By 1998 this figure could reach as high as $150 million. The land portfolio is a way of ensuring the Crown retains sufficient land to effect settlements, and ensuring that specific land sought in a claim in not put beyond the reach of claimants.

What this means is that many millions, hundreds of millions, of dollars worth of land will be returned to Maori through the Treaty of Waitangi process. For example, in the recent Tainui settlement 39,000 acres are proposed to be returned. The cash component of the settlement will be some $170 million minus the value of this land (which has not yet been determined).

Two issues arise here:

1. What opportunities / benefits does this create?
2. What is the effect on non-Maori land holders?

Opportunities/Benefits

The first question is what opportunities or benefits are created. What is the effect on the property market? The use of Crown land in Treaty settlements will, of course, have a significant impact on the property market.

The entry into the property market of a whole new group of land owners will create a number of spin-offs associated with property and property management. Increasing numbers of Maori will be developers, farmers, agriculturalists and landlords. This will in turn mean opportunities for solicitors, financial and investment advisers, and banks, as these ventures are managed and financed. As well as the benefits for the property and related industries, the transfer of assets to Maori will have the added effect of decreasing the economic marginalisation of Maori in New Zealand society, with obvious advantages.

Effect on Non-Maori Landholders

The return of land to Maori has caused consternation in some quarters, particularly amongst European land owners.

However, the Crown has been clear that new injustices, to Pakeha landowners, will not be the price of remedying historical injustices. Today's generation did not sign the Treaty. Indeed, individual settlers of the last century were not Treaty signatories either. The Crown signed the Treaty, so it was the Crown which breached the Treaty, and it is the Crown which is responsible for providing appropriate redress.

To underline this policy, the Government passed section 3 of the Treaty of Waitangi Amendment Act in 1993. That section prohibits the Waitangi Tribunal from recommending the return to Maori ownership of any private land, or recommending the acquisition, by the Crown, of any private land. This provision relfects a wider Government policy position that private land is not available for redress other than on a willing seller willing buyer basis. Therefore fears that land claims over your land will lead to it being taken for a settlement, or that its value will be reduced because of the potential for it to be taken for a settlement, are groundless, since private land cannot be transferred to Maori settlement without the owner's agreement. There is no danger that freehold land could be forcibly transferred to claimants.

Conclusion

In conclusion, Treaty settlements will involve the transfer of large amounts of land but unwilling private sellers are not affected in any way. The Waikato-Tainui settlement potentially involves the transfer of up to 1,200 properties. That is just one settlement, although admittedly a major one. The skills of the various property related professions will therefore be required in the delivery of Treaty redress.

I state that not as a selling point for the Treaty process. My job is to achieve Treaty settlements not to create work for the property industry. Nonetheless, the reality is that large scale property transfers will mean business for the property industry. People involved in the industry will benefit in a financial sense from that.

At the same time, I hope people will see any participation in this process as something far more than a mere economic activity. The process we are involved in is fundamentally worthwhile.

It is, I believe, creating a more harmonious society for our children to grown up in.

ABOUT THE AUTHOR

Belinda Clark has a B.A., L.L.B.(Hons). and an L.L.M. in International Law. She has practised as a commercial lawyer and spent eight years in the NZ Diplomatic Service including a posting to the UN in New York.

Changing Social Attitudes to Lane! Ownership

A controversial look at the issue of land rights in Australia and Canada.

by PJ Mahoney F. N. Z. I. V.

This is the second 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 1996.

The first part was published in the July 1996 issue of the NZVJ.

The Mabo Case

In June 1992, the High Court of Australia, in considering the *Eddie Mabo & Others v The State of Queensland* (No. 2) case, brought down a decision which has had a significant impact on the question of land rights of indigenous minority people and in particular, the Torres Strait Island people and Aborigines.

Before the Court was the question posed by the plaintiffs, as to the validity of the long-held assumption that when Australia was colonised, preexisting land rights of the indigenous people did not survive. This case raised the specific issue of whether the Crown acquired sovereignty for the Australian continent on the basis that the lands were "terra nullius" (land belonging to no-one) and as such whether the Crown not only acquired title, but also beneficial ownership.

The majority decision (6-1) by the High Court in June 1992 established the way in which the common law in Australia should recognise the land rights of the Aboriginal and Torres Strait Island people. The judgement, which was a lengthy one and which I note has been quoted by one observer "as certainly not something to read for relaxation, although it might cure insomnia", created considerable interest, particularly within legal and administrative circles. This attracted considerable publicity, with the decision attracting comments ranging on the one hand, as being recognised as a panacea for all Aboriginal problems and on the other, as being regarded by some as the thin edge of the wedge for non-Aboriginal people in respect of future ongoing land claims.

The actual dispute concerned the Murray Islands which lie in the Torres Strait comprising a land area of some nine square kilometres and consisting of three principal islands. These islands were occupied by the Meriam people for generations prior to first European contact and have been continuously occupied up to the present date. Anthropological records and research showed the Meriam people were the direct descendants of those persons described in early European reports. There have been strong customs among the Meriam people regulating land ownership, whilst the land of the Murray Islands belonged to individual groups who used it mainly for growing crops and vegetables.

A brief history of the land issue dates back to 1877 when the then Queensland Government annexed the Murray Islands and administered them as a part of Queensland. It should be noted, however, that at no stage did the then State Government assume ownership of the land in question, or expressly take away the land from the native owners.

Issues Addressed

The issue addressed by the High Court in the Mabo case, was whether the annexure of the islands by the Queensland State Government in 1877 and subsequent actions of the Government (in particular the 1985 Act of Queensland Coast Islands Declaratory Act) was valid. The actions of the Queensland Government endeavoured to not only acquire sovereignty, but also extinguish any land rights of the islanders without entitlement to compensation. This, if upheld, was to have the effect of vesting in the Crown, represented by the Queensland Government, the absolute ownership, legal possession and exclusive power to confer title to all land in the Murray Islands.

The High Court in its 6-1 decision, considered the way in which the common law in Australia should recognise the rights of Aboriginal and Torres Strait Island people on this question of land rights. The order made by the High Court in effect declared that the land in the Murray Islands is not Crown land within the meaning of the Land Act of 1962 (Queensland) and that with some exceptions for specific areas,

> "the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands", but that such title is subject to the power of the Queensland parliament and Governor in Council "to extinguish that title by valid exercise of their respective powers, provided any exercise of those powers is not inconsistent with the laws of the Commonwealth".

Whilst six of the judges were in general agreement, their decisions were not identical and there were some variations in their conclusions. Specifically however, the High Court decided that the ownership of the Murray Islands by the inhabitants prior to 1877 was unaffected by the subsequent action of the Queensland Government in annexing these islands.

On the related issue of the question of European settlement and pre-existing land ownership by Aborigines, the Court decided.

> "that the common law of Australia recognised the concept of `native title' as it would recognise any Aboriginal ownership of land pre-existing European settlement. Aboriginal ownership or native title would be recognised, as in the Mabo case, where a clan or group has continued to acknowledge their laws and to observe the customs based on the traditions of that clan or group and whereby their traditional connection with the land has been substantially maintained.
>
> Therefore, `native title' where it existed, survived the Crown's mere acquisition of sovereignty (ie. European settlement).
>
> The Crown can at any time extinguish native title and acquire ownership of that land as it canin respect of any land.
>
> Where the Crown appropriates land owned by Aborigines under `native title' but that appropriation is not inconsistent with native title, the native title will survive. Native title to an area of land is also extinguished if the clan or group ceases to acknowledge or observe those customs, loses its connection of the land or on the death of the last members of the clan or group."

Continued Use

In essence, the Mabo (No. 2) decision, on the question of Aboriginal land ownership, appears to state that Aborigines will have to establish a continued use of the land according to recognised customs or tribal law from prior to European assumption of sovereignty. The continued use of land by members of the original tribe or clan under `native title' is imperative, as well as the land having never been alienated so as to extinguish the `native title'.

The Murray Island situation in Mabo (No. 2) lent itself ideally to identifying the characteristics of an existing native title situation. The local people had maintained continuing connection with the land and their traditional practices. They had traditionally defined identifiable gardens, and no Government had acted to alienate these holdings. This differs from the traditional, more nomadic habits of the mainland people, and apparently Mabo remains the only instance of existing identified native title.

In many parts of Australia, indigenous people may not be able to demonstrate the necessary continuing connection with the land. Other people who can do so are likely to find that their `native

It will be evident, therefore, that there is a very clear distinction between the rights of the indigenous people in Australia in respect of land claims under the Native Title Act and that of claimants under the Waitangi Tribunal in the New Zealand jurisdiction.

title' has been extinguished. However, some people may be able to establish their continuing title to their lands, which would otherwise be unavailable to them under the existing patchwork of Aboriginal Land Rights legislation.

Compensation

Whether the process of pursuing such claims is to be left entirely to the judicial system or handled within the political arena (eg. in comparison with the Canadian treatment of indigenous land rights), is a matter for further political consideration. Significantly in the Mabo case, the plaintiffs - five in total, three of whom died prior to the decision being handed down did not seek compensation or damages in respect of past interference with their rights and interests. As such, the Court was not called upon to decide any questions as to compensation.

If and where `native title' is extinguished and compensation is to be paid by the Crown, this raises the intriguing question as to the rights granted under the native title, the extent of the title determined by reference to the laws and customs of the indigenous inhabitants.

Such rights will depend upon the facts of each particular case, but may well include some or all of the following:

the right to reside permanently on the land,

the right to traverse any land, hunt, fish and create food and vegetation from such land,

the right to gather materials including timber, bark, resin, grass and other material as required for ceremonial and domestic purposes,

the right to bum off vegetation on the land, the right to conduct ceremonies peculiar to the culture of the resident people, the right to exclude others from all or particular parts of the land.

As far as I am aware, Australian legal history does not provide any direct precedent for the assessment of compensation for any loss or diminution of these rights of native title. Compensation determined for loss following extinguishing of native title and where the assessment of the value of the land provides occupation comparable to that as granted under freehold ownership, should be a relatively straightforward exercise. However, debate will undoubtedly arise in assessing compensation for non-pecuniary losses flowing from extinguishing of title and where the native title involves a lesser form of occupation or "rights" than is provided under traditional freehold ownership.

I understand that legal precedent has been limited and to some extent confusing. It appears that the granting of a pastoral lease will extinguish native title, but even this is now uncertain. Compensation is to be on the basis of "just terms", which implies "special value to the owner", which itself has never been found to include "sentimental" or emotional aspects of value. Native title however, is considered to include an intangible, special attachment, which poses particular problems for determination by the valuer.

Native Title Act

As a consequence of the Mabo decision, the Commonwealth Parliament in November 1993 passed the Native Title Act which took effect from 1 January 1994. The Native Title Act picks up the common law definition of native title as described in the Mabo decision and attempts to strike a balance between the interests of native title holders and others affected by the recognition of native title.

In summary, the Native Title Act of 1993 provides:

- recognition of Native Title rights and sets down some basic principles in relation to Native Title in Australia,
- for the validation of past Acts which may be invalid because of the existence of Native Title,
- for a future regime in which Native Title rights are protected and conditions imposed on Acts affecting Native Title land and waters,
- a process by which Native Title rights can be established and compensation determined, and by which determinations can be made as to whether future grants can be made or acts done over Native Title land and waters,
- for a range of other matters, including the establishment of a national aboriginal and Torres Strait Islander land fund.

The Act also sets up the Native Title Tribunal to process native title applications. This Tribunal is an independent body authorised to process applications by:

> Claimants being Aboriginal people and Torres Strait islanders who wish to claim native title over their traditional land or waters, or compensation where native title has been extinguished or impaired.
>
> Non-claimants being a person(s) other than a claimant who applies to find out whether native title existed over land or waters before action is undertaken on the area concerned.

The Tribunal, which is not a Court, has power as an arbitral body under the Act to make a determination whether or not certain future acts (including granting of mining leases) affecting native title can proceed, if a state or territory has not set up its own arbitral bodies to do this. As a general rule, the Tribunal uses mediation to resolve disputes over claims and to avoid the need to proceed to Court.

The Tribunal is required by law to carry out its functions in a fair, just, economic and informal manner. As a general rule, the Tribunal will travel to meeting places considered reasonably convenient to all parties and will generally sit in locations which are considered more compatible to the claimants. In this respect, the Tribunal follows a similar procedure to that adopted by the New Zealand Waitangi Tribunal in hearing its claims.

Disputed Native Title claims that cannot be resolved by mediation, will then be referred by the Tribunal to the Federal Court.

Of particular interest to the average "joe citizen" is a concern regarding what land can be claimed under the Native Titles Act. As a general statement, Native Title cannot affect the rights of existing land owners or other rights in the land or waters.

Vacant Crown land which has not been subject to any extinguishing grants in the past may now be claimed. Similarly, land which is the subject of reserves or nonextinguishing interests such as mining leases, etc. may also be open to claim.

Land which is apparently open to claim today may not have Native Title, if it had been subject to the extinguishing grants in the past. Native Title once extinguished cannot be revived.

Differences

It will be evident, therefore, that there is a very clear distinction between the rights of the indigenous people in Australia in respect of land claims under the Native Title Act and that of claimants under the Waitangi Tribunal in the New Zealand jurisdiction. The indigenous Maori, in signing the Treaty of Waitangi with the Crown, entered into a formal contract which effectively was to provide a partnership between the Crown and Maori, but which has not always been fully honoured. The claim of the indigenous Aboriginal people of Australia, is not based on a breach of a contract, but rather a successful challenge

European settlement was viewed as justification for disregarding the indigenous people, the imposition of territorial sovereignty and the administration of British law.

as to whether native title invalidated the Crown claim of sovereignty over lands which purportedly belonged to no-one. It is in respect of this action, that the indigenous people of Australia are seeking redress for the loss of their rights and the consequential damages and injustices they have sustained. It is understood that many aboriginal groups within Australia are becoming cynical about the benefits that will accrue to them, but equally pastoralists and mining companies remain anxious about the effect on their activities.

If the Courts are unable to provide the necessary guidance on this issue, then perhaps a further legislative response will be required.

The Canadian Experience

Both Canada and Australia share similar constitutional traditions with a common colonial past, both having been the product of British imperialism. These two countries also have a common characteristic of a federal government structure (state/provincial and national), which is in contrast to the situation in New Zealand where there is no provincial government, but rather a single unitary government. This dual government structure does create another tier within the legal and constitutional framework of these two countries and this is particularly relevant to the question of legal and constitutional changes. These two countries also share another feature: namely each has an indigenous population which generally has been dislocated and dispossessed following European settlement and colonisation which took place more than 200 years ago.

Recent developments in Canada, however, have given rise to a dramatic change from what was otherwise a similar history with Australia. It has been claimed that there are nearly one million people living in Canada who possess indigenous ancestry. Many of these people, following a succession of treaties and laws as imposed by successive federal Governments, were historically consigned to the outskirts of Canadian social, economic and political life. This dislocation and dispossession of indigenous peoples occurred within a constitutional framework which, from its outset, apparently denied the legal existence of indigenous sovereignty and indigenous property rights.

Natives Disregarded

International and colonial law at the time of British administration of sovereignty over North America, was premised on the assumption that the continent constituted "terra nullius", despite the known presence of indigenous inhabitants. The social and political structure of the indigenous people at the time was apparently insufficiently advanced to satisfy British imperial recognition. As a consequence, European settlement was viewed as justification for disregarding the indigenous people, the imposition of territorial sovereignty and the administration of British law.

As far as the indigenous/Aboriginal people were concerned, what effectively happened was that the Crown in Canada entered into some 500 separate treaties with the indigenous/Aboriginal people, both prior to and subsequent to confederation. These treaties encompassed more than one-half of Canada's land mass. In most instances, the indigenous (Indian) signatories agreed to "cede, release, surrender and yield up" their rights with respect to land in return for specified benefits and reserve land. These agreements were at the time typically viewed by the judiciary as extinguishing common law rights associated with indigenous land title and substituting a set of treaty-based rights.

A Royal Proclamation of 1763, prohibited the private purchase of Indian land throughout the Crown's North American colonies and also undertook to preserve on behalf of the indigenous Indians, certain defined areas of land.

This Proclamation has subsequently been held to be a fundamental document defining the relationship between the Crown and "the first nations" in Canada. When the North American colonies decided in 1867 to form a confederation, there was little doubt in the minds of many and in particular the legislators, that Canada enjoyed territorial sovereignty and could therefore pass laws governing the indigenous people.

It was generally recognised (and has been until relatively recently) that the constitutional position of indigenous peoples in Canada had the following characteristics:

The Crown enjoyed territorial sovereignty over an underlying title to all the territory known as Canada.

Indigenous people enjoyed limited Aboriginal rights of use and enjoyment of non-surrendered ancestral and reserve land.

In some instances, indigenous people enjoyed limited treaty based hunting, fishing and trapping rights with respect to portions of surrendered land. Parliament was entitled to pass legislation regulating indigenous people without their consent and such laws could regulate and extinguish both common law and treaty based rights.

Provincial Government was entitled to pass laws of general application regulating Aboriginal people in the exercise of common law rights of Aboriginal title.

Indigenous people exercised limited self-governing authority over reserve land subject to an over-riding federal supervision and authority.

Dramatic Changes

However, over the past 30 years, the situation as to the rights associated with indigenous people has changed dramatically. Initially the 1969 Government White Paper proposing "a global termination of all special treatments of Indians including the Indian Act", was an attempt by Government to argue that differential treatment on the basis of race was contrary to Canadian political traditions. Aboriginal groups were quick to denounce this White Paper. Such was the level of controversy associated with it, that it was subsequently withdrawn.

This then was the beginning of the new era and the political and legal emergence of the "First Nations of Canada". What followed was a series of notable cases, with perhaps one of the more significant being *Calder v AGBC*. In this case, the majority of the Court recognised the legitimacy of a claim of indigenous people to land. The Court determined the Aboriginal/indigenous title as a bundle of common law rights of use and enjoyment of ancestral land, stemming not from any positive legal enactment, but rather from indigenous possession from time immemorial. This in effect is similar to the position of the indigenous people of Australia.

In a series of other decisions, the Courts indicated that it was willing to interpret statutory rights in relation to indigenous people in a sympathetic manner. One Supreme Court of Canada decision held that the Federal Government owed a special fiduciary obligation to the Aboriginal people when disposing of ancestral or reserved land.

One of the consequences of the Court's decision in *Calder v AGBC* (1973) was that the Federal Government announced that it was prepared to enter into negotiations with respect to territory which had not previously been the subject of a treaty between the Crown and Aboriginal people. A series of land claim agreements between federal and provincial Governments and the Aboriginal people, purported to extinguish Aboriginal title to land in exchange for monetary compensation, title to specified land, hunting, trapping and fishing rights over certain territory, as well as administrative authority with respect to social and political matters. Any land coming within such an agreement could only be sold to the Government as the purpose of land rights, as provided by the agreements, was to ensure "economic self-sufficiency of the Aboriginal people". Where an Aboriginal community wishes to negotiate a land claim agreement, it typically commences its process by filing a Statement of Claim, stating that the community has not adhered to a treaty in the past and that it has traditionally used and occupied a territory in question. It identifies in some detail the claimant's group and the geographic extent of the claim. Upon receipt of such a Statement of Claim, the Federal Minister of Indian Affairs and Development will assess the likelihood of successful negotiations, the priority of settlement of claims in the area and will decide whether to proceed with the claim, as well as determine the scope and parameters for any negotiations.

