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new zealand property JOURNAL

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NZ Property Institute benefits

The New Zealand Property Institute was launched in 2000 to take the profession into the 21st century. This followed overwhelming support for a new organisation by members of the New Zealand Institute of Valuers (NZIV), the Institute of Plant 6r Machinery Valuers (IPMV), and the Property & Land Economy Institute of New Zealand (PLEINZ).

The Institute has a membership of 3000 key property professionals, who provide services in a number of property related areas involving people, places and spaces. These include; property management, property consultancy, property development, property valuation (rural, residential, commercial and industrial), facilities management, plant and machinery valuation, financial analysis, real estate sales and leasing, project management, and others.

The Institute has 17 branches across provincial and metropolitan New Zealand, a number of overseas members, and is affiliated to a number of other international property organisations.

The Institute's business plan has 3 key goals:

- To become the first choice pre-imenent organisation for property professionals to belong in New Zealand;
- To lead and influence the New Zealand property sector and its environment;
- To provide professional support of members to enhance public confidence in the profession.

The institute promotes a code of ethical conduct and provides a range of membership services and benefits.

The institute provides a range of products, services and benefits including:

- The Property Business - published bi-monthly in partnership with AGM Publishing. This is the institute's lfagship publication, which has established itself as the leading property publication in New Zealand.
- PI JOBMail - a weekly email service to all members advertising jobs available in the sector.
- PI Property Card - each of PI 3000 members are entitled to the PI Property Card. This gives entry to institute events at discounted prices along with access to discounted products and services available only to members. For example 30% subscription discounts to the award winning Unlimited magazine, office supplies, accommodation - average savings have been estimated of over $15,000 across a range of products.
- PI Property Awards - the Institute promotes professionalism and recognises excellence by providing awards and scholarships at a range of levels to people involved in property
- PI Property Network. This is the network of 17 branches across the country. It provides a local focus point for institute social, networking and educational activities.
- P1 Property Registration. This is an added status conferred by the PI Registration Board in the streams of Plant and Machinery Valuation, Property Consultancy, Property Management, and Facilities Management. The Valuers Registration Board registers Valuers.
- PI Property Profession. This is the Institute's national committees and administration systems, which sets standards, undertakes disciplinary proceedings and provides the professional backing for the profession.
- PI Property University This is the Continuing Professional Development programme of the Institute for its members. By offering local and national courses and partnering with other providers the Institute enhances the professional learning of members.
- PI Property Careers - a web based service being developed which will provide an online market for property related jobs.
- PI Career Foundations - a key package, which provides additional support, targeted at university students and graduates needs.
- PI Property Publishing includes discounted textbook for student members, the publication of the Property Journal (formerly the Valuers Journal), PI Statscom, and other publications.
- P1 Library Services. The Institute has an extensive range of publications on all aspects of the property profession, members are welcome to request information on subjects to be supplied.
- P1 Property Global. The institute has developed a global strategy to ensure that New Zealand based members can access international research and practice in some overseas countries. In addition PI has signed and agreement with the international Facilities Association based in the USA which gives PI members membership at NZ$190 instead of over $700. Other relationships have been developed with the Australian Property Institute, RICs, Singapore, Canada, Hong Kong and further developments are in the pipeline.
- www.property.org.nz the PI website provides information on the Institute and its members and is being developed further.
- Other PI products and services. The Institute is also looking at partnering with other organisations to bring more benefits to members and these will be announced as they are progressively launched.

To become a New Zealand Property Institute member: There are eight levels of membership that recognise professionalism and achievement Student, Graduate, Affiliate, Associate, Full Member, Senior Member, Fellow and Life Member. Not everyone is able to become a New Zealand Property Institute member. To check out how you can become a member either contact us, go to our website for more information, or contact Mike Clark, chairman of the PI membership committee at mac@seagars.co.nz

Submitting articles to the New Zealand Property Institute Property Journal

Notes for Submitted Works

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

Deadline for contributions is not later than the January 10, May 10 and September 10 of each year.

Format for Contributions

All manuscripts for publishing are to be submitted in hard copy - typed double-spaced on one side only of A4 sized paper and also in Microsoft Word document format on IBM compatible 3.5" disk or alternatively emailed to head office.

Any photographs, diagrams and illustrations intended to be published with an article, must be submitted with the hardcopy. A table of values used to generate graphs must be included to ensure accurate representation. Illustrations should be identified as Figure 1, 2 etc.

A brief (maximum 60 words) profile of the author; a synopsis of the article and a glossy recent photograph of the author should accompany each article.

Manuscripts are to be no longer than 5000 words, or equivalent, including photographs, diagrams, tables, graphs and similar material.

Articles and correspondence for the PI Property journal may be submitted to the editor at the following address: The Editor, PI Property Journal, PO Box 27-340, Wellington.

Why become a member of the New Zealand Property Institute?

NZ Property Institute's primary objective is to represent the interests of the property profession in New Zealand.

The New Zealand Property Institute:

- Promotes a Code of Ethical Conduct
- Provides Registration the formal recognition of experience and certified qualification of excellence
- Provides networking opportunities
- Assists in forming professional partnerships
- Provides a marketing tool in the approach to new and existing clients
- Provides The PROPERTY Business 6 times a year in partnership with AGM Publishing
- Distributes national P1 newsletters and email updates
- Delivers a National and Branch CPD programme
- Offers membership with the International Facility Management Association (IFMA)
- Offers other international linkages
- Offers networking opportunities between the profession and the universities through the PI "Buddy Programme"
- Promotes annual PI Industry and Student Awards
- Delivers an annual PI Conference
- Offers links and information through the PI website wwwpropertyorg.nz
- Provides regular branch breakfast and lunch seminars
- Promotes the annual Property Ball in partnership with the Property Council
- Provides PI Confidence index and PI JobMail

For more information on our services to members contact the Pl National Office:

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Code of Conduct for Expert Witnesses

Valuers are referred to Rule 330A which requires an expert witness to comply with the Code of Conduct

1. A party to a proceeding who engages an expert witness must give the expert witness a copy of the Code of Conduct set out in Schedule 4.
2. An expert witness must
   (a) state in any written statement of the proposed evidence of the witness served under rule 441B or rule 441C or at the time of giving oral evidence or in any affidavit containing the evidence of the expert witness that the expert witness has read the Code of Conduct and agrees to comply with it:
   (b) comply with the Code of Conduct in preparing any written statement of the proposed evidence of the witness to be served under rule 441B or rule 441C or in giving any oral or affidavit evidence in any proceeding.
3. The evidence of an expert witness who has not complied with subclause(2)(a) may be adduced only with leave of the court.

Code of Conduct for Expert Witnesses

Duty to the court

I. An expert witness has an overriding duty to assist the Court impartially on relevant matters within the expert's area of expertise.
2. An expert witness is not an advocate for the party who engages the witness.

Evidence of expert witness

3. In any evidence given by an expert witness, the expert witness must
   (a) acknowledge that the expert witness has read this Code of Conduct and agrees to comply with it:
   (b) state the expert witness' qualifications as an expert:
   (c) state the issues the evidence of the expert witness addresses and that the evidence is within the experts area of expertise:
   (d) state the facts and assumptions on which the opinions of the expert witness are based:
   (e) state the reasons for the opinions given by the expert witness:
   (f) specify any literature or other material used or relied on in support of the opinions expressed by the expert witness:
   (g) describe any examinations, tests, or other investigations on which the expert witness has relied and identify, and give details of the qualifications of, any person who carried them out.
4. If an expert witness believes that his or her evidence or any part of it may be incomplete or inaccurate without some qualification, that qualification must be stated in his or her evidence.

   If an expert witness believes that his or her opinion is not a concluded opinion because of insufficient research or data or for any other reason, this must be stated in his or her evidence.

Duty to confer

6. An expert witness must comply with any direction of the Court to
   (a) confer with another expert witness:
   (b) try to reach agreement with the other expert witness on matters within the field of expertise of the expert witnesses:
   (c) prepare and sign a joint witness statement stating the matters on which the expert witnesses agree and the matters on which they do not agree, including the reasons for their disagreement.
7. In conferring with another expert witness, the expert witness must exercise independent and professional judgment and must not act on the instructions or directions of any person to withhold or avoid agreement.

Earl *Gordon,* Chairman *of New* Zealand *Property* Institute's Professional *Practices Committee,* supplied the *information* above.

of economic concepts to land resources. This point is made clear in the existing Valuation Standard 1 (market value basis of valuation) as well as in Guidance Note 4 (use of discounted cash flow in property valuations). An economic underpinning is fundamental, especially in the case of rent reviews where there is limited `comparable' market evidence. This is the case for ground leases because there are few new long term renewable ground leases being entered into, and thus ground rental valuations should involve the application of a robust economic hypothesis.

In the absence of new leasing evidence, it has become entrenched as a valuation practice to *rely* on previous arbitration awards as evidence of ground rental rates. This practice has created a self-perpetuating pattern of meaningless numbers which have no logical connection to economic reality. As such, arbitration awards per se are not evidence of anything about the market. That this approach is erroneous is clear from the carefully reasoned decision of justice Hoffman (now Lord Hoffman) in Land Securities. His Honour pointed out that:

(a) an arbitration award is based on a hypothetical not a real transaction, it is merely the arbitrator's opinion of what would have happened;
(b) that opinion is based on the evidence before that arbitration only, it is not admissible as expert evidence;
(c) in any event, the arbitrator from the earlier hearing cannot sensibly be cross-examined;
(d) if any evidence of the earlier arbitration is truly relevant, it can and must be tendered directly (and tested) again; and
(e) there is no justification for an irrelevant inquiry into the correctness or otherwise of the earlier award.

We note that paragraph 6.4 of the current NZVI Valuation Standard 1 - Market Value Basis of Valuation, states:

Market Valuations *are generally* based *on information regarding comparable property.* The valuation *process requires a* Valuer *to perform adequate* and relevant *research, to perform competent* analyses, and to draw *informed and supportable judgements.* In *these processes,* Valuers *do not accept* data without question, but should *consider* all *pertinent* market *evidence,* trends, comparable transactions, *and other information. Where* market data *are* limited, *or* essentially non existent (as *for* example with certain specialised *property),* the Valuer must make *proper* disclosure *of the* situation and must state *whether the* estimate is *any way* limited by the inadequacy *of the* data. All valuations *require exercise of a* Valuer's *judgement,* but *reports* should disclose *whether the Valuer* bases (sic) *the* Market Value estimate *support* on market *evidence, or* whether the estimate is *more* heavily based *upon the* Valuer's judgement because *of the* nature *of* the *property* and lack *of comparable* market data.

The reliance on previous arbitration awards as market evidence is inconsistent with the above standard. In our experience the same valuers who rely on previous arbitration awards also advocate that the focus is on the prudent lessee. They also choose to disregard and accept the significant relationship between yields analysed from the sale of ground lessors interests and ground rent rates. Given that the role of a valuer is to interpret the market not set it, this is a major deficiency in their analysis.

