IN THE DISTRICT COURT
AT HAMILTON

LVP 6A/03
LVP 6B/03

UNDER	The Maori Affairs Restructuring Act 1989
IN THE MATTER OF	An objection to valuations
BETWEEN	FREDERICK MOUNTFORT RETEMEYER Objector
AND	THE MINISTRY OF MAORI DEVELOPMENT Respondent

Hearing: 19 November 2004

Coram: Judge R P Wolff
Mr D Smyth
Mr V Winiata

Appearances: Mr Muldowney for the Objector
Mr Parker for the Respondent

Judgment: 6 January 2005

JUDGMENT OF THE LAND VALUATION TRIBUNAL
DELIVERED BY JUDGE R P WOLFF (CHAIRMAN)

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[1] The present objector, Mr Retemeyer, was for all relevant periods a lessee of two blocks of land situated in the Waitomo District. They are known as Hauturu West B2 and Uekaha A12A.

[2] The leases both commenced on 1 September 1961 and ran for 42 years and they expired on 31 August 2003.

[3] The lease required Mr Retemeyer to improve the land during the term of the lease and maintain it. Provided this was done, at the expiration of the term, Mr Retemeyer was entitled to receive compensation from the lessor for the value of all improvements that he had made to the land.

[4] The operative clause that set out that arrangement is clause 18 of the lease document. It provides:-

> *"That the lessee having observed and performed the covenants and conditions of his part herein contained, or implied, shall be entitled on the termination by effluxion of time of the two hereby created (unless a renewal term shall be created as hereinafter appears, and in such case he shall be entitled on the termination of effluxion of time of any such renewed term) to such sum by way of compensation as shall be equal to 75 per centum of the value as determined in the manner hereafter mentioned of all improvements effected by the lessee in existence on the said land on the termination by effluxion of time of the said lease."*

[5] Clause 19 provided:

> *"That for the purposes of determining the amount of compensation to which the lessee is so entitled, the value of the said improvements on the expiration of the said term or renewed term as the case may be, shall be determined by a special valuation to be made by the Valuer General in accordance with the provisions of s 351 of the Maori Affairs Act 1953."*

[6] Part 24 of the Maori Affairs Act 1953 was repealed on 1 October 1989 by the Maori Affairs Restructuring Act 1989. Section 351 Maori Affairs Act 1953 is within Part 24 and was thus repealed. The relevant provision of the Maori Affairs Restructuring Act 1989 provided:

> *"Section 19(1) All lands that immediately before the commencement of this Act were subject to Part 24 of the Maori Affairs Act 1953 are hereby declared to be subject to part of this Act".*

[7] Section 19 relates to Maori land development. Section 41 of the Act provides that compensation is to be assessed by a valuation and s 41(2) provides:

> *"The provisions of ss 37 and 38 of this Act shall apply with the necessary modifications and a special valuation is made under this section".*

[8] Section 37 which relates to the special valuation provides:

> *"On the completion of the special valuation, the registered valuer shall cause to be prepared a certificate setting forth the following particulars:-*
>
> *(a) Name of lessee;*
>
> *(b) The area of land comprised in the lease and the name by which that land is commonly known or other description of the land sufficient to identify it;*
>
> *(c) A list of the improvements and the value of those improvements either separately or in classes;*
>
> *(d) The unimproved value of the land; and*
>
> *(e) The capital value."*

[9] Section 37(3) which defines the term capital value and value of improvement provides:

> *"For the purposes of this section, the term "capital value" and "value of improvements" have the meanings assigned to them by the Valuation Act 1951 and subject to subss (4) and (5) of the section every valuation made under this section shall be made in the same manner as if it were a valuation under that Act (as enforced before its repeal under s 53 Rating Valuations Act 1998)."*

[10] Section 37(4) sets out the particular definitions of improvements and provides:

> *"For the purposes of any determination by a registered valuer under this section, the Valuation of Land Act 1951 shall be read as if the following definition of the term "improvements" had been substituted for a definition of that term set out in s 2 of that Act. "Improvements" means all work done and material used at any time on the land by the expenditure of capital or labour by any owner or occupier of the land insofar as the effect of the work done or the material used is to increase the value of the land and the benefit thereof is unexhausted at the time of the valuation."*

[11] Section 37(5) provides:

> *"For the purposes of any determination by the registered valuer under this section the term "unimproved value" in relation to any land means the sum that the owners state or interest in the land, if unencumbered by any mortgage or other charge, might be expected to realise at the time of the valuation if offered for sale on such reasonable terms and conditions as a bona fide seller might be expected to impose and if no such improvements had been made on the land".*

The interpretation of the lease; Condition Precedent

[12] Clause 18 of the lease contains conditions precedent to the objector's entitlement to compensation.

[13] Counsel for the Ministry has drawn our attention to ***Cochrane v Maori Trustee*** (unreported, HC, Whangarei, 14 July 1987, Wylie J), which held that this part of clause 18 was not in accordance with the statutory power under which leases were granted so that the condition precedent was ultra vires. That portion of the clause could, however, be severed from clause 18 so that the lessee's entitlement to compensation was not effected.

[14] In addition, counsel had conceded, during the course of the hearing that the Maori Trustee waived the condition precedent argument in any event.

[15] Notwithstanding that the condition precedent does not prevent compensation being paid, the lessor is entitled to reimbursement for the costs of remedying any breach of the covenants.

[16] Here the evidence was plain that Mr Retemeyer had failed to comply with the covenants as to fertiliser. The lessor is entitled to be recompensed for the cost of the immediate application of fertiliser.

[17] Historical breaches of the fertiliser or maintenance covenants reflect themselves in the current value of the pastures and of the development improvements.

[18] The best evidence as to the cost of remedying the breach came from Mr Wrenn who calculated that the cost of remedying the breach (including the failure to

re-grass) as $8,000 for Uekaha and $9,000 for Hauturu. We believe that these sums should be deducted from any compensation due to Mr Retemeyer.

Interpretation of the lease; valuation methodologies

[19] We have set out above the sections that we need to consider in determining the total amount of compensation due to Mr Retemeyer.

[20] We accept Mr Parker's submission that, while the applicable principles for valuing unimproved land are well-established, they are difficult to apply because of the absence in most cases of sales evidence of unimproved properties. We agree too that the first step is to identify the nature of the land in its unimproved state and to value that by reference to any sales which are available. This value is then deducted from the capital value of the land at the current improved state to arrive at the value of improvements. As Mr Parker remarked, of course, that is easier said than done.

[21] We accept also that the price of the land in its unimproved state has to take into account the cost of carrying out the improvements to bring it into its current state. There is, therefore, a need for the valuer to have regard to the present value of improvements. Because it is difficult to ascertain the unimproved value as a result of lack of sales evidence, a practical approach is required as, as Mr Parker notes, the Court of Appeal has said, "To harmonise the practical reality with the requirements of the definitions".

The different valuation approaches.

[22] Mr Wrenn has used a cost based approach and his calculations are based on an unimproved value by subtraction. There are two aspects of his approach that troubled us. The first was his reference point for "unimproved value", the second was his assessment of the costs.

[23] The difficulty we have with Mr Wrenn's valuation in respect of both properties is that his starting point for unimproved value appears to be the state of the land as described in the lease, i.e. as it was 1961.

[24] The selection of this date overlooks that contemporaneously with the signing of the lease Mr Retemeyer purchased the improvements. We believe that this means that, notionally, the land being leased was the unimproved land, as if the 1961 improvements were absent. Reference then back to the lease to determine the unimproved state, in order to determine the compensation due at the end of the lease, is in our view an error.

[25] We believe that "unimproved", in this case, means covered with the natural vegetation that existed prior to any development of the land, that is, the hillsides were covered with the natural bush indigenous to the area and the wetlands were similarly clad in an undeveloped state.