Nunavut Agreement

In the Nunavut Agreement between the Inuit people and the Crown, the Federal Government demonstrated a willingness to address a range of issues in negotiations including: land selection, self-government, environmental management, resource revenue-sharing, hunting, fishing and trapping rights, compensation and economic development. The agreement with the Inuit people included the surrender to the Crown of all the aboriginal claims, rights and interests in land and water within the jurisdiction and sovereignty of Canada. In return, the Crown granted to specified Inuit organisations rights in respect of defined areas of land, some of which included mineral rights. Such land however, can only be sold to the Government, as the stated purpose of the land rights as granted in terms of the agreement, is to ensure "economic self-sufficiency of Inuit". The agreement also provided the Inuit people with a direct involvement in land use planning, environmental impact assessments and wild life management.

At the same time that the Aboriginal people were enjoying increasing success in the Courts with their comprehensive claims, the Aboriginal issues moved into the constitutional area as a result of constitutional reform efforts undertaken by the Federal Government aimed at accommodating the independent nationalist aspirations being espoused in the province of Quebec.

As a consequence of this, there have been further Court cases, one of the more noteworthy being the Supreme Court of Canada decision in R *V Sparrow* (1990), where the question of recognition and affirmation of Aboriginal fishing rights was challenged. In this instance, the Court determined that the passing of future laws must infringe as little as possible upon the rights of the Aboriginal people and where such infringements do occur, they be accompanied with fair compensation. In the same decision, the Court addressed the issue of fiduciary responsibilities of the Crown to act in an Indian group's best interests when leasing surrendered reserve land to a third party. The Court held that the relationship between the Government and the Aboriginals is trust-like, rather than adversarial, and therefore recognition and affirmation of Aboriginal rights were to be defined in light of this relationship. It was held that the constitutional relationship between the Government and the indigenous people was a fiduciary one, whereby the Government was expected to act in the interests of Aboriginal people in Canada.

Focus on Rights

More recent litigation has focused on this relationship between Aboriginal rights with respect to land and Aboriginal rights with respect to governance. In British Columbia, the Gitksan and Wet'suwet' en people in British Columbia brought an action seeking a declaration that they owned 22,000 square miles of territory and were entitled to govern the territory by reference to Aboriginal and not provincial law. The Judge at first instance held that all the Aboriginal rights in the province were extinguished by a series of colonial proclamations prior to British Columbia joining the confederation.

The judgement was subsequently overturned on appeal by the British Columbia Court of Appeal, which held that the Aboriginal rights of the claimant had not been extinguished prior to British Columbia joining the federation. This Court also ruled that the claimants did not have a right of self-government, but recognised that the people constituted organised societies, with their unique traditions, rules and regulations which continue to exist, though subject to federal and provincial law.

Whilst this decision of the Court of Appeal of British Columbia may have been subject to appeal to the Supreme Court of Canada, the decision nevertheless does recognise existing indigenous rights in British Columbia. It also raises the intriguing question as to whether the Constitution Act of 1867 recognises and affirms indigenous rights of Govern - ment. If indigenous communities do possess rights of a jurisdictional nature, then what is the relationship between indigenous, provincial and federal jurisdictions?

Subsequent attempts by federal Government through the Constitution Act 1982 to introduce reform to all provinces as well as the federal Government, has not resolved this debate. It is now well recognised that the moves of the Mulroney Government and the then proposed "Meech Lake Accord" foundered when federalists complained that it weakened the Federal Government's ability to act as a national Government. Others argued that the interests of the smaller provinces were compromised in an attempt to placate the growing nationalism within Quebec. At the same time the Aboriginal people strongly resisted the Accord on the basis that it incorrectly considered Canada as founded by two peoples: the English and the French. The peoples of the "First Nations" argued that the Accord did not address whether the explicit right of Aboriginal self-government should be entrenched in the Constitution. The subsequent Charlottetown Accord of 1992 proposed some major recommendations with respect to the entrenchment of Aboriginal self-government. The Accord proposed that the Constitution of Canada be amended to recognise that "the Aboriginal peoples of Canada have the inherent right of self-government within Canada" and that this right be interpreted as a recognition of Aboriginal government being one of three orders of government in Canada. This controversial Accord, whilst defeated in a national referendum of October 1992, does possibly constitute an important benchmark for any future constitutional recognition of Aboriginal self-government. As a consequence of the 1992 referendum, Aboriginal government by constitutional amendment is not likely in the immediate future.

However, the experience in Canada on the question of indigenous people's rights of governance is undoubtedly a strong

" an ethic of fairness "

indication of the evolutionary process of the native and indigenous peoples and their pursuit of identity and possibly sovereignty. As such, this process will likely continue to shift the focus of the constitutional position of Aboriginal people from the initial emphasis on land rights, to questions of indigenous sovereignty, governance and jurisdiction. Indeed, it is generally recognised that questions surrounding the use of land are in themselves intimately connected to the wider issue of sovereignty and governance.

Conclusion

This brief overview on the issue of land rights for indigenous peoples in the identified Pacific nations of Australia, New Zealand and Canada, hopefully has provided an insight into what, in my view, is likely to be a continuing debate in both political and legal forums for the balance of this decade and well into the next century. The ongoing claims and struggle by indigenous people for justice in terms of land occupation, land rights, sovereignty and governance, will likely become a more controversial and politicised issue, particularly within New Zealand.

One of the intriguing questions arising from this particular issue, is why at this point in history has this specific issue of indigenous peoples rights become foremost in the minds of legislators, sociologists and others, in certain western countries. Perhaps the prolonged period of relative peace and prosperity enjoyed by most countries since the 1950's, has contributed towards a greater emphasis and focus on individual rights and minority interests. Interestingly however, this does not necessarily seem to be the case in other parts of the world including central and eastern Europe, as well as countries of Central and South America and parts of Asia. One can only speculate whether these countries, some well known for their suppression of minorities and human rights, would have countenanced such a development or process as is now clearly established in the social and judicial framework of the three countries referred to.

The process of review and redress in respect of indigenous peoples' claims to land rights and related issues, does raise an important but rarely mentioned principle: being that of fairness. I believe that the primarily European based culture and traditions as developed in the new world nations of Australia, New Zealand and Canada, populated substantially by European immigrants and subsequent generations of settlers of western European and Anglo-Saxon stock, who immigrated to a new world to achieve greater freedoms and prosperity, does include an intrinsic characteristic, which I would describe as: "an ethic of fairness", reflecting a belief in social justice.

It is this ethic, which I believe has permitted the development of claims and allowed the grievances of the indigenous minorities to be brought to the forefront of public attention. To some extent, therefore, continued support for such claims does depend upon the understanding and support of the sympathetic, silent majority. This principle of fair-mindedness may, however, be tested in the future, if claimed grievances become untenable. At that stage, the extent of sympathetic understanding may well start to wane. I also believe that the willingness to entertain claims will not extend into the future indefinitely and likewise the responsibility for past actions may not necessarily be willingly carried by successive generations.

Participation

In rectifying past grievances and injustices, it is understood and recognised that the common intention is to enable all groups and minorities to fully participate in a modem society or community whilst retaining their own individuality. This being the case, it is therefore imperative, that any remedies or compensation granted to redress previous grievances become a positive factor and thus contribute towards a fully integrated community/society. In this regard, there appears to be a dichotomy between those claimants solely seeking compensation or redress for past injustices and those who are also claiming individual sovereignty and autonomy.

As already indicated, major changes in the social and political direction as well as reparation granted to various minorities, do rely upon the continued sympathetic support of the silent majority. If however, the political pendulum were to lurch too rapidly in any one direction, there is always the possibility of a counter-reaction developing. This would inevitably be reflected in a growing demand on politicians to acknowledge any such change or firming in public opinion and to act accordingly.

Irrespective, I believe that the issues currently before us will not lapse, for history has repeatedly taught us that dispossessed people will continue with their ongoing struggle for restoration of rights formerly usurped. The success of the minorities in this regard, will greatly depend upon the support of a sympathetic and generally passive consenting majority,

Evolutionary Process

One of the major difficulties in this whole process is the inability of both the indigenous people and the European populace to recognise or accept that whilst the evolutionary process of change from a tribal/community culture to that of individual rights, is now well advanced in physical and economic terms, the cultural and spiritual significance of this change is a much slower process. Redress for grievances on a physical and economic level can be addressed within a relatively short time frame, whereas the evolutionary process in respect of the spiritual and cultural dimension associated with land ownership, appears to have no specific time constraints.

In the interim, the machinery which has already been set in place for review and reform of past grievances in some of the countries I have identified, will undoubtedly create golden opportunities for many of the claimants and of course, their advisers. This has been evident within my own country of New Zealand, where some of the more far-sighted tribes in establishing claims in terms of the Waitangi Treaty, have been very quick to recognise the opportunities and have clearly demonstrated the need to provide:

leaders with the ability to unite their various tribes/groups,

a vision to capitalise on the existing political and social climate,

the skills and expertise to negotiate and reach binding agreements on behalf of their own people and the Crown,

a willingness to conclude negotiations on an equitable basis and then proceed with the real task of utilising such assets to generate income for the benefit of the claimant group and successor generations.

Some of the more pro-active tribes and groups who have successfully concluded negotiations on major land settlements and other issues, will likely emerge in the foreseeable future as significant land owners and investors. As such, they will have the opportunity to independently pursue some of the stated social goals and objectives of their people in such varied areas as: social and economic advancement, educational and job training programs, as well as promoting and maintaining their own heritage and culture.

The next decade or so will therefore likely be a watershed period for many indigenous minority groups in their quest to achieve a more equitable slice in the social and economic pie as developed in these three relatively affluent and progressive nations. The success or otherwise of the various claimant groups will be dependent greatly upon the degree of cooperation, understanding and tolerance shown by all participating parties. This will require an acceptance that the views and demands of neither the majority nor the minority interests can dominate.

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The Valuation rri s and Sand its

by Robin Hocking

This Australian paper is reproduced by kind permission of the author and the Valuer and Land Economist.

This paper touches on a wide range of valuation matters. It is intended to highlight the need for a thorough investigation of the subject site and its market potential. The paper also comments on the real world use of dual capitalisation rates and the author expresses concern that too often reliance is placed on projected cash flows using unrealistic discount rates.

Readers must note that the paper was written for an Australian audience. The legislation, authorities and licences referred to may not necessarily apply in New Zealand.

Introduction

The following is intended to be broad and to apply to the valuation of both quarries and landfills with matters such as extractive licences and Waste Discharge Licences referring to Victorian legislation.

There is a multitude of variables in the valuation of a particular site and all sites should be treated as being individual and different even adjoining sites.

The method of valuation is primarily the capitalisation of recurring profits, which requires the assumption and estimates of many factors and I stress very strongly that all variables in the capitalisation process are interdependent and cannot be changed in isolation and should only be amended after consideration is given to all other variables and estimates.

Extractive Industries - Quarries and Sand Pits

Quarries are usually considered to be valuable real estate and in most cases this is correct. However, there are examples where quarries fail to meet expectations, for many reasons, and sufficient instances where mortgagees have been required to suffer severe losses to indicate that quarrying is a very competitive industry with high inherent risks and liabilities. The operation of a successful quarry requires expertise and often a large capital outlay that could run in excess of $20,000,000. A simple crushing and screening plant can cost $1,500,000 and a large plant such as CSR's relatively new operation at Oaklands Junction, in the vicinity of $20,000,000.

It is of the utmost importance for the valuer to establish what is being valued. The subject of the valuation will be either the freehold/operator's interests, the lessor's interest or the lessee's interest. The lessor's interest will be the value of the rental/royalty income stream and the lessee's interest may be similar to the freehold-operator interest.

The time frame over which the projected budgets and cash flows are made is also of importance and this applies equally to freehold or leasehold interests. I provide further details later in these notes but, in my opinion, the time frame should reflect the life of the quarry and useable reserves, plus an element of risk in meeting the budget forecasts.

The valuation of an extractive industry site comprises

(a) The value of the reserves to the quarry operation

or

(b) The value of a royalty income stream

Licences

The issue of Extractive Industry Licences is provided for in the Extractive Industries Act 1966 and controlled by the Department of Energy & Minerals. It is seldom that a new licence is issued within six months and some licence applications take in excess of five years. On average, an application for an Extractive Industry Licence will probably take between two and three years.

An extractive licence can only be issued over freehold land. This requires the permission of the land owner, mortgagees and any other interested parties.

An Extractive Industry Lease is issued over Crown land and many quarries are required to operate under both Extractive Industry Licences and Leases. This applies to a land title restricted to a depth of 15.2 metres, where land below 15.2 metres is owned by the Crown.

There are occasions when permits can be obtained from the Department of Conservation and Natural Resources (DCNR) for the removal of quarry material from certain reservations and this applies, in particular, to State forests. These are annual permits/ leases and because of the restricted security of tenure, there can be difficulties in obtaining satisfactory finance for a medium to large operation.

An Extractive Industry Licence is not required for extraction to a depth of only two metres, however, in almost all circumstances a Planning Permit is required and it should be expected that DCNR will be a referral authority.

An Extractive Industry Licence can be issued for up to thirty years and renewed thereafter for periods of ten years.

There is little problem in obtaining a renewal of the majority of licences. The licence holder is required to apply for the renewal prior to the expiration date and the Act allows that quarry to continue working under the same conditions until such time as the renewal application is accepted with its new conditions, or refused. The licence holder has the right of appeal to the A.A.T. against a refusal or onerous working conditions.

It is important to recognise that an extractive licence is issued to the operator/applicant and the licence does not run with the land. This is different to a Planning Permit and once a licence has been granted, it is very difficult for any party to place the Department of Energy & Minerals (DEM) in a position where the licence will be cancelled without the consent of the licence holder. The issue of a licence requires the consent of the land owner and mortgagees. Once the landowner has given consent, the DEM is no longer interested in the terms of any lease or occupancy agreement. The Department's prime concern is for the safe and proper conduct of the quarry and compliance with working conditions. An extractive licence can be, and often is, assigned subject to the consent of the licence holder, the assignee, the Department, the landowner and the mortgagee. The DEM will not become involved in "domestic" arguments and as already stated, a licence is not likely to be cancelled because the licensee loses access to the site. This could be the result of the expiration of a lease, the early termination of a lease through a breach of conditions or a mortgagee taking possession.

Mortgage Control

Because a licence cannot be assigned without the consent of the licensee, it becomes obvious that a prudent mortgagee will exercise control over the extractive licence and this is generally arranged by a separate agreement between the mortgagee, the mortgagor and the licence holder. It is possible for a mortgagee to obtain the signature of the licensee to an undated request to the Department to assign the licence to the mortgagee or to whom it may direct.

The following example is an actual set of circumstances that brings into play many of the above points.

A small hard rock quarry operated under an existing Extractive Industry Licence and the remaining reserves were sold by the owner/operator (a), to another quarrying company (b). The selling price was cash and the two parties entered into an occupancy licence for some years at a peppercorn rent. The original licence holder agreed to assign the licence.

The Extractive Industry Licence was due for renewal and the application was lodged by the first quarrying Company (a). The second quarrying company (b) decided, in consultation with DEM, to allow the renewal to take place prior to the assignment. This seemed a logical step in the procedure.

The land was already mortgaged by company (a) but the proceeds of the sale of the reserves were not used to reduce the mortgage. Quarrying Company (b) did not register its leasing agreement on title and consequently, did not obtain the existing mortgagee's consent. The ongoing argument between quarry Company (a) and the mortgagee resulted in Company (a) withdrawing the consent for the assignment but a court decision confirmed to the Department that the original consent to assign was to be considered valid. Consequently the process for the renewal of the original licence continued and the assignment was held in abeyance.

As a result of further disagreement, the mortgagee took possession and locked out Company (b) on the grounds that its occupation was not consented to by the mortgagee. Common sense prevailed and the mortgagee and Company (b) entered into a new leasing agreement with Company (b) now paying for the stone a second time.

The DEM continued with the application for renewal and held the valid application for assignment. However, it is interesting to note that the mortgagee was not the licence holder and the licence holder is still "alive" and, for a second time, Company (a) advises DEM that it withdrew consent for the assignment. This could leave Company (b) in a position where they will need to negotiate again or return to the Court for a ruling.

This licence has since been renewed in the name of the original licence holder and is awaiting action for the proposed assignment to Company (b). The DEM will not enter into this argument and is waiting for instructions as to a valid request for an assignment. It is obvious DEM needs only to deal with the licence holder.

At the date of writing these notes, the assignment matter remains unresolved. The quarry continues to be operated by Company (b), who is complying with the licence conditions and who will be considered by DEM to be the agents of the licence holder, unless the licence holder lodges an objection.

I wish the parties good luck and use this as an example of some of the problems for valuers and mortgagees.

Checklist

The following matters are worthy of note -

a) The valuer must be aware with whom he is dealing ie. a freehold owner, a lessee, a lessor, a licence holder or a Government authority over Crown land.

b) The valuer must consider if all necessary consents can be obtained. This may involve the land owner, the mortgagee, the Crown, Department of Conservation & Natural Resources, Planning & Environment, Local Authorities, Department of Energy & Minerals and the licence holder.

c) Leases involving an extractive industry site should be registered on title.

A geological report is required in almost all circumstances...

d) The conditions of the Extractive Industry Licence are of the utmost importance and must be fully understood. I have not gone into detail as to operating conditions but as a rule they are generally clear and precise. Conditions pertaining to reclamation, hours of operation, any restrictions on the volumes for extraction, buffer zones and lines of sight plus the approved Working Plans must all be given proper and due consideration.

e) A licence is expected to run full term and it is unusual for it to be cancelled or revoked. Provided an application for renewal is lodged prior to the expiry date, the quarry will be permitted to continue operating under the original conditions pending the issue of the renewed licence or any new conditions.

Reserves

The Victorian Extractive Industries Act defines stone as "sandstone, free stone or other building stone, basalt, granite, limestone or rock of any kind ordinarily used for building, manufacturing or construction purposes, quartz (not being quartz crystals), slate, gravel, clay (not being fine clay, bentonite or kaolin), sand, earth, soil or other similar materials." The exceptions such as fine clay, bentonite or kaolin and quartz crystals are controlled under the Mineral Resources Development Act 1990 and a Mining Licence.

A geological report is required in almost all circumstances and a competent report will provide the valuer with not only the total volumes of the reserves but also the expected volume suitable for extraction and sale, together with estimates for overburden, etc.

