IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CIV 2007-441-000578

UNDER	the Land Valuation Proceedings Act 1948
IN THE MATTER OF	a decision of the Land Valuation Tribunal at Napier dated 19 July 2007
BETWEEN	CHIEF EXECUTIVE OF LAND INFORMATION NEW ZEALAND Appellant
AND	KANE CARDING COMPANY LIMITED Respondent

Hearing: 26 November 2007

Court: Venning J
Mr G Horsley (lay Member)

Appearances: M Parker for Appellant
J Upton QC for Respondent

Judgment: 11 December 2007 at 11.00 a.m.

JUDGMENT OF THE COURT

This judgment was delivered by me on 11 December 2007 at 11.00 a.m., pursuant to Rule 540(4) of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: Crown Law, Wellington
Bisson Moss, Napier
Copy to: J Upton QC, Wellington

Introduction

[1] In 1979 the Hawkes Bay Hospital Board took land belonging to Kane Carding Company Limited under the since repealed Public Works Act 1928. The land was on the uphill, eastern side of a woollen mill which Kane Carding operated through its directors Mr and Mrs Vink. The land taken measured 1.3663 hectares.

[2] After it took the land, the Hospital Board built a boiler room and associated tunnel to service the needs of the adjacent hospital. In time Napier Hospital was closed. The land is no longer required. The boiler room has been decommissioned. In accordance with its obligations under s 40(2) of the Public Works Act 1981 the Crown offered to sell the land back to Kane Carding. The Crown offered the land back at $430,000 plus GST. Kane Carding's valuer considered the property was worth $340,000 (inclusive of GST). Kane Carding accepted the offer to buy back subject to the price being determined by the Land Valuation Tribunal.

[3] The Hawkes Bay Land Valuation Tribunal valued the land at $262,500 exclusive of GST. In addition it directed that Kane Carding could require the Crown to remove diesel tanks (and any contaminated surrounding land) to the satisfaction of the Napier City Council. In the event that Kane Carding chose not to require the removal of the tanks the Tribunal directed that the purchase price was to be reduced by $35,000 plus GST.

[4] The Crown appeals from that decision.

Preliminary matter - inspection

[5] Mr Upton QC suggested that the Court may wish to inspect the property. Mr Parker took a neutral position. We have decided it is unnecessary to inspect the property. We have the benefit of the evidence of the valuers who did inspect the

property and also the observations of the Tribunal following their inspection of the property.

The valuation approaches

[6] Mr Reid, the valuer engaged by the Crown, considered three valuation approaches to arrive at the value of $430,000 plus GST for the property:

- The optimised depreciated replacement cost approach : $521,000

- Direct market comparison (prior to adjustments) : $350,000 to $500,000
  (with subjective adjustments) : $400,000 to $450,000

- Investment approach : $450,000.

[7] On the other hand, in arriving at his figure of $340,000 (including GST) Mr Kitchin, the valuer engaged by Kane Carding, applied four approaches:

- Depreciated replacement cost : $430,000

- Residential block land sales : $240,000

- Hypothetical subdivision : $350,000

- Residential conversion : $400,000.

[8] We note that in fixing his values for the property as inclusive of GST Mr Kitchin does not seem to have followed the standards recommended by the Property Institute of New Zealand and Australian Property Institute Professional Practice (5 ed November 2006). Page 62 of that practice guide provides:

> In New Zealand non-residential valuation shall be stated as plus GST (if any) and residual valuations shall be stated as including GST (if any). Any exceptions to the standard treatment of GST shall be clearly stated.

And p 199:

> The valuer should consider the manner in which similar properties are bought and sold from a GST perspective and adopt the most appropriate treatment of GST accordingly.

[9] The subdivision approach in particular would generally lead to sales that incur GST and costs that would be claimable as GST inputs. However, in fixing the value at a GST inclusive figure, Mr Kitchin has been consistent in his approach. All his valuations are on a GST inclusive basis.

[10] As the Tribunal noted, there was also the rating value fixed by Quotable Value for the property of $300,000 in 2002. In addition, although not noted by the Tribunal, Mr Reid recorded that as at 1 September 2005 the value fixed by Quotable Value for the property was $500,000.

