H D KENT

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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AP370/97

UNDER the Valuation of Land Act 1951

IN THE MATTER OF a determination of the Land Valuation Tribunal made on the 4th day of November 1997

BETWEEN KENT'S NURSERIES, HARRY DALE KENT and CLARA MAY BUICK

Appellants

A N D THE VALUER-GENERAL

Respondent

Coram: Ellis J.
Wild J.
I.W. Lyall

Hearing: 29-30 March 1999

Counsel: Appellants in Person
L. Hansen for Respondent

Judgment: 19 MAY 1999

JUDGMENT OF THE COURT

Solicitors:
Crown Law Office, Wellington for Respondent

This is an appeal against a decision of the Land Valuation Tribunal delivered on 4 November 1997. The appeal is by way of rehearing under s26 of the Land Valuation Proceedings Act 1948. The appeal in fact involves three decisions made by the Tribunal affecting the value of a property situated at 510-514 Fergusson Drive, Upper Hutt. The valuations are of the capital values (CVs) in 1992 and 1995, the rates postponement values (RPVs) in 1985, 1982 and 1995, and whether or not the property should have received a special rateable value (SRV) in 1992 and 1995. The appellants' land is held in six titles, but for many years has been used in one block as a nursery. The land is zoned "residential general" and the nursery is being carried on pursuant to existing use rights. The valuations have been done for the land in two parcels, and under two valuation references.

The formalities of the appeal

As is usual, the appeal was conducted on the papers and evidence before the Tribunal. Mr Kent had prepared written submissions, which had been disclosed to the respondent. Ms Hansen prepared written submissions in reply and disclosed these to the appellants, who prepared short written submissions in reply. Mr Kent and Ms Buick represented themselves and Mr Kent made their submissions, as he had done before the Tribunal. For reasons we shall soon state, we decided to ask the respondent's valuer Mr Allison to give evidence

relating to certain properties the appellants proffered for comparison, and Mr Kent and Ms Hansen had the opportunity to cross-examine him.

The burden of proof is on the appellants to satisfy us that the respondent's valuations were wrong: *Valuer-General v Littlewood & Ors* (Auckland Registry HC15-18/97, Hammond J, unreported 13 March 1998). We note that the Valuation of Land Act 1951 was repealed and replaced by the Rating Valuations Act 1998 as from 1 July 1998. However, this appeal falls for decision under the 1951 Act and the Rating Powers Act 1988.

The valuations

We have adopted the format in Ms Hansen's submissions showing the 1992, 1995 and 1985 revaluations by the Valuer-General, the valuations put forward by the appellants as objectors, and the values fixed by the Tribunal. The notations are capital value (CV), land value (LV), value of improvements (VI), and Valuer-General (VG).

"*Revaluation as at 1/10/92*

(a) Lots 41, 46 and Part Lot 47 DP 3605 containing 7411m^2 (Val No 15900 4500) - 510-512 Fergusson Drive, Upper Hutt.

Section 2 Values - Valuation of Land Act 1951

	VG	Objector	LVT
CV	$445,000	$242,438	$445,000
LV	$400,000	$96,330	$400,000
VI	$45,000	$146,108	$45,000

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Rates Postponement Values - s25A Valuation of Land Act

	VG	Objector	LVT
CV	$142,000	$155,889	$142,000
LV	$97,000	$9,781	$97,000
VI	$45,000	$146,108	$45,000

(b) Lot 42 DP 3605 containing 1012m^2 (Val No 15900 4500/1) - 514 Fergusson Drive, Upper Hutt

Section 2 Values - Valuation of Land Act

	VG	Objector	LVT
CV	$65,000	$81,942	$65,000
LV	$50,000	$13,156	$50,000
VI	$15,000	$68,786	$15,000

Rates Postponement Values - s25A Valuation of Land Act

	VG	Objector	LVT
CV	$28,000	$70,121	$28,000
LV	$13,000	$1,335	$13,000
VI	$15,000	$68,786	$15,000

Revaluation as at 1/9/95

The valuations remain unchanged from 1992.