Care is required to ensure that references to volumes of reserves and quarry material are consistent. Reserves are referred to by either volume or weight ie cubic metres or tonnes. The reference needs to be further defined as to whether it is a bank metre, ie a metre of material in situ or a loose cubic metre and whether the total reserves are considered gross reserves, or if an allowance has been made for loss to arrive at the reserves of final product. This is particularly relevant in sand where there will be a loss of product through any washing process. The conversion rates for quarry material will vary depending on the type of the reserves but as an example the following conversion rate provides a broad average -

Stone/Basalt -

1 bank cubic metre = 2.4 tonnes

1 loose cubic metre = 1.6 tonnes

Obviously, 1 tonne of stone will always remain as 1 tonne of stone but allowances need to be made between 1 tonne of stone in situ against 1 tonne of product with provision for loss through the production of quarry dust or non commercial sizes.

Geological Report

The geological report should be prepared by a competent person.

A geologist specialising in oil exploration will probably not hold the necessary experience to allow him to write a geological report on sand reserves.

A geological report should provide the following details -

- Overburden quantities
- Quality of stone
- Volume of reserves

And in the case of sand

Clay content

Estimates of coarse sand and fine sand

A fineness modulus (FM)

Reserves are classified as either probable or proven. For the valuation of a quarry, the reserves should be classified as "proven" which indicates that sufficient work has been carried out to allow this estimate to be made. Probable reserves are where further work is required before the definition of proven can be allocated to the resource.

In estimating sand reserves, the FM is an important indicator. The FM is the aggregate of percentages passing specified sieve sizes divided by 100. An FM in excess of 2.0 is accepted as indicating a good construction sand ie concrete sand and an FM below 2.0 is an indication of finer sands useful for either blending with construction sand, or suitable as a packing sand, filter sand and brick sand. The total volumes of the resource are not always able to be valued and this is of the utmost importance to the valuer.

Volumes

The total volumes available to the licence holder are the result of an act of Mother Nature and/or man. Mother Nature put the reserves in place and man has made an arbitrary decision on the areas of the titles representing the reserves available to the current operation. Consequently the available reserves to the operation may be huge and cover a large title area or, alternatively, they may be restricted by a considerably smaller title holding.

Time Frame

The time frame used for the purpose of the valuation is also of importance. This time frame will reflect the market place and the ability of the quarry to sell a certain volume of material. The period will also reflect the inherent risks in meeting the budget estimates and the reserves remaining in the licensed area. If the remaining reserves are only small, the projected life of the quarry may be considerably reduced and this in turn will affect the estimates and the risk factor used in capitalising a recurring profit.

In my opinion, the volume of reserves used for valuation purposes should be primarily the result of multiplying the anticipated and budgeted annual sales by the expected life or, alternatively, dividing the available reserves by the projected output whichever is the lesser. However, there is no point in attempting to value total reserves of 50,000,000 tonnes when the anticipated extraction rate is, say, 60,000 tonnes per annum, producing a requirement of only 1,200,000 tonnes over the next 20 years.

The following example highlights the problem of valuing a site with enormous reserves but with limited sales potential.

Reserves
50,000,000 tonnes

Sales 100,000 tonnes per annum

Life of reserves
- Physical 500 years
- Acceptable for valuation purposes - say 25 years

Reserves required
= 2,500,000 tonnes

A life, for valuation purposes, of 500 years is obviously nonsense for only a small output and any attempt to value the total resource of 50,000,000 tonnes will create a valuation error.

Miscalculations

There have been various errors in the valuation of quarries over the past few years and the following are examples of three sites where mistakes, for whatever reason, have been made.

a) Sand

This site was evaluated by engineers as being a very large resource of fine sand suitable for glass manufacture and other uses including foundry sand. Many assumptions were made but geological reports left much to be desired.

Initial test samples were taken manually from selected sites in the face of the pit, where it was obvious, clean sand was

" Various valuations were carried out by accountants and share brokers ... estimates of value exceeded $4m ... can now be purchased for $100,000.

available. The tests resulted in a clay content ranging between 8% and 14%, whereas, the true clay content of the whole of the resource was in excess of 34%

The assumption that the sand was suitable for glass, was naive. Most sand can be used for glass manufacturing, however, white glass requires an extremely pure silica content somewhere in the range of 99.8% and impurities such as iron and other minerals make the resource uneconomic. At the same time, the market for glass sand is limited to two major companies of which one has its own massive resource.

Needless to say, the valuation of $120,000,000 could not be justified when the property was sold for $2,000,000.

b)Stone

This property was a hard rock quarry with a large volume of reserves potentially available. However, the majority of the immediately available reserves were a low grade stone and access to the higher grade material was not licensed.

Various valuations were carried out with the main error being the use of figures such as 30c per tonne x 30,000,000 tonnes ie $9,000,000. Financial difficulties resulted in a sale of the whole of the site for less than $800,000 including plant and machinery.

At an extraction rate of 130,000 tonnes per annum over 20 years, the reserves needed were only 2,600,000 tonnes. The 30c per tonne is now justified.

c) Sand

The reserves at this site were considered very good quality and suitable for many uses including concrete sand. Various valuations were carried out by accountants and share brokers using elaborate cash flow spread sheets with capitalisation rates as low as 10%. Estimates of value exceeded $4,000,000.

The main error was the assumption that these reserves could be sold into the market place. There was no legitimate consideration of the distance into the Melbourne construction market, the cost of handling, production and transport, or the cost of infrastructure and a washing plant. Competition was also overlooked. This site cannot compete with other resources in the major markets and can now be purchased for $100,000.

Royalties

Royalties are usually established by open market negotiations, comparison with other known royalty agreements, comparison with Crown royalties fixed by legislation, or by a percentage of the ex bin selling price.

Royalties are based on the value per tonne or per cubic metre out the gate and in today's market, the most common royalties range between 15c/m3 and $1.20/m3.

Crown royalties are set by legislation via the Department of Energy & Minerals and are uniform throughout the State of Victoria, regardless of location, quality or type of stone. Current royalties are running at $1.38/m3 ie 84c per tonne for sand or stone. It should be noted that the royalty for dimensional stone is set on a different basis.

In my opinion, the best and most logical royalty agreements are those based on a percentage of the ex bin selling price. These agreements range between, say, 4% and up to 8% of the bin price and not usually over 10%.

A royalty on the above basis could be, say -

Average selling price $12/m3
Royalty ® 8% = 96c/m3

When it is necessary to obtain comparable royalties, it is obvious and easy to rely on the Crown royalty as a market indicator. This is not necessarily correct and I suggest the Crown royalty has little to do with market values. The Crown royalty does not differentiate between

- The locality in which the quarry operates,
- The distance from a market place, the cost of transport or the selling price,
- The quality of the stone ie Class I or Class 4, or
- The cost of production.

In a commercial royalty agreement, there should be provision for the payment of a minimum royalty or at the very least, a rental. The minimum royalty protects the land owner in instances where extraction may be delayed or even cease for reasons other than the quality of the stone.

It should be noted that royalty rates may vary with the grading of various products. It is not uncommon for a higher royalty to be paid for, say, A Grade or Class 1 stone and a lower royalty paid for a lesser quality. However, this differentiation in quality can lead to arguments and, in some circumstances, an audit may be difficult to achieve.

Valuation Methodology

The valuation of a quarry site can only be based on either the capitalisation of a recurring profit or by comparison with other quarries using a unit value per tonne for the available reserves or, alternatively, a unit area.

It is important to base the valuation on the capitalisation of a profit before interest and tax (PBIT). This allows good comparison between quarries, and the financial figures for an operating quarry should, at the very least, give a fair and reasonable indication of the existing market conditions.

The capitalisation of a recurring income provides a value that can be used to arrive at a unit value per tonne of reserve in situ. This in turn can be used for comparison with other quarries which quickly establishes a "rule of thumb". However, until a value has been arrived at by capitalisation, I do not believe a unit value per tonne in situ (or cubic metre) can be anything else but a rule of thumb.

If the capitalisation method is accepted as being valid for the subject property, the complications of the quarry valuation are reduced to the need to know two major estimates -

a) The sustainable recurring income - Profit Before Interest and Tax (PBIT)

b) The anticipated or acceptable life of the quarry reserves.

These two estimates reduce the problems *of* valuation to an elementary and simple question how much money will the quarry make and how long will it last? To complete the valuation, it will be necessary to make certain assumptions and to provide the following estimates and budgets -

- The total volume of reserves
- The life of the reserves ie a physical life and a budget period
- Annual sales
- Average selling price or gross income
- Costs of production
- PBIT or recurring profit.

The value of the reserves is arrived at by the use of the present value formula for a projected income over a terminal period. This is a typical "dual" rate and, in my opinion, the sinking fund component should also make an allowance for income tax.

The life of the quarry can be a period up to, say, 25 years. It is usual to divide the available reserves by the projected sales/extraction rate to arrive at the life of

FIGURE 1

Reserves gross	35,000,000 tonnes	
Reserves required	15,000,000 tonnes	
Life/Period	25 years	
Sales	600,000 tonnes per annum	
Average selling price	$12.25 per tonne	
Cost of production	$6.80 per tonne	
PBIT	$5.45 per tonne x 600,000 tonnes per annum = $3,270,000 per annum PBIT	
CAPITALISATION RATES		
Return on capital	25%	
Sinking fund, to replace capital	8.5%	
Allowance for income tax on sinking fund	33c	
Years purchase	3.5920	
	Value	$11,745,934

FIGURE 2

PROOF OF CAPITALISATION

Valuation of investment	$11,745,934	
Profit/PBIT		$3,270,000 pa
Return on capital @ 25 %		$2,936,483
Gross sinking fund		$333,517
tax on sinking fund @ 33c		110,060
Net funds available for sinking fund		$223,457 pa

Effective sinking fund rate = 8.5 (33% of 8.5) = 5.695%

The future value of $223,457 pa x 25 years @ 5.695% = $11,745,982

the quarry, however, periods longer than 25 years have only a marginal effect on the final value and there will be many instances where the period for capitalisation purposes is reduced to reflect a perceived market opinion and to also reflect the risk in achieving the projected budget figures. The example in *Figure 1* could be representative of several of the major quarries servicing the Melbourne and metropolitan area.

The following should be noted

The cost of production must make a proper allowance for the depreciation of plant and machinery to allow the value of plant and machinery to be added to the reserves to obtain the total value of the quarry operation.

The majority of valuers are familiar with typical dual rate tables but I am concerned there is misunderstanding of the procedure by some valuers and certainly by some accountants. I cannot agree to the use of a high capitalisation rate while maintaining the same high rate for replacement of a depreciating asset. The break up or "proof' of the capitalisation procedure assists in the understanding of the workings of the "dual" rate. (see *Figure 2)*

There are differing opinions as to the use of the sinking fund rate and the allowance for income tax. I prefer to use the *Figure 2* scenario but agree that other sets of figures may be used provided always the same method is used to allow proper comparison between quarries.

Figure 2 results in the valuation of 15,000,000 tonnes at a unit figure of 78c per tonne in situ. This, in my opinion, is far more satisfactory than attempting to analyse other sales information to arrive at a unit figure. At the same time, it must be admitted this unit value of 78c per tonne in situ is high when it is considered that this quarry operation is paying for 25 years of stock in advance.

Mistakes

There are many mistakes to be made in the valuation of extractive sites and generally it is only financial difficulties that allow the valuation to be tested. A list of common mistakes should include the following -

- The valuation attempts to value the whole of the known reserves when this volume is excessive.
- The use of a low capitalisation rate is a common error by accountants with no attempt to use a dual rate reflecting a risk free rate for replacement of capital.
- The estimated life of a quarry can often be too long. Consideration for a shorter capitalisation period should be given to country quarries, which may have a small market share, a low selling price and/or be subject to severe competition from the local Shire owned quarries.
- The use of a high profit figure requires careful consideration and proper allowances for depreciation of plant and machinery and other outgoings including reclamation must be provided.
- The expiration date of leases can be important, particularly where there may be the opportunity for a lessor to refuse an extension of the lease or renewal of the extractive licence.
- Residual values must be treated with extreme caution. It is unlikely that an alternative use will be found by the quarry operator during the extractive life and most attempts to project the future value over a long period will be later proved to be incorrect.
- It is not uncommon for owners to incorrectly assume the value of the quarry is related to or even equal to the value of the gross income - ie reserves of 1,000,000m3 and a selling price of $10/m3 = $10,000,000. This is obviously incorrect but I have seen a "valuation report" prepared by a consulting engineer stating the value of a particular quarry, based on this assumption. The same mistake is also made where the profit figure is used over the total volume of reserves without discounting to present values.
- Buffer areas rarely add value to the quarry operation or the reserves. Unless there is surplus land that can be sold, it is seldom a quarry will dispose of buffer areas even if they are considerably larger than required by legislation,

The difference between freehold and leasehold reserves is often very little, provided there is security of tenure, and it may be incorrect to severely reduce the value of reserves held under lease.

The value of the hole for a future landfill can be important but again extreme caution must be exercised when projecting a future value, and high risk rates for discounting purposes should be used. Personally, I would be reluctant to provide a value for a future landfill unless the closing of the quarry was imminent and there was a good basis for assuming the necessary permits for landfill would be issued.

Observations Deserving Further Discussion

In concluding this discussion on the valuation of quarry sites, the following observations are made

Amortising reserves The amortisation of reserves is a matter of company policy. There are taxation implications, and Company Law requires the amortising of a depreciating asset unless valid reasons are provided. I believe there is a good argument not to amortise quarry reserves if those reserves have a life longer than 20 years and where future valuations are likely to maintain those values.

The accounting procedures in many quarries are doubtful and often improper and these occur particularly with small quarry operations where the full accounting for all outgoings in not provided. The cost of final reclamation may involve considerable funds and it also needs to be noted this can be defined by the A.T.O. as capital and not operating costs. Company policy will decide whether there is a value for reserves held under lease. The value of leasehold reserves is open to interpretation and varies between companies and in particular the major operators. In my opinion, the value of secure leasehold reserves is similar to that of secure freehold reserves, albeit there would be an adjustment to the profits for the royalty payment.

As an example, I ask the following question -

If all the Boral quarries were held under lease and all the Pioneer quarries were held freehold - would this mean that Pioneer has assets in its balance sheet and Boral has no assets?

Plant and machinery is an important part of the success of any quarry and the correct choice of plant has serious repercussions on the cost of production.

The value of plant and machinery is subject to age, obsolescence, maintenance programmes and capacity. In my experience a good "rule of thumb" for the valuation of fixed plant is to assume the primary items such as crushers, screens and conveyors represent between 35% and 40% of the replacement cost new (RCN) of the total plant. This provides an easy method of establishing the RCN of the total plant and then judgement needs only to be made on a percentage for depreciation. It is obviously easier to obtain new prices for individual items of plant rather than establish values for used items and add the depreciated values for civil works, installation and electrics, etc.

It is difficult to obtain accurate costs of production and accounting procedures will differ from operation to operation. Like all businesses, there will be a break even point and valuers must be aware that a reasonable profit for one quarry with a high output will not be accurate if used to value a similar quarry with a smaller output.

Valuation of Royalty Incomes

I believe the royalty income can be capitalised in a similar manner. The lessor's interest requires assumptions on the projected rates of extraction and the risks involved over time for the royalty stream to remain stable or to increase or decrease.

If the lessor's interest is offered for sale, I suggest the minimum royalty will become an important figure in the mind of a purchaser/investor. Unless the purchaser is familiar with the quarrying industry, a vendor may find it difficult to convince purchasers of the expectation of a higher income stream and that will need to be reflected in the capitalisation rates.

In my opinion, there are many instances where the capitalisation of a royalty should also reflect a risk free sinking fund for the replacement of capital, similar to the valuation of the reserves as a depreciating asset.

Capitalisation rates for a royalty will have a range of, say, 12% to 17.5%.

Summary

These notes are not intended to be all embracing or definitive. Provided the valuer is aware of the traps and pitfalls in assessing value, together with misinformation from over enthusiastic clients, the valuer will be in a position to make logical judgements on the estimates and budgets required.

ABOUT THE AUTHOR

The author is a director of C.J.Ham & Murray Pty. Ltd. Melbourne, which commenced business in 1853. He has considerable experience in the valuation of quarries and landfills and has valued in excess of 160 quarries throughout Australia over the past eight years. He is an associate of the Institute of Quarrying.

Legal Aspects of Goodwill in Matrimonial Property Cases

by Wendy Parker and Julia Pedley

This article discusses the valuation of goodwill in matrimonial property cases. Issues considered include the distinction between personal and practice goodwill, the impact of differing business structures, restraint of trade clauses and the value placed on security of tenure of business premises. The article concludes with a consideration of the role of valuers as expert witnesses in matrimonial property proceedings.

Introduction

Valuers play a pivotal role in the division of a business on dissolution of marriage. In some cases a business will be considered to be the separate property of one spouse under the rules provided by the Matrimonial Property Act 1976, [the Act]. Where this occurs, the business will remain the property of the owning spouse. However where abusiness is classified as communal or matrimonial property, it must be divided between the parties by the court pursuant to the Act. This division is of the value of the business rather than of the business itself. Therefore, before the respective shares of the parties can be established the business must be valued.

On matters of valuation the Act does not specify principles or provide legislative guidelines which are to be applied in arriving at a dollar value. As a result, the role of the valuer becomes critical in establishing the worth of both tangible and intangible business assets. As this article will demonstrate, recognition of the existence of goodwill and, in particular, the actual type of goodwill, can have a significant impact on the value attributed to a business. For this reason valuers who are called upon to value business property in relation to matrimonial property proceedings will clearly play a crucial role in the division process and should therefore be aware of the common law developments in this area.

Methods of Valuation

Because goodwill is an intangible asset, the central valuation issue is ascertaining the factors and considerations that should be taken into account when attempting to attach a dollar value to it in circumstances which are quite distinct from a usual standard sale/purchase transaction. The methods for valuing goodwill as a business asset are varied and can range from consideration of the percentage of annual fees, to that of average net profits, or to the well recognised "purchase of three years super profits" method, (that is, profits in excess of what one may pay as a salary for the operation of the business). Under this last method, goodwill must represent payment for profits in excess of what one might expect to receive as a salary for one's involvement in the business. In making this assessment factors to be taken into account should include the time required to run the business, the degree of expertise involved, the amount of capital involvement and the risk factor associated with it. A further factor in some cases is the commercial reality of the surrounding circumstances. For example in *Burgess v Burgess'* the issue was whether goodwill was actually capable of division in a sole proprietorship valuation firm. In this case the goodwill was valued on the established reputation and standing of the firm, and the court was not prepared to give consideration to any downturn in the economy for valuation purposes.

The whole issue of attempting to put a dollar value on goodwill can be further complicated by the fact that goodwill as a business asset may often be absent as an item in the accounts of the business. This could be seen as an obvious advantage to the party who claims that this is a consequence of the business having no goodwill. In such a case the primary issue then becomes whether or not goodwill should be assessed at all as an asset of the business.

What Is Goodwill?

In approaching this question the courts appear to identify goodwill in the context of the established definition first applied by Lord Macnaghten in *Inland Revenue Commissioners v Muller & Co's Margarine Ltd' :*

> "[Goodwill] is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing that distinguishes an old established business from a new business at the start."