Tribunal decision

[11] The Tribunal considered that both valuers had overstated the value for the property. It decided the most appropriate approach was to value the boiler house and immediately surrounding land separately from the balance of the land. In arriving at a value for the boiler house and surrounding land the Tribunal considered that Mr Kitchin's residential conversion approach was preferable. That put a value of $175,000 on the boiler house and surrounding property. The Tribunal then applied Mr Reid's investment/subdivision approach to value the balance of the land but increased the risk allowance to 30 percent from the 20 percent applied by Mr Reid. When the discount for the risk allowed was applied, the Tribunal arrived at a result of $87,500 for the balance of the land, and accordingly fixed the value for the property overall at $262,500 (exclusive of GST).

Issues

[12] The issues raised by the appeal are:

- the approach to be taken by this Court to the appeal;

- whether the Tribunal fell into error in concluding that the property's unusual features led to the valuers overstating the property's valuation;

- the effect of the acknowledged arithmetical error by the Tribunal in its calculation;

- whether the Tribunal fell into error in the methodology it adopted in assessing the value of the land at $262,500;

- whether this Court has jurisdiction to order costs on the appeal.

The approach to be taken to the appeal

[13] The appeal is by way of rehearing: s 26 Land Valuation Proceedings Act 1948. As noted in the recent decision of *Kent's Nurseries v Upper Hutt City Council* HC WN CIV 2005-485-001958 6 August 2007 Mallon J and Mr R P Young:

> [49] … The appeal is by way of rehearing. The High Court may confirm, discharge or vary the order of the Tribunal, or refer it back to the Tribunal for further consideration. It may generally make such order as it considers just and equitable in the circumstances of the case.
>
> [50] This means that this Court considers itself the matters that were before the Tribunal and which are the subject of the appeal. It does so on the basis of the record from the Tribunal and must bear in mind any advantages the Tribunal had in seeing and hearing the witnesses and, in this case, in inspecting the property.

[14] The Land Valuation Tribunal is a specialist tribunal constituted by a District Court Judge and two valuers. The approach to be taken to an appeal from a specialist tribunal was considered in some detail in a decision of the Full Court of the High Court, *Leary v New Zealand Law Practitioners Disciplinary Tribunal* HC AK CIV 2006-404-007227 21 August 2007:

> [4] There is a variety of approaches to the manner in which an appeal by way of rehearing can be conducted, ranging from a full rehearing of all the evidence, through appeals – as this one is – on fact and law relating to the exercise of a discretion and without statutory guidelines, to appeals limited to points of law. In all such appeals, however, the onus is on the appellant to demonstrate the decision appealed from was wrong as lacking evidential foundation, wrong in law, demonstrating error in the exercise of discretion or

> on procedural grounds (*Herewini v Ministry of Transport* [1992] 3 NZLR 482, 489-490).

[15] It is not for a Court on such an appeal to substitute its own decision *de novo.* The Court will not interfere without positive grounds for doing so: *L v Canterbury District Law Society* [1999] 1 NZLR 467.

[16] We approach this appeal on the basis that the appeal should only be allowed if the appellant satisfies the Court that the decision was wrong in the way discussed in *Leary*. It would not be enough, for instance, if this Court considered that a more appropriate valuation of the property was different to that found by the Tribunal unless it could be shown that the Tribunal's decision as to the value was without evidential foundation, wrong in law or based on an error in the exercise of its discretion or otherwise wrong on procedural grounds.

Did the Tribunal fall into error in concluding that the property's unusual features led to the valuers overstating the property's valuation?

[17] Mr Parker submitted the Tribunal fell into error in concluding that the property had a number of unusual and unattractive features that impacted on the valuation of the property suggested by both valuers.

[18] The Tribunal identified that the property had the following unusual features:

- the shady nature of the site;
- the difficulty of access;
- the question of land stability;
- the steep slopes involved;
- geotechnical issues; and
- the unusual nature of the improvements (the boiler house)

After identifying those features, which followed its own inspection of the property, the Tribunal concluded that both valuers had overstated the value of the property.

[19] It was open to the Tribunal to find as a matter of fact that the property had the features referred to, and to find that they would detract from the value of the property. But the features were obvious. They were acknowledged by the valuers. The valuers referred to them in arriving at their valuations. In his evidence Mr Reid noted that:

> Parts of the subject land have limited sun and would be less desirable for intensive residential development.

Mr Kitchin acknowledged that it was highly likely a geotechnical inspection would need to be carried out in order for any future subdivision to occur and recorded that the distinctive character produced by the natural setting, elevation, views and aspects was in some instances "off-set by the difficulties of access, limited building sites and narrow winding roads". He next noted that the property suffered from shading due to its valley situation (which was particularly bad in winter months). He also made reference to the fact the northern portion of the property was relatively steep. Both Mr Kitchin and Mr Reid also dealt extensively in their evidence with the nature of the improvement, the boiler house. Mr Kitchin referred to it as a "stranded asset".