Special Rateable Values - 1992 and 1995

The Tribunal did not grant special rateable values for the property in either 1992 or 1995.

Revaluation as at 1/7/85

The rates postponement value for the property effective from 31 March 1989 were:

	VG	Objector	LVT
CV	$120,000	$131,800	$120,000
LV	$70,000	$5,925	$70,000
VI	$50,000	$125,875	$50,000

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The statutory provisions

The s2 valuations were made by the Valuer-General for the purpose of updating the district valuation rolls which form the basis upon which rates are levied. The rolls show the LV, the CV and VI. They also show any RPV and SRV and these are determined under sections 25A and 25E of the 1951 Act respectively. LV, VI and CV are defined in s2 thus:

> "'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."
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> "'Value of improvements' means the added value which at the date of valuation the improvements give to the land."
>
> "'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."

Sections 25A and 25E provide:

> **"25A. Rates postponement values of farmland -**
> (1) The Valuer-General or the Valuer, as the case may be, may from time to time on his or her own motion or upon the application in writing of the principal administrative officer of the territorial authority or of the owner or

occupier of any land, determine the rates postponement value of land that -

(a) Is farmland within the meaning of section 2 of the Rating Powers Act 1988; and

(b) The value of which is in some measure attributable to the potential use to which the land may be put for residential, commercial, industrial, or other non farming development.

(2) The rates postponement value of any land shall be determined by the Valuer-General or by the Valuer under this section -

(a) So as to exclude any potential value that, at the date of valuation, the land may have for residential purposes, or for commercial, industrial, or other non-farming use; and

(b) So as to preserve uniformity and equitable relativity with comparable parcels of farmland the valuations of which do not contain any such potential value.

(3) Notwithstanding anything in subsection (2) of this section, no such rates postponement need be determined by the Valuer-General or the Valuer, unless in his or her opinion the amount of such value is less than the capital value if the capital value system of rating is in force, or less than the land value if the land value system of rating is in force, or less than the annual value if the annual value system of rating is in force.

(4) Sections 18 to 25 of this Act, as far as they are applicable and with the necessary modifications, shall apply with respect to the notification of, and objection to, any rates postponement values determined under this section.

(5) No objection to the amount of any rates postponement value determined under this section shall be upheld except to the extent that the objector proves that the rates postponement value does not preserve uniformity with existing roll values of comparable parcels of land having no potential value for residential purposes, or for commercial, industrial, or other non-farming development."

"25E. Special rateable values of 'existing use' properties - (1) The Valuer-General or the Valuer may from time to time, of his or her own motion or on the application in writing of the principal administrative officer of the territorial authority or of the owner or occupier of the land, determine the special rateable value of land that is used for any purpose for which the owner or occupier is entitled to use the land [under section 10 of the Resource Management Act 1991].

(2) The special rateable value shall be determined by the Valuer-General or the Valuer under this section upon the assumption that -

(a) The actual use to which the land is being put is a permitted activity in an operative district plan in force for the district in which the land is situated (whether or not such a plan is for the time being actually in force); and

(b) That use will be continued for the purpose for which the land is actually being used at the time of valuation; and

(c) The improvements on the land will be continued and maintained or replaced in order to enable the land to continue to be so used.

(3) Notwithstanding anything in subsection (1) or subsection (2) of this section, no special rateable value need be determined by the Valuer-General or the Valuer under this section, unless in his or her opinion the amount of such value is different from the capital value if the capital value system of rating is in force, or different from the land value if the land value system of rating is in force, or different from the annual value if the annual value system of rating is in force.

(4) Sections 18 to 25 of this Act, so far as they are applicable and with the necessary modifications, shall apply with respect to the notification of and objection to any special rateable value determined under this section.

(5) No objection to the amount of any special rateable value determined under this section shall be upheld except to the extent that the objector proves that the special rateable

value does not preserve uniformity with existing roll values of comparable parcels of land in the district that are used exclusively or principally for the purpose for which the subject land is actually being used, [the use of those parcels of land being a permitted activity in an operative district plan in force for the district in which those parcels of land are situated (whether or not such a plan is for the time being actually in force)]."