Importantly, the Courts will only rarely entertain an appeal and overturn an arbitration award if there is an error of law on the face of the award. The Courts will not set aside an award if there is a valuation error.

3. Shortcomings in the conduct of valuers

When parties to a contract have a dispute over price and registered valuers are involved, then the profession is representing that they have expert ability to resolve that dispute. Furthermore it is often a requirement of many lease agreements that the arbitrators are valuers of the New Zealand Institute of Valuers. Given the requirements of the Code of Ethics that a member must maintain the strictest independence and impartiality in the performance of professional duties, any valuation dispute should not be adversarial. Sadly this is not the case, with some valuers appearing to be acting as advocates and breaching confidentiality.

Our experience is that valuers cannot agree basic valuation principles. Some valuers advocate that a market rent is the rent that a prudent lessee shall give and when coupled with partial and flawed analysis this creates widely diverging opinions as to rental levels. These irreconcilable differences ultimately lead the parties to arbitration. So that you can appreciate the magnitude of the problems, the cost to the lessors of the last four arbitrations, involving counsel and a range of witnesses, totalled $1,292,721. The average cost for each arbitration was $323,180 and we would expect that each lessee had similar costs.

With costs of this magnitude, there are clearly very serious problems. We believe that these problems are largely attributable to the fact that there are no mandatory standards governing rental valuations, nor are there standards governing the conduct of valuers engaged in undertaking rent reviews and arbitrations. In addition there is no process to obtain a ruling on correct valuation methodology

Recommended Actions

We note the comment in the Property Business December 2002 issue that property is a $400 billion plus asset base in New Zealand. If the valuation

a leasehold value arises only where there is a positive difference between a property's market rent and the contract rent. Where a contract rent exceeds the market rent, a negative leasehold value may occur ...°

The application of the International Valuation Standards definition of Leasehold Value would mean that when the contract rent and the market rent are equal (which should be the case on the date of the rent review) then the value of the lessee's interest in the land is zero. If the lessee's interest in the land is zero, then the lessor's interest in the land will be equal to the freehold land value. (The other component of the lessee's interest is the value of the improvements, but it is not relevant in this case because the improvements are to be disregarded.)

Thus the operation of market forces, and elementary economics means that the rent is at market when the following conditions are met:

(i) The present value of the future rentals equals the freehold land value;
(ii) There is no transfer of wealth from either party to the other;
(iii) On the date of the rent review the value of the lessor's interest and the value of the unencumbered freehold land are equal;
(iv) That the ground rental rate is equal to the capitalisation rate for a sale of the lessor's interest on the date of the rent review.

In summary then, the core propositions that we believe should underpin ground rental valuations, and which the NZ Property Institute should move quickly to adopt, include the following:

(A) In establishing a market ground rental (assumed to be bare land, free of improvements) the assessment should be undertaken on the basis of rational parties: that is, the hypothetical willing but not anxious lessor entering into a new lease for the estate and fee simple in the same terms as the subject lease (save for commencement date) with the hypothetical willing but not anxious lessee. These rational parties are not captive, and have access to the knowledge of the market and other options available as would be available from well-informed and competent advisors. The actual parties to the transaction must be ignored.

(B) The "classical" method may be relied upon if the market data is sufficiently cogent. It is undeniable that in fact there are very few new long-term ground rentals being entered into on the hypothetical basis outlined in (A), above. Further, there is a risk that such a minute number of such transactions may be distorted by the particular source of (valuation) advice taken by one or both parties to any such new leasing.

(C) While not directly comparable in the "classical" sense, shorter and non-renewable leasings may provide cogent evidence for ground rental valuations in the relevant area, bearing in mind that, in the ordinary course, a short term lease will provide a floor for long term leases; and that the expanded rights available to a lessee under a long term lease will ordinarily command a significantly higher rental than a short term lease of the same land.

(D) In many cases the "traditional" method will be appropriate: that is, Rental = Land Value x Ground Rental Rate. This is essentially a restatement of the income capitalisation valuation formula (Land Value = Rental = Capitalisation Rate). Both propositions reflect the accepted principles that:
(i) the market value of land is the present value of the future income expected from that land; and
(ii) rent determines value.

(E) As a matter of logic and good economics, the ground rental rate is equal to the market capitalisation rates that would apply to the sale of the lessor's interest on the date of the rent review. On that rent review date, the contract rent (reflected by the ground rental rate) will be equivalent to the market rent (reflected by the capitalisation rate).

(F) If, on review date, the contract rent and the market rent diverge, a "transfer of wealth" would occur between the parties. As willing, rational and non-captive parties would not enter into a new lease at a rental that merely transferred wealth, such a divergence would involve an incorrect application of valuation principle.

(G) Given (A), (D), (E) and (F), above, market prices paid for lessors' interests may provide cogent evidence in relation to ground rental valuations. Although, as time passes and the market changes, there may be a divergence between the contract rent and the market rent, the same considerations that apply to a lessor entering into a new ground lease apply as well as to an investor seeking to acquire such a position by acquiring an existing lessors' interest.

(H) In entering into a new lease, or acquiring a lessor interest, the party about to become a lessor will rationally consider all the alternative options for use of their capital. This means that ground rental valuations must be undertaken in the context of wider investment opportunities for the lessor.

(I) Conversely, the lessee (or anyone seeking to acquire a lessee interest) will recognise that the alternative method of access to the property in question (or a proxy for it) is to purchase the freehold. There is nothing in economic or valuation principles that supports that a ground lease provides an inherently lower cost of access to land for a lessee.

Q) In entering into a long-term ground lease, both parties take risks. The lessor takes the risks of major changes in land demand generally in the area that is, a decline in capital value - which the lessee does not share. The lessee takes the risk of developing the land to its highest and best use in a manner, which utilises their competitive advantages and is designed to generate a return which not only covers the rental but also provides a reward for the skills and capital involved in the development.

(K) The capital asset pricing model, and other reputable and rational methodologies based on discounted cash flow projections, can provide valuable assistance in ground rental valuations, provided it has recognised that such methodologies do not eliminate the requirement for judgement most obviously, in the choice of a beta in the CAPM.

(L) Reliance on ground rental rates determined in previous awards, or in settlements based on such awards, is misplaced. Even if admissible as evidence (a matter of debate), references to previous arbitration awards invites relitigation of the earlier arbitrations, and such reliance bears no resemblance to the legal use of precedent (which relates to propositions of law, not to particular factual circumstances). Further, use of such awards in settlements in the past has created a self-perpetuating pattern with no logical connection to economic reality.

Valuation of Business Goodwill for Compensation under the Public Works Act 1981

Introduction

As demands on public transport and other infrastructure increase, there is likely to be increasing use by local authorities and Requiring Authorities of the Public Works Act 1981 ("PWA") to obtain land for necessary public works. While these plans may mostly affect private landowners, more and more businesses will be affected by the need for land.

The PWA enables a local authority or the Minister of Land Information to acquire, by voluntary agreement or to compulsorily take, land or an interest in land for any "public work". The latter term is broadly defined, and essentially applies to any project undertaken by a Government department or local authority.

In addition to the Crown and local authorities, there are also a wide range of Requiring Authorities, who are generally infrastructure providers and are approved as such under the Resource Management Act 1991. They are then able to obtain a designation over land they require, and request the Minister to acquire or take that land under the PWA for their benefit. For convenience, we refer to Requiring Authorities, the Crown and local authorities together as "acquiring authorities".

When land is acquired or taken under the PWA, compensation is payable, and Part V of the Act sets out the various elements of compensation to which the landowner may be entitled. This article is concerned with one of these elements, the entitlement under s 68 (1) (b) to compensation for the loss of a business where that business is closed down and not relocated to an alternative site. For convenience, we use the term "acquired" to refer to both acquisitions and takings:, Part V applies equally to each.

Section 68 PWA

The PWA makes express provision for compensation for what it terms the "loss of goodwill" in a business. Section 68(1)(b) states:

The owner of any land taken *or acquired under* this Act *for* a public *work* who has a business located on that land shall *be* entitled to compensation *for* loss *of the* goodwill *of any* such business ...

There is surprisingly little case-law on this section. The previous statute the Public Works Act 1928 had no equivalent provision to s 68, and business losses were generally compensated under the obligation to make full compensation for the acquisition or taking of land. Little assistance can therefore be gained from case-law under the former Act, although general observations in case-law regarding business valuations can be of assistance in interpreting and applying s 68.

Section 68 must always be considered in the light of s 60(1), which sets out a landowner's overall or basic entitlement to compensation, and provides that:

where under this Act any land is acquired *or* taken *for any public work* ... and *no other provision* is *made under* this *or any other Act for* compensation *for* that acquisition ... *the owner of* that land shall be entitled to full *compensation from the Crown* (acting through the Minister) *or* local authority, as *the case* may *be, for* such acquisition ...

Valuation Process

Goodwill is inherently an accounting concept, and the valuation of business goodwill under s 68 is therefore largely based on the financial statements of the business concerned. Land Information New Zealand, which must ultimately approve any compensation settlement on behalf of the Crown, requires the previous three years' financial statements as a basis for assessments of goodwill. While this may be sufficient for many situations, in some cases (especially where recent years have been affected by the prospect of acquisition or are not representative of the business in the future) it may be necessary to use the financial statements for a longer period and make appropriate adjustments.

LINZ has Accredited Supplier Standards, which require negotiation agents acting for an acquiring authority to use Chartered Accountants rather than Registered Valuers to assess business goodwill. If a valuer assesses the business goodwill and the assessment is deficient, there are obvious risks in

professional negligence for a valuer. Even if the assessment is not deficient in any way, there is also a risk to the landowner or acquiring authority that, although an agreement has been reached between them, LINZ may decline to approve the settlement on the grounds of non-compliance with its own Standards. LINZ may be prepared, though, to accept in individual cases an assessment made by valuers, but express approval would be required to minimise the risk just outlined.

Although the valuation process is not primarily a legal process, legal considerations drawn from the analysis above apply to the process. A common (but not the only) method employed is to assess the annual earnings produced by the business, capitalise that using an appropriate discount rate, deduct the tangible assets, and so arrive at a goodwill figure. We adopt his method for the purposes of illustrating the application of the relevant legal principles.

Legal Principles

Drawing on ss 60 and 68, and in the absence of any case-law to the contrary, the following legal principles governing valuations of business goodwill under s 68 (1) (b) can be identified:

- the actual business on the land being acquired must be the subject of the valuation valuations drawing on industry standards or averages are quite inappropriate;
- the valuation must be of the loss that the land owner is actually suffering as a result of the acquisition, and not of the market value of the business on the open market; and
- the valuation must be based on the actual financial statements for the business, adjusted only on restricted grounds.

These principles mainly relate to the process of determining, from the financial statements, the annual earnings from the business.

Which Business actual or industry average?