[20] The Tribunal was entitled to take the factors it identified into account. But the factors the Tribunal relied upon to find the valuers had overstated the value of the land had already been identified by the valuers and had been implicitly, if not expressly, taken into account by the valuers in fixing their values for the property. It is implicit from its finding that the valuers had overstated the value of the property that the Tribunal considered the valuers had either failed to take these features into account or, alternatively, that the valuers did not give sufficient weight to them. If the former, then the Tribunal was simply wrong. If the latter, the Tribunal did not attempt to explain the difference in any detail.

[21] With the exception of taking a different discount rate of 30 percent for the profit and risk allowance on the investment approach/hypothetical subdivision of the balance land, the Tribunal did not attempt to quantify the impact of the features they had identified. Mr Reid had allowed a 20 percent discount, primarily for the

geotechnical risks of subdivision. The extent to which the Tribunal considered that the 30 percent discount took account of the factors it had identified was left unexplained. The Tribunal simply referred to having "had concerns as to the profit and risk allowance adopted by Mr Reid …". Mr Reid's discount of 20 percent led to a final figure of $138,000. The difference between the two discount rates calculates out to just under $17,000, which in turn would lead to a final figure of approximately $120,000. But Mr Reid apparently considered the $138,000 too high and fixed the value for the remaining land at $100,000. So the difference in value that the Tribunal must have considered existed for the features that it identified, the $17,000 reduction, had already been taken account of by Mr Reid in any event.

The effect of the arithmetical error by the Tribunal

[22] As Mr Upton accepted, the Tribunal also made an arithmetical error in applying the discount factor of 30 percent. The Tribunal accepted Mr Reid's approach to the valuation of the balance land, but incorrectly assessed the 30 percent discount as leading to an end figure of $87,681. The discount is applied to the net realisation figure. The correct end figure was actually $120,853 as the following table shows:

		Reid	Tribunal	Corrected Tribunal Approach
Gross realisation		$310,000	310,000	310,000
Less:				
GST	34,444			
Selling expense	14,329			
		48,773	48,773	48,773
Net realisation		261,227	261,227	261,227
Less:				
Profit and risk allowance	20%	43,338		
Profit and risk allowance	30%		93,455	60,283
Outlay		217,689	167,772	200,944
Less:				
Development Costs	70,560			

Holding costs	9,531	80,091	80,091	80,091
		137,598	87,681	120,853
Market Value (say)		138,000	87,500	120,000

[23] The Tribunal also fell into error when purporting to accept Mr Kitchin's valuation of the boiler house and improvements. As noted, Mr Kitchin's valuation was on a GST inclusive basis. But the Tribunal, while stating it "acknowledges Mr Kitchin's rationale and treatment of the GST factor in arriving at his assessment" took the figure of $175,000 exclusive of GST for that aspect of the property when Mr Kitchin valued it at $175,000 inclusive of GST.

Did the Tribunal fall into error in the methodology it adopted in assessing the value of the land at $262,500 exclusive GST?

[24] The task of the Tribunal was to arrive at the value of the property as a whole in accordance with the accepted valuation approach:

> The estimated amount for which a property should exchange on the date of the valuation between a willing buyer and a willing seller in an armslength transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion.

New Zealand Property Institute Professional Practice Standards 2004.

[25] In accordance with the practice approved in *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 at 84:

> It has long been recognised that valuers should select the most reliable method of valuing the property in question and, to the extent that it is sensibly and practicably possible, should then verify the value arrived at by reference to other methods. No one method is generally regarded as conclusive, and for that reason prudent valuers check the valuation which they have arrived at following the most reliable method, by any other method which is appropriate in the circumstances.

each of the valuers took a variety of approaches to valuing the property generally. In doing so, the valuers arrived at a number of different values for the property, each calculated on the approaches they took to the valuation of the property as a whole. They then stood back and fixed a valuation for the property, calculated on the basis of their various entire property valuations.

[26] In arriving at the figure of $262,500 the Tribunal decided the most appropriate approach was to value the boiler house and surrounding land and then value the balance of the land to arrive at a market valuation for the whole property. There can be no criticism of that approach in general terms.