Sections 25G(1) must also be read:

"**25G. Special provisions as to rates-postponement values and special rateable values** - (1) Rates-postponement values and special rateable values as determined under sections 25A to 25F of this Act shall be deemed to be entered in the valuation roll on such date as the Valuer-General or the Valuer, as the case may be, determines, being not earlier than the end of the financial year immediately preceding the date when it is actually made and assessed:

Provided that where any rates postponement value or special rateable value is made on the application of the owner or occupier to the territorial authority following a revaluation of the district made in the last month of any financial year and that application is made not later than the end of the first month in the next financial year, the rates-postponement value or special rateable value shall be deemed to be entered in the valuation roll on the last day of the previous financial year, whether or not the rates-postponement value or special rateable value has actually been determined and entered on or before that date or is not determined and entered until after that date. ..."

As will be seen, s25A refers to "farmland" as defined in s2 of the Rating Powers Act 1988 which provides:

> "'Farmland' means rateable property that is separately rated, and is used exclusively or principally for agricultural, horticultural, or pastoral purposes, or for the keeping of bees or poultry or other livestock..."

It is not disputed that land used as a plant nursery is farmland as so defined.

Part X of The Rating Powers Act 1988 provides for postponement of rates on farmland. Section 158 proceeds on the basis of a valuation under s25A and the difference between rates on the values so calculated and the full rates is postponed. Section 162 states that payment of postponed rates shall on the registration of a specified certificate "be a charge on the land" in question. Section 163 provides for writing off postponed rates after five years. Section 164 provides that postponed rates not written off become payable when the Valuer-General determines that the RPV ceases to have effect. Part XI provides for SRVs calculated under s28E, which by s173 are then deemed to be the rateable value for the purposes of the Act, and the rates on the property are to be computed accordingly.

So the starting point is always the s2 or open or fair market valuation and then the operation if appropriate of sections 25A and 25E follows. On the Valuer-General's valuations recorded above, the effect on the appellants' rates

will be obvious. The precise amounts at stake are not material to what we must decide.

The grounds of appeal

The Notice of Appeal is a large document and lists seven grounds of appeal with the following headings: Postponed rates as a charge on the land; Shrinking Mr Kent's submissions to their material essence; Existing use values; Rates postponement values; Section 2 values; 1988 Application for rates postponement values; other miscellaneous findings. Before us the issues condense to whether postponed rates are a charge on the land; the section 2 values; the rates postponement values, the existing use values; and the backdating of rates postponement values to 31 March 1988. The first two are closely related.

Are postponed rates a charge on the land, and what is their effect on section 2 values?

The Tribunal held postponed rates are a statutory charge on the land and do not affect the capital value of the land. We agree. The definition of Capital Value in s2 of the 1951 Act expressly excludes any charge on the owner's estate or interest in the land, and the registration of a certificate under s162 of the Rating Powers Act 1988 creates a statutory charge on the land. The rationale is basic and simple. The definition of Capital Value puts to one side debts secured

against the land, which includes rates in the ordinary way, and postponed rates by virtue of s162. The definition does not equate with the owner's equity in the land, but his interest in the land in this case a freehold interest in fee simple. Mr Kent submitted that the capital value of the land should be reduced by the amount of the postponed rates. We reject this submission and agree with the Tribunal. There is an obvious distinction between encumbrances by way of charge and encumbrances such as easements. The postponed rates have no bearing at all on the calculation of s2 valuations, that is capital value, land value or the value of improvements.

As to the s2 valuations themselves, these were made by Mr Allison for the Valuer-General. The Tribunal said this:

> "Mr Allison's responsibility was to ensure that his analysis was based upon a carefully considered and reasonable assessment of appropriately comparative property values in or about the Upper Hutt area. If he is shown by the Objectors to have acted upon incorrect principles of valuation, or to have failed to properly assess local conditions and comparative properties then it would be our duty to intervene and correct the mistakes. The same would be the case if he failed to observe the definitions of 'capital value', 'land value' and 'improvements' prescribed by s2 of the Valuation Act.
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> It is important to remember that the valuation of real estate involves more than assessing price. Price and value are different concepts. That the assessment of the value of a property is to an appreciable extent a matter of opinion become self evidence [sic] when contrasting the divergent views expressed by Mr Kent and Mr Allison. Valuation is

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> not pure science and Utopian perfection is an unreal expectation. What was expected of Mr Allison was a careful competence and the primary issue for decision is whether he lived up to that expectation.
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> The responsibility of Mr Allison was to assess the value that a willing buyer would pay a willing seller on the open market on such reasonable terms and conditions as a *bona fide* seller might be expected to impose."