The words of s 68(1)(b) are very clear, that the actual business is to be valued. The section says: "the owner of any land ... who has a business located on that land shall be entitled to compensation for ... loss of the goodwill of any such business". This is also consistent with the landowner's overall entitlement under s 60, which requires "full compensation" to be paid for the owner's loss, not for the industry average owner's loss.

On what basis: market or earnings?

Some negotiation agents for acquiring authorities propose that the owner should receive the market value of the business or what a willing buyer would pay a willing seller on the open market for the business which in some situations may differ significantly from the value indicated by the financial accounts, possibly because the owner is able to operate the business in a way other operators could not.

In our view, such an approach is entirely inconsistent with the PWA. The owner is not losing the market value of the business, but the annual earnings flows as recorded in the financial accounts. Section 60 requires the acquiring authority to make "full compensation" for the owner's loss, which must therefore be those earnings flows.

If the valuation were to be based on the market value, words similar to those that appear in s 62 in relation to the valuation of land "that amount which the land if sold in the open market by a willing seller to a willing buyer on the specified date might be expected to realise" would have to appear in s 68 also. No such words appear, and it would be quite inappropriate to insert what Parliament has clearly excluded.

In one of the few cases dealing with business valuations under the PWA, the High Court expressly rejected a willing buyer/willing seller market valuation of a business. In McNulty v Minister of Survey & Land Information (unreported, M61/92, High Court Dunedin, Hansen J & Mr Lyall, 9 July 1993), the Court noted that the Minister's valuer "approached the matter on the basis of an open market willing buyer, willing seller of the business. We do not consider that to be the correct approach".

What adjustments should be made to the financial statements?

For the valuation to reflect the actual loss to the owner arising from the acquisition, it must be based on the normal and sustainable income and expenditure of the business, as it existed before it was affected by publicity regarding the acquisition. Adjustments may therefore need to be made to the financial statements to reflect extraordinary or unsustainable items and any effect ("blight") on the business caused by the prospect of the acquisition.

If the valuation is to be based on the actual financial statements for the business, it will need to reflect the trends shown in those statements, adjusted only for those items which are acknowledged to be in the long term. This would exclude one-off or non-recurring items, and should produce "normalised" figures on which the valuation may be based.

Where income or expenses are not stable over time, trends can usually be identified from the statements from both financial analysis and explanations from the owner, and used to assess the normal and sustainable figures.

In a 1947 decision of the then Land Sales Court, Mountenay to Young [1947] NZLR436, the Court emphasised that, where a valuation is undertaken on the basis of financial statements, extraordinary items

or events should be excluded and trends determined from the revised financial statements. A "hypothetical buyer would note the steady increase in takings but would remember that 1945-46 was an exceptional year ... as to expenses, he would be impressed by the steady rise in costs, and knowing the general tendency of the times would assume that his average outgoings in future would be unlikely to be less than the actual outgoings for 1945-46".

What discount rate?

Having determined the annual earnings generated from the actual business on a normalised and sustainable basis, it is necessary to capitalise these using an appropriate discount rate.

The selection of a discount rate reflects such factors as the level of risk in the particular industry as a whole, comparable alternative investments, and rates of return. However, it cannot be solely market-based, as the overall requirement is to make full compensation for the owner's loss and, specifically, to compensate for the loss of goodwill in the business on the land being acquired. This precludes a purely market-based approach.

All businesses differ from one degree to another, and is highly unlikely that there is such a thing as an industry standard business with no distinguishing features. It is therefore necessary, when selecting the discount rate, to consider those factors that distinguish this business from the industry average.

Although it is a decision under the 1928 legislation, which had no equivalent of s 68, Minister of Works v Cromwell Farm Machinery Ltd [1986] 2 NZLR 29 is of assistance in identifying some of the factors that are relevant when considering the valuation of a business. The Court of Appeal noted that factors such as "an established and reputable business which has available dealer franchises, a locally resident staff which might be expected to remain, and an established clientele" would be relevant. Given the provisions of the 1981 Act, these factors are appropriately included at the discount rate stage of the valuation.

If these factors suggest that the business is different (whether better or worse) than the industry average, the discount rate that is adopted must reflect these factors. If the discount rate does not do so, the resulting valuation cannot be said to be that of the business on the land being acquired, or to fully compensate the owner for the loss of that business.

Conclusion

Where land is being acquired, and there is a business that will not be relocated following acquisition, the acquiring authority's obligations under the Public Works Act 1981 are:

- primarily to make "full compensation" for all losses arising from the acquisition; and
- specifically to pay compensation for the "loss of the goodwill" of the business.

Although there is very little case-law on the valuation of business goodwill under s 68 of the PWA, an analysis of relevant provisions of that Act and case-law on business valuations generally reveals several key legal principles governing such valuations:

- the actual business on the land being acquired must be the subject of the business, and not an industry standard or average business;
- the valuation must be of the loss that the land owner is actually suffering as a result of the acquisition, and not of the market value of the business assessed on a willing buyer/willing seller basis in the same way as a sale on the open market;
- the valuation must be based on the actual financial statements for the business, adjusted only to remove extraordinary or unsustainable items, or the effects of pre-acquisition "blight"; and
- although the discount rate applied to the annual business earnings may include market factors, this must not be to the exclusion of factors relating to the specific business, if these indicate that it differs from other industry businesses.

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covers conditions of subdivision consents. The types of conditions that might be found on a rural resource consent may include:

- Financial contributions these can either be money contributions, a land contribution which includes esplanade strips or reserves or a combination of land and money. Some financial contributions will be ongoing.
- Bonds bonds can also be required in respect of the performance of conditions of the consent. I note that under the recently enacted Resource Management Amendment Act 2003 (the RMAA) which comes into force on 1 August 2003, Councils will have the authority to impose a bond which continues after the consent has expired.
- Covenants the Council may also require that a covenant be entered into in favour of the consent authority, in respect of the performance of any condition. Bonds and covenants can be registered under the Land Transfer Act 1952 and run with the land.
- Conditions requiring services, work or ongoing maintenance.
- Tree planting and protection and enhancement of the landscape.
- Regular monitoring, measurements and testing.
- Conditions requiring earthworks or retaining walls.
- Conditions protecting the land including preventing erosion or flooding.

You should seek advice in order to ascertain whether the conditions of the consents are being met and whether any adverse effects have been created through the operations taking place on the land which might impact on the value of the property. Advice should also be obtained on the costs associated with meeting the conditions and obligations associated with a consent.

When do the consents lapse or expire?

I would then check the lapse and expiry of the consents. This is especially so if a new business venture is not yet constructed or has not yet commenced, as the consent may have lapsed. Under the RMAA, the default lapsing period of consents has been extended from 2 to 5 years so this is something to be aware of after August 1 2003.

The expiry of consents is an important factor when valuing a rural asset. It is necessary to note here that land use consents and subdivision consents usually have unlimited duration unless specified in the consent, but the RMA imposes a maximum of 35 years (unless specified) on the term of water permits, coastal permits and discharge permits.

Where a consent has expired or is due to expire, then the chance of, and cost associated with, replacing that consent is a valuation consideration. Especially when the use is dependent on that consent.

Therefore the valuer must not only consider the existence of the consent at the time of the valuation, but must also get advise on the possibility of having to replace the consent if it is due to expire or has already expired.

Are there any existing use rights?

In some cases there will be existing use rights associated with an activity where resource consents are not required. These must also be taken into consideration at the time of the valuation.

Section 10 of the RMA addresses existing use rights in relation to land. This section allows for land to be used in a manner that contravenes a rule in a district plan if:

- that use was lawfully established before the rule became operative or the proposed plan was notified; and
- if the effects of the use are the same or similar in character, intensity, and scale to those which existed before that time.

This section also allows for existing use rights where the use was lawfully established by way of a designation and the effects of the use are the same or similar in character, intensity and scale to those which existed before the designation was removed.

However existing use rights are lost when a use of land has been discontinued for a continuous period of more than 12 months after the rule in the plan became operative or the proposed plan was notified.

An analysis of existing use rights is somewhat difficult and complex so good advice needs to be obtained on this. Therefore the prudent valuer would ensure that any use of land that was allowed as an existing use right is still being continued and if not, for how long it has been discontinued. Fresh consents must be applied for if the existing use right no longer exists.

There are limited existing use rights in relation to the use of the coastal marine area, beds of lakes and rivers, water and the discharge of contaminants into the environment. Section 20 of the RMA allows for an activity that was formally permitted or did not require resource consent under a proposed plan, to continue until the regional plan including that rule becomes operative. This only applies if the activity:

- was lawfully established before the proposed plan was notified;
- if the activity has not been discontinued for a continuous period of 6 months since that proposed plan was notified; and
- the effects of the activity are the same as those which existed before the plan was notified.

Valuing Resource Consents in the Rural Environment

Introduction

In this workshop 1 will discuss methods for valuing resource consents for rural based industries, which by the nature of their activities and consequent likely environmental effects, require resource consents to operate.

My comments will centre on issues the valuer has to address when assessing the value of land on which an activity is being undertaken subject to resource consents. Bill Loutit has defined 8 issues a valuer should address, and if necessary take advice on, when assessing the value of a rural property These are:

1. What consents are in place?
2. What potential does the land have for obtaining consents?
3. What conditions, obligations and costs are associated with the consents?
4. When do the consents lapse or expire?
5. Are there existing rights?
6. Does the consent run with the land?
7. Have consents been granted for neighbouring properties that might affect the value of the asset?
8. Are there any designations or heritage orders on the property?

While as Bill explains, this list is not exhaustive, however it is a very helpful check-list for valuers.

Typical rural land based industries undertaking activities requiring resource consents:

The following table lists consents required and valuation issues associated with a sample of rural industries:

Industry	Consents	Valuation issues
Dairy farming	Water permit for irrigation. Discharge permit for effluent.	Reflected directly in land value.
Plantation forestry	Land use consents for harvesting and planting. Water permits for diversion of streams or construction of roads over streams.	Reflected in land value. LEV [Land Expectation Value] calculations will indicate values.
Mining [quarries]	Land use consents which may include conditions of consent relating to noise, vibration and restoration. Discharge permit to air. Discharge permits for drainage etc.	Reflected in the value of the land content of the business.

Industry	Consents	Valuation issues
Land-fills	Land use consents / designations which may include conditions in relation to traffic, noise, smell and restoration. Discharge permit for drainage etc.	Reflected in the value of the land content of the business.
Hydro electric utilities	Water permits and land use consents. Lake storage easements.	Reflected in the value of the land content of the business.

- the effects of the use being the same in character, intensity, and scale to those that existed prior to the district plan, and
- existing use rights are lost when a use of land has been discontinued for a periodof more than 12 months after the rule in the plan became operative.

Consider two scenarios:

The company operating a quarry near a residential area decides to increase production threefold to service a new market and a valuation is required to provide security to fund the additional plant. This proposal cannot be considered to be the same character, intensity, and scale.

