IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

7/98

AP No ~~370/97~~

UNDER	the Land Valuation Proceedings Act 1948
IN THE MATTER	of an appeal pursuant to section 26 of that Act from a decision of the North Canterbury Land Valuation Tribunal
BETWEEN	CARTER HOLT HARVEY FORESTS LTD a duly incorporated company having its registered office at Auckland, and carrying on business as a forestry company Appellant
AND	THE VALUER-GENERAL First Respondent
AND	LAND INFORMATION NEW ZEALAND Second Respondent

Dates of Hearing: 3rd and 4th August 1998

Judgment Released: 27 November 1998

Counsel: Messrs Curry and Salmon for the appellant
Mr Parker for the respondents

RESERVED JUDGMENT OF YOUNG J AND MR R P YOUNG

INTRODUCTION

These proceedings are by way of appeal and cross-appeal from a decision of the North Canterbury Land Valuation Tribunal (Judge TM Abbott and Mr TI Marks) delivered on 11 February 1998 in which it allowed in part only objections by the appellant Carter Holt Harvey Forests Ltd ("CHHF") from 1 September 1993 roll valuations of the Eyrewell and Mt Thomas Forests.

Mt Thomas Forest is a young forest of mainly radiata pine planted since 1970 and situated on the foothills of the Southern Alps, some 61 km north west of Christchurch and on the north side of the Ashley River. It has an area of 2,106 hectares. Eyrewell Forest is a large plains forest on the north bank of the Waimakariri River with a total area of 6,764 hectares, of which approximately 6,546 hectares are, or could be, planted in forest. Eyrewell was planted approximately 70 years ago. It has been in forest ever since.

CHHF occupies both forests; in each case this is pursuant to a Crown forestry licence ("CFL") under the Crown Forest Assets Act 1989 ("the CFA Act"). The Valuer-General has appeared in support of the roll values. The position adopted by the Valuer-General has been generally supported by Land Information New Zealand ("LINZ") which represents the Crown as owner of the forestry land.

In issue in this case is the land value, as defined by the Valuation of Land Act 1951, of the two forests.

Section 2 of that Act contains the following definitions:

> "'Capital value' of land means the sum which the owner's estate or interest therein, if unencumbered by any mortgage or other charge thereon, might be expected to realise at the time of valuation if offered for sale on such reasonable terms and conditions as a bona fide seller might be expected to require. ...

> 'Improvements', in relation to any land, means all work done or material used at any time on or for the benefit of the land by the expenditure of capital or labour by any owner or occupier thereof in so far as the effect of the work done or material used is to increase the value of the land and the benefit thereof is unexhausted at the time of valuation;
>
> ...
>
> 'Land' means all land, tenements, and hereditaments, whether corporeal or incorporeal, in New Zealand, and all chattel or other interests therein, and all trees growing or standing thereon.
>
> ...
>
> 'Land value', in relation to any land, means the sum which the owner's estate or interest therein, if unencumbered by any mortgage or other charge thereon, might be expected to realise at the time of valuation if offered for sale on such reasonable terms and conditions as a bona fide seller might be expected to impose, and if no improvements (as hereinbefore defined) had been made on the said land.
>
> . .
>
> 'Owner' means the person who, whether jointly or separately, is seized or possessed of or entitled to any estate or interest in land."
>
> 'Value of improvements' means the added value which at the date of valuation the improvements give to the land."

Section 28(1) provides that the district valuation roll prepared by the Valuer-General shall be the roll from which the local authority rating roll is prepared. Section 28(3) provides that the value of any trees (except "fruit trees, vines, berryfruit bushes, and live hedges") is not to be included in any local authority rating roll.

So, the task for the Valuer-General was to determine the sum which the owner's estate or interest in the two forests might have been expected to realise if offered for sale at the date of valuation if no improvements had been made on the land, save that the value of the trees on the land was not to be included in that sum.

The principal complicating feature to this case is that both forests are held pursuant to the statutory regime created by the CFA Act. This was passed with a view to enabling the Crown to divest itself of the forests while retaining ownership of the land which would remain available to satisfy claims by Maori under the Treaty of Waitangi Act. The scheme of the act

is that the trees in a Crown forest cannot usually be sold otherwise than pursuant to an arrangement which involves the issue of a CFL.

In this case, the Crown has sold the trees in the two forests to CHHF and has granted CFLs to CHHF in respect of each.

The salient features of the relationship between the Crown and CHHF arising out of the CFA Act and the CFLs in respect of each forest are as follows:-

1. The CFLs commenced on 31 October 1990.

2. The CFLs enure for the benefit of, and are binding on, the successors in title to the Crown, see s 15.

3 The CFLs "[do] not transfer to, or confer on, the licensee an estate or interest in land", see s 16.

4. The Crown may not sell the land except by way of exchange for adjoining land while it remains subject to the CFLs (only a theoretical possibility here), see ss 8 and 35(1).

5. If a recommendation is made under the Treaty of Waitangi Act for the return of either forest to Maori, then

   - The Crown must return the forest to Maori subject to the rights of CHHF under the CFL and the Crown must also pay compensation related to the value of the forest (see s 36 and the first schedule to the act).

   - Notice terminating the CFL must be given and the CFL would terminate on the expiry of 35 years commencing on the 30th day of September following the giving of the notice (see s 17(4)(b)).

- CHHF would be entitled to use the land only for forestry purposes and in respect of the current crop only, with any land that is harvested to be returned to the licensor (that is the new Maori owner) with no compensation for trees or improvements which cannot be removed.

- The new owners would have enhanced rights of access (see CFL, clause 16.4).

6. If a recommendation is made that the forest not be returned to Maori, then

   - The Crown can terminate the CFL, but this would create an initial fixed term of 35 years plus a further term of the same period, meaning that the Crown could not resume the land until 2060.

   - There would be no restriction confining the use of the land to forestry purposes.

   - The Crown is required, on termination, to buy the licensor's trees and improvements (see clause 15.4 of the CFL).