[27] The Tribunal went on to adopt the approach taken by Mr Kitchin to fix the value of the boiler house and the immediately surrounding land at $175,000 (subject to the issue of GST) but then took the general approach of Mr Reid as to the valuation of the surrounding land at $87,500 (incorrectly applying its deduction of 30 percent). It then combined the two figures arrived at by two quite separate exercises to arrive at a valuation for the property as a whole. The difficulty with this approach is in the amalgam of two quite separate approaches, when each approach was, to a degree, part of the single exercise of arriving at a market valuation for the whole property .

[28] Mr Kitchin's valuation of the boiler house and the immediately surrounding land, and Mr Reid's valuation of the balance land would have been informed by the valuations that they applied to the other part of the valuation exercise in each case, to arrive at the overall market valuation. Put another way, Mr Kitchin's figure for the boiler house and surrounding land at $175,000 was dependent upon his valuation of the balance land at $225,000, giving a total value for the property of $400,000.

[29] Similarly, in fixing his valuation of $100,000 for the potential subdivision Mr Reid was no doubt influenced by the fact that on his approach, the value of the boiler house and its surrounding area was $350,000, leading to a valuation of $450,000 for the whole property. That must be so as Mr Reid has rejected his calculation of the land at $138,000 as being too high. Even though Mr Reid suggested the figure of $138,000 was conservative, he rounded it down further to $100,000 to lead to the valuation of $450,000 for the property as a whole.

[30] The task of the valuers and the Tribunal was to arrive at a value for the entire property. In so doing it was the end result, the value for the entire property, that was particularly significant rather than the individual aspects of how that valuation was made up. The valuers were attempting to achieve a valuation that in their experience

and judgment was sustainable for the property overall. Using the methods the Tribunal relied on, in the case of Mr Reid, it was $450,000 exclusive of GST. In the case of Mr Kitchin it was $400,000 inclusive of GST.

[31] While in *Boat Park* the Court went on to say at 84:

> At times the valuation may represent a collage of approaches. Two or more methods may properly be applied in respect of the subject property and the correct market value be determined by a critical comparison of the results obtained by the application of those various methods.

the Court was there speaking of the situation where different valuation approaches to the entire property will lead to different results, and the ultimate market value may not accord exactly with any of the valuations achieved by such methods. The ultimate valuation may reflect a judgment based on the valuer's experience after taking account of a number of different valuations reached by different methods. The ultimate valuation need not coincide exactly within any particular valuation figure. That is quite different to the exercise that the Tribunal engaged in in the present case. It took two different parts of two quite separate valuations and cobbled the two together. While it is good practice to test the ultimate valuation by reference to a variety of valuation methods, each must result in a single valuation of the whole property.

[32] In the approach it adopted the Tribunal overlooked that the correct approach of the valuers was to value the property as a whole. In our judgment, in approaching the matter in that way, the Tribunal fell into error. The error is confirmed by a consideration of all the other valuation evidence. Of the other ten valuation approaches (taking account of both valuations by Quotable Value and both direct market comparisons by Mr Reid) only one valuation is less than the $262,500. That should have given the Tribunal cause for reconsideration of their final valuation for the property.

Summary

[33] In our judgment the Tribunal in this case erred in the following ways:

a) It failed to articulate why it considered the 30 percent discount was required to take account of the unusual features of the property when they had been taken into account by the valuers.

b) It made an arithmetical error in applying the 30 percent discount.

c) It adopted Mr Kitchin's value of $175,000 for the boiler house and immediately surrounding land but it did so on the basis it was GST exclusive when Mr Kitchin had stated it to be GST inclusive.

d) It took two different parts of two quite separate valuation approaches from the two valuers and combined them to arrive at a valuation for the property overall.

[34] The first, a) is relatively minor. The next two, b) and c) are largely arithmetical. An adjustment could be made to take account of them. The last d) is, however, more fundamental. It is an error in approach which requires this Court to consider the valuation exercise again.

[35] In doing so, we agree the appropriate method is to value the boiler house and surrounding land as a residential conversion (being the most realistic and probable use of the property) and then to fix a value for the balance land. Only Mr Kitchin valued the boiler house and surrounding land as a residential conversion. We accept his valuation of that at $175,000 (inclusive GST) as appropriate, as did the Tribunal. We also accept his figure of $25 per square metre for the balance land of 9,000 square metres or $225,000, in total $400,000. Mr Kitchin's valuation of the balance land at $25 per square metre is supported by Mr Reid's evidence. In his brief in reply, Mr Reid noted Mr Kitchin's figure of $25 per square metre for the balance land and said "… we would support this level".