An intending purchaser of the quarry company, now in receivership, requires a valuation and advises you it is a great business although it has not been operating for 18 months. The existing rights are lost, and to continue the business consents will need to be applied for.

- A proposed activity, to be undertaken by a business, for which consents are required. The valuation of land owned by a company intending to undertake a proposed activity where consents are required, such as a land-fill, requires a comprehensive review of the likely consent requirements and procedures. It is of interest to note that currently Northland and Gisborne TDC's consider trucking waste out of their districts to be an economic proposition, but are still proceeding to acquire land for land-fill if the trucking-out option becomes uneconomic. The strategic value of their land acquired for land-fill is a "potential" value. Later I will make reference to issues in an existing land-fill development.

Other considerationsoutside direct legal issues:

As well as requiring legal advice on the issues mentioned the valuer should be aware of other public attitude, technical and policy issues:

- Technology advances may allow compliance with more stringent consent conditions to be economically feasible. [e.g. scrubbing discharges from mining operations to comply with the emission requirements of a district plan]
- Public perceptions may change as a result of "creeping" residential development. [i.e. Ardmore airport noise issues]
- Public adoption of "green" culture. [Changing attitude toward recycling in Gisborne which produced 40,000 tonnes land-fill 3yrs ago. The amount is now reduced tol8,000 tonnes [reduction of 3,000 tonnes household and 19,000 tonnes green and process waste] with plans to reduce to 15,000 tonnes. The reduced quantity [41 tonnes/day] can probably be economically trucked out of the district.
- The existing consent may create a "quasi-monopoly" advantage. [strategic holding of a quarry resource to reduce competition]
- The presence of resource consents for activities on surrounding land. Bill Loutit's discussion on this topic shows the advantage of a search to ensure consents granted but not yet exercised for an activity would not materialise in the future to disappoint an adjoining owner.

Table: Value of the business with and without the consent:

NOPAT	With consent $1.5m	Without consent $1.2m
Value of the business:		
Land surface rights	$2,000,000	$2,000,000
- resource consent	3,000,000	0
Land value	5,000,000	2,000,000
Buildings	5,000,000	5,000,000
Plant and machinery	3,700,000	3,700,000
Chattels	200,000	200,000
Inventory	750,000	750,000
Operational working capital	350,000	350,000
Value of the business	$15,000,000	$12,000,000

Ground Lease Rent Review Arbitrations -Valuer Roles
Advocate, Expert or Arbitrator?
Is there a difference?

Introduction

Now that the Arbitration Act 1996 has seen some reasonable exposure it is appropriate to again review the valuer role in ground rent fixing.

Many ground leases, such as those arising out of the Public Bodies Leases Act 19691, set a rent review dispute resolution process requiring:-

1. Two arbitrators, one each appointed by the lessor and lessee, who are to make a valuation.
2. An umpire, now a third arbitrator under the 1996 Act, who is to be appointed by both arbitrators before they commence their valuation.

Arbitral practice in ground rent disputes

Usual practice is for the arbitrators to be the valuers who produced the original rent assessment for the respective parties. This of course is more cost-effective than the alternative of each party appointing a valuer to undertake the assessment and then each appointing an arbitrator to produce a new assessment when the dispute arises.

It is a matter of law that the initial process is a submission pursuant to the 1996 Act, whether or not it is spelt out in the lease2.

A 'submission' is the term given to the agreement to submit present or future disputes to arbitration.

Once the valuers in these situations step over the threshold from valuer to arbitrator they transform from a valuer/client relationship with the respective original instructing parties, to an arbitral tribunal jointly responsible to both parties. That point arises very early on in the process in fact when appointment has been accepted by the valuer to be one of the two arbitrators who then appoint a third.

Once that threshold has been crossed it is no longer proper for either valuer to alone accept instruction or direction from one of the parties - a concept which applies no matter whether the arbitration falls under the Arbitration Act 1908 or Arbitration Act 1996.

The process under the Arbitration Act 1908 is well expressed by the late John Wall in his article `Arbitration Practice's, but recent trends clearly show a need for all involved to be reminded of the respective duties.

Quoting from the conclusion to John's article, he sums up:-

"Arbitration within the valuation *profession* has *been well recognised by other property* related *bodies and the* legal *profession* and it is incumbent *upon* valuers who *accept* an appointment *to decide upon a difference,* to act with strict impartiality and a *reasonable* level *of expertise* that is *expected of* them.

Before accepting an appointment the valuer must be quite clear as to the responsibility that is being conferred and should not accept without possessing the capabilities to arrive at a reasoned conclusion."

1. Clauses 5 and 7-11 of the First Schedule
2. Hamill v Wellington Diocesan Trust Board 1927 GLR 197 and Wellington College Board v John Duthie and Company Limited 1940 NZLR 839.
3. NZ Valuers' Journal December 1989 page 32.

(d) In the absence of express or implied provisions to the contrary, it will also be necessary that each party be given an opportunity to understand, test and rebut its opponent's case; that there be a hearing of which there is reasonable notice; that the parties and their advisers have the opportunity to be present throughout the hearing; and that each party be given reasonable opportunity to present evidence and argument in support of its own case, test its opponent's case in cross-examination, and rebut adverse evidence and argument.

(e) In the absence of express or implied agreement to the contrary, the arbitrator will normally be precluded from taking into account evidence or argument extraneous to the hearing without giving the parties further notice and the opportunity to respond.

(I) The last principle extends to the arbitrator's own opinions and ideas if these were not reasonably foreseeable as potential corollaries of those opinions and ideas which were expressly traversed during the hearing.

(g) On the other hand, an arbitrator is not bound to slavishly adopt the position advocated by one party or the other. It will usually be no cause for surprise that arbitrators make their own assessments of evidentiary weight and credibility, pick and choose between different aspects of an expert's evidence, reshuffle the way in which different concepts have been combined, make their own value judgments between the extremes presented, and exercise reasonable latitude in drawing their own conclusions from the material presented.

(h) Nor is an arbitrator under any general obligation to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he finally commits himself.

(i) It follows from these principles that when it comes to ideas rather than facts, the overriding task for the plaintiff is to show that a reasonable litigant in his shoes would not have foreseen the possibility of reasoning of the type revealed in the award, and further that with adequate notice it might have been possible to persuade the arbitrator to a different result.

(j) Once it is shown that there was significant surprise it will usually be reasonable to assume procedural prejudice in the absence of indications to the contrary.

Impartiality

The position in law is somewhat more exacting than many valuers or property professionals realise. An interesting Court of Appeal case9 on impartiality concerned whether or not a government valuer was an indifferent person in an arbitration involving the Crown. The question for determination was whether the Crown (as lessee under a lease which provided that the fair annual rent for the term of renewal be settled by two indifferent persons as arbitrators (one to be appointed by the lessee and one by the lessor) might appoint as its nominee a valuer employed by the Valuation Department, he being a person employed by the Crown. The provisions of the lease were expressed to be a submission under and within the meaning of the Arbitration Act 1908. The decision notes that quite independently of the expressed requirements that the persons to be appointed by the parties shall be "indifferent" it is a general rule of law that inasmuch as an arbitrator is in a quasi judicial position he must be a person from whom there can be expected complete impartiality and indifference both as between the parties to the arbitration and in regard to the matters which are the subject of arbitration. The lease was between the Wellington Harbour Board as lessor and the Crown as lessee. It was executed by the Postmaster General and Minister of Telegraphs for and on behalf of the Crown. The Court noted that while an officer in the Valuation Department is not in any direct sense subject to the control of the Director General of the Post and Telegraph Department, nevertheless the Court would not be on safe ground in treating the Valuation Department and Post and Telegraph Department as separate entities. Both are Departments of State. The Court therefore concluded "that no officer employed by the Government of New Zealand in any of its various departments would qualify as an "indifferent person" in a matter like this." This supported the decision of the lower Court.

The BOC v Trans Tasman Properties case is a more recent interesting Court of Appeal decisionlo where the setting aside of an rent review award was sought on the grounds of bias on the part of the arbitrator. The grounds for the challenge were that the arbitrator, a barrister, had a conflict of interest at the time of the arbitration through having acted as counsel on instructions of the building managers in an objection to a Government valuation and subsequent Court action arising out of that objection. The final Court action in that matter was a judgment of the High Court delivered 10 December 1990. The bias case failed on the grounds that the lessor in the matter before the arbitrator had no interest in the property for the Government valuation under objection, the property having subsequently changed hands to the Lessor. The barrister's retainer ended with delivery of the High Court judgment six months before acceptance of the appointment as arbitrator. The Court therefore concluded "A fair-

9 Attorney General v Wellington Harbour Board, Court of Appeal 16 October 1958, Gresson P, NZ Valuer Vol 16 No 4, December 1958, page 37.

10 Boc New Zealand Limited (formerly New Zealand Industrial Gases Limited) v Trans Tasman Properties Limited (formerly Robt Jones Investments Limited), C.A.119/95, Judgment delivered by Gault J, 4 November 1996.

Condition Appraisal of Infrastructural Assets. The importance to Asset Management planning (NZ Army Case Study)

N

Introduction

1. Despite the importance of infrastructural assets, they are not always acknowledged by either central or local government as being core business, and are often allocated a low priority for funding whenever budgetary pressures arise. In the United States the federal government reduced the expenditure on the nation's infrastructure from $174 billion in 1986, to $118 billion in 1998 (General Accounting Office (GAO), 2000, p. 5), a reduction of 32.2%. This problem is also evident in local government, in the period from 1960 to 1982 there was a 31% decline in investment per capita in infrastructure. One explanation for this phenomenon is that "...fiscally distressed governments behave myopically, decreasing capital maintenance and replacement in order to finance more visible service activities." (Bumgarner, Martinez-Vazquez, & Sjoquist, 1990, p. 1)
2. The level of investment in infrastructure is proving insufficient to replace existing assets which are wearing out, a problem exacerbated by increasing levels of demand. The Mayor of New Orleans testified to a Senate committee regarding the ability of cities to fund their infrastructural needs in the future, yet alone maintain their existing infrastructure, "These needs are of national significance, of national economic importance, and of substantial cost, exceeding local capital resources." (Sanchez, 2001, p. 4)
3. To ensure that organizations can attract appropriate funding levels it is imperative that they develop a robust asset management plan. This will assist with quantifying the funding required to maintain the property portfolio.

Asset Management

4. -What do we mean by asset management? This topic is covered well in the NAMS manual', and other similar publications. Asset management is a systematic approach to measuring the current state of an assets condition and developing a plan to ensure that the required levels of service are delivered at least cost over the lifecycle of the asset. This will ensure that assets support the organizations long-term strategic goals.