   - For reasons which are not clear there would remain a prohibition on sale of the land by the Crown while the CFL remains extant, that is probably until the year 2060, see s 35(1)

7. The CFL provides for payment of an initial licence fee with this fee to be reviewed on 31 October 1993 and every three years thereafter, the basis of the licence fee being:

> "that the yearly licence fee payable for the next three year period commencing on any Review Date will be 7% of the Land Value as at that date".

"Land value" in clause 1.1.6 is defined as meaning:

> "the sum that the Land, if unencumbered by any mortgage or other charge thereon, might be expected to realise ... if offered for sale on such reasonable terms and conditions as a bona fide seller of the Land might be expected to impose but adjusted as may be necessary to take into account the terms and conditions of this Licence."

After 9 years, that is in 1999, there is to be a more general review of the licence fee regime but with a continuing market focus to the intent that the Crown should continue to receive a market return on the land.

We note as well that the CFA Act provides for restrictions on use associated with the conservation purposes, protection of archaeological sites, protection of sites of historical, spiritual, emotional or cultural significance, water and soil covenants, forest research areas, and Wahi Tapu (see ss 18-23) and for public access (see ss 24-28).

The most difficult issues in this case relate to the extent to which the restrictions under the CFA Act and the CFLs (to which we will refer as "CFL tenure restrictions") diminish what might otherwise be thought to be the value of the owner's estate or interest in the two forests.

THE ISSUES BEFORE THE LAND VALUATION TRIBUNAL

The methodology adopted by the parties and the tribunal was to establish first, for each forest, what was referred to as its freehold equivalent land value ("FEV") and then to determine whether, and if so to what extent, that should be discounted to reflect the peculiarities of the CFL tenure restrictions.

Prior to the hearing before the tribunal, the parties were able to reach agreement as to the value of Mt Thomas assessed on a FEV basis. So,

for Mt Thomas, the only issues before the tribunal related to the effect on land value of CFL tenure restrictions. Valuation NZ and CHHF agreed that, if one put aside the possible effect on land value of CFL tenure restrictions, the Mt Thomas values were as follows:-

Land value	850,000
Improvements	350,000
Capital value	$1,200,000

So the Mt Thomas FEV was $850,000. CHHF, however, asserted that once allowance was made for CFL tenure restrictions, the appropriate values were as follows:-

Land value	359,125
Improvements	350,000
Capital value	$709,125

For Eyrewell, the conflicting valuation positions adopted by the parties were as follows.

Valuation NZ put forward the following values :-

Land value	5,580,000
Improvements	340,000
Capital value	$5,920,000

Because Valuation New Zealand did not accept that any allowance should be made for CFL tenure restrictions, its land value figure $5,580,000 is to be compared with the FEV figure contended for by CHHF. CHHF contended that the relevant values, if CFL tenure restrictions were ignored, were.-

Land value	4,250,000
Improvements	335,000
Capital value	$4,585,000

CHHF's FEV of $4,250,000 is thus to be compared with the Valuation New Zealand figure of $5,580,000. CHHF went on to argue, however, that allowing for CFL tenure restrictions, the values were:-

Land value	1,795,600
Improvements	335,000
Capital value	$2,130,600

THE DECISION OF THE LAND VALUATION TRIBUNAL AS TO EYREWELL FOREST ON FEV BASIS

The tribunal analysed the valuation evidence in relation to the Eyrewell Forest CHHF's valuation evidence on FEV came from Mr Bilbrough, a registered valuer in private practice in Christchurch. The expert for the Valuer-General was Mr HD Black, a registered valuer employed by Valuation NZ in Christchurch. The valuation evidence for LINZ came from Mr DJ Armstrong, a registered valuer and farm management consultant.

There was no substantial difference in relation to the value of improvements at Eyrewell Forest with the result that the tribunal adopted Mr Black's figure of $335,000.

That left in contention the FEV assessment. The differing contentions were as follows:-

- Mr Black initially contended for $5,580,000 in his original brief and, in a supplementary brief, $6,080,000.

- Mr Bilbrough asserted $4,250,000.

- Mr Armstrong in his original brief contended for $5,072,250 and, in a supplementary brief, $6,300,000. He had earlier, in a document prepared for a licence fee assessment under the CFL, come up with a land value figure of $4,038,000

The tribunal assumed that the land was to be valued in a "cut-over" state. After reviewing the evidence and the differing methodologies offered by the valuers the tribunal adopted as its preferred methodology a "put and take" approach. The tribunal took as a starting point the value of the land for pastoral purposes and then adjusted that for various factors.

The steps in the tribunal's reasoning were as follows:-

1 Forestry was not the highest and best use of the land at Eyrewell as at 1 September 1993; but the cost of developing the land for pastoral (or perhaps life style rural-residential) purposes would have been uneconomic with the result that the land could only be utilised effectively for forestry purposes.

2. A starting point for the assessment was an approximate value of $1,200 per hectare for pastoral land in the vicinity of Eyrewell.

3. 5% was an appropriate discount for lack of fertility (as land used for forestry, as the Eyrewell Forest has been, will usually be less fertile than land which had been used for pastoral purposes).

4. There should be a further reduction of 15% to allow for the risk of wind and fire damage.

5. There should be a discount for size of 10% (this because there are few buyers for large blocks of land, so the dollar value per hectare diminishes).

6. There should be no discount for:-

- Possibly greater costs of planting cut-over forestry land in trees than would be incurred in planting trees on land previously used for pastoral purposes.

- The liability for rates in respect of a water race which was surplus to the needs of CHHF.

This resulted in a "put and take" calculation as follows:-

Pastoral land value				1,200
Less deductions for forestry use:				
1)	Fertility (5%)	60		
2)	Wind-throw risk (10%)	120		
3)	Fire risk (5%)		60	
4)	Size (10%)		120	
	Total deductions			360
	Freehold equivalent land value			$840

The tribunal's analysis of the limited sales evidence indicated support for the "put and take" figure of $840 per hectare with the result that it concluded that the value of the Eyrewell land on a FEV basis, that is, leaving aside the effect of the CFL tenure restrictions, was $840 per hectare as at 1 September 1993. This produced a rounded total figure of $5,680,000.