[26] Independently of the significance of the purchase by the lessee of the improvements, we believe that the proper interpretation of "unimproved land" leads to the same conclusion, namely that the land in its natural state.

[27] Mr Wrenn's starting point of the condition of the land in 1961 means that he has not addressed the real issue in this case, namely the difference between the unimproved value of the land and its present day value.

[28] The approach that we suggest as appropriate is somewhat simpler than that considered by either Valuer. It does not involve any consideration of exhausted improvements. All exhausted improvements are excluded naturally in assessing the present day value of the land.

[29] On the related issue of the costs of effecting the improvements, the misdirected reference point of the commencement of the lease rather than the natural state may have resulted in Mr Wrenn's cost figures being too light, thus further causing us to hesitate to accept his final conclusions.

[30] For these reasons, we believe that we cannot therefore rely on Mr Wrenn's figures for the unimproved values for either block. For, while we accept the thorough and careful analysis that he undertook, we cannot escape the conclusion

that he has misconstrued the meaning of unimproved in the context of the present case.

[31] The issue then becomes whether the objectors can satisfy us that Mr Doyle's approach produces the correct figure for the compensation payable to Mr Retemeyer.

[32] Mr Doyle's experience is considerably less than that of Mr Wrenn. Mr Doyle, in fixing a value to unimproved land, has considered comparative sales, although these are somewhat distant from the subject site and are not unimproved land sales but rather sales of farms containing unimproved areas.

[33] Further, we were not entirely convinced by his methodology of using a ratio of improved value to land value using a comparison between various unimproved sales and various unnamed grazing block sales.

[34] If this "ratio method" had been the sole basis for his assessment, we would not have accepted it. However, Mr Doyle has considered comparative sales in a more general way, even if the comparison properties are somewhat removed from the subject property.

[35] In this regard we note that the Valuation Members of the Tribunal were somewhat surprised that neither valuer was able to provide comparative sales figures closer to the subject site. We contemplated adjourning our deliberations and calling for further investigation by both Valuer witnesses. However, in the end we were satisfied that we should adopt Mr Doyle's figures because we felt that they not only had the analysed comparative sales, but he also seemed to have a more realistic assessment of the costs associated with bringing the land from its unimproved state into production..

[36] While Mr Doyle's analysis in some respects betrayed his lack of experience, the Tribunal was satisfied that in all his calculations he was conservative and professional and he was not seeking to inappropriately advocate for a value to the improper benefit of the objector.

[37] We note that, in relation to the Hauturu block, he had taken into account the clearing of flood protection work on the Waitomo River which was not on the subject land. This may have been an error of principle, but we are not persuaded that this has led to a significant measurable error in his overall assessment of the compensation due to Mr Retemeyer for that block.

Conclusion

[38] The evidence we heard that leads us to the conclusion that Mr Doyle correctly assesses the unimproved value of Uekaha at $127,500.00 and Hauturu at $146,760.00. The parties having therefore agreed as to capital value of each respectively at $195,000.00 and $304,000.00, we are able therefore to calculate on a simple arithmetical basis the amount now due in respect of each block to Mr Retemeyer.

[39] These figures are $50625.00 for Uekaha and $117,730.00 for Hauturu being 75% of the value of improvements of each block.

[40] From each of these sums are to be deducted respectively the figures of $8000 and $9000 we have earlier mentioned to compensate the lessors for the absence of compliance with the condition precedent regarding fertilizer.

Costs

[41] Finally, we turn to the issue of costs. On that subject we accept Mr Parker's submission as to costs and costs shall fall where they lie.

Result

[42] We are satisfied that Mr Retemeyer should be compensated to the extent of $42625 being 75% or the value of the improvements to Uekaha less the costs of the application of fertilizer to correct his failure to honour the lease conditions.

[43] Applying the same considerations in the case of Hauturu the resulting compensation figure is $108, 930

JUDGE RP WOLFF