   Asset management is designed to improve:

- stewardship and accountability
- communications and relationships with stakeholders
- service levels to be quantified
- risk management
- assess the probability and consequences of asset failure
- financial efficiency
- adoption of life cycle costing

(NAMS, 2000, p. 1.3)

6. In order to complete an asset management plan we need to determine the condition of the assets. Determining the condition of assets will prevent

1. International Infrastructure Management Manual, National Asset Management Steering

- The Federal Highway Administration estimated that every dollar of repair spent when the highway is in a good condition saves $4-5 than if the highway pavement is allowed to deteriorate to a fair condition, and saves $10 than if the highway pavement is allowed to deteriorate to a poor condition (GAO, 2000, p. 33).
- Building Research Association of New Zealand (BRANZ) completed a study of building elements typically found in residential houses. They reported that failure to undertake maintenance on time results in maintenance costs increasing by 105% after five years, and *256%* after ten years2 (Bishop, 1998, p. 33).

10. These results are consistent with De Sitters "Law of Fives", which states that if maintenance is not performed, then repairs equalling five times the maintenance costs are required (De Sitter, 1984, cited in Vanier, 2001, p. 16).

Determining the Condition of a Property Portfolio

11. There are several ways in which we can determine the condition of a property portfiolio, and each has different utility.

Determining the Condition of the Portfolio at the Strategic Level

12. A number of organizations report the Facilities Condition Index (FCI) which is represented by:

$$FCI = 1 - \frac{\text{unfunded maintenance}}{\text{portfolio replacement value}}$$

AAPPA report on a number of *Key* Performance Indicators (KPI's), and the FCI is one such measure. Over the last five years the FCI for Australasia was reported as 0.970
(AAPPA, 2002, p. 11).

13. The US Defence Force produces an annual Installations Status Report in which facilities are rated as Red (R), Amber (A) or Green (G). The combination of Red, Amber or Green is used to determine the condition rating; where the:

Total Possible Score = 3 x number of assets

Actual Possible Score = (3xG + 2xA + IXR)

A C-rating is then determined, as being the actual score as a percentage of the possible score, with scores falling into one of four categories, refer to Table 1.

14. The FY 2001 Installations Readiness Report, reported that 69% of facilities were assessed at C3 or below This percentage has increased from the 60% reported in FY 2000 (US DOD, 2001, p. 4). The US Defence Force is using this analysis to justify an increase in its infrastructure budget, with the goal of achieving:
- FY 04 full facility sustainment funding in order to prevent further deterioration
- FY 10 an annual 67 year recapitalisation rate
- FY 10 overall C-2 quality grading for all facilities (Van Antwerp, 2002, p. 28)

Determining the Condition of the Portfolio at the Asset Level

15. A number of methods are used to record the condition of an organization's assets. The NAMS Manual uses a 1 to 5 scoring for most asset types. Typically the scoring system is as follows:

16. In some sectors more specific guidance is available, e.g. the NAMS manual refers to the "NZ Infrastructure Asset Grading Guidelines -Water Assets", which provides guidance on assessing the condition of pipe networks.

Table 1. C-Rating Scale

Facility Rating	Description	C-Rating
C1	Only minor facility deficiencies with negligible impact on capability to perform missions.	90% or above
C2	Some facility deficiencies with limited impact on capability to perform missions.	75% to < 90%
C3	Significant facility deficiencies that prevent performing some missions.	60% to < 75%
C4	Major facility deficiencies that prevent satisfactory mission accomplishment.	Less than 60%

million in FY 01-02 to $7.63 million in FY 03-04.5

21. Last year the Army trailed a condition-based system based on a model used by the Australian Defence Force, refer to Annex B. The aim was to look at each asset by major work element, and allocate a priority to each element of work. The end result was a list of projects in four lists:
    - Property Portfolio
        - planned maintenance6
        - minor new works?
    - Housing
        - planned maintenance
        - minor new works

22. The final list used to allocate funding within these major groupings, and identify which projects will remain unfunded. The Army intends to directly link its condition appraisals to its 5-year operating plan by breaking each asset down into major work elements, and then estimating the maintenance requirements over the next 100 years. This time-frame has been chosen to ensure that irregular activities such as maintenance of underground services and the resealing of roading networks are covered.

Linking Condition Appraisal to a Long-Term Financial Strategy

23. Over the next few years more organizations can expect that they will be required to provide a direct linkage between the condition of their property portfolio and their long-term financial strategy. For local government, the Local Government Bill, which comes into effect on 1 July 2003, will require local authorities to state what their asset management policy is (NZ Government,

Non-Componentisation of Assets Impact on Depreciation

Annex A

	Building Value	Component Value	Depreciation	Annual Depreciation	
	%		Life of Assets	%	($)
Value	100	1,000,000			
NZDF Current Policy					
Wooden Building			75	1.33	13,333
Concrete			100	1.00	10,000
Rawlinsonss					
Structure	27.60	276,000	75.00	1.33	3,680.00
External fabric	15.10	151,000	75.00	1.33	2,013.33
Roof	7.50	75,000	25.00	4.00	3,000.00
Internal fitout	21.60	216,000	25.00	4.00	8,640.00
Flooring	7.20	72,000	12.00	8.33	6,000.00
Electrical	3.40	34,000	25.00	4.00	1,360.00
Electrical-CIS	3.40	34,000	5.00	20.00	1,360.00
Services	7.20	72,000	25.00	4.00	2,880.00
External & sundry	5.50	55,000	75.00	1.33	733.33
P&G	1.50	15,000	75.00	1.33	200.00
Total	100.00	1,000,000			35,307
Treasury Guidelinesy					
Structure	55.00	550,000	75	1.33	7,333.33
Fitout	30.00	300,000	20	5.00	15,000.00
Services	15.00	150,000	35	2.86	4,285.71
		1,000,000			26,619

6. Activities undertaken on a cyclic basis to maintain the asset.
7. New work, and major refurbishments.

property .r..,

Example:

	Operational Training Facility	Office Accommodation	Vehicle Storage
Type of Work	Ballistic Matting	Carpeting	Exterior Cladding
Contribution	1	3	4
Condition Index	-2	-1	-1
• Required Condition	2	3	4
• Actual Condition	4	4	5
Consequences			
• capability			
• environmental	2	5	5
• legislative	5	5	5
• safety/health	2	2	5
• deterioration	2	3	4
• morale	1	3	5
Weighted Priority	75.9	226.0	365.9

Contribution Factor. This factor rates the importance of the asset to the operational outputs of the ADF.

A formula is then applied to these factors which produces a list of tasks with a weighted priority between 1 (the most important), and 501 (the least important). More than one task can be allocated the same weighted priority *

*See example chart above

New Zealand Housing Corporation

The property condition index is determined as part of the annual property inspection. All defects are recorded, and a property with less than 10 defects is deemed to meet the required standard. This system is being refined this year, as it fails to differentiate between minor and major defects. The inspections have also been outsourced to an organization able to provide technically competent staff to undertake these inspections. Previously non-technical staff from HNZC undertook these inspections.

Queensland Housing Corporation

The Department has commissioned some very comprehensive research to produce a Hold/Sell Index which is capable of assisting the strategic decision making process. Three areas; Need, Output Cost, and Property Standard are each rated out of 10 to produce a final score out of 30.

The Property Standard part of the Hold/Sell Index is determined by a Property Condition Index (PCI). The PCI is a ten-point scale which rates dwelling condition, age, and amenity A rating of three is the minimum property standard.

About the author: Lieutenant Colonel *Bruce* Kenning, MBS *(Property), BSc*, DipBusStud *(Property* Management), is *the Director of Property* Management *for* the New Zealand Army, an appointment he has *held* since December *1996. The Army property portfolio* has *a replacement* value *of* approximately *$850* million, and includes several large land holdings including the Waiouru Military Training *Area* at *63,000 hectares.* In his military *career, Bruce* has *served* with the United Nations in Cambodia (demining), and in Bougainville as *the Chief* Liaison *Officer* with *the Peace* Monitoring *Group.*

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New Zealand Property Valuers An Endangered Species. How do we breathe life back into our Endangered Profession?

Introduction

Ladies and Gentleman, Colleagues of the Profession.

You might have recently experienced advertising situations vacant for a property valuer and had either none or limited replies, or you might have heard of yet another experienced colleague leaving the valuation profession to try something else.

Individually this may not concern you, however what I am about to present collectively WILL concern you.

To put it simply, the demand for valuation services is escalating and yet the number of valuers able to provide this service is decreasing at a rapid rate (in fact if the decline was to continue at the rate it is today, our profession could be `extinct' by the end of this decade).

So what does this mean?

With possible de-regulation on the horizon will our profession simply be phased out & replaced?

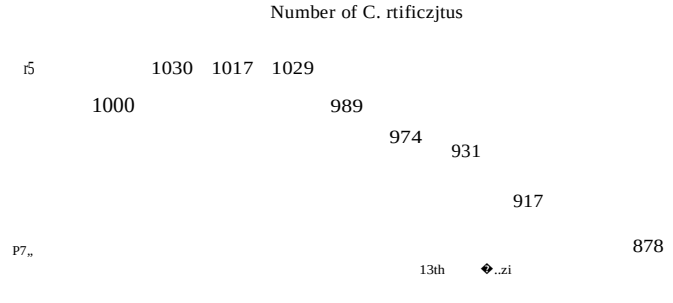
The Decline

The number of practicing valuers is declining at an Alarming Rate: -Since 1989 we have experienced a 20% decline in the number of practicing valuers in New Zealand. This represents a net lost of 206 valuers. We are now at our lowest number in the last 15 years with just 878 people holding an annual practicing certificate as at year-end 2002. The provisional figure for 2003 has dropped further to 843.

The Number of new registrations at their lowest level in since records began in 1959: Just 17 people became registered in 2002. In fact the average number of registrations over the past 3 years is just 17. This compares to an average of over 40 registrations throughout the 1990's and an annual average of 65 throughout the 1980's

These statistics make sobering reading. From a business model perspective, our "replacement rate" is

Number of Annual Practicing Certificates



Source: Property Regulatory Group, LINZ

Source: Property Regulatory Group, LINZ

now in rapid decline and the future sustainability of the profession is under real threat.

Increasing Demand

The reverse could be said for the demand for our services. I am sure we have all seen the NZPI job mail over the past 12 months. It is inundated with valuation practices seeking qualified valuers. Many of these positions are simply not being filled. This problem stretches from the cities to the provinces. This is at a time when the demand for our services is at an all time high and the supply of property assets continues to expand in line with population and business growth. This is no more evident than in the Auckland Region.

I have taken the liberty to extract some statistics from a recently published paper by the Auckland Regional Council entitled "A Day in the Life of Auckland, June 2003.

This paper provides a fascinating overview of our region. Some of the more pertinent facts are as follows:

- The Auckland Regional population is growing by 49 people per day.
- There are over 400,000 homes and growing at 21 dwellings per day
- The number of dwellings is forecast to reach 720,000 by 2050
- On average, 80 homes are sold per day worth $20 million
- There are 110,000 business throughout the region
- 2.2 million square metres of commercial office space*
- 6.2 million square metres of industrial floor space*

`Jones Lang LaSalle Research monitored areas.