THE TRIBUNAL'S VIEW OF THE CFA AND CFL ARGUMENTS

CHHF's case, as summarised by the tribunal, went along these lines.

The Waitangi Tribunal in 1991 had issued a report regarding the claim by Ngai Tahu in respect of most of the South Island. The Waitangi Tribunal had found that the Crown was in breach of its obligations under the Treaty in respect of the Kemp and North Canterbury purchases. Eyrewell is clearly within the land which comprised the Kemp purchase, while Mt Thomas is probably within both the Kemp and North Canterbury purchases Accordingly, as at September 1993, it was likely Ngai Tahu would regard Eyrewell and Mt Thomas as being at the top of its list for return.

Mr Laing (who was the lead valuer for CHHF on this aspect of the case), in his approach to the case, proceeded on the assumption that, as at 1 September 1993, the probability of return of both forests to Ngai Tahu was

100%, ie completely certain. He contended that the deduction to reflect the CFL tenure should be 35% for the terms and conditions of the licence, with a further 35% deduction from the resulting figure for the limitations on disposition under the CFA Act.

Mr Laing's calculations were as follows:-

	Eyrewell	Mt Thomas
Freehold equivalent value	$4,250,000	$850,000
Less		
(i) Discount for CFL tenure and the terms and conditions of the licence @ 35%	$1,487,500	$297,500
Adjusted land value	$2,762,500	$552,500
(ii) Discount for limitation on powers of disposition @ 35%	$966,900	$193,375
Land value	$1,795,600	$359,125

The tribunal was not much attracted to Mr Laing's argument. The 100% "chance" that the two forests would be returned to Ngai Tahu ownership was seen as well overstated. At the time of the hearing before the tribunal (and indeed when it released its decision) there was no suggestion current that Ngai Tahu was seeking the return of either forest. Indeed, as at the date of the hearing before us, there was still no such suggestion. The tribunal had some difficulty in following the logic underlying some of Mr Laing's calculations and, as well, regarded the whole exercise as founded on a fallacy as it saw the prospect of transfer of either forest to Ngai Tahu as being remote

The tribunal then went on to say:-

> "In the final analysis, the differences between freehold tenure and the Crown's tenure in respect of Eyrewell and Mt Thomas are firstly, the existence of the CFL, secondly, the prohibition on sale for the term of the CFL, and thirdly, the potential impact of a binding Waitangi Tribunal recommendation or other outcome involving return to Ngai Tahu.

> Against that background, the issue is whether or not the CFL tenure system (the statutory restriction on sale which was enacted by the CFA Act, the return to Maori provisions of the Act, and the provisions of the CFL) impacts on the value of the Crown's interest in Crown forestry land such as Eyrewell and Mt Thomas.
>
> In several cases tribunals and courts have held that statutory or other similar restrictions on disposition can impact on the value of the land in question. We shall refer to three such cases in particular, although we have considered all the authorities to which counsel have referred us."

The three decisions referred to by tribunal were the *Valuer-General* v *The Trustees of Christchurch Racecourse* (1995) New Zealand Valuers' Journal 53, *Auckland Grammar School Board* v *DOSLI* [1995] DCR 937 and the *Valuer-General* v *Mangatu Incorporation* [1997] 3 NZLR 641.

Having reviewed those authorities, the tribunal then said:-

> "While Crown forest land remains subject to a CFL, the Crown's rights as owner are similar to the rights of a lessor. In particular, the Crown is entitled to a licence fee on the agreed basis of 7% of land value, and the Crown also has what could be described as an expectation of reversion on the termination of the licence if no recommendation for return in respect of the forest in question is made by the Waitangi Tribunal. Furthermore, in the event of a recommendation for return or a negotiated settlement with Ngai Tahu which involved the transfer of either forest, the Crown would obtain the benefit of a credit in respect of its Treaty of Waitangi claim liability to Ngai Tahu, the amount of the credit being the value of the forest which is transferred.
>
> In those circumstances in our view the appropriate approach is to adopt the minimum deduction of 5% in respect of the terms and conditions of the CFL which has been adopted in the context of the licence fee reviews and then to calculate the net present value of a 7% rental return on that figure ...
>
> Using that calculation approach, and on the basis that the freehold equivalent value of Eyrewell Forest as at 1 September 1993 was $5,680,000, the net present value of the Crown's interest in Eyrewell would be $5,581,706 on a pre-tax basis and $5,489,046 on a post-tax basis. For present purposes the post-tax figure should be rounded down to $5,489,000, which therefore represents the value of the Crown's interest in Eyrewell Forest as

adjusted to reflect the terms and conditions of the CFL, while the corresponding figure for Mt Thomas is $821,400."

The tribunal then reduced these figures by a further 10% for the prohibition on sale and the prospect of a return to Ngai Tahu, producing, as final figures:-

Eyrewell Forest	
Land value	4,940,000
Improvements	$340,000
Capital value	$5,280,000
Mt Thomas Forest	
Land value	$740,000
Improvements	$350,000
Capital value	$1,090,000

THE APPEAL AND CROSS-APPEAL - OVERVIEW

Both appellant and respondents dealt with the case as involving the establishment of the FEV values for Eyrewell and Mt Thomas (with the Mt Thomas FEV being agreed) as one discrete issue and with the effect of CFL tenure restrictions as a second discrete issue

The CHHF contention was that the tribunal's FEV assessment of Eyrewell was too high; this broadly on the basis that the tribunal's figure of $840 per hectare was inconsistent with the evidence of all the parties. CHHF also asserted that the deduction for CFL tenure restrictions was too low.

The respondents' position was that there should have been no deduction for the CFL tenure restrictions. As well, while critical of some of the steps in reasoning of the tribunal as to its FEV assessment of Eyrewell, the respondents were content with the outcome of $840 per hectare but acknowledged that this, on their theory of the case, should be reduced to $825 which is the roll value.

We are dealing with this case on appeal from a tribunal which saw and heard witnesses over a number of days and, necessarily, developed a far

better feel for the case than we could hope to achieve on our perusal of the evidence assisted as we were by the submissions of counsel. On issues of fact and as to matters of appreciation, it would not be right for us to interfere with the decision of the tribunal merely because we might, on the evidence, have come to a different view.