As this article demonstrates, the concept of goodwill has subsequently been further developed and extended. As a result, the definition in *Muller* should now be viewed as a starting point only. Interestingly, Canadian and US cases break the definition of goodwill down further into categories such as personal goodwill, individual goodwill, location goodwill, product goodwill and service goodwill.[3]

Personal/Professional Goodwill or Practice Goodwill?

The issue of whether to include goodwill as an asset of the business was addressed in *Maslen v Maslen* where the husband was in sole practice as a quantity surveyor. The court refused to accept valuation evidence submitted for the wife which recognised the existence of a goodwill content and accordingly valued it as an asset of the practice. On the basis that the business was only showing a very modest return, the court found that there was no goodwill to value. In arriving at this decision, Roper J focused on the personal nature of the business. It is apparent that his decision was based on recognition of the argument that the worth of the husband's reputation in his business, albeit representing goodwill, was to be viewed as goodwill which was personal to him and thereby distinct from any goodwill of the practice. This interesting concept of a split between personal/professional goodwill and practice goodwill was again subsequently considered and recognised in *Burgess v Burgess*[5] and by the Court of Appeal in Z v Z[6] and has been further developed in more recent cases.'

In *Burgess'* a central issue to be resolved was whether a valuation business contained an element of goodwill, and if so, whether it was capable of division. The husband maintained that if goodwill was present, then on the basis that it existed in the medium of a sole proprietorship business operated by him, it was therefore personal to him. Furthermore, he claimed that to attach goodwill to the practice and include it in the valuation of the business would represent, on division of the matrimonial property, an overpayment to the wife and be disproportionate in terms of a former agreement made between the parties. Boshier J was not persuaded by this line of reasoning. Distinguishing the case from *Maslen* and from the High Court decision in Z, His Honour found that goodwill had not been created by the husband but had already existed on the basis that the firm was one of only two firms of valuers practising in the location and enjoyed a well-known name and established position. In addition, a founding member of the firm had at the time of purchase remained as an associate so that goodwill was "inescapably concluded as a component of the purchase price."9 Here the element of goodwill was identified as being strongly associated with the name and reputation of the business. It was present, part of the practice, and therefore capable of division. However, it may be seen from subsequent decisions that the courts are prepared to draw a distinction and recognise that for valuation purposes there is a difference between personal or professional goodwill and practice goodwill.

This distinction is recognised as being particularly applicable to sole proprietors, to the extent that where the business is one which depends largely upon the personal expertise of the proprietor, then although goodwill is identified, it will be seen to attach to the individual and not to the practice, thereby resulting in a nil value for matrimonial property valuation purposes. Such was the case in *Willkinson v Diprose10* where the wife was the sole proprietor of an antiques business which she had established during the marriage. Again, the substantial point in dispute concerned the value of the goodwill of the business. The decision of MacCormick J is significant as he found as an element of principle, in certain types of business, goodwill is to be associated more with the knowledge and skill of the proprietor than with the more generally accepted idea of it being representative of the name, reputation or location of the business. Therefore, in such cases, His Honour observed that "[a]ny existing goodwill could disappear overnight with an inexperienced new proprietor.""

Clearly, in cases involving a sole proprietorship, especially one which involves a business operation of a highly specialised nature, the degree of dependency of that operation on the expertise of the proprietor becomes a highly relevant issue in the valuation of goodwill. This scenario arose in I v I12 where the judge emphasised the "extremely specialist specialisation" of the husband. A central issue concerned the valuation of goodwill in the husband's highly specialised ophthalmological practice. The husband maintained that there was simply no goodwill to value by reason of the highly specialist nature of the practice, and the fact that its very success relied upon his personal skill and expertise. The court found that a distinction must be drawn between what is clearly professional goodwill, being that which exists as a result of the individual knowledge and expertise of the proprietor, as opposed to practice goodwill. By its very nature the former would be impossible to separate and transfer to another person or purchasing entity. Accepting evidence that no specialist practice would be sold with a goodwill element, the court considered alternative evidence submitted for the wife as to what the goodwill would have been valued at if the practice had been of a general rather than a specialist nature.' Aubin J held that "[t]he law is plain that the test must be that of the willing but not anxious seller and the willing but not anxious buyer ...".14 He went on to add that in view of the extremely specialised nature of the practice, "I am bound to say that I have great difficulty in seeing why a willing but not anxious purchaser will be prepared to pay anything for goodwill in the circumstances here." 15 Accordingly the court held that the practice was to be valued without regard to any goodwill.

Therefore, it would appear that wherever the court ascertains that the success of the business is attributable to the drive and acumen of an individual, any goodwill that attaches is likely to be personal in nature. The result of this, for valuation purposes, is a significant reduction in the market value of the business.

Valuation of Partnership Interests

The approach of the courts to valuation of goodwill in a partnership situation was discussed in *Guiney v Guiney*[16] where the established *`Hatrick Test'* was given further extension. In *Hatrick v Commissioner of Inland Revenue*,[17] the traditional starting point for valuation purposes was described as being the vendor willing but not anxious to sell and the purchaser willing but not anxious to buy. This has been accepted by the judiciary as a sound valuation principle." In *Guiney*, a strict application of market principles resulted in goodwill in a business partnership being attributed value only to the extent that it was a marketable commodity. Its marketability as a commodity was, according to Hardie Boys J, "represented by the price a person would be willing to pay to obtain the opportunity of joining this partnership. Its assessment assumes not only a willing but also a willing and informed buyer."[19] This is clearly an extension of the *`Hatrick Test'* from where a willing buyer has now become a willing *and informed* buyer. Hardie Boys J considered that in the reality of the market, the willingness of a prospective purchaser to make a payment for goodwill would depend upon the marketability of the goodwill, assessed by the result of informed judgement. Marketability can be ascertained by comparing the income one would expect to receive as either a salaried employee or independently self employed, giving consideration to the future profits of the business, having regard to the market as well as to the terms of the partnership agreement itself. The decision emphasises that the terms of the partnership agreement will be a relevant indicator of the marketability of goodwill and, the value attributed to it within the partnership. For example, where the agreement specifies that on balance sheet values goodwill is to be excluded, then, under *Guiney*, this would be seen as indicative that goodwill should not be viewed as a marketable commodity.[20]

Commercial Reality

The emphasis given to the marketability of a business and therefore its goodwill in *Guiney* indicates that judges are not prepared to arrive at a valuation solely as the result of a mathematical exercise. As Robertson J stated in *Heaslip v Scott*,[21] "[t]here is no point in doing a mere accounting exercise with telephone numbers if it does not have a commercial reality."[22] The current state of the market and the practical effect of any order are relevant considerations when placing a value on goodwill. This may again be seen to be an extension of the *`Hatrick Test'* where the willing but not anxious buyer is now extended to be not only an informed buyer but in addition, a buyer who is acting according to the constraints or otherwise of commercial reality. Such reliance on commercial reality appears to downgrade the importance of sound valuation principles. For example, in the recent case of Briggs,2" the effect of commercial reality was to override the value of company shares arrived at by an income capitalisation method of valuation. The dominant factor in the case was the impact of personal goodwill. In the Family Court the value of the shares in a family company had been assessed at $1.4 million. However, on appeal to the High Court, Thorp J held that in reaching that assessment the Family Court had erred by failing to discount the value of the shares so as to take account of the considerable personal goodwill of the husband, as distinct from company goodwill. Thorp J therefore reassessed the value of the shares at $1.1 million after allowing for substantial discounting to represent the personal goodwill factor.

Restraint of Trade Clauses

A result of the general application of the *`Hatrick Test'* is that a notional sale of the business is always assumed. Therefore, wherever the assets value method of valuation is adopted, a notional liquidation is necessarily involved. Where this involves a sole proprietorship or partnership, one of the major issues concerning the valuation of goodwill is whether the anticipated `sale' should be made with or without the inclusion of a clause in restraint of trade. This substantive issue was debated at length in the landmark decision of Z v Z.24 In the District Court the value of the goodwill in the husband's legal practice (which he ran as a sole practitioner), had been assessed at $80,000 on the assumption that on a sale of the practice, a covenant in restraint of trade would be given by the husband. However, if no restraint of trade clause was to be given then the goodwill was assessed at $25,000. The husband appealed to the High Court where the question before Holland J was whether the goodwill should be valued on the basis that a restraint of trade clause would or would not be given.

The restraint of trade clause issue in itself raises the question of whether such a clause forms an integral part of the value of the goodwill or not. Holland J did not consider the application of the *`HatrickTest'* as particularly useful in the circumstances of the case, considering that there was not a reasonable probability that the husband would be selling the practice in the near future. As a result of this recognition he held that there should be no imposed obligation on the husband to sell so as to increase the value of his practice purely for the purpose of property division under the Act25 . This view is in line with a general reluctance on the part of the courts to accept a particular valuation method which would result in either a sale of the business or in a forced sale or purchase of the shares in a business. It is therefore clear that in so far as valuation issues are concerned, the courts are focusing on the practical outcome of any such order made by them. In *Crichton v Crichton"* Jeffries J held that due to a recessionary market, a sale of the business was not possible without causing unacceptable and unjust financial detriment to the husband. Accordingly, His Honour concluded that the husband should be given an opportunity to develop a scheme for relocating and restructuring the business.27

Preferring a different approach to *Hatrick*, in the High Court in Z v Z, Holland J considered the correct approach would be to value the goodwill of the business without the anticipation of any covenant in restraint of trade, thereby resulting in a reduction in the value of the goodwill from $80,000 to $25,000. However in the Court of Appeal, Richardson J in restoring the goodwill to its valuation of $80,000 discussed the principles for assessing goodwill in relation to professional practices and held that in placing a value on matrimonial property the aim is to make a fair assessment and to facilitate this the test to be applied should be the *`Hatrick Test': 28*

> "In the hypothetical market the willing but notanxious seller must be taken to seek the maximum price available from what is obtainable for sale. Protection against the hypothetical seller's competition through a covenant in restraint of trade is an element of goodwill increasing the price a hypothetical buyer would otherwise be prepared to pay-"

It is therefore clear that the principle being applied here by the court is the value of the property on a hypothetical sale: 29

> "The valuation of matrimonial assets is to be made solely by reference to a hypothetical market price, and personal considerations which might affect the proprietor's sale decisions must generally be irrelevant."

This, however, appears to be at odds with the attention given to market considerations, and with the grounding in practical reality seen in cases such as *Crichton* and *Briggs.*

Security of Tenure

A further factor that can affect the value of goodwill pertains to the presence or absence of security of tenure of the business premises.30 This is based on the general assumption that the immediate availability of premises from which a purchaser would operate the business provides an obvious advantage. Lack of security of tenure could substantially reduce or eliminate any goodwill and this factor has been applied as an element of principle which should be taken into account when attributing a value to the goodwill of the business. In *Wilkinson v Diprose31* the business was run from premises held by the wife's mother on a monthly tenancy. The lack of security of tenure contributed to the judge finding the goodwill of the business to have a nil value.

The interrelationship between the benefit of security of tenure and goodwill was also considered in the later Court of Appeal decision of *Dahya v Dahya.32* In the High Court the judge had valued the goodwill of the parties' dairy business at $44,000. The business was run as a partnership in premises rented from a property development company owned by the husband's family and in which the husband was a shareholder. On appeal the Court of Appeal affirmed the valuation approach taken by the lower court accepting that although the partnership had no lease, it did have practical security of tenure for all intents and purposes due to the husband's interest in the landlord company. However it is clear that but for the husband's direct link with the landlord company no security of tenure for the partnership business would have been present with the inference that this would have led to a somewhat different result in the valuation of the goodwill.

Expert Evidence

It is not uncommon for each party in a matrimonial property case to engage a valuer. In assessing the credibility of expert valuation evidence, the court may consider such matters as the qualifications held by the experts, the reasons for their opinions and the facts and concerns upon which those opinions are based.33 Where such an assessment is made two distinct approaches are evident. The first involves the court relying on its discretion to select one method of valuation and reject the other method.34 The second approach is to take the `broad sword' approach and opt for a mid point dollar value between the two parties' valuations. Decisions indicate that where the court considers that both experts have adopted appropriate, albeit dissimilar, methods of valuation resulting in a wide differential, or where the same method has been used but there has been a divergence of approach taken on several vital issues, the court will not use the valuation reports to arrive at precise figures for division purposes but will take the `broad sword' approach, frequently resulting in the court splitting the difference somewhat arbitrarily by taking more or less a mid point figure between the two extremes.35 Such decisions lend credibility to the suggestion that this gives a party an incentive to appoint their own expert so as to arrive at a polarised valuation. Generally, on receiving conflicting expert evidence the approach of the court appears to be to treat the evidence as persuasive only and indeed it is always a matter for the court to decide whether to treat any expert evidence as persuasive or not.36 The decisions indicate that the court will exercise its discretion and appoint an expert under s38 of the Act in cases where there is an insufficiency of evidence in matters of valuation.37 When considering issues of valuation, the court has a discretionary power to appoint an expert for the purposes of valuation.38 Where the power is exercised, the valuation report will only have the status of evidence in the proceedings and as a consequence it should not be seen as a binding valuation on the parties.39 Each party must be given a copy of the report and the opportunity to tender evidence on any matter contained in such a report.40 Where issues concerning valuation are anticipated as likely to be highly complex, it is submitted that the court should choose to exercise its discretion under s38 to appoint a valuer to inquire into the valuation issues and present a report to the court.41 However, in order to safeguard their own interests, it is commonplace for parties to appoint their own valuation experts, and therefore a court appointment of an expert is relatively rare.42 This exacerbates the tendency of polarisation of valuation evidence as previously discussed. The problem is further compounded by an absence of legislative guidelines for judges on the appropriate method of valuation.

Conclusion

The case law in this area demonstrates a number of interesting developments. The concept of goodwill is being refined with distinctions between personal and practice goodwill having a marked impact on the outcome of cases. In some instances the courts place emphasis on the hypothetical nature of the exercise, while in others the issues are firmly viewed within existing commercial parameters. The absence of legislative guidelines and the heavy reliance by the judiciary on the knowledge of valuers with regard to valuation methods and outcomes make it clear that in all cases the role of valuation, and therefore of the valuers who provide valuation evidence, is central to the process of dividing business property under the Matrimonial Property Act 1976.

(1989) 5 FRNZ 387.

2 [1901] AC 217, 223.

In *Briggs v Briggs* (High Court, Auckland, M 108/95, 11 March 1996), Thorp J also considered these principles to be equally applicable to the New Zealand jurisdiction.

4 (1982) 5 MPC 91.

(1989) 5 FRNZ 387.

[1989] 3 NZLR 413; [1990] NZFLR 85; (1989) 5 FRNZ 297.

Wilkinson v Diprose (1989) 6 FRNZ 37;1 v I [1995] NZFLR 276; (1994) 12 FRNZ 490; *Briggs v Briggs* High Court, Auckland, M 108/95, 11 March 1996, Thorp J.

8 In *Burgess* the purchase of the business was at an all-in figure containing no breakdown of asset values and had been facilitated by means of a loan secured by a mortgage over the matrimonial homestead.

(1989) 5 FRNZ 387, 398. Boshier J distinguished the High Court decision of Holland J in Z v Z, stating that the present case turned very much on its own facts and that the business interest had been jointly purchased by the parties. The decision of Holland J in Z v Z was later unanimously overturned by the Court of Appeal, see note 6 for references.

(1989) 6 FRNZ 37.

Ibid p41.

[1995] NZFLR 276, 280; (1994) 12 FRNZ 490, 494.

The accountant expert for the wife valued the goodwill at $30,000. This figure represented practice goodwill and the figure of $30,000 was one quarter of what he claimed the value of goodwill would have been had this been the sale of a general praclice rather than a specialist practice.

4 [19951 NLI-aI:R 276. 279:(1994) 12 FRNZ 490, 494.

Ibid p280, p494.

(1984) 2 NZFLR 475; (1984) 1 FRNZ 235.

[19631 NZLR 041 CA.

Haldane v Haldane 119811 1 NZLR 554; (1981) 1 NZFLR 43; *l'orrell v Powell* [19871 1 NZLR 192; and others.

(19$4) 2 NZLLR 475 at 477; (1984) 1 FRNZ 235 at 236.

In *Guioeir* the partnership agreement provided that in the event of death or default of a partner. another partner could buy out the interest at balance sheet values with no figure attributed to goodwill.

High Court, Rotorua, M 55/911, 27 March 1992.

Ibid, P12.

High Court, Auckland, M I08/95, 11 March 1996, Thorp J.

(1988) 5 NZFLR 1 11; (1988) 3 FRNZ 64;1198913 NZI.R 413 (CA): 1 1 990) NZFLR 85 (CA): (1989) 5 F'RNZ 297.

For a discussion on the courts unwillingness to force the sale of a business, see Bridge. C "Reallocation of Property after Marriage Breakdown" in M Henaghan and B Atkins (eds) *Family Low Policy in Neu' Zealand,* Auckland, Oxford University Press, 1992.

19911 NZFLR 529, 535; (1991) 8 FRNZ 37. 44.

In *Crichton* the company shares formed the bulk of the husband's share of the matrimonial assets.

(1989] 3 NZLR 413, 415: 1.19901 NZFI..R 85. 87: (1989) 5 FRNZ 297. 299 per Richardson J.

2„ ibid p417; 89; 301, per Casey J.

Lack of security of tenure can also affect the overall value of a business for valuation purposes. *In Hof/)nan v I Lgffinari* (1989) 5 FRNZ 407 the lausband'ti failure to renew the lease on the business premises resulted in a loss estimated at $30,000.

(1989) 6 FRNZ 37.

i 19911 2 NZLR 150 *(CA): (1990) 7* FRNZ 128 (CA).

Crfc hion *v ('riehion* [19911 1 :NZFLR 529(1991) 8 }:RNZ 37 ,

Examples of this approach include *Maslen v Mac'leo* (1982) 5 MPC 91: and *hatr'ess v Burgess* (1989) 5 URN!`, 387.

For example in *Wilkinson t' lVilkiiison* (1991) 8 FR NZ 1, differin, valuations of goodwill in a sole medical practice ranged between SO and 4100,0(0. However. Williamson J held that the value of the goodwill was $60,000. Similarly, *in Brig gs v I3ri ggs* (I li �,It Coin-t, Auckland, M 108/95, 11 klarch 1996), Thorp J selected it valuation figure for the shares at $1.I million, representing a figure between the valuations of $1.467 million and $0.5 million, (being valuations st=a nritted for the husband and wife t e- spectively),aftertaking into account the personal goodwill that attachcJ to the husband.

I v 1 [1995] NZFLR 276, 280; (1994) 12 *FRN7* 490, 494, per Aubin J.

Recent cases are discussed herein.

See also *Claure/ter v Chureher* (1977) 1 MPC 40 and *Marriott v :Marriott* (1981) 4 MPC 144 on the valuation of land; *L.elrper v Lepper* (1977) 1 MPC 118 - on the value of company assets stripped since sc ;t-ration; *Mellardv v Mclfcardr (1* 3 MPC 109 on the value of spar, - it private company and *Moyle r Moyle* (1981) *4 MPC* 149 on lac valuation of an interest in alt ac counting partnership.