How many Valuers are required to provide a sustainable service to this region?

You will be interested to know that there are now as many Clowns, Acrobats and Magicians as Practicing Property Valuers employed in the Auckland region.

Have you ever wondered what would happen if Valuers didn't provide an adequate level of service to landowners, business and lending institutions? - What/ where are the alternatives?

Why Are We Losing Valuers?

I have outlined below some of the key issues facing the decline in valuation numbers in recent years.

The Number of People enrolling for Property Degrees is not increasing: -. Not enough school leavers are entering property degrees. There are currently around 32,000 secondary students completing Year 13 with approximately 26,000 students enrolling annually at Universities throughout the country. However, the number of students annually graduating from our property degrees is less than 100. This represents under 0.5% of the total number of students graduating annually at University. This for a sector that boasts having a $400 billion dollar asset base. It is simply not enough.

The Number of Property Students wanting to be Valuers is declining: The composition of students entering our property degree is changing. 40% of those students completing a property degree at Auckland University are completed conjoint degrees, predominantly with commerce. These students have a much wider choice of employment. In addition students majoring in property have a much wider

Auckland Region
Ever Wonder What Everyone Does All Da

Accountants

Lawyer,

Real Estate Agents

Bus Drivers

Debt Collectors

Rubbish Collectors

Property Valuers '

Clowns, Acrobats & Magicians

variety in job opportunities within the sector itself than in the past.

To understand how our property students perceive the valuation profession, I have recently undertaken a survey of Year 2 Valuation Students at Auckland University The results make for some interesting reading. A total of 34 students responded to the survey representing 63% of the entire class.

What Would Persuade Students to Reconsider

Whilst half of the valuation students are considering valuation as a career, this will still not provide the numbers we need for future sustainability. To attract even more graduates to our profession we must start to address the 'issues and perceptions' of the younger generation.

Some of the key findings include:

- The job is considered too boring, monotonous, tedious
- The salary is too low
- Not perceived as an interesting career path
- Interested in other property jobs
- Registration period too long

Let us explore some of these issues:

Low Salaries: - Low salaries are a major concern to young graduates. This is supported by the recent NZPI Remuneration Survey, which indicated that valuers have the biggest representation in the lowest remuneration bracket ($40,000 to $60,000pa).

We have debated this topic many times before. It all comes down to the fees we can charge our clients isn't it?

Why is it then that 8900 accountants and 3100 lawyers can collectively charge an hourly rate of well over $200 per hour when we as a small group of professions, are still completing valuation reports for well under $100 per hour, and still undercutting ourselves?

There must be a practical solution!

Registration Period Too Long: - Think about it. It takes longer to become a registered property valuer than it does for the majority of other professional and specialist careers. After all we are just property valuers not paediatric surgeons or airline pilots! The three-year registration period and the prospect of facing the Valuers Registration Board still send shivers down my spine. This appears to be a real deterrent to students considering valuation as a career option.

Losing an increasing number of experienced valuers to other jobs All of you will know at least two or three of your peers who have left the profession in recent years. Anecdotal evidence would suggest this trend is increasing. It appears that higher salaries, increased prestige, less stress/liability are keys factors driving our best to greener pastures. We need to halt this trend.

No mechanism to allow mature people into our Industry. There are a range of experienced property and other professional people that would seriously consider becoming valuers. However, the current statutory criteria and the prospect of a significantly reduced salary over the regulatory period precludes these people from moving to the valuation profession.

Summary Case Law

High Court
- Property
- Real
- Encumbrances
- Caveats

Glanville v Medial Holdings Ltd 25/2/03, Heath J, HC Auckland M46-IM03

Successful application to remove caveats G applied to remove caveats placed on land of which he was registered proprietor G claimed caveats should be removed on grounds purchasers had failed to comply with time constraints in respective agreements G submitted that even if caveators had arguable case High Court should exercise discretion and remove caveats caveats were lodged by MHL and second respondent EPL to protect interests which both parties asserted they had under agreement for sale and purchase MHL and EPL contended that it was at least arguable they would have been granted extensions to comply with time constraints.

Held, on evidence presented, Court cannot conclude there is reasonably arguable case that either MHL or EPL was entitled to extension of time - in this case it is appropriate to exercise discretion as MHL presented no evidence to suggest it could perform its obligations under sale and purchase agreement no resource consent has been applied for by EPL therefore *they* are in breach of terms of agreement as they had agreed to apply for consent within 12 months - caveats lodged by both MHL and EPL are removed - application granted.

High Court
- Equity
- Fiduciary relationships
- Property
- Interests in land
- Trusts
- Classification
- Constructive trusts

Wallace v McQueen 3/3/03, Durie J, HC Wellington CP76/02

Unsuccessful application by W W argued that an arrangement or agreement existed between M and second defendant A W claimed this agreement was a joint venture for purchase and development property in question being Palmerston North's old Post Office ("PO") - W alleged that fiduciary obligations were breached because M and A excluded W in purchasing PO W sought a declaration that third defendant (current property owner) was holding PO as a constructive trustee for rightful owners - M and A denied there being any arrangement or agreement of this nature in existence whether there was in fact an arrangement or understanding to enter into an association for purpose of buying and developing building.

Held, whether W has established on balance of probabilities that an arrangement or understanding for joint venture purchase existed such as would give rise to an obligation on W and A's part - in absence of direct or written evidence inferences can be drawn from such evidence that may be relied upon W failed to establish that joint venture purchase was mutually contemplated - all parties had own understandings which were validly held but those understandings were simply in different mental spheres fact that M and A's primary purpose was to protect their present business on ground floor of PO while W sought to convert to retail shops was factor that bore weight in M and As favour orders for relief for counterclaim removing caveat reserved costs at category 2 band B would be appropriate but memoranda may be submitted if need be - application denied.

High Court
- Property
- Real
- Land settlement

Singh v Cintra *Court* Ltd 27/2/03, Paterson J, HC Auckland AP65/02

Successful appeal against judgment finding solicitor liable for deposit on undeliverable title CCL signed agreement with D for purchase of D's property and paid deposit to real estate agent- two days after agreement signed, D's solicitor ("S") gave assurances to CCL's solicitor that D had received deposit CCL cancelled agreement after settlement failed to go ahead and sought to recover deposit from S as D was insolvent CCL obtained judgment against S for $30,000 his client had accepted for deposit on property S claimed CCL was not entitled to recovery of deposit as offer had become unconditional - S argued there was no causal nexus between his firm and loss suffered by CCL.

Held, CCLs loss was attributable to D's inability to repay his mortgages and not by any assurance given by S - on balance of probabilities Court is of view that deposit would have been released to D before settlement date - agent had been holding deposit for D and it would have formed an asset in his bank account therefore CCL would have had no better claim to it than D's other creditors CCL may have right to sue S for failure to honour his undertaking to deliver

was created for site in 1947 - lease under which it was made was terminated in 1957 - exterior wall on southern side of building used by C protruded onto other site - building would be unusable without wall - TLL announced its intention to demolish wall and issued proceedings seeking declarations that all party wall easement rights were terminated in 1957, that C had no legal or equitable interest in wall and TLL was entitled to remove it - High Court rejected arguments by C on estoppel and derogation of grant but granted relief under s 129 Property Law Act 1952.

Held, relief can be granted under s 129 Property Law Act 1952 as all that is required to invoke jurisdiction is encroachment no estoppel arises in relation because no representation allowing the wall was made - restriction should be placed on TLL because it is necessary to prevent purpose of grant being frustrated appeal dismissed.

High Court
- Trusts
- Administration
- Applications to Court

Re Auckland Baptist Tabernacle Trust Board 31/3/03, Chambers J, HC Auckland M2/03

Successful application by ABTTB for consent of sale - ABTTB had owned a building and land on comer of Karangahape Road and Queen Street in central Auckland - ABTTB reached an agreement with T as to purchase of second floor of building subject to consent of High Court - ABTTB also sought removal of caveat on land.

Held, proposed sale to T is desirable caveat is to be removed application granted orders accordingly

High Court
Civil procedure
Application
Contract
Breach
Remedies
Specific performance
Property
Real
Title
Transfer

Zondag *v Zondag 10/4/03,* Master Faire, HC Hamilton CP44/02

Unsuccessful application by plaintiff HZ for summary judgment against defendant BZ BZ purchased property in Coromandel HZ intended to emigrate from Holland and had discussions with his brother BZ about prospect of buying some of BZ's land - when HZ came to New Zealand parties agreed a house would be built for HZ on Lot 6 of the land as part of the building project a driveway, parking, and land development work was undertaken in course of that work it was discovered that part of driveway and parking area had been constructed on adjourning Lot 7 owned by BZ HZ alleged parties entered into an agreement providing for transfer of portion of Lot 7 to Lot 6 so that encroaching developments would be in title held by HZ HZ sought an order BZ specifically perform alleged agreement and take necessary steps to add to HZ's title part of Lot 7 in question HZ relied on a series of emails, work undertaken by a surveyor on BZ's instruction and resource consent to point to an agreement to transfer the land sought - at issue was size of the land sought - HZ contended it was 1675 m2 - BZ stated he was only prepared to transfer 327 m2 to cover problem caused by driveway and parking being built on Lot 7.

Held, there is no written document or oral discussion where specific size of the land is either directly recorded or there is evidence of a statement between parties - there is doubt as to whether there was a specific agreement concerning transfer of the piece of land as alleged by HZ there is no document that complies with s 2 Contracts Enforcement Act 1956 or no series of documents that can be read together which comprehensively set out the terms of an agreement - HZ is also unable to prove BZ has no defence - there is real doubt as to whether there was specific consideration agreed upon for the transfer - if there is such doubt then there is an arguable defence in relation to the element which applies to part performance - here Court is required to consider circumstances in which part performance took place and to see if it is unconscionable for defendants to rely on the acts of part performance, and yet not perform the contract as this element has not been satisfied by HZ, Court cannot conclude a plea of part performance has no defence - application for summary judgment dismissed and parties are to file and serve amended statements of claim, with costs being reserved orders accordingly

High Court
- Civil procedure
- Application
- Maori affairs
- Land

Proprietors of Parininihi Ki Waitotara Block v Ngaruahine Iwi Authority 7/4/03, Harrison J, HC New Plymouth CP18/99

Unsuccessful application by NIA PKW was a registered proprietor of freehold lands throughout Taranaki - land included a farm block in Manaia - PKW had about 7,200 shareholders, holding in total 1.205 million shares PKW owned all its land in common under one equitable title due to its status as a Maori incorporation NIA promoted view that common ownership of all PKW lands by all its beneficial owners was wrong in addition that

to set aside arbitral award proceedings consolidated - affidavits sworn indicated a history of procrastination and avoidance on C's part C accepted that he did not contribute to arbitrators costs C emphasised that award reflected considerable allowance for interest - OBL challenged liability for and quantum of interest OBL also questioned appropriateness in arbitral process of notice being given to C of interest component - in addition to opportunity for C to make submissions or give evidence to arbitrator on interest.