We have reached the view that the FEV of Mt Eyrewell, as determined by the tribunal, was too high, essentially because, on our appreciation, the $840 per hectare assessment made by the tribunal went beyond any evidence before the tribunal which the tribunal can be fairly regarded as having accepted. As well, in one comparatively minor respect, the tribunal did not allow for a feature of the Eyrewell land (the liability for a particular water rate) which we think did have the effect of diminishing its value. There are other issues on which we are inclined to differ from the approach adopted by the tribunal. These points are discussed in this judgment. But they are very much matters of detail or emphasis and they do not justify further interference with the decision of the tribunal. So, with the exception of an allowance necessary to reflect the different view we have taken of the Eyrewell FEV, we are content to affirm the results reached by the tribunal.

In the balance of this judgment we deal with the case in the two parts in which it was argued; the value of Eyrewell on a FEV basis and the effect of CFL tenure restrictions.

THE VALUE OF EYREWELL ON A FEV BASIS

The Parameters of the Valuation Exercise/ The Forestry Dimension

We should say at the outset that we are satisfied, as was the tribunal, that the land must be valued for forestry purposes. The tribunal found that forestry was the highest and best use of the land, after allowance was made for the costs of developing the land for other purposes. As well, the CFA Act regime meant that the land could, in any event, only be used for forestry purposes at valuation date

In the course of argument before us, this approach was not seriously challenged by either party.

Two elements of the valuation exercise which relate to this forestry dimension were, however, debated in front of us. The first relates to the concept of "cut-over forest" and the second relates to the relevance of forestry specific risk factors in assessing the value of the land. It is to these factors that we now turn.

"Cut-Over Forest"

As we have already indicated, the scheme of the Valuation of Land Act is that a land value assessment should include the value of any trees except in relation to the land value assessment which appears in a valuation roll. S 28(3)(a) provides:

> "The value of any trees (other than fruit trees, vines, berryfruit bushes and live hedges) shall not be included in any valuation appearing in a valuation roll ..."

At page 10 of its decision the tribunal noted that the effect of this subsection was that land in this case must be valued as "cut-over forest". We are by no means sure that that particular phrase (which carries the connotation of trees having been removed but the roots remaining) is helpful.

In the Valuation Tribunal decision in *The Valuer-General* v *Fletcher Challenge Forests Ltd* (unreported Land Valuation Tribunal, Rotorua V2/94, decision delivered 7 June 1996) the tribunal was confronted with the contention that it should envisage the forestry land in question in a cut-over state. The tribunal's response was as follows:

> "We accept the Respondent's submission and determine that the starting point we must adopt is not the cut-over state, but rather a notional view of land which has constituted the floor of a growing

> forest with the value of the trees which constituted that forest notionally removed. ... In order to 'disregard' the trees, it is necessary to notionally eliminate the total tree including its roots."

On appeal (*Fletcher Challenge Forests Ltd* v *Valuer-General* (unreported, High Court, Auckland Registry, AP35/96, judgment of Salmon J and Mr J P Larmer delivered, 17 December 1996) this court disagreed with that approach:

> "We consider that the proper approach is to value the land as land used for growing trees. In identifying that component of the land value that excludes the value of the trees we see no reason to ignore their existence."

That contention was not challenged on appeal, see *Fletcher Challenge Forests Ltd* v *The Valuer-General* (unreported, CA119/97, judgment delivered 29 September 1997, page 2).

The tribunal's conclusion that the land has to be envisaged as "cut-over forest" came from the certain remarks made in the Court of Appeal in *Fletcher Challenge*. There the court set out an argument made by the appellant in this way.

> "Fletcher Forests' contention on this point is that post-harvest debris, stumps and weed growth make access and replanting difficult. The costs of replanting or initial establishment will be greater on land which is already forestry land as against what they would be for much cleaner pastoral land. Thus a prospective purchaser would pay more for pastoral land intended to be used for forestry than for land already in forest. So, after the first step of valuing the subject land as if it were pastoral land, an adjustment must be made to reflect the additional pre-planting costs which will be incurred on land which is already forest land."

The court then went on to note that appellant's case had been that the difference in gross terms, to reflect this factor was $355 per hectare which was discounted to $156 per hectare to allow for the rotational nature of forest planting and the futurity of the expenditure in all but the first year. The Court of Appeal accepted that, on the evidence, such an allowance

was appropriate (although the quantum was remitted to the High Court for determination).

In the present case, the tribunal concluded that it was implicit in the Court of Appeal's approach that the land had to be envisaged as being in "cut-over forest". However, as we have already noted, that approach had been expressly rejected in the High Court and the Court of Appeal, when directly discussing the "cut-over forest" concept noted that there was no challenge to that rejection. We do not consider that the allowance for pre-plant costs in *Fletcher Challenge* means that the valuation must proceed on the basis of an imaginary cut-over forest as at valuation date. Rather the allowance simply recognises that where land is already planted in forest, further rotational planting may be more difficult than initial planting on pastoral land due to the existence of roots and harvesting debris. This becomes quite clear when the High Court judgment in *Fletcher Challenge* is considered.

Although we differ from the tribunal, at least as to the appropriateness of the phrase "cut-over forest", this makes no difference to the valuation result because the tribunal, in any event, rejected on the evidence before it the argument that planting cut-over forest is more expensive that planting land which has been used for pastoral purposes.

Relevance Of Forestry Specific Risk Factors

Obviously the best valuation evidence in relation to the Eyrewell forest consisted of comparable sales of land already in forestry with adjustments made for the value of growing trees Because of the relative paucity of that evidence, it was also necessary to consider sales of pastoral land. An important step in the analysis of the evidence of pastoral land sales was to establish what might be regarded as a "pastoral land value" of the Eyrewell land. The various valuers called for the parties were relatively uniform in their assessment, on that footing, of the Eyrewell land which they regarded as being worth approximately $918-$960 per hectare

The respondents, however, denied before the tribunal that it was appropriate to make deductions for forestry specific risk factors; this argument being put on two bases: first, a forester wishing to acquire land at Eyrewell for forestry purposes would have to pay $900 per hectare approximately in order to meet the market if the land was to be acquired; and, secondly, that because the land must be envisaged as being in forest (albeit with the value of the trees deducted) factors that relate to the value of the crop only (such as the forestry specific risks we are talking about) are irrelevant to the value of the land.