Section 38(l).

RL Fisher *Fisher on Matrimonial Property* (2nd ed), Butterworths, Wellington, 1984, para 18.34.

(Food v Wood (1981) 4 MPC 221: *('ole v Cole* (1982) *5 MPC 17.*

In Cites v Giles [19851 1 NZLR 761) (CA); (1984) 3 NZFLR 11 (CA). Two share valuers had been appointed by the court under s38. This was done so as to avoid a lengthy hearing *before* the judge on what promised if.) be divergent expert evidenee on the value of business assets. A party who fails to obtain a valuation cannot apply, for the Court to use its discretionary power unders38 for the purpose of disputing any valuation submitted *by* the other party: *McHarcly c t12cHarily* (1984) 3 [MPC 1 (39.

ABOUT T E AUTHORS

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Unlisted Property Unit Trusts: A Comparative Performance Analysis

by Jason Sunderland

This paper was prepared for the 1995 New Zealand Institute of Valuers Post Graduate Award in Property.

Abstract

New vehicles for investing in property assets are regularly being developed. Direct investment in land and buildings is not the only option available for those wishing to invest in commercial property. One such option is investment in unlisted property unit trusts (uPUTs). This paper measures and analyses the investment performance of uPUTs compared with marketable securities (shares and bonds) and direct investment in commercial property. It also discusses the general characteristics of uPUT investment in New Zealand and investment performance measurement and analysis.

The study utilises total return data and covers the 10-year period from January 1985 to December 1994. This was a particularly difficult period in New Zealand for investment in uPUTs, shares, bonds and direct investment commercial property. The results of the study show that:

1) On a risk-adjusted basis as measured by the Sharpe Index, the investment performance of uPUTs was inferior to that of bonds and there was insufficient evidence to demonstrate that the investment performance of uPUTs was superior to that of shares and direct investment in commercial property;

2) uPUTs offer portfolio diversification potential when incorporated in a portfolio of bonds, yet there was insufficient evidence to demonstrate that uPUTs offer portfolio diversification potential when incorporated in a portfolio of shares; and

3) There was insufficient evidence to demonstrate that uPUTs can be viewed as substitutes for conventional direct investment in commercial property.

Introduction

New roads into property investment are constantly being built. Direct investment in land and buildings is not the only option available for those wishing to invest in commercial property. One such alternative is unlisted property unit trusts (uPUTs); an indirect property investment vehicle. Because of the large outlay generally involved in acquiring top quality commercial property investments, the opportunity for outright ownership by smaller investors is restricted. This obstacle has been overcome by the advent of uPUTs. These operate by pooling the funds of many individual investors, enabling people with limited capital to obtain beneficial interests in high quality commercial property.

This type of property investment provides individual investors with the opportunity to participate indirectly in large commercial property investments and therefore benefit from the use of professional managers, pooling of resources and greater portfolio diversification.

Although several studies have been conducted into the investment performance of unit and investment trusts which invest in shares, little attention has been focused on the investment performance of uPUTs. The attractions of uPUT investment are considerable, but detailed investment performance measurement and analysis is rare.

The recent popularity of this form of investment and the increasing importance of property investment performance measurement and analysis has created a need for evaluating this indirect property investment vehicle.

This study, therefore, measured and analysed the investment performance of uPUTs compared with marketable securities (shares and bonds) and direct investment in commercial property in order to determine whether uPUTs:

- Achieved higher risk-adjusted returns than those produced by shares, bonds and direct investment in commercial property.
- Offer portfolio diversification potential when incorporated in a portfolio of shares and bonds.
- Can be viewed as substitutes for conventional direct investment in commercial property.

It also discussed the general characteristics of uPUTs and investment performance measurement and analysis. The study utilised total return data and covered the 10-year period from January 1985 to December 1994. This was a particularly difficult period in New Zealand for investment in uPUTs, shares, bonds and direct investment commercial property. As such, the specific purpose of this study was to:

- Present an overview of uPUT investment in New Zealand.
- Outline and describe investment performance measurement and analysis.
- Measure the investment performance of uPUTs in relation to marketable securities (shares and bonds) and direct investment in commercial property in New Zealand over the 10-year period from January 1985 to December 1994.
- Analyse the investment performance of uPUTs in relation to marketable securities and direct investment in com-

FIGURE 1: ANNUAL NOMINAL TOTAL RETURNS FOR UPUTS, SHARES, BONDS AND DIRECT INVESTMENT IN COMMERCIAL PROPERTY (JAN 1985 - DEC 1994)

120
100
80
60
40
20 -
0
-20
-40
-60

1985 1986 1987 1988 1989 1990 1991 1992 1993 1994

Year (Dec.)

uPUTs(1) Bonds(3) --- Shares(2)
- Commercial Property(4)

1) uPUT total returns measured by the FPG Property Trust Index (FPG RESEARCH)
2) Share total returns measured by the NZSE Gross Share Index (New Zealand Stock Exchange)
3) Bond total returns measured by the NZGS Gross Bond Index (CS First Boston)
4) Commercial property total returns measured by the JLW Total Return Index (JLW Advisory)

Source: Author's calculations

mercial property in New Zealand over the 10-year period from January 1985 to December 1994.

- Examine various investment portfolio considerations concerning uPUTs.

Theoretical Framework and Hypotheses

The general aim of the study was to measure and analyse the investment performance of uPUTs compared with marketable securities (shares and bonds) and direct investment in commercial property, to try to discover whether uPUTs:

- Achieved higher risk-adjusted returns than those produced by shares, bonds and direct investment in commercial property.
- Offer portfolio diversification potential when incorporated in a portfolio of shares and bonds.
- Can be viewed as substitutes for conventional direct investment in commercial property.

In order to achieve this, semiannual total returns covering the 10-year period from January 1985 to December 1994 were collated from four main sources:

- FPG Research (FPG Property Trust Index - measure of uPUT investment performance).
- The New Zealand Stock Exchange (NZSE Gross Share Index - measure of share investment performance).
- CS First Boston (NZGS Gross Bond Index - measure of bond investment performance).
- Jones Lang Wootton (JLW) (JLW Total Return Index - measure of direct investment in commercial property performance).

In measuring and analysing the investment performance of uPUTs in relation to marketable securities and direct investment in commercial property, the availability of uPUT total return data dictated the period evaluated. The first annual total return data for uPUTs was not available until December 1984.

Listed property trusts/companies were also considered as an additional investment vehicle that could be compared to uPUTs. The New Zealand Stock Exchange produces an index for the property sector, however details of this index were only available back to July 1986.

The reason for selecting a 10 year period for analysis was that 7-10 years were needed in order to make any meaningful conclusions about property investment performance.

With respect to the use of total return data, it was utilised as in all modern investment work today, the focus of interest is on the total rate of return on assets, that is, the return inclusive of both income and capital gain or loss.

In measuring and analysing the investment performance of uPUTs in relation to marketable securities and direct investment in commercial property and to provide a logical basis for comparison of the asset classes, four performance measurement and analysis techniques were utilised:

- Measure of return (arithmetic mean).
- Measure of risk (standard deviation).
- Measures of risk and return (coefficient of variation, Sharpe Index).
- Measure of diversification (correlation coefficient).

The reason for measuring and analysing the investment performance of shares and bonds in relation to uPUTs, is that historically those who have attempted to measure the investment performance of commercial property compared with other assets have used shares and bonds as the alternate assets. Therefore, it can be said that both shares and bonds compete for investment dollars with commercial property.

Empirical Analysis

The results of the initial empirical analysis indicated that:

- Unlisted property unit trusts (uPUTs) over the 10 year period of analysis achieved lower returns and higher risk on average compared with shares, bonds and direct investment in commercial property (see *Figures 1 and 2)*.
- On a risk-adjusted basis as measured by the Sharpe In-

FIGURE 2: SEMIANNUAL NOMINAL TOTAL RETURNS
(Jan.1985-Dec.1994)

	uPUTs(1)	Shares(2)	Bonds(3)	Commercial(4) Property
Mean	1.88	5.70	7.27	6.81
Standard Deviation	9.62	20.81	4.15	4.86
Coefficient of Variation	5.13	3.65	0.57	0.71

1) uPUT total returns measured by the FPG Property Trust Index (FPG RESEARCH)
2) Share total returns measured by the NZSE Gross Share Index (New Zealand Stock Exchange)
3) Bond total returns measured by the NZGS Gross Bond Index (CS First Boston)
4) Commercial Property total returns measured by the JLW Total Return Index (JLW Advisory)

Source: Author's calculations

FIGURE 3: PERFORMANCE MEASURED BASED ON SHARP6 INDEX
(Semiannual Data: Jan.1985-Dec.1994)

	Sharpe Index
uPUTs (1)	-0.49
Shares (2)	-0.04
Bonds (3)	0.17
Commercial Property (4)	0.05

1) uPUT total returns measured by the FPG Property Trust Index (FPG RESEARCH)
2) Share total returns measured by the NZSE Gross Share Index (New Zealand Stock Exchange)
3) Bond total returns measured by the NZGS Gross Bond Index (CS First Boston)
4) Commercial property total returns measured by the JLW Total Return Index (JLW Advisory)

Source: Author's calculations

FIGURE 4: CORRELATION MATRIX: SEMIANNUAL NOMINAL TOTAL RETURNS
(Jan.1985-Dec.1994)

	(1)	(2)	(3)	(4)
(1) uPUTs	1.00			
(2) Shares	0.26	1.00		
(3) Bonds	0.11	0.00	1.00	
(4) Commercial Property	0.62	0.31	-0.08	1.00

I) uPUT total returns measured by the FPG Property Trust Index (FPG RESEARCH)
2) Share total returns measured by the NZSE Gross Share Index (New Zealand Stock Exchange)
3) Bond total returns measured by the NZGS Gross Bond Index (CS First Boston)
4) Commercial property total returns measured by the JLW Total Return Index (JLW Advisory)

Source: Author's calculations

dex, the investment performance of uPUTs was inferior to that of shares, bonds and direct investment in commercial property (see *Figure 3).*

- Unlisted property unit trusts (uPUTs) offer portfolio diversification potential when incorporated in a portfolio of shares and bonds as shown by the low positive correlations between uPUTs, shares and bonds (see *Figure 4).*
- Unlisted property unit trusts (uPUTs) can be viewed as substitutes for conventional direct investment in commercial property as exhibited by the high positive correlation between uPUTs and commercial property (see *Figure 4).*

However, in formally testing the validity of the initial empirical analysis utilising one and two-tailed statistical tests (t-Test) the majority of the results were found to be inconclusive and not statistically justifiable.

For example, the initial empirical analysis indicated that uPUTs can be viewed as substitutes for conventional direct investment in commercial property. However, when this conclusion was statistically tested the result showed that there was insufficient evidence to demonstrate uPUTs can be viewed as substitutes for conventional direct investment in commercial property.

This was partly due to the small data set and the analysis covering a particularly difficult period in New Zealand for investment in uPUTs, shares, bonds and direct investment in commercial property.

The overall interpretation and conclusions of the study show that:

- On a risk-adjusted basis as measured by the Sharpe Index, the investment performance of uPUTs was inferior to that of bonds and there was insufficient evidence to demonstrate that the investment performance of uPUTs was superior to that of shares and direct investment in commercial property.
- Unlisted property unit trusts (uPUTs) offer portfolio diversification potential when incorporated in a portfolio of bonds, yet there was insufficient evidence to demonstrate that uPUTs offer portfolio diversification potential when incorporated in a portfolio of shares.

  There was insufficient evidence to demonstrate that uPUTs can be viewed as substitutes for conventional direct investment in commercial property.

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  There was insufficient evidence to demonstrate that uPUTs can be viewed as substitutes for conventional direct investment in commercial property.

Implications of the Study

Historically, the literature on the investment performance of investing in commercial property, both indirect and direct has suggested that commercial property has provided higher risk-adjusted returns than shares or bonds. In this study, uPUTs on a risk-adjusted basis achieved returns inferior to that of the bonds, yet there was insufficient evidence to demonstrate that the investment performance of uPUTs was superior to that of shares and direct investment in commercial property.

Nevertheless, uPUTs can still be attractive to individual investors, as investment in uPUTs offers diversification benefits and hence, improve risk-adjusted performance in a portfolio of bonds. Given that the results of this study indicate a low positive relationship between uPUTs and bonds, inclusion of uPUTs in an existing bond portfolio should reduce portfolio variability and hence increase portfolio risk-adjusted performance, even if the uPUT component of the portfolio only offers low returns in relation to the other constituents of the portfolio.

Furthermore, the results of the study show that uPUTs cannot be viewed as substitutes for conventional direct investment in commercial property. Often investors view uPUTs as substitutes for conventional direct investment in commercial property, although there is insufficient evidence to demonstrate this is so.

Therefore, uPUTs offer both advantages and disadvantages to individual investors. In comparison with shares and direct investment in commercial property, uPUTs have historically offered comparable risk-adjusted performance. Meanwhile, due to uPUTs low positive correlation with bonds, uPUTs offer diversification benefits and, hence, lower portfolio risk. Finally, there was insufficient evidence to demonstrate that investors can view uPUTs as alternatives for conventional direct investment in commercial property.

Conclusion

Overall, this study has shed some light on the investment performance of uPUTs compared with marketable securities (shares and bonds) and direct investment in commercial property over the 10 year period from January 1985 to December 1994.

It identifies how uPUTs provide individual investors with the opportunity to participate indirectly in large commercial property investments and therefore benefit from the use of professional managers, pooling of resources and greater portfolio diversification. Finally, the importance of property investment performance measurement and analysis is emphasised. The study illustrates how the recent popularity of OUT investment and the increasing importance of property investment performance measurement and analysis has created a need for evaluating this indirect property investment vehicle. Measuring property investment performance has developed into a priority consideration for both individual and institutional investors. Also, it shows that the analysis of investment performance plays an important role in the investment process by providing a powerful tool from which to make more informed investment decisions.

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REFEREED PAPER

The Valuation of Local Authority Assets:

Identifying the Appropriate Methodology

by Sandy Bond

Abstract

This paper presents the results of a study undertaken in 1995 to determine the current practice within New Zealand of how local authorities record the assets they own, and secondly, how they go about valuing these assets for financial reporting and other purposes. Of particular interest are those classes of assets that could be described as non-market, non-income assets, such as infra-structural assets and heritage assets (ie. "public good assets"). The aim was to find out firstly, whether local authorities adopt a similarity of approach to record and value the assets they own, and to identify the problems associated with this, and secondly, to generate information to enable a model to be developed to help solve the problems identified.

This information will provide a New Zealand perspective of current practice for input into an international comparison of results obtained from similar studies conducted in Australia, the UK and US. Once analysed the aim is to find an international solution to the problems identified. Particular emphasis will be placed on developing a new valuation methodology to apply to public good assets and procedures to follow that will assist those responsible for meeting the purpose identified. It is anticipated that this information would be useful to the New Zealand Institute of Valuers in helping to develop clear industry guidelines on the procedures and methods to adopt when recording and valuing local authority assets.

The study included two separate groups of respondents: local authority CEOs and valuers involved in valuing local authority assets. Postal surveys were used to question the respondents. The initial data analysis included the calculation of means and percentages by response categories for all questions to provide an overview of response patterns. A comparison was then made between the results of local authorities located in rural areas and those located in urban areas to see if there was a statistically significant difference between these.

The essential finding of this study is that the procedures and methods adopted by local authorities, and the valuers they employ, for recording and valuing their assets vary widely.

The valuation methodology employed varied widely for most assets, however, there was general consensus that the appropriate method to adopt in the valuation of infra-structural assets is a cost-type approach. The main difficulties in using a cost-type approach to value any asset, but more particularly when valuing infra-structural assets, is in the estimation of the expected life of assets and the deprecia-

tion rates to apply to these. Despite the NZ Society of Accountants' Statements of Standard Accounting Practice 3 and 28 that provide guidance on how to depreciate fixed assets there appears to be little consistency in the selection of economic lives and depreciation rates to apply to each asset class, and whether or not some assets, such as roads, should be depreciated at all.

Despite the availability of a number of guidelines and standards published by the accounting and valuation professions the survey results indicate that less than 10% of the respondents get a lot of guidance, with the main sources cited being Audit New Zealand and the NZ Society of Accountants' accounting standards. The respondents to the valuers' questionnaire indicated a similar absence of guidance which appears to be a major cause for the inconsistencies evidenced above. Again, the accounting profession was the main source cited for guidance provision.

Introduction

Over the last few years there has been a worldwide movement towards public accountability and more efficient resource management. As a by-product of this together with the introduction of various legislation the need has arisen to define, value and record local authority assets and resources, and to do so using specific financial reporting guidelines. The main purpose of this process is to enable local authorities to make the most cost-effective use of their capital and to ensure that no asset is overlooked or under-utilised. This exercise is not unique to New Zealand. Other countries, such as Australia and the United Kingdom, are in the process of, or have completed, the collation of such data.

National professional bodies, including the New Zealand Institute of Valuers' International Assets Standards Committee and the New Zealand Society of Accountants, continue to work at an international level to ensure a similarity of approach in response to the increased awareness of the need to adopt common standards globally. However, these developments are not without their problems. For example, despite the mandatory guidance provided by the International Assets Valuation Standards Committee on the valuation of fixed assets, and the Statement of Standard Accounting Practice (SSAP) 28, for reporting these, some inconsistencies have arisen between the two sets of standards. Further, the former standards have not covered the more difficult to value asset classes such as infra-structural and heritage assets, and have tended to be too general in nature, with the latter dealing more with the basis of valuation rather than method. Some of these problems are currently being addressed according to a joint statement between the two organisations indicating that they are now willing to work together to ensure that the standards are made consistent within the next two years.

Problem Identification

Initially, the joint effort resulted from the identification of a problem that existed within both the UK and New Zealand, of identifying, recording and valuing local authority assets for financial reporting and other purposes. An extensive literature review was completed to determine the extent of the problem and identify any possible solutions to these. You are referred to the 1995 PRRES conference proceedings and Property Management (UK), vol.11, no.4, for the background to this project.

It appears from the literature review that the procedures for recording and valuing local authority assets in New Zealand are not clearly understood by local authorities and as a result those adopted vary widely between authorities, particularly as related to "public good" assets (ie. non-market, non-investment assets, as discussed above). Further, and partly as a consequence of this, those involved in the valuation process are not clear on the methodology to adopt for these assets.

Most valuation methods are based on the assumption that property is purchased and held for financial gain and that it will be utilised to meet that purpose. Yet, if comparability is not possible owing to a lack of market evidence or if profit motive is not the primary reason for investing in property, then what is the real benefit of assessing a hypothetical value based on these assumptions? Such a value estimate may not fit in with the philosophy of the undertaking concerned. Herein lies the problem.

To date, there are only three conventional valuation approaches available to value non-market, non-investment property: income, sales comparison and depreciated replacement cost, or variations of these. While the former two approaches are appropriate to assess investment and market value, they are not appropriate to assess utility (owner) value so the cost approach has inevitably been selected as the approach of last resort.