Held, tentative view that this is an appropriate case in which to make a sub-article 5 order appropriate amount of that order should be amount of arbitral award amount will lie in a neutral situation pending outcome of application - order made that sum of $44,019 shall be made as an award to be brought into Court, or otherwise secured, pending determination of application to set the award aside - logical decision would be to dismiss application to set arbitral award aside and to enter award as a judgment - however there may be factors which make that course inappropriate and may well need to be addressed later - matter will be set down for mention in Duty Judge list costs reserved orders accordingly

High Court

Maori Affairs
Land
Freehold
Property
Real
Lease

Proprietors of Huruharama Ponui Block Inc v A-G 26/3/03, Rodney Hansen J, HC Auckland M 1062-SD02

Unsuccessful application for declaration concerning alienation of Maori freehold land ("MFL") - first applicant PHPB agreed to develop block of land at Taupo as high quality residential enclave and perhaps hotel land is Maori freehold land administered by PHPB, and proposal contemplates leasing land to third applicant (`SPL") who build dwellings and issue unit titles to purchasers of residential and commercial units - all applicants sought declarations concerning their obligations under Te Ture Whenua Maori Act 1993 ("TTWMA") in relation to proposal - applicants sought declarations that they were not required to apply to Maori Land Court for confirmation of assignment or variation of lease to SPL and that Registrar would not have to note variation applicants argued land was alienated in terms of resolution before Te Ture Whenua Maori Amendment Act 2002 ("AA") came into force and that variation and assignment need no further approval - Attorney-General submitted that lease to SPL exceeded what was authorised in resolution therefore there was no alienation before AA came into force.

Held, AA came into force and changed procedures for authorising alienation of MFL, therefore it is appropriate to consider events that took place before and after amendment had agreement with S been reached before AA came into force, there would have been effective alienation of land PHPB is required to apply to High Court for approval of lease as varied and is required to have Registrar note variation it is not appropriate to make declarations sought until lease has been approved in accordance with s 150B TTWMA application declined.

High Court

Alternative dispute resolution
Property

Grey District Council v Banks 14/2103, Panckhurst J, HC Greymouth M6/02

Unsuccessful application by GDC to have B removed as an arbitrator GDC owned commercial and residential properties B leased residential section in Blaketown dispute arose during rent review as to basis for assessment of future rental - arbitration process invoked B appointed arbitrator by group of lessees - GDC notified GDC appointed own arbitrators - process required arbitrators to appoint umpire - dispute arose concerning process - GDC obtained legal opinion on 14 May and issued proceedings - whether B was competent or qualified to act as arbitrator and whether she was disqualified because of personal interest - whether GDC time-barred from making claim.

Held, under s 19(3) Arbitration Act 1996, the Arbitration Act 1908 is only to be used where the arbitration agreement allows two arbitrators but is silent on the appointment of an umpire - test of competence is objective reasonable belief in competence - B is not competent in that she possesses no special degree of skill or experience fitting her to the task B's direct financial interest is an obvious personal interest barring her acting as impartial or independent arbitrator 15-day limitation period applies to both challenges of competence and/or self-interest - GDC failed to comply with this therefore application dismissed.

High Court

Criminal law
Proceeds of crime
Confiscation order
Forfeiture

Solicitor-General for New Zealand *v* Fitzgerald 4/4/03, Chisholm J, HC Christchurch M329/92

Partially successful application for forfeiture order S-G applied for forfeiture order for house and two titles of farm property pursuant to Proceeds of Crime Act 1991 - S-G claimed these properties were used to facilitate commission of serious drug offences and were thereby tainted - house was registered in

parties wish to do - application for summary judgment dismissed.

High Court
- Property
- Real
- Fixtures
- Removal

Canterbury Regional Council v Musson 12/2/03, Panckhurst J, HC Christchurch CP59/02

Successful application by CRC for declaratory judgment - M lessee of CRC's property prior tenants filled gravel pits with hardfill dispute as to whether this gave rise to an improvement in terms of Public Bodies Leases Act 1969 - if it was considered an improvement, it was to be disregarded in reaching valuation of land for rent review purposes.

Held, undue emphasis is not to be placed on s 14 (9) Public Bodies Leases Act 1969 - an improvement must be assessed under generally understood terms and in context of the lease - improvements in general must be for betterment of land or premises, be substantial in nature, and have quality of permanence - filling of gravel pits fulfilled this but lessee's right to remove is illusory as is their right to seek compensation for value - hardfill "merged" with land becoming part of its unimproved value - declaratory judgment granted - no improvement made.

High Court
- Civil procedure
- Application
- Property
- Real
- Encumbrances
- Caveats

Pomeroy v Niederer 16/4/03, Master Faire, HC Auckland M100/03

Successful application by P and S for an order that caveat not lapse P and S trustees of Auckland 1 Trust and vendors of land subject to caveat N purchaser of land P and S entered into agreement for sale and purchase with N in June 1998 agreement was subject to a boundary adjustment and easements set out in an attached draft transfer agreement provided that P and S would obtain all survey plans, consents, and approval for boundary adjustment and easements, but if any adjustments had not been completed by settlement, settlement would not be deferred property would be transferred to N for 12 months from settlement date or until adjustments were completed P and S would be entitled to caveat property sold, provided consent was not withheld to any dealing subject to completion of adjustments - whether P and S intended to sell freehold less adjusted area whether agreement was intended to reserve a right to transfer back adjusted area provided appropriate arrangements to do so were set up within 12 months.

Held, P and S did contact N's solicitors within 12 month period and elected to proceed with boundary adjustment ability to make boundary adjustments was provided for, for up to 12 months, by virtue of agreement for sale and purchase - all practical steps required to perfect boundary adjustment taken, meaning that a significant delay in bringing application should not weigh against exercise of Court's discretion to order that caveat not lapse - it is imperative P and S take proceedings without delay to enforce agreement requiring transfer of adjusted piece of land order caveat not lapse - application successful.

High Court
- Civil procedure
- Judgments
- Summary
- Contract
- Termination
- Effect
- Equity
- Remedies
- Specific performance

Kandelaki v Whitham 30/4/03, Master Lang, HC Auckland CP6-IM03

Unsuccessful application for summary judgment - K and W entered into an agreement for sale and purchase of Ws property agreement provided for payment of deposit of $35,000 which K paid on 19 October 2002 - on 30 August, 2 September, and 5 September 2002 W gave written notice purporting to cancel agreement clause in agreement provided that 3 working days' notice was needed to cancel on basis that deposit was not paid - K sought an order that W specifically perform agreement.

Held, at least arguable that letters made it clear W was cancelling agreement and grounds for doing so were non-payment of deposit deposit was not paid within 3 working days and so arguable that agreement was validly cancelled - order of specific performance would not be available in any event because it would require W to carry out building alterations to K's satisfaction when there is already acrimony between parties - application for summary judgment dismissed with costs in favour of W.

High Court
- Contract
- Formalities
- Acceptance
- Counter-offer
- Property
- Real
- Encumbrances
- Caveats

Missen v Savill 24/4/03, Master Lang, HC Auckland M391-IM03

Unsuccessful application to remove caveat - S made M a written offer to purchase M's property for $265,000 with a deposit of $26,000 - M-made a counter-offer increasing purchase price and agreeing to pay $11,000 in real estate agent's fees - real estate agent on behalf of S made a counter-offer of $265,000 and deposit of $16,000 M's solicitor wrote "agreed" at bottom of letter and signed it, noting that earlier settlement was available, and sent it to real estate agent - S submitted an agreement with a new clause asking for immediate access to property before settlement - M received an alternative offer and withdrew original counter-offer to S S lodged a caveat and M applied to remove it.

Held, when M's solicitor wrote "agreed" on letter, S's counter-offer was accepted a series of interlinking documents can be used to constitute sufficient memorandum in writing required by s 2 Contracts Enforcement Act 1952 - at least arguable that M did intend to be bound at point solicitor was instructed to agree to S's counter-offer S's new agreement with additional term regarding access amounted to proposed variation but did not go to heart of agreement already reached - application to remove caveat dismissed.

High Court
- Civil procedure
- Judgments
- Summary
- Property
- Real
- Mortgages

Muldrock v Hawe *3/2/03,* Master Gendall, HC Palmerston North CP27/02

Successful application by M for summary judgment H and M lived together in relationship in nature of marriage from October 1993 to April 2001 and purchased home in question in joint names - M sought orders for summary judgment that property at 34 Abraham Crescent be sold - M sought order that H pay all rates, mortgage, and rental arrears - M sought order that H pay him occupational rental calculated at 7.5% equity on home from 14 April 2001 to date of sale M sought order that H hold her share of net proceeds of sale in home as trustee for M no notice of opposition or response was made by H.

Held, application for order for sale of property granted application for additional orders adjourned.

High Court
- Property
- Real
- Interests in land
- Beneficial interests
- Rights attached

Ernst & Young *Nominees* v Kiwi *Property* Holdings Ltd 9/4/03, Paterson J, HC Auckland M1689-SW02

Successful application for leave to bring an application to strike out portions of amended statement of claim whether E&YN without pleading cause of action against second defendant IBM can obtain permanent injunctive relief against IBM E&YN claimed it was entitled to first offer of naming rights of commercial building owned by KPHL E&YN submitted KPHIs granting of signage rights to IBM was in effect granting of naming rights and applied for permanent injunctive relief against this happening - E&YN's position was that it was entitled to relief against IBM, notwithstanding it had no cause of action against IBM, as KPHL either breached contractual arrangement or derogated from its grant IBM claimed there was no cause of action against it as High Court ("HC") cannot retain IBM from exercising rights which it has obtained from KPHL IBM submitted there was no precedent where permanent injunction was granted against party where there is no allegation of illegality or contractual breaches.

Held, legal rights of E&YN are against KPHL and not IBM HC does not have jurisdiction to join IBM as defendant on allegations against KPHL E&YN cannot obtain injunctive relief against IBM and leave is given to bring application there will be order striking out relevant parts of causes of action - application granted.

High Court
- Property
- Real
- Access rights
- Land settlement

Cotterell v Winsor 8/5/03, Master Lang, HC Auckland CP358-IM02

Successful claim for special and general damages C contracted for sale of land with W and once contract was unconditional C purchased another property W could not find sufficient finance and sale fell through however W used C's property as access way for work being done on his neighbouring residence - C had to rely heavily on bridging finance to sustain both properties - C had to sell property at price substantially lower than contracted for with W C sought special damages for breach of contract and other expenses incurred in having unconditional sales agreement fall through C sought damages for W trespassing on her land - C sought general damages as she claimed events had been traumatic - C sought award of exemplary damages on basis Ws behaviour was outrageous and amounted to contemptuous disregard of her rights.