Like the tribunal, we reject these arguments. Since we are of the view that the land must be valued for forestry purposes, we think it inescapable that forestry specific risk factors must be reflected in the valuation. This is because it is what a forestor would pay for the land that fixes its maximum value for present purposes. Forestry specific risk factors such as fire and wind-throw will, in the long run, affect the return from the forest. The forester's analysis of the likely returns will be reflected in the licence fee or rental which the forester is prepared to pay the landowner or alternatively in the price at which the forester will be prepared to buy the land. The value of the land to the Crown is to be assessed in terms of its forestry use and the market return which the Crown can expect to derive throughout the term of the CFL must be affected by the income which can be derived from the land for forestry purposes. What is perceived as being likely to impact on the forester will impact on the revenue which the Crown can derive.

Accordingly, when evaluating evidence of sales of pastoral land, we are satisfied that allowance must be made for forestry specific risk factors

The Valuation Approach Of The Three Valuation Witnesses And The Tribunal

Mr Black

Mr Black, whose initial valuation underpinned the roll valuation under attack, had examined 6 sales of which one only (referred to in the case as the "Radiata Roundwoods" transaction) was a sale of land used at the time of sale for forestry purposes. His analysis of the Radiata Roundwoods transaction was not accepted by the tribunal. In that transaction, the purchaser had acquired land and trees. By far the greater proportion of the sale price must have related to the trees rather than the land Small percentage variations affecting the assumed value of the trees had a major effect on the assumed land value component of the purchase price. So it was hard to extract much of use from this sale.

Predominantly Mr Black relied on sales of pastoral land. In his evidence he said:-

> "When valuing the land I have taken into consideration the sales of adjoining farm land. I have discounted the land for size only.
>
> The values have not been discounted for such things as wind, fire and rainfall as the comparative sales have these included in their sale prices."

To the extent that Mr Black relied on sales where land was acquired for forestry purposes, he could assume, quite legitimately we think, that the purchasers were allowing for the risks of wind and fire damage in the prices they paid. But the sales of adjoining land to which he referred in the passage from his brief we have just cited involved only one forestry sale (Radiata Roundwoods) which, as we have indicated, was not regarded as helpful by the tribunal.

For reasons just given we are satisfied that the logic of the exercise requires pastoral sales evidence to be evaluated on a basis where proper allowance is made for forestry specific risk factors. Mr Black did not carry

out that exercise. So, in the final analysis, Mr Black did not produce a supportable FEV assessment which adequately allowed for the fact that the land could be used only for forestry purposes. Our appreciation of the tribunal's decision is that it took exactly the same view.

Mr Black had adopted the view that without any discount for size (given the area of the block) the land had a value for pastoral purposes of approximately $918 per hectare and with a discount for size a value of $825 per hectare. Given that the tribunal thought a discount for size was appropriate, his evidence could not support a FEV assessment in excess of $825 per hectare and, given his refusal to allow for any forestry specific risk factors (which the tribunal itself thought should be allowed for), any FEV assessment based on his evidence would have to be significantly below $825 per hectare.

Mr Armstrong

In his evidence before the tribunal Mr Armstrong produced two valuations being:

(a) A value at $750 per hectare or $5,072,250 based on the forestry use; and

(b) A value at $930 per hectare or $6,300,000 based on unrestricted use.

In preparing his valuation based on forestry use, Mr Armstrong appears to have looked primarily at sales of forestry land and he also looked at land values based on a rate per cubic metre of productivity. As to this he noted:

> "Having considered that underlying sales evidence, a potential purchaser of land for forest use would then give consideration to this land relative to its productive potential to grow trees for timber or processing to chip."

Mr Armstrong's higher valuation at $6,300,000 is not relevant to the present inquiry because it does not proceed on the basis of a forestry use and this was really conceded by Mr Parker at the hearing before us.

The credibility of Mr Armstrong's valuation at $750 per hectare might be thought to have been adversely affected by a letter he wrote of 7 November 1995 in which he advised a value of $4,038,000 for Eyrewell. That valuation was produced for the purpose of the licence fee renewal for 1993 as between the Crown and CHHF. Mr Armstrong said "I have valued the licence at $4,038,000" and went on to state that:

> "this valuation equates to $600 per hectare over the plantable area and $596 on the gross area."

Given that the exercise he was engaged in then was conceptually very similar to the FEV assessment in issue before the tribunal, there was scope for some discomfort for Mr Armstrong arising out of the difference in his two sets of figures ($750 per hectare and $600 per hectare). However, he gave a reasonably good account of himself in cross-examination and, as well, Mr Parker was able to point us to evidence indicating that not only Mr Armstrong but also Mr Laing (with whom Mr Armstrong had been dealing in 1995) had come up in value since 1995.

Mr Bilbrough

As we shall show shortly, the tribunal's approach was very much to follow the valuation methodology of Mr Bilbrough who was the CHHF lead valuer on this issue. But the result was, for Mr Bilbrough and CHHF, very much a Pyrrhic victory. In his evidence, Mr Bilbrough, having examined sales of forestry and other land, arrived at a valuation of $660 per hectare using what has been described "the put and take" method. He started with a basic or unencumbered value of $1,200 per hectare and made the following deductions:

(a)	Fertility build up less 20%	$240
(b)	Wind throw risk less 20%	$240
(c)	Fire risk less 5%	$60
	TOTAL DEDUCTIONS	$540

Therefore, on his approach value on a FEV basis was $660 per hectare setting aside for the moment the issue of the water rate which is discussed separately in this judgment.