[36] We conclude that the market valuation for the property is $400,000 (inclusive of GST), applying Mr Kitchin's methodology. We accept the valuation as inclusive of GST as that is the basis of Mr Kitchin's valuation.

The fuel tanks

[37] The Tribunal noted that no further adjustment was needed for the tunnel and gas mains but that the fuel tanks were a potential source of contamination. Mr Reid did not place a cost on that, but accepted in principle that the vendor, the Crown, would be responsible for their removal. The Tribunal accepted Mr Kitchin's figure of $35,000 plus GST as the cost for removing the tanks and any surrounding contamination. The Tribunal accordingly directed that Kane Carding could require the Crown to remove the tanks and any contaminated surrounding land to the satisfaction of the Napier City Council. In the event it determined not to require the removal then the price was to be reduced by a further $35,000 plus GST. We agree with that approach.

Does this Court have jurisdiction to order costs on this appeal?

[38] Section 37A of the Land Valuation Proceedings Act 1948 provides for costs on an appeal as follows:

> 37A Orders as to costs
>
> (1) **On the determination of any appeal to the Court** (not being an appeal from a decision of a Land Valuation [Tribunal] on a claim for compensation under the [Public Works Act 1981] or in proceedings under the Land Settlement Promotion [and Land Acquisition] Act 1952), **the Court may make such order as to the payment and amount of costs to any party to the appeal as it thinks fit**.
>
> (2) This section shall bind the Crown.
>
> (emphasis added)

[39] The Court referred to is the High Court. Section 37A reinforces the general rule contained in r 46 of the High Court Rules that the Court has an overriding discretion as to costs. There is no equivalent provision relating to the award of costs in the Land Valuation Tribunal, although as the Land Valuation Tribunal is deemed to be a Commission under the Commission of Inquiry Act 1908 it has power to order payment of costs: *Evan Vincent Kerr-Taylor v Chief Executive Land Information New Zealand* LVP4/02 8 June 2007.

[40] The issue in the present case is whether the parties have contracted out of that provision and made their own agreement that costs are to lie where they fall. Parties are able to make their own agreements as to costs, so long as those agreements are not contrary to public policy: *Prince v Haworth* [1905] 2 KB 768; *ANZ Banking Group (NZ) Limited v Gibson* [1986] 1 NZLR 556 (CA); *Beecher v Mills* [1993] MCLR 19 (CA).

[41] In the present case the Crown offer of sale is in a standard form which includes a clause:

> 8.0 Legal Costs
>
> 8.1 Each party shall bear their own legal expenses.

[42] In *Kerr Taylor* the Land Valuation Tribunal confirmed its earlier decision of *Chief Executive of Land Information New Zealand v D A Culav & Ors* LVP56/00 23 July 2002 that as the agreement of sale envisages the price may be fixed by proceedings before the Land Valuation Tribunal the costs of those proceedings are intended to be covered by the clause.

[43] We do not need to determine whether the decisions in *Kerr-Taylor* and *Culav* are correct. There is in our judgment a difference between legal costs and expenses in the Land Valuation Tribunal and costs in this Court.

[44] The rationale for holding that the clause extends to the proceedings before the Land Valuation Tribunal does not apply to an appeal from that decision. Self evidently, while all valuations that are contested will have to go to the Land Valuation Tribunal, not all decisions of the Land Valuation Tribunal will be the subject of appeal. Indeed appeals are relatively rare. While clause 8 of the offer may apply to the incidental costs associated with conveyancing following the sale and may extend to cover costs in the Land Valuation Tribunal as held by that Tribunal it does not by its wording, expressly cover costs incurred in an appeal to the High Court. If costs on such an appeal were to be excluded, particularly bearing in mind the express wording of s 37A then clear wording would be required.

[45] We conclude that clause 8 of the agreement does not preclude this Court from ordering costs on the appeal.

[46] The general principle noted in r 47(a) that the party who fails with respect to a proceeding should pay costs to the party who succeeds applies in this case. We reserve the issue of costs in the event counsel wish to be heard by way of written submission but indicate that in our view an order on a 2B basis would be appropriate.

Result

[47] The appeal is allowed. The Tribunal's finding that the valuation for the property is $262,500 (plus GST) is quashed. The valuation of the property is fixed at $400,000 (inclusive of GST).

[48] The Tribunal's decision as to the diesel tanks, noted at [37], stands.

[49] This Court has jurisdiction to award costs on the appeal. Costs are however reserved for further submission in the event counsel are unable to agree.

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Venning J (for the Court)