As a large proportion of the assets owned by local authorities are not regularly traded on the open market, nor is an income derived from them, both the sales comparison and income approaches are not appropriate to value such asset classes. The replacement cost approach is the most commonly applied approach in this case which may be appropriate. However, this method is not sophisticated enough to take account of the whole purpose and potential of the assets being valued, and the reliability of the results is therefore questionable. For example, the method ignores the trading value of the asset, which for a heritage property could be substantial. Further, as the approach requires the estimation of the life of the asset and selection of a depreciation rate to apply problems arise when valuing assets, such as roads for example, which are often maintained in perpetuity.

For those classes of assets which are either purely non-market, non-investment in nature such as infra-structural assets, or a cross between an investment property and one with solely utility value such as a heritage building, neither the replacement cost approach nor income approach provide logical valuation outcomes. New methods are required, particularly where the traditional valuation methods fail to provide reliable solutions. The aim of the study was to help demonstrate the current state of practice within local authorities in New Zealand for recording and valuing "public good" assets owned (ie. non-market, non-investment assets as discussed above), to identify problem areas and to build a base of knowledge from which solutions can be found. The study also involved identifying the current practice of those responsible for valuing these assets to help identify a new methodology that adequately meets the purpose for which these valuations are required.

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FIGURE 1: DETAILS OF ASSET RECORDING

Factor	Frequency %NZ
Is a record of assets owned kept?	
Yes	90
No	10
Type of Database Maintained	
Computer	65
Hard copy	5
Both computer and hardcopy	30
Minimum value of an asset recorded	
$200 and below	8
$201-$500	48
$501-$1000	27
$1001-$2000	14
$2001-$5000	3

FIGURE 2: ASSET MIX

Proportion of asset class owned

Property	%	Other Fixed Assets	%	Infra-structural	%
1-9%	37.8	1-9%	97.3	65-75%	13.5
10-15%	27.0	10-15%	0	76-85%	40.5
16-25%	27.0	16-25%	2.7	86-90%	18.9
26-35%	5.4	26-35%	0	91-96%	27.0
over 36%	2.7	over 36%	0	over 96%	0

This is the first part of a three part research project aimed at developing an international valuation model for the valuation of public good assets. The project is being carried out in conjunction with Peter Dent, lecturer in the School of Estate Management, University of Central England, Great Britain, who is conducting a parallel study in the UK. The next part of the project will involve conducting similar studies in Australia and the US to obtain a geographically dispersed set of results for international comparison, from which, once collated and analysed, a model will be developed.

Research Objectives

Primary Objective

To find out the extent of consistency in the procedures and methods adopted by local authorities, and the valuers they employ, for recording and valuing their public good assets.

Secondary Objectives

i) To identify specific problem areas in the recording and valuing of public good assets owned by local authorities in New Zealand.

ii) To provide a basis and stimulus for discussions between the valuation and accounting professions in order to reach consensus on the purpose for the valuation undertaking and the approach to take to meet this.

iii) To provide a New Zealand perspective of current practice for input into an international comparison of results obtained from similar studies conducted in the UK, Australia and the US. Once analysed the aim is to find an international solution to the problems identified. Particular emphasis will be placed on developing a new valuation methodology to apply to public good assets and procedures to follow that will assist those responsible for meeting the purpose identified.

Research Procedure

The study included two separate groups of respondents: local authority CEOs and valuers involved in valuing local authority assets.

A survey instrument was developed which included questions on how the local authority records the assets owned; what proportion of each class of asset is owned; whether these are valued, how frequently, for what purpose and by whom; the methods of valuation used; expected lives and depreciation rates applied to certain assets; and whether the local authority considers the valuation exercise achieves the purpose for which it is undertaken and how much guidance is provided to assist with the task.

The questionnaire was administered to all local authorities in New Zealand. In conjunction with this, to add to the information received, the annual plans of the local authorities were analysed to see how they report their financial position and to verify some of the information provided in the questionnaire.

The initial data analysis included the calculation of means and percentages by response categories for all questions to provide an overview of response patterns. A comparison was then made between the results of local authorities located in rural areas and those located in urban areas to see if there was a statistically significant difference between these.

This information helped to identify the proportion of public good assets owned by local authorities and to determine the extent of any problems highlighted in the approaches taken to record and value these.

From the survey, a list of the independent valuers involved with valuing local authority assets was collated which formed the sample for the follow-up study. The valuers were surveyed to determine more technical details about the valuation methods they employ in the valuation of local authority public good assets.

Results

The essential finding of this study is that the procedures and methods adopted by local authorities, and the valuers they employ, for recording and valuing their assets vary widely.

Asset Register

As was expected a large majority of local authorities surveyed (90.2%) maintain a record of the assets owned. Of those that do record their assets 65% indicated that they keep these records on a computer database, while 30% keep both a computer database and a hard copy register of assets owned. Only 4.9% kept a hard copy register only, as would be expected from the advances in technology.

Not all assets are recorded in a database, it depends on the value of the assets. Only those assets over a specified minimum value are recorded this way. Results indicated that 48.6% of respondents record assets above $201-$500, with 27% recording assets above $501-$1000. It appears that the minimum figure is set by each individual local authority, with little consistency between them. The information in the registers is updated continuously by 19%, regularly by 44%, annually by 27%, and two-to-three yearly by 10% indicating the variance in timeliness of the information kept.

Figure 1 shows a summary of these results.

Assets Owned

The mix of assets owned is of interest to determine the relative importance of each of these, as only the valuation of certain classes of assets owned by local authorities is of interest in this research, specifically the non-market, non-investment classes that pose the greatest valuation challenges. Results indicate that 92% of the respondents have up to 25% of their total asset portfolio in property, 97.3% have up to 9% invested in other fixed assets and 86.4% have over 75% invested in infra-structural assets. Thus, the largest share of a local authorities asset portfolio, based on the current value of assets, is in infra-structural assets, the more difficult to value asset class. (See *Figure 2)*

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Valuation of Assets

The regularity of asset valuations was of interest to determine if there is consistency in this between local authorities. Further, it was of interest to determine if the local authorities are fully aware of the purpose for carrying out such valuations. Given that the majority of local authorities value the assets for financial reporting purposes which occurs on an annual basis, the regularity of valuation would indicate how up-to-date the figures shown in these reports are. Obviously, the older the valuations, the less relevant they may be to present day circumstances, which could potentially jeopardise the usefulness of the figures indicated in the reports for management purposes.

The results displayed in *Figure 3* indicate that only 68% value their assets regularly. This is possibly due to some local authorities employing independent valuers (as recommended in the NZ Society of Accountants' guidelines) which increases the costs involved. The decision is then based on the trade-off between timeliness of information and cost of valuation with the results suggesting that more regular revaluations would not provide enough change to the information to warrant the cost involved. The majority of local authorities value their assets three yearly indicating this period as being considered a reasonable trade-off.

The three yearly valuation period may also be adopted due to the reliance that local authorities place on the valuation figures produced by Valuation New Zealand (for rating purposes) which are mostly carried out on a three-yearly basis. The NZ Society of Accountants allows VNZ valuation figures to be used provided the basis of valuation is verified as appropriate for financial reporting purposes by an independent valuer, including the Valuer-General, (refer to Statement of Standard Accounting Practice, SSAP 28-4.17).

FIGURE 3: ASSET VALUATIONS

Factor			Frequency %
	Are Assets Valued Regularly?		
Yes			68
No			32
	Regularity of Valuation Updates		
Annually			20
Three yearly			76
Other			3
	Purpose of the Valuation		
(i)	Legislation		55
(ii)	Annual book-keeping		41
(iii)	Other:	Insurance	15*
		Asset management	17*
		Other	3*

Some respondents indicated more than one reason for valuing assets, ie. either (i) or (ii), * + (iii)

FIGURE 4: THE VALUERS EMPLOYED

Factor	Frequency %
Valuer Status	
In-house	6
Independent	63
Both in-house and independent	30
Verification of In-house Values	
Yes	76
No	23

While it does appear that local authorities are aware of the purpose for having the valuation completed, it is of concern that they are using these for other purposes in some cases. Given that a valuation is undertaken for a particular purpose and the methodology used is based on that purpose, the valuation figures may not be relevant or the methodology appropriate for another purpose and to use them for such could be providing misleading results.

Figure 4 summarises responses to questions about who is responsible for conducting the valuations and, if they are carried out in-house, if these valuation are independently verified. The purpose of these questions was to determine the objectivity of the valuations and their appropriateness to the task, as well as to identify the independent valuers involved.

The identification of independent valuers was necessary for the formation of the sample required for the second part of the study. As indicated, two thirds of the respondents employ independent valuers to carry out the valuations. Of those respondents that do use their own valuer, 76% indicate that they get these valuations independently verified. This, at least, provides a degree of confidence in the objectivity of the valuations obtained.

Valuation Methodology

a) Local Authorities

The valuation methodology employed varied widely for most assets, however, there was general consensus that the appropriate method to adopt in the valuation of infra-structural assets is a cost-type approach. The main difficulties in using a cost-type approach to value any asset, but more particularly when valuing infra-structural assets, is in the estimation of the expected life of assets and the depreciation rates to apply to these.

Despite the NZ Society of Accountants' Statements of Standard Accounting Practice 3 and 28 that provide guidance on how to depreciate fixed assets there appears to be little consistency in the selection of economic lives and depreciation rates to apply to each asset class, and whether or not some assets, such as roads, should be depreciated at all.

"Other methods" were the next most frequent response, however, from the responses received to question 8(b) relating to what these other methods were, it appears that some respondents were unclear on what was actually being asked of them, or did not understand the difference between a type of valuation and a valuation method. For example, the most popular of the "other methods" indicated by respondents was "Net Current Value", which is a type of value as opposed to an actual method. Similarly, of those that responded that they use "other methods", one-third indicated that they use government value, which again is a type of valuation, not a method of valuation. No new, innovative methods were identified through this question. It appears that the three traditional valuation approaches are the sole methods used in the valuation exercise. This highlighted a problem with the structuring of the questionnaire. Those respondents that do not carry out valuations in-house or were not aware of the methods adopted by the independent valuers employed should have been directed to ignore this question and any others relating to valuation methodology.

b) Valuers

Similar responses were recorded from the valuers' survey in relation to the methods used. All of the respondents used the replacement cost approach to value infra-structural assets with a variety of methods being adopted for the other asset classes. For example, when valuing investment property one respondent used all four approaches listed, one used sales comparison, direct capitalisation, and DCF methods, another used sales comparison and direct capitalisation and the last used the replacement cost approach only. Similar responses were observed for the other property types indicating that little consistency exists in the approaches adopted when valuing land and buildings.

No new, innovative methods were identified from these questions. Refer to *Figure* 5 for a summary of the results.

Guidance Provided

Despite the availability of a number of guidelines and standards published by the accounting and valuation professions the local authority survey results indicate that less than 10% of the respondents perceive that they get a lot of guidance, with the main sources cited being Audit New Zealand and the NZ Society of Accountants' accounting standards. The respondents to the valuers' questionnaire indicated a similar perception that there is an absence of guidance which appears to be a major cause for the inconsistencies evidenced above. Again, the accounting profession was the main source cited for guidance provision.

Appropriateness of the Valuation Exercise

The majority of the respondents consider that the valuation methods outlined in the questionnaire are appropriate for the exercise being undertaken. Of those that responded that they consider either none, or only some of the methods to be appropriate, the reasons most commonly cited for this were that cost and historic government values do not adequately reflect value.

It must be realised, however, that the respondents may not be valuation specialists and therefore may not actually know how appropriate the valuations are. Many of the respondents are merely users of valuation information and not qualified to determine the appropriateness of this. For such respondents an "unsure" response option should have been provided to allow for this.

Whilst over two thirds of the respondents consider that the values derived are an accurate reflection of the local authority's assets, these figures were lower than expected. This might indicate that for some respondents the valuations are not meeting the purpose for which they are required. The two most commonly cited reasons for respondents indicating that they do not

FIGURE 5: VALUATION METHODS

Method	Investmet Pty	Operatnl Pty	Historic Pty	Infrastrucl Assets
Sales Comp.	75%	50%	25%	-
Repl. Cost	25%	75%	25%	100%
Dirct. Captlsn.	50%	50%	-	-
DCF	50%	-	-	-

FIGURE 6: RELEVANCE OF THE VALUATION EXERCISE

Factor	Frequency %
Appropriateness of the Methods	
Yes	81
Some are, others are not *	19
'Reasons given: cost does not equal value; historical govt. values does not equal value	
Accuracy of the Valuations	
Yes	69
No*	31
Usefulness of the Valuation Exercise	
Yes	86
No"	14

*Reasori given: Unable to compare value of local authorities.

consider the valuations reflect the value of the assets is that the valuations take no account of the value these assets have to the local authority, and that the methods for valuing infra-structural assets are too subjective. Despite 31% of the respondents considering that the valuations are not an accurate reflection of value, over 85% felt that the valuation exercise, as a whole, was useful in achieving the purpose for which it was required. The only reason provided for the exercise not to be considered useful was that it did not enable local authorities to be compared. Suggestions for how the task could be better achieved indicated that set guidelines are needed to enable comparison of local authorities through the adoption of a consistent approach, that the valuations need to be more objective, and more research is required to develop new approaches. *(Figure 6)*

Rural/Urban Comparison of Results

All responses were separated into two groups: those local authorities located in rural areas and those located in urban areas. The local authorities were divided into the "rural" and " urban" categories based on 1991 population and land area statistics published in the 1993 Local Government Directory.

Comparing the results from the Mann-Whitney tests from the two groups indicated the responses were significantly different for the variables set out in *Figure 7*.

It is not surprising that rural local authorities have a greater proportion of infra-structural assets in their asset portfolio compared to urban areas due to their relatively smaller proportion of land and buildings owned due to the lower population density of rural areas.

The difference in depreciation rates applied to plant could be as a result of the different type of plant owned in rural compared to urban areas. The same conclusion could apply to the difference in expected life of motor vehicles and trucks, that is, it could relate to the difference in type and extent of use of these in each area.

The difference in depreciation rate applied to the roading base may be caused by a few factors, but before addressing this it must be pointed out that there was only one respondent in the urban area which may affect the representativeness of the results. Assuming that this one response is representative the difference could be due to the heavier use made of roads in urban areas and the need to apply a higher depreciation rate to reflect this, or alternatively, roads may be maintained better and for longer in rural areas.

The difference in expected lives of water networks may be due to the different type of water networks located in rural as compared to urban areas or to the level of use of these. Again the representativeness of the results may be affected by there only being two respondents from the urban area compared to seventeen in the rural area.

Refer to *Figure 8* for a summary of these comparisons.

Local authorities situated in rural areas (population of 44,000 or less, and a land area greater than 500,000 hectares for smaller populations) comprised 73% of the total number of local authorities that responded.

Discussion

Limitations: An Overview

A number of limitations relating to the study data and reported results are noted and readily acknowledged. The study is of how local authorities record and value their assets, yet it is recog-

FIGURE 7: SIGNIFICANT DIFFERENCES RURAL/URBAN RESULTS

Variable	Rural	Urban
Proportion of infra-structural assets owned	81-90%	71-80%
Depreciation rate applied to plant	11-15%	6-10%pa
Expected life of motor vehicles and trucks	6-7Yrs	1-5Yrs
Depreciation rate applied to roading base	Less than 1%	4%pa
Expected life of water networks	30-49Yrs	80-89Yrs

REFEREED PAPER

FIGURE 8: A COMPARISON OF RESPONSES BETWEEN "RURAL" AND "URBAN" AREAS

NB Numbers in brackets show responses of those situated in "rural" areas.

	Mean	Std Dev	Cases
Question 4(a)(iii) Approximately what proportion of infrastructural assets does your authority own, as a % of the total portfolio? *Response scale* 1=65-70% 2=71-75% 3=76-80% 4=81-85% 5=86-90% etc	2.64 (4.40)	2.34 (1.89)	11 (30)
Questions 8(c), 2: What is the depreciation rate applied to plant? 1=1-5% 2=6-10% 3=11-15% 4=16-20% etc	2.17 (3.25)	0.41 (1.22)	6 (24)
Question 8(c), 3: What is the expected life of motor vehicles? 1=1-4 years 2=5 years 3=6 years 4=7 years etc	1.67 (3.75)	1.50 (1.94)	6 (24)
Question 8(c), 9(a): What is the depreciation rate applied to roading base? 1=1% 5=3% 2=1.5% 6=3.5% 3=2% 7=4% 4=2.5% 8=4.5%, etc	7.0 (0.13)	0 (0.35)	1 (8)
Question 8(c), 9(b): What is the expected life of water networks? 1=20-29 years 5=60-69 years 2=30-39 years 6=70-79 years 3=40-49 years 7=80-89 years	7.0	1.41	2

nised that these are separate tasks which are likely to be conducted by different individuals. As such it is possible that those responding to the questionnaire were not involved with the valuation exercise themselves, but simply with the recording of the assets and valuation outcomes. This being the case the respondent may not have been familiar with the valuation process and some of the more technical details involved and therefore not best qualified to answer some of the questions asked.

Unfortunately, due to the confidential nature of the questionnaire and the wording within it, it is not possible to identify the respondents' role within the process. However, by following up the initial questionnaire with one aimed specifically at the valuers involved some of these problems were partially overcome and details on more technical aspects were able to be obtained.

The results from the valuers' survey relied on a small number of respondents ie. five. As it was not possible to identify specific individuals working in this area of valuation, questionnaires were simply sent to the named firms and companies. It is possible that other firms and companies are involved that were not named in the initial study and as such were not included in the sample of the second group of respondents. A question in the survey instrument relating to the valuers' level of experience in valuing local authority assets helped to identify the extent of their involvement in the exercise nationwide, but due to the limited number of respondents the findings may not be fully representative of all the valuers employed in this area of work.

Lastly, as the questionnaire asked specific questions about valuation methodology which, as outlined earlier in the report, has been problematic for certain asset classes some valuers may not feel confident enough in their own valuations to divulge information and details that could potentially reveal their ability (or lack of) to value these assets. Given that they may therefore consider the information highly confidential, despite the assurances given that it would remain so, this may have influenced their decision to complete the questionnaire and affected the response rate achieved.

Evaluation of the Survey Instruments

Local Authorities Questionnaire

The main difficulty identified other than those identified above was in the definitions of assets. With question 4 (b), for example, which asks what proportion of property owned is within specified categories, it appears that a few respondents misunderstood what was being asked. It was assumed that the options outlined covered all of the different property classifications, but according to the responses obtained which did not add up to 100% in some instances, it would appear that other classifications exist.

According to one response received the classification of "Community assets" is no longer legally applicable. Judging from the terminology used in the annual plans this does appear to be true. In this case the question needs rewording with currently applicable terms. According to the annual accounts the terms used to describe fixed assets are: "operational fixed assets"; "non-operational fixed assets"; and "restricted assets".