The Tribunal's Approach

The tribunal's approach was to take as its starting point the $1200 per hectare derived from pastoral sales and then to make the following deductions:-

(a)	Poor fertility	$60
(b)	Wind throw risk	$120
(c)	Fire risk	$60
(d)	Size	$120

The result was a value of $840 on a FEV basis. So although the tribunal accepted Mr Bilbrough's approach in terms of methodology, it applied it so as to produce a figure which was in fact higher than the roll valuation under attack ($825 per hectare).

Our Assessment Of The Tribunal's General Approach

Where expert evidence has been given, and especially where there is a conflict of such evidence, a court is required to form its own conclusions. Where there is a conflict, the court will usually either accept one view or the other or make a finding somewhere in the middle. Obviously it is open for a finding "in the middle" to be a synthesis of the evidence given

by different experts or perhaps a discounting by the court of the evidence given by one or more of the experts. A judge may accept an expert's evidence in all respects but one and if so must necessarily adjust the expert's conclusions to account for that factor. In such circumstances, there must be reasonable scope for reworking an expert's figures. Judges do this all the time, especially in cases involving the assessment of damages. That there is no evidence which, at least in specific terms, supports the precise re-workings or adjustments is no basis for challenging the judgment. In such a case, the judge's conclusions are within the scope generally of what the relevant expert was contending for.

We think that there is a point at which what starts off as a legitimate re-working exercise can becomes something different and in fact go beyond the evidence given. We think that this point is reached in a valuation case when the tribunal can be regarded as having performed its own valuation. Further we think that this is what happened here: that the tribunal, in the course of synthesising the conflicting valuations presented to it, finished up by doing its own valuation exercise and thereby produced a figure which we are satisfied did in fact go beyond the valuation evidence given.

We think this point can be demonstrated in two ways.

The first, and perhaps most telling, is simply to look at the result. The tribunal's assessment was $840 per hectare on an FEV basis. But that figure is not supported by any of the expert witnesses. Nor can it be regarded as a legitimate extrapolation of the evidence given by those witnesses based on the reworking approach which we have just mentioned To be precise:

1. Mr Black's evidence could not support a FEV assessment in excess of $825 and, in reality, if his evidence was adjusted to allow for forestry specific factors as it should have been, his FEV value would have been lower;

2. Mr Armstrong's evidence would not support a FEV assessment in excess of $750;

3. Mr Bilbrough's evidence would not, without adjustment, support a FEV assessment in excess of $660.

While we accept that some re-working of an expert's figures is a legitimate exercise we cannot accept that it was appropriate for the tribunal to re-work Mr Bilbrough's figures so vigorously that the result exceeded the maximum that can fairly be regarded as having been contended for by experts called by the Valuer-General and the Crown.

A second way in which the point can be demonstrated is to examine the various assessments of the value of the land for pastoral purposes. All witnesses assumed that the Eyrewell land had a value, for pastoral purposes, which was in the range of $918-$960. These are figures which contain no deduction for size. The tribunal's starting figure was $1,200 and its general deduction for poor fertility was $60.00. This implies an assumption by the tribunal that the "pastoral value" of the Eyrewell land was in the order of $1,140. This figure is in the order of $200 more than the corresponding step in the evidence of all the valuers who gave evidence.

The result is that we are satisfied that the tribunal's decision in respect of the FEV of $840 goes beyond the evidence and that accordingly the appeal must be allowed. The question then is what we should do

A "put and take" approach inevitably gives rise to significant debates and argument as to the appropriateness of each of the deductions and their magnitude. The subjective nature of the exercise was recognised by the tribunal in its decision in this case. Although the "put and take" method was utilised in the *Fletcher Challenge* case, the conventional approach is that taken by Mr Armstrong and involves a judgment as to the rate per hectare based on an examination and analysis of sales (principally of forest land) on a per hectare basis with the result compared to a "put and

take" calculation and also against the likely productivity of the land in question.

We accept that factors such as fertility, wind throw risk, fire risk, size, and pre-plant costs are all candidates to be taken into account on a "put and take" assessment; this as the judgment of the Court of Appeal in *Fletcher Challenge* shows. Whether and to what extent such deductions would be appropriate here was a matter of much dispute before the tribunal and, to a lesser extent, before us. However, we are of the view that allowance for these factors is implicit in Mr Armstrong's conclusion at $750 per hectare. Since it is Mr Armstrong's approach which, on our appreciation, sets the upper limit of the valuation for present purposes, we see no particular need to discuss these items in any detail.

There was some direct sales evidence in relation to forestry land in the general vicinity which had sold at prices of $773 and $787 per hectare. The blocks are smaller than Eyrewell, but, on the other hand, are further away than Eyrewell from Christchurch and also from CHHF's fibreboard mill at Sefton The tribunal's analysis of these sales would support a valuation at Mr Armstrong's figure of $750. As well the tribunal obviously concluded that Mr Bilbrough had been heavy-handed in some of his deductions. In those circumstances we think that, subject to the issue of the water-rate, to which we are about to turn, we should adopt Mr Armstrong's figure of $5,072,250 (based on $750 per hectare) as the Eyrewell FEV.

The Water Race

Mr Bilbrough reduced his value by $210,000 on account of payment of water rates of $23,182 per annum for which the owner receives no benefit. This relates to a water race which is surplus to the requirements of CHHF but for which a special water rate is nonetheless levied. This deduction was challenged by the respondents' witnesses on the grounds that there was no evidence from sales in the immediate vicinity of any such deduction, even where purchasers did not use the water race which

attracts the additional water rate. This challenge was accepted by the tribunal which said:

> "However, in our view there is no evidence whatever that a prospective notional purchaser of Eyrewell would regard the water rate liability to the Council as a factor which would impact on the value of the property. As Mr Bilbrough conceded under cross-examination (notes of evidence, page 86, lines 25-28), there is no evidence which would indicate that properties in the Eyrewell area which are serviced by the water race but which do not in fact use any water sell at a lower price because of that factor."

We disagree with that approach. As the Court of Appeal said in *Fletcher Challenge*:

> "Simply because a factor relevant to a valuation cannot be quantified by evidence does not mean it should not be taken into account."

and:

> "Assessing the impact of such a factor is a matter of judgment rather than calculation."