Held, C is entitled to $49,000 for loss on resale of house caused by W's failure to complete purchase - W is also liable for all other expenses incurred by C in having land prepared for resale - C is awarded general damages in amount of $14,000 for W trespassing on

land - an award of exemplary damages is inappropriate in this situation as W does not fully comprehend seriousness of what he has done and Court believes he would have eventually tried to settle purchase price in full - application for damages granted.

High Court
- Civil procedure
- Judgments
- Summary
- Parties
- Third party
- Property
- Real
- Easements
- Rights of *way*

Baker v Braatvedt *10/4/03,* Master Faire, HC Hamilton CP38/02

Successful application by plaintiffs for summary judgment - unsuccessful application by Br to join third parties - plaintiffs are trustees or have interest in two family trusts - Br advising solicitor, initially employed by law firm, later acted on own account Trusts purchased four titles which make up combined property two titles leased to Caltex Oil New Zealand Ltd, other two leased to TPF Restaurants Ltd for a Burger King ("BK") restaurant - both leases provided for right of way essential to operation of BK premises - plaintiffs sold freehold titles to Caltex lease - no right of way reserved right of way obtained for life of BK lease from purchaser at additional expense - plaintiffs claimed Br breached retainer contract by not securing right of way application for summary judgment of liability only Br claimed his conduct not truly causative and that previous firm's failure to register caused loss Br sought to add law firms he was previously employed at as third parties on grounds they handled original purchase and lease construction.

Held, plaintiffs did not risk breaking contractual obligations as lessor until they were committing to sell land altering titles at earlier dates did not have any direct effect on liability which they incurred when entering into sale, it was sale that caused problem - Br has no credible defence since relevant time was at sale, then Br was employed alone for purpose of protecting plaintiffs' rights no third parties should be joined because at time of sale Br acted alone - because damages relate to a failure to create a legal right of way or to include a condition in sale agreement there is no impediment to entry of judgment for liability summary judgment granted, third parties not joined.

High Court
- Environment and natural resources
- Conservation
- Historic places
- Maori affairs
- Land
- Resource management
- Designations
- Roading

Takamore Trustees v Kapiti Coast District Council; Waikanae Christian *Holiday Park* v Kapiti Coast District Council *4/4/03,* Ronald Young J, HC Wellington AP191/02; AP192/02

Successful appeals against decision of Environment Court ("EnvC") two appeals were lodged and heard together against EnvC decision which upheld Notice of Requirement ("NOR") granted in relation to creation of a link road - NOR application was sought for a designation for road, granted by Hearing Commissioners and appealed to EnvC appellants against that decision have been affected in different ways and made submissions on multiple grounds, which sometimes overlapped - TT were affected because if proposed road was built as planned it would go through land considered waahi tapu, recognised by local authority in its District Plan and under Historic Places Trust registration Waikanae Christian Holiday Park ("WCHP") property would be intersected by proposed road, which would affect property use and destroy park's character - whether wrong legal test was applied by EnvC when determining project had national importance - whether only part of intended NOR route could have been confirmed and whether s 171 Resource Management Act 1991 ("RMA") required factors including community expectations to be considered whether EnvC was correct to reject evidence of koiwi (human bones) in wetlands as presented by TT and if requirement existed to give reasons for rejection of evidence - whether consultation with local Maori was sufficient in relation to requirements under RMA and principles of Treaty of Waitangi in EnvC considerations - whether discounting alternative routes was an unreasonable consideration with regard to s 171(1) RMA whether grounds, if made out, are also material failures.

Held, EnvC made no error of law in determining project had national importance, as focus on s 5 RMA was proper and there was no attempt to add to statutory matters identified as of national importance in terms of s 6 RMA EnvC did not have power to cancel part of NOR rather EnvC had to either completely cancel it or not cancel it at all - in regard to evidence relating to koiwi, EnvC rejected evidence on basis that it was cryptic, assertive, sparse, and geographically imprecise, but it is difficult to see how much more specific evidence could possibly be given that it concerned an oral history there was no rational reason given for rejecting evidence of koiwd obligation exists to give reasons and failure to do so was an error of law EnvC rejected evidence fundamental to TT case - with regard to s 171(l)(c) RMA, EnvC failed to apply correct legal test to special

consideration of alternative routes; and this matter is significant - both TT and WCHP argued it was reasonable to consider alternative routes and nothing existed in nature of link work which eliminated this as consideration by itself this failure might not have constituted a successful appeal, but when considering other matters EnvC should have opportunity to reconsider its view on this matter also EnvC also erred in its interpretation of s 7(a) and s 8 RMA KCDC is obligated not simply to consult Maori but to have regard to Maori concerns in decision-making - failures of EnvC relating to ss 6(e), 7(a), and 8 RMA go to essence of decision and different views could effect NOR confirmation decision of EnvC is quashed and appeal referred back for reconsideration appeal allowed.

Legislation

Land Transfer (Computer Registers And Electronic Lodgement) Amendment Act Commencement Order 2003
SR 2003/103

This order brings into force, on 12/6/03, ss 42 and 52 Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002. These provisions, which are the only provisions of that Act not already in force, provide as follows:

- s 42 substitutes in the Land Transfer Act 1952 a new s 70 relating to the removal of easements from the register:
- s 52 inserts into the Land Transfer Act 1952 a new s 145A relating to the early lapse of caveats against dealings.

Cadastral Survey (fees) Regulations 2003
SR 2003/123

These regulations, which come into force on 1/7/03, prescribe the fees payable under the Cadastral Survey Act 2002 for-

- determining under s 9(a) of the Act whether cadastral survey datasets and cadastral surveys comply with standards set under s 49 of the Act; and
- auditing compliance with those standards where the standards provide for the production of records or information for the purposes of the function in s 7(1)(j) of the Act.

Land Information New Zealand (fees and charges) Regulations 2003
SR 2003/124

These regulations, which come into force on 1/7/03, replace the Land Information New Zealand (Fees and Charges) Regulations 2002.

Land Transfer Amendment Regulations 2003
SR 2003/125

These regulations, which come into force on 1/7/03, substitute a new schedule of fees in the Land Transfer Regulations 2002. The fees prescribed are payable in respect of matters under the Land Transfer Act 1952. The main changes are-

- the abolition of the $90 surcharge on titles transactions:
- the introduction of a new fee of $20 for the resubmission of instruments.

N E W ZEA L A N D

INSTITUTE Pml"" ? '
STATSCOM

Index to Costings

Residential Costings

Maria Stable-Page	Jim Glenn Valuers	Waikato	Residential	1 May
Maria Stable-Page	Jim Glenn Valuers	Waikato	Residential	1 August
Maria Stable-Page	Jim Glenn Valuers	Waikato	Residential	1 November
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Denis Milne	North Canterbury Valuations	Canterbury-Westland	Residential	5 December
Bill Paterson		Canterbury-Westland	Residential	1 October
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Roy Evans	"Engelbrecht, Evans & Co"	South/Mid Canterbury	Rural	1 February
Denis Milne	North Canterbury Valuations	Canterbury-Westland	Residential	1 February

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nevv ..aria: r_ *property*

Waihi, Waikato August 2002

Contributed by Maria Stables-Page, Jim Glenn Valuers
Construction: Concrete piles, fibrolite exterior cladding, Dutch gable iron roof. Open plan kitchen/ living area, 2 bedrooms, 1 bathroom, separate WC, laundry and hall.
Areas: 82m2
Contract Price: $81,334 (excl. GST)
Analysis:
Dwelling: 82m2 $933.34/m2 Modal Rate: $925
Multiple: 1.01
Deck: 3.6m2 180/m2
Notes: Keith Hay Homes. The Buchan (Classic) design. Contract price excludes carpet and vinyl.

Ngatea, Hauraki Plains May 2002

Contributed by Maria Stables-Page, Jim Glenn Valuers
Construction: Concrete pad to brick veneer exterior cladding, multi hip Monier tile roof. Open plan kitchen/dining area, family room, formal lounge, 4 bedrooms, bathroom, ensuite, hall and garage.
Areas: Living 163.2m2
Garage 43.8m2
Contract Price: $155,480 (excl. GST)
Analysis:
Total: 207m2/ 845m2 Modal Rate: $925
Multiple: 0.81
Notes: A Golden Home Danya. Above average quality kitchen, two ranch sliders, lounge and dining area have bay window style walls. Automatic garage door with 2 remotes.

Kerepehi, Hauraki Plains November 2002

Contributed by Maria Stables-Page, Jim Glenn Valuers
Construction: Concrete pad to brick Colourseel weather board pre-painted Superclad 300 exterior cladding and a split gable pre-painted 6 rib galvanized iron roof. Open plan kitchen/living area, laundry/ bathroom, 2 bedrooms and additional living area.
Areas: Dwelling 56.2m2
Verandah 5.4m2
Contract Price: $53,600 (excl. GST)
Analysis:
Dwelling: 56.2m2/ 957m2 Modal Rate: $925
Multiple: 1.03
Notes: Riverside Versatile Cottage. No interior painting in price.

Ashley, Canterbury Westland Ranch Style Hip Bungalow, December 2002

Contributed by Denis *J* Milne, North *Canterbury* Valuations
Construction: 4 bedroom, 2 bathroom bungalow with integral double garage on a small rural residential block. Well-appointed dwelling of BV walls and C/S roof.
Areas: 190.38 m2
Contract Price: $208,225 (excl. GST)
Analysis:
Total: 190.38m2 Net Modal Rate: $733.74
Notes: Included in the contract price is the country build factor 1% of contract price per 10km which is 6,597 and the architect/draughting fees are 1,833.

Belfast, Canterbury Westland Hip Roof Bungalow, November 2002

Contributed by Denis *J* Milne, *North Canterbury* Valuations
Construction: 4 bedroom, 2 bathroom with integral double garage on a level site. Concrete floor, brick veneer cladding and concrete tile roof.
Areas: Total 147.91 m2
Contract Price: $148,058 (excl. GST)
Analysis:
Total: 147.91m2 Net Modal Rate: $708.53
Notes: Included in the contract price is the country build factor 1% of contract price per 10km which is 1,650 and the architect/draughting fees are *2,750*. Built by Jennian Homes. Standard plan by Group builder with gas heating, as appliances 5,500 kitchen.

Rangiora, Canterbury Westland December 2002

Contributed by Denis *J* Milne, North *Canterbury* Valuations
Construction: Superior 4 bedroom dual serviced hip bungalow with integral double garage situated on a farmlet. Brick veneer walls with corona shakes roof.
Areas: 238.9 m2
Contract Price: $241,482 (excl. GST)
Analysis:
Total: 238.9m2 Net Modal Rate: $704.98
Notes: Included in the contract price is the country build factor 1% of contract price per 10km which is 6,855 and the architect/draughting fees are 4,570. Costs include septic tank. Private builder.

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