It appears from the annual plans that "operational assets" include: land and buildings (other than restricted assets), computer equipment, motor vehicles, plant and equipment, and furniture and fittings. Some local authorities also include library book collections and zoo animals under this heading (eg. Hamilton City Council). "Restricted assets" are those that cannot be disposed of because of legal or other restrictions. How each local authority classifies its fixed assets does not, however, appear to be consistent j udging from the annual plans. For example, Auckland City divides fixed assets into the following categories:

- Infra-structural assets
- Heritage property
- Restrictive property
- Parks
- Functional council property
- Investment property
- Plant and equipment
- Computer equipment, furniture and fittings, motor vehicles
- Investments in shares
- Art and rare books
- Library books
- Zoo animals.

Hamilton City Council classifies its assets as follows:

- Fixed assets:
  - operational assets
  - infra-structural assets
  - restricted assets
- Investment property
- Property intended for resale.

Wellington City Council have used the following classification system:

- Infra-structural assets
- Fixed assets:
  - land and buildings
  - library collection
  - other fixed assets
- Investment property
- Restricted assets as defined above but including also art and rare books, and zoo animals.

North Shore City Council classifies its assets as follows:

- Infra-structural assets
- Restricted assets
- Fixed assets:
  - land and buildings (excluding restricted land and investment property)
  - investment property
  - library books
  - all other fixed assets.

As can be seen from the above examples inconsistencies exist and it would have been difficult to have expressed question 4 in a way that would be relevant to all local authorities.

Another difficulty highlighted, and not envisaged, was that of how to accommodate in the questions consolidated or subsidiary companies of the local authorities (ie. Local Authority Trading Enterprises, or LATEs). The respondents may have included the figures from these in their answers or may have excluded them, but it was not made clear in the questionnaire which to do. However, as the questionnaire was addressed to and refers to the local authority, as opposed to its subsidiary, it is hoped the respondents provided their answers in terms of the former only. Had the annual plans been obtained before the questionnaire was written and sent out, some of the definition problems outlined above could have been avoided.

Valuers' Questionnaire

As the valuers' questionnaire was written after the local authority questionnaires were returned a number of the identified wording problems were able to be avoided by making the necessary amendments to the definitions and the like.

Conclusions

The essential finding of this study is that the procedures and methods adopted by local authorities, and the valuers they employ, for recording and valuing their assets vary widely. Not only do some local authorities not record the assets they own (10%), those that do record them only record those assets that are over a minimum value threshold set independently by each authority.

How often the asset register is updated and the type of information recorded varied widely as did the regularity with which the assets are valued and these values updated. Some local authorities value their own assets, others seek independent valuation advice, with about a third of the local authorities utilising both in-house specialists and independent valuers.

From a valuation perspective it is of concern that the largest share of a local authorities asset portfolio is in infra-structural assets, the most difficult asset class to value. The valuation methodology employed varied widely for most assets, however, there was general consensus that the appropriate method to adopt in the valuation of infra-structural assets is a cost-type approach.

The main difficulties in using a cost-type approach to value any asset, but more particularly when valuing infra-structural assets, is in the estimation of the expected life of assets and the depreciation rates to apply to these. Despite the NZ Society of Accountants' Statements of Standard Accounting Practice 3 and 28 that provide guidance on how to depreciate fixed assets there appears to be little consistency in the selection of economic lives and depreciation rates to apply to each asset class, and whether or not some assets, such as roads, should be depreciated at all.

Despite the perceived lack of guidelines, there are a number available to aid the task of accounting for assets for financial reporting purposes:

- NZ Society of Local Government Managers (SOLGM) "Guidelines for Good Accounting Practice in Local Government" which though not binding were developed to be consistent with;
- The General Accepted Accounting Practice (GAAP), and more specifically the NZ Society of Accountants' Statement of Standard Accounting Practice (S SAP) 17, Accounting for Investment Properties and Properties Intended for Resale and 28, Accounting for Fixed Assets. These statements specify that the valuation of assets should be prepared in accordance with;
- The NZ Institute of Valuers' Asset Valuation Standards.

It appears that either these guidelines are not being followed adequately, or the guidelines themselves are not specific enough to achieve the task. For example, the SSAPs specify that valuations should be systematic and preferably annually, yet this has not occurred in some instances with a third of the respondents not valuing them regularly, and of those that do, over three quarters value them three yearly. Also, the SSAPs specifically suggest not using government valuation figures unless the basis of valuation is confirmed as appropriate for financial reporting purposes by an independent valuer (SSAP 28,4.17). Of those that responded that they used an independent valuer, by far the most frequently quoted valuation organisation was Valuation New Zealand but it is unclear from the responses received whether all of these have the valuation basis verified by an independent valuer.

To overcome the inconsistencies evidenced clear and specific guidelines are required on how local authorities are to record and value their assets, with similar guidance required by the valuers involved with respect to the methodology to use to achieve the purpose of the valuation exercise.

From a joint statement by the New Zealand Institute of Valuers (NZIV), and the New Zealand Society of Accountants (NZSA) published in the *Neti Zealand Valuers Journal* (1995 March), it appears that the two professional bodies have at least made progress to overcome some of the problems highlighted in this research by agreeing to liaise in ensuring consistency between the NZIV Valuation Standards and the relevant Financial Reporting Standards of the NZSA.

> "The objective of cooperation between the parties is that the financial reporting standards which deal with valuation issues and the Institute's Valuation Standards be made consistent within the next two years", p.39.

This move together with the current review by NZSA of SSAPs 3, 17 and 28 is seen as a major step forward in overcoming the problems identified in this research. Further, this will be aided with the adoption of International Standards on the Valuation of Public Sector Infrastructure and Heritage Assets for Financial Statements and related accounts that are currently being considered by the International Asset Valuation Standards Committee (TIAVSC). However, to ensure consistency of application of any methods suggested specific guidelines will also be needed. Whilst it is recognised that the process of recording and valuing local authority assets for financial reporting purposes is still evolving and that it would appear from the foregoing that the professional bodies involved are taking action to help overcome the problems, the results from the study indicate that much work is yet needed to achieve the initial purpose of greater resource efficiency. In summary, it is recommended that this starts with a revisit of the purpose of the valuation exercise and agreement upon a value definition which can adequately meet this purpose.

Further, given the increasing public awareness of the need for greater accountability in the way governments operate and manage the assets and resources they own, and the changes in legislation that make this process a legal requirement it is important for future studies to focus on how successful this has been and to determine how the process of recording and valuing assets and the reporting of these can be better linked with achieving greater resource efficiency.

Definitions of Terms

Infrastructural assets are fixed utility systems that provide a continuing service to the community and assets not generally regarded as tradeable. These include roads, water and sewerage services, street lighting and stormwater systems.

Restricted assets are those assets which cannot be disposed of because of legal or other restrictions and that provide a benefit or service to the community. These include reserves vested under the Reserves Act and endowments or other property held in trust for specific purposes.

Notes on Valuation Methods

The sales comparison approach uses sales of comparable properties recently sold to determine value.

The depreciated replacement cost approach, or optimised DRC, estimates the cost of the asset new less depreciation (usually provided on a straight line basis that will write off the asset to its estimated residual value over its economic life).

The income approach estimates the likely maintainable net income for the asset and capitalises this to derive an estimate of value. The discounted cash lfow method, is a similar approach in that the net income streams likely to be obtained for the asset over a specified period are discounted back to present day terms.

ABOUT THE AUTHOR

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LEGAL DECISION

The Proprietors of Rotorua Nol Block Incorporated v The Valuer-General and Lloyd Lewis Morgan *(High Court, Rotorua, Fisher J and Mr I Lyall sitting as a Land Valuation Court, M35/95, 21 June 1996)*

Valuation of land Lease Valuation of unimproved value of land for purpose of determining rent payable under lease Whether the unimproved value includes existing use rights Town and Country Planning Act 1977, ss90 and 91, "unimproved value".

IN THE HIGH COURT OF NEW ZEALAND

ROTORUA REGISTRY

IN THE MATTER of the Land Valuation Proceedings Act 1948

BETWEEN THE PROPRIETORS OF ROTOMA NO I BLOCK INCORPORATED

Objector

AND THE VALUER-GENERAL

First Respondent

AND LLOYD LEWIS MORGAN

Second Respondent

Hearing: 29 & 30 April, 1 May 1996

Counsel: G.J. Dennett & D.F. Dugdale for Objector

No appearance for First Respondent (abides decision) J.N. Briscoe for Second Respondent

Judgment: 21 June 1996

Reserved Judgment of Fisher J and Mr I Lyall

Sitting as a Land Valuation Court

Solicitors: Dennetts, P.O. Box 644, Rotorua for Objector

Davys Burton, P.O. Box 248, Rotorua for Second Respondent

Introduction

The objector is a Maori incorporation owning a 13.7 hectare block of land on the western shores of Lake Rotoma in the District of Rotorua. It objects to the unimproved value of $125,000 assessed by the Valuer-General in a special valuation of 1 June 1990. The purpose of the valuation was to determine the rent payable by the second respondent Mr Morgan as the lessee of a lease renewed for a term of 21 years from that date. By order of Blanchard J on 27 July 1995 that objection has been moved into this Court because it was thought to involve a significant question of law. The question is whether existing use rights are to be included when arriving at aproperty's unimproved value.

Factual background

The land is described in the report of the Valuation Department as follows:

"The subject property is an irregular shaped parcel of land on the western shores of Lake Rotoma. It has a good stretch of sandy lake shore but this varies with lake fluctuations. The property has no legal road access but limited physical access is occasionally available through adjoining forestry land. The most frequently used access is by boat which incorporates a short trip across the lake from the Lake Rotoma Reserve. The contour is undulating rising to the hilly land at the rear with a natural cover of scrub and light bush. There is an area of approximately one and a half hectares of lagoon located towards the centre of the block."

At the material time the land was zoned as Rural I under the Operative Rotorua District Planning Scheme. The Scheme's ordinances limit dwellings on a given property to the erection of one principal dwelling-house together with one subsidiary dwelling with a maximum floor area of 65 square metres. At the material time there were 17 baches on the property, their continued use being sanctioned by existing rights under the then Town and Country Planning Act 1977.

The land was leased to Mr Morgan for an original term of 21 years from 1 June 1969 at an annual rental of $1,600. The lease contained a right of renewal for a further term of 21 years to commence on 1 June 1990. Mr Morgan exercised that right of renewal and the current term will thus continue until 1 June 2011. The rent for the renewed term is to be 10 percent of the unimproved value as ascertained by a special Government valuation effected as at 1 June 1990. That was the impetus for the special valuation of $125,000 challenged in the present proceedings.

In reporting to the objector the Valuer-General considered that the 17 baches were to be excluded from the valuation on the basis that they constituted improvements. He was to consider only the unimproved value. That much was not disputed. But the Valuer-General also considered it immaterial that the baches were protected by existing use rights. The objector disagreed. Its contention is that a value should be placed upon the existing use rights and added to the value of the rest of the land. Even without existing use rights it argues that the Valuer-General has understated the unimproved value.

Legislative background

Clause 24 of the lease provided that upon renewal for the second term the lessee was to pay throughout the renewed term of 21 years:

> "a yearly rental equal to ten (10) per centum of the unimproved valuation as ascertained by a special Government valuation to be made at the expense of the lessee in the month of May 1990 provided that such rental shall be not less than the rental reserved for the expired term".

The statutory authority for making such a valuation was s 249A(1) of the Maori Affairs Act 1953 which provided:

> "Where any lease of Maori freehold land or of [General land] owned by Maoris contains a provision for the revision of the rent during the term of the lease or for a right of renewal for a further period of years and the basis for the computation of the revised rent or the rent for the renewed period is expressed to be a special Government valuation of the land comprised in the lease, the provisions of this section shall apply to the making of any such valuation."

Pursuant to s 244 of the same Act the expression

> -unimproved value' is to have the meaning assigned to it by the Valuation of Land Act 1951 and notwithstanding any amendment to that expression during the currency of any lease the expression is for the purpose of such a valuation to continue to have the meaning assigned to it by the Valuation of Land Act 1951 as at the commencement of the lease".

When this lease was signed in 1969, "unimproved value" was defined in s 2 of the Valuation of Land Act 1951 as follows:

> "`Unimproved value' of any land means the sum which the owner's estate or interest therein, if unencumbered by any mortgage or other charge thereon, might be expected to realise at the time of valuation if offered for sale on such reasonable terms and conditions as a bona fide seller might be expected to impose, and if no improvements (as hereinbefore defined) had been made on the said land."

"Value of improvements" is materially defined in the same section as "the added value which at the date of valuation the improvements give to the land".

"Improvements" are defined in the same section as follows:

> "`Improvements' on land means all work done or material used at any time on or for the benefit of the land by the expenditure of capital or labour by any owner or occupier thereof in so far as the effect of the work done or material used is to increase the value of the land, and the benefit thereof is unexhausted at the time of valuation; but, except in the case of land owned or occupied by the Crown or by a statutory public body, does not include work done or material used on or for the benefit of the land by the Crown or by any statutory public body, except so far as the same has been paid for by the owner or occupier either by way of direct contribution or by way of special rates on loans raised for the purpose of constructing within a county any road, bridge, irrigation work, water races, drainage works, or river protection works ..."

Although the statutory meaning of "unimproved value" is to be adopted as it stood at the commencement of the lease in 1969, the valuation itself is to be effected in the present case as at 1 June 1990. The objector's case is that by 1 June 1990 the existing use rights associated with the property added to the unimproved value. By that date existing use rights were governed by ss 90 and 91 of the Town and Country Planning Act 1977. They materially provided:

> 90. Existing use may continue -(1) Any land or building may be used in a manner that is not in conformity with the district scheme or any part or provision of it as in force for the time being if
>
> (a) The use of that land or building -
>
> (i) Was lawfully established before the district scheme or the relevant part or provision of it became operative; and
>
> (ii) Is of the same character, intensity, and scale as, or of a similar character, intensity and scale to, that for which it was last lawfully used before the date on which the district scheme or the relevant part of provision of it became operative
>
> 91. Reconstruction, etc., of non-conforming buildings (1) Except as otherwise provided by any provision in the district scheme relating to the matters set out in clause 8(a) of the Second Schedule to this Act, where any existing building is not in conformity with a district scheme or any part or provision of it as in force for the time being, then the building may be reconstructed, altered or added to if-
>
> (a) The reconstruction, alteration, or addition does not increase the degree by which the building fails to conform to the scheme or any part or provision of it; and
>
> (b) The reconstruction, alteration, or addition would not increase the current market value of the building by more than 60 percent.
>
> (2) In assessing the current market value of a building for the purposes of subsection (1)(b) of this section, that value shall be taken as the value of the building in the condition it is or was in before the reconstruction, addition, or alteration in question took place less the value of any prior reconstruction, addition, or alteration which was completed during the period of 5 years preceding the commencement of the reconstruction, alteration, or addition in question."

Prima facie, therefore, the question is whether for the purposes of determining "unimproved value" as at 1 June 1990 one should have regard to existing use rights within the meaning of ss 90 and 91. Before adopting that approach, however, four preliminary points relating to statutory changes need to be disposed of. The first is that the Maori Affairs Act 1953 has since been repealed by the Te Ture Whenua Maori Act 1993. Mr Dugdale submitted that by virtue of s 20(g) of the Acts Interpretation Act 1924 the current proceedings fall to be determined under the procedure lfowing from s 249A of the Maori Affairs Act 1953 and its invocation of ss 244 and 245 of the same Act. Subject to certain preliminary steps there specified, those provisions ultimately lead to conventional procedures for the disposal of objections under the Valuation of Land Act 1951 and the Land Valuation Proceedings Act 1948. In view of s 201 of the Te Ture Whenua Maori Act 1993, and the lack of express preservation of certain provisions of the Maori Affairs Act 1953 for the purposes of proceedings already in progress, that approach may be less than obvious. However, the point has not been taken by Mr. Briscoe and we cannot see that anything practical turns upon it. The second point concerns the role of the Maori Trustee. Section 249A(5) of the Maori Affairs Act 1953, and its adoption of s 244 (2) to (5) and s 245 of the same Act, conferred a right of objection to valuations obtained under s 249A(1). The procedure specified in s 245 had envisaged a role for the Maori Trustee in the procedures to be followed in bringing the objection to a hearing. That was no doubt done because of the Maori Trustee's responsibilities in safeguarding the rights of Maori lessors. Since 1 April 1969 the effect of Part IV of the Maori Affairs Amendment Act 1967 has been to remove that role from the Maori Trustee. We accept that the relevant provisions of ss 244 and 245 are adopted pursuant to s 249A(5) only "as far as they are applicable and with necessary modifications". That wording allows the change in role of the Maori Trustee to be accommodated by dispensing with those procedural steps formerly involving the Maori Trustee.

The third point is that since the lease was signed the Valuation of Land Act 1951 has been amended by substituting a "land value" definition for that previously found for "unimproved value". As mentioned earlier, the effect of ss 249A(5) and 244(3) and (4) of the Maori Affairs Act 1953 is to preserve "unimproved value" and its original definition for present purposes.

Finally, the Town and Country Planning Act 1977 has been repealed by the Resource Management Act 1991, existing use rights now being governed by s 10 of the latter Act. It is clear that the special valuation in the present case was to be effected as at 1 June 1990. At that stage the existing use rights were governed by the 1977 Act. That is the Act which is relevant for present purposes.

The next question is whether for the purposes of determining "unimproved value", as that expression was defined in June 1990, one should have regard to existing use rights as then defined in ss 90 and 91 of the Town and Country Planning Act 1977.

Can unimproved value include existing use rights?

A number of matters are common ground. The physical baches themselves were "improvements", being "work done or material used ... for the benefit of the land by the expenditure of capital or labour by any owner or occupier thereof insofar as the effect of the work done or material used is to increase the value of the land and the benefit thereof is unexhausted at the time of valuation". The erection of the bathes meant that the land had corresponding existing use rights pursuant to ss 90 and 91 of the Town and Country Planning Act 1977. These were valuable rights. But for the erection of the baches the rights would not now exist. The question is whether those valuable rights, as distinct from the physical structures themselves, can in whole or in part support an increment to the unimproved value of the bare land.

It will be recalled that for present purposes "unimproved value" is

> "the sum which the owner's estate or interest therein ... might be expected to realise ... if offered for sale ... if no improvements ... had been made on the said land".

On its face the statute therefore requires that in arriving at the unimproved value of the land one must adopt a fiction: one is to consider what the land would now sell for if "no improvements [the baches] had been made [i.e. had been erected] on the said land". It is not disputed that if no baches had been erected on the land there could have been no existing use rights. As a matter of logic one might therefore have thought that existing use rights would have to be excluded from the unimproved value.

Mr Dugdale's argument to the contrary was confined to the decisions and dicta of a number of judges in various cases over the years. He declined to be side-tracked into a consideration of the words used in the statute itself. Whether the judiciary deserve this pre-eminence over the legislature we rather doubt, notwithstanding the popularity it seems to enjoy among many counsel. Of course the usual rules of stare decisis apply to past judicial interpretations. However in a dispute over the meaning of an instrument it does no harm to at least start with the words used in the instrument itself. If the meaning seems clear on its face it will be rare that prior authority will dictate anything different. At all events we turn to the decisions discussed.