In our opinion the deduction for the water rate should be made at the figure proposed by Mr Bilbrough. It is logical that any abnormal cost or any cost which does not furnish a corresponding or off-setting benefit should be taken into account. Why should a purchaser not allow for such a detriment?

Our FEV Conclusion

For reasons already given we adopt as a starting point the Armstrong figure of $5,072,250 which is reduced by $210,000 for the impact of the unproductive water rate, producing a net value of $4,862,250 assessed on an FEV basis.

THE CFL TENURE RESTRICTIONS

Introduction

So far the valuation arguments have been relatively straight-forward (save for the complexities implicit in a concept of valuing land which is in trees but with the value of the trees removed). The land tenure issues raised by CHHF raise more abstract and thus difficult considerations and, in the end, a common-sense solution is called for.

The features of the CFL tenure restrictions relied on by CHHF are primarily as follows:-

1. There is a risk of the land being returned to Maori in which case the Crown receives no monetary return from the transfer.

2. The system established under the CFA Act has rigidities designed to facilitate the requirements of accommodating Maori claims but also some other Crown objectives (such as public access). These rigidities make the land less attractive than a freehold land holding. On this basis, the FEV calculations should be significantly discounted to allow for these tenure restrictions.

3 The CFA Act prevents the Crown from selling the land until the year 2060

Our General Approach

We approach the matter this way (which is broadly the approach adopted by the tribunal).

What is to be valued is the owner's estate or interest in the land. This focus on the owner's estate or interest distinguishes the exercise required under our statute from that required by the New South Wales statute considered by the Privy Council in *Gollan* v *Randwick Municipal Council* [1961] AC 82 where it was held that what was required to be valued was a

"pure fee simple interest", see *Valuer-General* v *Mangatu Inc* [1997] 3 NZLR 641 at 649 *per* Richardson P. So any detriment to the value of the land arising out of the statutory regime to which it is subject must be factored into the land value assessment. This is what happened in *Mangatu* and in the decision of this court in *Valuer-General* v *Trustees of Christchurch Racecourse* (1995) NZ Valuers' Journal 53.

Whether restrictions on the use of the land which flow only from the CFLs are so required to be brought into account may be another matter. The CFLs do not create estates or interests in land. So the decision of Grieg J in *Valuer-General* v *Radford & Co Ltd* [1993] 3 NZLR 721 is not directly applicable. Where land value is split between a lessor and a lessee, each can be assessed and each is rateable (notwithstanding the logistical difficulties discussed in that case). Rather different considerations might be thought to apply where the arrangement said to cause the detriment or advantage to a particular owner's interest does not itself create an interest in land. However, this issue is more theoretical than real here, because the fundamental limitations on the use and disposal of the land on which CHHF rely flow from the CFA Act.

Obviously when the CFA Act was passed, there was no intention on the part of the Crown (or Parliament) to diminish the value of the Crown's forestry land But to satisfy the requirements of the Maori interests with whom the Crown had been in negotiation before the CFA Act was passed, it was necessary for the Crown to accept some limitations on the way in which Crown forestry assets should be held and managed. To the extent that these restrictions adversely affect the value of the owner's estate or interest in the land in issue in this case, they must be recognised in the valuation

Significance Of Possibility Of Return to Maori

One of the consequences of the legislation was to make the land subject to the possibility of return to Maori at the direction of the Waitangi Tribunal Such a transfer would not necessarily be for value, at least in a

formal or express sense. For instance, it is conceivable that particular land might be required to be returned to Maori due to its peculiar history or characteristics and this in a way which might be quite separate and apart from any global settlement of a tribal claim. There is no suggestion that this is, or ever has been, a realistic prospect in relation to either of these forests. Far more likely, at least as the claims process has developed, is that there will be a global settlement figure reached between the Crown and the relevant tribe and within the cap of that figure, Crown assets will be transferred to Maori at their market value. If such a process is followed, it is possible that the transfer will be effected through an actual or a deemed Waitangi Tribunal recommendation (see for instance s 26, Waikato Raupatu Claim Settlement Act 1995). If so the return to Maori of the relevant land will be at market value as far as the Crown is concerned.

For our part we think that these considerations are enough to dispose of the suggestion that the possibility of return to Maori needs to be reflected, itself, in the valuation save to a very limited extent. This very limited extent arises because land earmarked for expropriation for which market value will be paid is likely, by this fact alone, to be less desirable than land which is not so earmarked. Here this factor is of limited significance because the likelihood of the land being returned to Maori appears to be remote. The tribunal dealt with this factor in association with its assessment of the diminution in value flowing from restraint on sale considerations and we are content to do the same.

We add that the whole argument is very artificial If returned to Maori, the land will be free of any restrictions under the CFA Act. On the CHHF theory, the land value would therefore be restored to its FEV (or at least largely so). In this sense, the case is much more like *Thomas* v *Valuer-General* [1918] NZLR 164 than *Mangatu*.

We think that similar considerations apply to the compensation provisions in the first schedule If the land is returned to Maori, then the Crown will, as well, have a compensation liability under the first schedule to the CFA

Act. But this must logically be treated as apart from the value of the land. As well, it seems to us that whatever is transferred or paid to Maori will be for full value as far as the Crown is concerned.

Given the impossibility of sale by the Crown as at September 1993, the issue of land value must be treated as depending on a notional sale to a purchaser who would accept a position identical to that of the Crown. The position must be treated as including the risk of expropriation for full value. For reasons just expressed we see that risk as diminishing (but not to a large extent) the value of the land from the point of view of the Crown. But the CFL tenure system imposes some rigidities in the way in which Crown forestry land is held. Since the hypothetical sale we must consider would involve the purchaser accepting the other limitations implicit in the CFL regime, the impact of those restrictions on value must now be assessed.

CFL Tenure Restrictions (Other Than Restraint On Disposition)

Under the CFA Act, if the land is returned to Maori, the licence term is reduced to a maximum of 35 years depending on when the crop is harvested. The land may, pending the termination of the licence, only be used for forestry purposes and the compensation provisions in respect of improvements are more limited than if there is no such return. These possibilities naturally carry with them a level of uncertainty likely to carry through into the licence fees which can be obtained from licensees. As well, the whole CFL system imposes rigidities which no sensible owner of forestry land, if solely focused on maximising returns from the land, would accept. So it follows, from the view point of the Crown, that forestry land identical in all other respects to Eyrewell and Mt Thomas would be more desirable if it were not subject to CFL tenure restrictions. The FEV figure we have arrived at Eyrewell and that agreed for Mt Thomas must be taken as representing the value of the other forestry land and must therefore be discounted to reflect these artificial restraints and restrictions.

The tribunal allowed a deduction of approximately 5% relating to the terms and conditions of the licence This is a concept that is reflected in

the licence fee assessment. The evidence of Mr Armstrong was that there had been approximately 19 CFL reviews in the South Island which he had been involved with and the adjustments made for terms and conditions were at or around 5%. While this exercise did not involve exactly the same issue as the tribunal had to assess here, there are close similarities and we think that the 5% figure is appropriate. Certainly, we are not prepared to dissent from the tribunal's view of the matter.

In submissions to us, counsel for CHHF pointed to the provisions of the first schedule to the CFA Act which provides, inter alia, for compensation to be paid which is at least equal to 5% of the value of the trees at the time the recommendation for return is made "as compensation for the fact that the land is being returned subject to encumbrances". The suggestion was made to us that this was a statutory acceptance that the CFL regime detracted from the value of the land by some 20% (as 5% of the value of the trees is approximately 20% of the land value). We disagree with that view. We do not accept that parliament, in enacting schedule 1 to the CFA Act, was addressing the issue before us. Nor do we think that there is anything of assistance to be gained by way of analogy from this particular provision. On this point we agree entirely with the way the matter was put by the tribunal.

The tribunal adopted a reasonably complex approach to the impact of this 5% deduction on the value of the Crown's interest. It took the FEV, deducted 5% for terms and conditions of the CFLs, applied to that net figure the 7% annual return and then undertook a discounted cashflow exercise using discount rates and other assumptions adopted by Mr Laing for the purpose of crystallising his deduction percentage on account of the risk of Maori resumption. The arithmetic seems to have been along the following lines:-

FEV	5,680,000
less adj for CFL terms at 5%	· 284,000
	$5,396,000

Allowing a licence fee at 7% of this figure produces $377,720 before tax or $253,072 after tax. If the after tax income is discounted at 4.69% this comes to $5,489,046 which the tribunal rounded to $5,489,000. The calculation is made over a 10 year period and allows for the present value of the reversion to freehold value.

The last figure is only 1.72% in excess of the net starting figure of $5,396,000 and given this close correlation it seems to us that it may have been simpler to have used the net figure particularly since discount rates and even the amount of the revenue stream calculated at 7% of the adjusted land value are open to dispute (particularly given the general reviews as to the assessment of licence fees which occur every 9 years). However, in view of our appellate role, the broad brush nature of the discounting exercise required and a reluctance to tinker with the approach of the Land Valuation Tribunal, we are not disposed to interfere with its calculations

Effect Of Restraint On Sale - Possibility of Return to Maori

The tribunal allowed 10% for the restraint on sale and the possibility of a return to Maori. It appears that the tribunal did incorrectly assume that the Crown is permitted to sell the land if and when a recommendation is made that the land not be returned. In fact, the effect of s 35(1) of the Act is that there can be no sale at all while the land remains licensed. The reason for the absolute prohibition in s 35(1) is unclear and we suspect that if and when it becomes apparent that there will be no return to Maori, and an appropriate recommendation has been obtained from the Waitangi Tribunal, this restriction will be removed.

We agree that the restraint on sale makes the forestry land less attractive than otherwise identical land not subject to such a restraint. We also agree that the possibility of a return to Maori, albeit at market value, has a similar effect. So we agree that some discount was appropriate.

We are not persuaded that the tribunal's erroneous assumption that the Crown may sell the land if and when a recommendation is made that the

land not be returned had any material influence in the tribunal's allowance. We do not regard the possibility of return to Maori as a factor which, in itself, significantly adversely affects value.

The Crown is receiving a market return on the land, indeed perhaps an above market return (at least until review). The land is being used for what is, in effect, its highest and best use. So this is not a case where the restriction on sale is associated with a restriction of the land to a use which is not its highest and best use. The land does have a value to the Crown in terms of availability to satisfy Ngai Tahu claims should the occasion arise. If and when that occasion passes, we think that the Crown would be able to obtain the necessary legislation to sell the land if that is what it wishes to do or alternatively it may well be able to buy out the licence. In any event, given that it is receiving a market return from a safe investment, there is unlikely to be any pressing need to sell the land.

We did not regard reliance by CHHF on the *Christchurch Racecourse* case as a convincing foundation for a heavy discount for restraint on sale. As noted, in respect of this forestry land, the owner is receiving a market return; and this was certainly not the position in the *Christchurch Racecourse* case. As well, the 35% reduction in that case applied not only to restraint of disposition but also to reflect public rights of access and severe use restrictions.

In those circumstances, we are not prepared to differ from the tribunal on the 10% deduction.

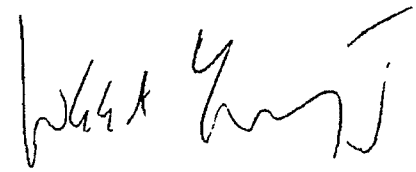
SUMMARY OF OUR CONCLUSIONS

We therefore dismiss appeal and cross-appeal in relation to Mt Thomas.

In the case of the Eyrewell valuation, we allow the appeal to the extent necessary to reflect our assessment of the Eyrewell FEV at $4,862,250 as opposed to the tribunal's FEV assessment of $5,680,000. Allowing for the discounts recognised by the tribunal that leads to a final land value for Mt

Eyrewell of $4,228,787, which we round to $4,229,000. The appeal is allowed to that extent only. The cross-appeal is dismissed.

We will receive memoranda from the parties as to costs, from CHHF within 21 days of the delivery of this judgment and from the respondents 14 days later.



Young J

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