The precedential starting point would appear to be the Privy Council decision in *Toohey's Limited v Valuer-General* [1925] AC 439. That was an Australian case in which a similar definition of unimproved value fell to be considered. Lord Dunedin said at p 443:

> "What ... [the valuer] ... has to consider is what the land would fetch as at the date of valuation if the improvements had not been made. Words could scarcely be clearer to show that the improvements were to be left entirely out of view. They are to be taken not only as non-existent but *as if they never had existed* ...what the Act requires is really quite simple: here is a plot of land; assume that there is nothing on it in the way of improvements; what would it fetch in the market?" (emphasis added)

On that approach it was held to be wrong to attempt to include in the unimproved value the value of a liquor licence associated with premises on the property. The liquor licence was one "which could only be granted in connection with buildings ... in a calculation in which you are told to assume that no building is there". The effect of *Toohey* is that in arriving at the unimproved value one must value the land "as if they [the baches] never had existed". If the 17 baches had never existed the existing use rights could never have existed either. The hypothesis would exclude existing use rights.

Mr Dugdale sought to overcome that difficulty by changing the hypothesis from the past to the present. He submitted that it would be sufficient to assume merely that the buildings were not on the land at the date of the valuation; it was unnecessary and inappropriate to go back to an earlier date and assume that they had never been built in the first place. However one must consider the words used in the statute. The definition of "unimproved value" in s 2 of the Valuation of Land Act requires that the valuer arrive at the sum which the land might be expected to realise at the time of valuation if no improvements *"had been* made", not "existed at the time of valuation".

Mr Dugdale submitted that the answer to that point was not to be found in those statutory words but in two decisions. One was *McKee v Valuer-General* [1971] NZLR 436 (CA). That was a case in which the Court held that the increment in value attributable to a conditional use consent obtained before the date for valuation represented one of the "improvements" and formed no part of the "unimproved value". In assessing the "unimproved value" the valuer had to put the consent to one side as if it had not been obtained and instead assess the value of the land with the chance of obtaining such consent. Mr Dugdale pointed out that delivering the joint judgment of himself and Richmond J, Turner J said at p 442 that "he [the valuer] must therefore, *as on that date* the date for valuation], consider the land as if the buildings actually erected upon it had been removed and the land were again vacant."

We agree that taken literally, and divorced from its context, Turner J's remark in *McKee* might be thought to focus upon the state of affairs as at the date of valuation, as distinct from the hypothesis that the buildings had never been erected in the first place. However we do not see that as the point of the dictum at all. In context, it was simply one way of making the point that to arrive at the unimproved value the buildings had to be ignored. In that case it would have made no difference whether one focused upon the state of affairs as at the date of the valuation or hypothesised that no buildings had ever been erected, and no conditional use consent ever given, in the first place. The conditional use rights at issue in *McKee* were in no way analogous to existing use rights, as the Court in *McKee* was at pains to point out (see p 445 line 50). The potential for obtaining a conditional use consent was something which ran with the bare land independently of any steps which might have been taken by the owner. That is the antithesis of existing use rights. They are wholly dependent upon improvements which have been effected to the land. To suggest that Turner J's dictum limits the hypothesis to the state of affairs as at the date of the valuation is therefore to take the dictum out of context. It would also conflict with the wording of the statute and the binding Privy Council decision in *Toohey.*

The other decision referred to by Mr Dugdale was *Tetzner v Colonial Sugar Refining Co Ltd* (1957) 14 Valuer (NSW) (PC) referred to in *Valuer-General v General Plastics (NZ) Ltd* [1959] NZLR 857 at 860. In *Tetzner* the Privy Council held that in determining the unimproved value of land on which there stood a sugar mill in Lautoka, Fiji, the valuer could take into account the effect of the mill upon the value of land in Lautoka generally. The peculiarity in that case was that improvements to the subject land had influenced the value of land in the whole district. It would have been odd if the unimproved value of the subject land had to be uniquely lower than the rest of the land in the same district. The solution adopted was that for that purpose value levels in the district as a whole could be taken to impact upon the unimproved value of the subject land.

It cannot be denied that in *Tetzner* the Privy Council departed from the strict hypothesis that no improvements had ever been effected to the subject land in the first place. But that was a case involving a very peculiar situation in which a distinction was drawn between the subject property on the one hand and the rest of the locality on the other. The statutory hypothesis was applied in conventional terms when considering the direct effects of improvements upon the subject property. Of course the present case involves nothing peculiar of the kind seen in *Tetzner.*

One must then turn to two authorities against the objector's proposition. One is *Valuer-General v General Plastics,* a decision expressly approved by the New Zealand Court of Appeal in *McKee v Valuer-General* at p 445 line 50. In that case the existing use rights argument now advanced by the objector was considered and rejected. Delivering the judgment of the Land Valuation Court Archer J said (p 860 line 22):

> "It follows, in our opinion, that if, in accordance with the authorities cited, we are required to disregard the improvements in order to assess the unimproved value of the subject land, we must also disregard the right to continue to use this property for industrial purposes which is a right flowing entirely from the existence of the buildings and from the uses to which they have been put."

The Court considered that the decision in *Tetzner* was "so far dependent on its own special facts as to have little relevance to the particular problem with which we are now faced." (p 861 line 45). Mr Dugdale submitted that *General Plastics* could be distinguished on the basis that at the time of that decision the Town and Country Planning Act 1953 conferred no right to reconstruct, alter or add as permitted under s 91 (1) of the Town and Country Planning Act 1977. It is true that in *General Plastics* the Court referred to the absence of any right to require substantial reconstruction, alteration or addition under the Town Planning laws as they then stood but we do not read the decision as in any way turning upon that point. The Court was relying upon *Toohey* and the much more fundamental concept that the land was to be valued as if the improvements to the land had never been effected.

The same view was taken in *Parata v Valuer-General* (1984) Land Valuation Cases 599. There the Land Valuation Court was similarly faced with the relevance of existing use rights for unimproved value purposes but unlike *General Plastics* the matter was governed by the legislation now before us, the Town and Country Planning Act 1977. That did not deter the Court from applying *Toohey* and *General Plastics.* Existing use rights were to be ignored. The Court specifically addressed and rejected the argument that changes in existing use rights between the 1953 and 1977 Acts warranted a departure from *General Plastics.* It is true that the judgment of the Court Roper J and Mr R.J. MacLachlan focuses upon s 90 of the 1977 Act rather than s 91. But we do not see what difference a reference to s 91 could have made. Section 91 merely concerns the detailed consequences of existing use rights once those rights have been established as relevant. It says nothing as to whether existing use rights are relevant to begin with. The theme of these decisions is that in determining unimproved value one must assume that the physical improvements have never been effected and that individual consents have never been obtained. *McKee* applies that approach to conditional use rights and *General Plastics* and *Parata* apply it to existing use rights. *Tetzner* involved a peculiar situation of no relevance here. In this context the bare land is valued as if no ad hoc planning rights had ever accrued.

We conclude that the unimproved value in the present case is to be assessed without regard to existing use rights.

Unimproved value on the merits

In evidence before us four valuers gave their opinions as to the 1990 unimproved value without regard to existing use rights. Mr Power, the valuer who had effected the valuation on behalf of the Valuer-General, arrived at $125,000, Mr Campbell, called by Mr Morgan, $140,000, Mr McDowell, for the objector, $255,000 and Mr Reynolds, also for the objector, $350,000. Our review of the evidence follows.

Nature of the property

The property is a long strip of lakeshore land having an average depth of 100 metres. It has riparian rights to 1.4 kilometres of foreshore, 800 metres of which consist of four main sandy beaches and one minor one. From the foreshore the property's contour rises towards the rear boundary where it adjoins a pine forest. Approximately two fifths of the property has a north-easterly aspect and the remaining three fifths a south-easterly one. There is a predominant cover of light native bush together with some exotic plantings including a grove of eucalyptus. Among the tress are many secluded building sites, all of which have uninterrupted panoramic views over Lake Rotoma and the surrounding rural areas. Of particular importance are the four independent bays separated by headlands. Each has a long uninterrupted beach giving access to the lake. The beaches are beautiful ones. The lake offers trout fishing, water-skiing, boating and swimming. The water quality is high without the weed problem affecting most of the other lakes in the region. The property is private and secluded.

As at 1 June 1990 the area was zoned Rural 1 in the operative scheme plan. As a predominant use the owner could erect one dwelling-house plus one subsidiary household unit. The total lfoor area of the subsidiary unit could not exceed 65 square metres and it had to harmonise with the principal dwelling. On the other hand there was nothing in the scheme plan to preclude siting of the subsidiary unit at a point well away from the principal dwelling. It would have been feasible, for example, to have a principal dwelling on the most prominent headland (Rogers Point) and a subsidiary unit occupied by a caretaker, friend or family member at one of the beaches.

The property has potential disadvantages, although the extent to which they are viewed as such depends very much upon the needs and expectations of the owner. The principal one is lack of road access. At times the lessees of the adjacent pine plantation have allowed occupiers of the subject property access to a public road via a partially metalled farm track. We accept Mr Morgan's case that such access could not be relied upon and that it should be ignored for valuing purposes. For all practical purposes access is confined to transport by individually owned boats departing from a public boat ramp and jetty adjacent to the state highway nearby. A boat trip of some 650 metres was required to the first of the beaches on the property. We are unable to accept that in any but the most unusual conditions wave heights on the lake would render such a trip difficult or dangerous. Boat trips from the public ramp around Rogers Point to the north-easterly facing beaches are not of consequence for present purposes since the property is to be valued as a single unit. The owner would land on the first conveniently available beach.

A wide range of properties was surveyed, both with and without road access. We have no doubt that under normal circumstances lack of road access will reduce value. It will be a particularly important consideration where properties are used as permanent homes given the commuting burdens which result. We are less convinced that this will always result in a reduction in value where the property is used as a holiday resort, especially where the property is of substantial size and value. Under those circumstances wealthy owners will often be attracted to the seclusion and sense of adventure offered by a property accessible only by boat and in some circumstances can even regard it as a bonus. It must be remembered that in holiday home terms this is a huge property with a shoreline of no less than 1.4 kilometres - hence its appeal to a wealthy buyer seeking seclusion rather than a more modest buyer seeking convenience. Another potentially adverse feature which received considerable prominence in the evidence was the crime and vandalism experienced by the 17 bach owners currently occupying the property. Apparently a sharp deterioration began in about 1990. While this is relevant it should not be exaggerated for present purposes. A valuation as at 1990 will not be affected by a sharp deterioration since then. Security problems are endemic to remote holiday properties in most parts of the country. A purchaser seeking a property of this kind would have to approach it on a comparative rather than absolute basis. There would also seem to be an important distinction between the experiences of the current 17 bach owners visiting their individual properties for holidays on infrequent occasions on the one hand and the situation of a single wealthy owner of the whole property on the other. The latter would almost certainly construct a large property with sophisticated security systems, probably protected also by a resident caretaker.

Another potential disadvantage is that Rotoma is readily accessible for day-trippers. At times some of these would want to land on one or more of the subject property beaches for picnics. We accept that in practice it may be difficult fully to police the riparian rights in that respect. On the other hand we doubt whether this will affect the property other than the beaches and even in their case it presumably applies only for limited times of the year and during limited times of the day. The lack of public services - water, sewage, power and telephone - should be recognised as factors reducing value. They will add to the cost through the need to provide alternatives. We doubt whether the same could be said of alleged health problems associated with the adjacent pine plantation. No doubt the associated pollen and spraying can affect people at certain times but there is no convincing evidence that this would have any appreciable impact upon the value of the land. Fire risk posed by the adjacent plantation is perhaps a distant consideration but again not one which we feel would have appreciable impact upon value. Fluctuating lake levels are a relevant consideration at Lake Rotoma although in our view the effect upon value would be moderate. Overall we would regard this as an unusually attractive property given the choice, beauty and length of its beaches, the quality of the lake, the attractive natural setting of trees and vegetation and the sense of privacy and seclusion. It must be rare that a property with these features will come on the market. The lack of road access and public services undoubtedly represent significant disadvantages to the majority of buyers. However we question whether they would deter a potential wealthy owner of the whole property who would erect a large secure dwelling-house and a subsidiary unit for a caretaker or family member, the whole project being designed around a holiday resort for intermittent owner-use.

Optimum use of the property

We are satisfied that the optimum use of the property in its unimproved state as at 1 June 1990 was to use it as a site for a substantial private holiday home together with a minor dwelling. The evidence indicated that other permitted uses of the property would have been uneconomic compared with its value for holiday purposes. The evidence also indicated that consent for departure from existing town planning restrictions was unlikely to be forthcoming.

The evidence as to type and origin of the owners of lakeside properties at Rotoiti and Rotoma, and also coastal properties further afield, suggests that the owner would probably have his or her permanent residence outside the district. Given the size and nature of this particular property the purchaser would almost certainly be a wealthy one. He or she would personally visit the property with family and friends relatively infrequently. For such a person the logistics of the boat access and adequate security measures would not, we think, pose a major difficulty.

In 1990 the market for that class of buyer was depressed as an aftermath of the 1987 stock market crash. On the other hand, the evidence also established that throughout that period there remained a small sector of buyers from New Zealand and overseas, particularly Europe, who continued to be attracted by properties having unique qualities of this kind.

Comparative Sales

It is not to be expected that the valuers who gave evidence could have come up with closely comparable sales evidence. The property has unique characteristics. Potential purchasers would have come from that select group who are prepared to pay extra for rarity and uniqueness. However, we have analysed those comparative sales which were provided.

The first grouping related to lakeside properties on Lake Rotoma itself. Most of these had relatively low values due to their leasehold tenure, difficulties over compensation for lessee's improvements and the consequent disincentive against the erection of substantial dwellings. The accumulation of these properties of modest standard has in turn impacted upon the value of residential real estate in those areas of Lake Rotoma. This is distantly relevant to the value of the subject property but the two areas are separated by the breadth of the lake. Sales evidence relating to those properties is of peripheral value only.

Of only marginally closer relevance was the sale of a freehold lakefront property at 190 State Highway 30, Lake Rotoma in August 1990 for $165,000 without chattels. We accept Mr Campbell's estimate of $85,000 as the land value portion of the sale price. However apart from sharing the same lake there is little which this property has in common with the subject property. Up to two thirds of the 1,695 square metres of the State Highway property is subject to intermittent flooding. There is little privacy or seclusion, the property being adjacent to a camping ground and service station. It is in a different category altogether when it comes to size, length of shoreline, seclusion and natural beauty.

Evidence was given as to the sale of small lakeside lots on Lake Rotoiti with land value in the range $125,000 to $190,000. Rotoiti is a larger and more prestigious lake than Rotoma. But in no sense can these small lots be compared with the major holiday retreat which the subject property represents. Its seclusion and huge shoreline put it into a different category altogether.

Interesting evidence was also given as to a series of eleven 4 hectare lifestyle blocks at Ohakana Island in the Ohiwa Harbour at Ohope. One sold in November 1989 for $195,000 exclusive of chattels and another in September 1990 for $145,000. Mr Campbell attributed approximately half to the land value. He estimated that these properties would have sold for approximately twice those sums but for the lack of road access. Some other details were contentious but the fundamental question is whether the unimproved sites at Ohakana are really comparable to the exclusivity of the subject property with its huge coastline and choice of beaches. A true comparison would have involved the purchase of Ohakana Island by a single wealthy purchaser seeking an exclusive holiday resort with attractive beaches abutting a recognised recreational lake. The Ohakana evidence should not be dismissed as irrelevant but the figures revealed can in no sense be directly transposed to the subject property.

Next there was evidence as to the sale of individual lots on the Coromandel Peninsula in the range $180,000 to $185,000. That might suggest some comparability between Coromandel and Rotoiti properties of similar size and water access but for the reasons mentioned earlier, the subject property is very different from the normal beachfront lot in size, seclusion, access and location.

Finally there was evidence of a series of large coastal blocks on the Coromandel Peninsula, one or two of which shared access characteristics similar to the subject property. Adjusted land prices were in the general range $300,000 - $350,000. The evidence is helpful but the analogy should not be pressed too strongly. These coastal properties would not be subject to the same volume of day-trippers as Rotoma and in most cases they were larger. On the other hand they did not enjoy the range of beaches presented at Rotoma.

Valuation conclusions

It is no criticism of the four valuers who gave evidence that they were unable to find any closely comparable property sale. It would be rare for a large Rotorua district lakeside property of this kind to come on the market - particularly with the unusually long shoreline divided into attractive beaches, the beauty of the natural surroundings and the seclusion. The range of potential buyers for such a property would be small but the rarity value would drive up the price. A large block with its own secluded beaches is much more difficult to find than a single lot with a shared beach and neighbours in close proximity. The lack of road access significantly reducing value for the vast majority of properties would in our view diminish greatly in significance for the seriously affluent seeking seclusion. On the other hand one must not overlook the generally depressed market as at 1 June 1990. Where a property has the unusual features of this one, and where no evidence of directly comparable sales has been adduced, the value adopted must be the result of a robust value judgment. Of course the sales referred to must be taken into account, and likewise an attempt at adjustment for the differences, but one should not become so preoccupied with such figures that one does not see the wood for the trees. In the end the only question is what this particular property might have been expected to fetch if offered for sale on the open market in its unimproved state in June 1990. The point is illustrated by the ambivalence in the evidence of Mr McDowell. His carefully calculated value was $225,000 but when asked what the property would have actually sold for his answer was "$225,000 would be the absolute minimum. I believe it would have sold for up to $500,000". In the end there is, or should be, no difference between value and expected sale price. On I June 1990 the market generally was depressed. Against that, there remained a strand of affluent purchasers prepared to pay top money for special properties having the unique characteristics of this one. Bearing all those considerations in mind we would fix the unimproved value as at 1 June 1990 at $240,000.

One of the valuers included an adjustment for GST. The legal test for unimproved value is simply what the bare freehold land would have sold for on the open market. Whether either buyer or seller might have been affected by goods and services tax was a subjective question for that individual. For present purposes the parties to the hypothetical transaction must be regarded as sellers and buyers without special revenue burdens or benefits. In our view the definition of "unimproved value" precludes any reference to the possible complications of goods and services tax.

Result

The objection is allowed. The unimproved value of the subject land as at 1 June 1990 is fixed at $240,000.

Leave is reserved to the objector to file a memorandum as to costs within 10 days of the delivery of this judgment, the respondents to file a response within 7 days of receiving the objector's memorandum and the objector to have a further 5 days within which to file any reply.

RL Fisher J

Mr I Lyall

Readers Please Note...

Due to a production transcript error the charts included in Rodney Jefferies article on "The Proposed Maori Reserved Land Leases Compensation Model Is It Fair?" *(NZIV Property Digest September 1996 pages 32 & 33) were distorted. We apologise for this error and advise any readers requiring a correct version of either of the charts to contact the Editor.*

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