We respectfully agree with this.

Another underlying flaw in Mr Kent's submissions was to value improvements before rather than after land value. As is plain from the definition we have quoted, the value of improvements is the difference between land value and capital value. As will be seen from the values, Mr Kent proposes much of the capital value is shifted from land value to improvements.

The Tribunal was satisfied that Mr Allison had employed correct procedures and comparisons in making his valuations. Mr Kent does not claim to be a valuer and while his submissions were very comprehensive, he could not in our view point to any error in valuation approach or error of fact or arithmetic in Mr Allison's assessments. The burden was on him to show Mr Allison was in error. In a case such as this, absence of any comparable valuation by an expert valuer makes it very difficult indeed for the appellants to succeed, and we find that the challenges to the s2 valuations fail.

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The rates postponement values

The appellants' land is farmland within the meaning of s2 of the Rating Powers Act 1988. Because it is zoned residential, and the s2 value was determined on the basis of residential use, s25A of the 1951 Act applies. Mr Allison revalued the land "so as to exclude any potential value that, at the date of valuation, the land may have for residential purposes". The results are set out above. As s25A stipulates, he was obliged to preserve uniformity and equitable relativity with comparable parcels of farmland, the valuations of which do not contain any such potential value, and subsection 5 makes that the only basis for challenge.

The appellants' land is centrally situated in Upper Hutt City and there are no comparable pieces of farmland and certainly no comparable nurseries in the residential zoning.

Because it was mentioned by Mr Kent, we record that the former Urban Farmland Roll is of no relevance to any of the assessments we are considering.

Mr Allison made his assessments as at 1985, 1992 and 1995. He stated:

> "5.4 My method, uses the small block value range for Mangaroa/Whitemans Valley which is the nearest location to the subject property where horticulture is a permitted activity and there is virtually no chance of further

subdivision or development for non farming use and therefore the values do not include any factor for such potential. I believe this satisfies the Section 25A(2)(a) and also identifies the value levels for nearest comparable farm land. It is critical when valuing/comparing such parcels that like block sizes are used for comparison, as the unit hectare rate alters dramatically with varying section sizes, and so I limited the example to the 0.5 to 1ha range.

5.5 In (b) the use together of the words uniformity and equitable relativity suggest to me that a broadening of the definition of uniformity from 'being the same' to being consistent (Concise Oxford Dictionary) is appropriate.

To achieve this consistency in valuing terms I believe it is necessary to adjust for those locational factors that the subject block has in terms of an horticultural activity, and in the subject case the adjustment factor used has achieved this without including non farming potential."

His best example was the Scholes property which he analyzed. Using this and other material, the valuations were explained in his evidence. Mr Kent submitted a list of properties which he claimed were more appropriate comparisons. Four of them had already been considered by Mr Allison and he said this about them.

"1. <u>SPCA 15180/69800</u>

The roll values for this assessment have been fixed reflecting that this land forms a portion of the adjoining railway corridor (i.e. not a separate title) it has a railway designation, and it does not front a formed public road. It is therefore considered to be not comparable for the purposes of making any valid value comparison with the Kent property.

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2. CEMETERY 158180/410

The roll values for this assessment have been fixed to reflect that this section is a local cemetery (Designated as such) and has an undulating to hilly contour. It also is considered not to form a valid value comparison with the Kent property.

3. PATCHETT 15190/346

The roll values for this assessment have been fixed to reflect that this section is relatively remotely located and has an undulating to hilly contour. It is also considered not to form a valid value comparison with the Kent property.

4. MOSS GREEN 15190/5

The roll values for this assessment have been fixed to reflect that this section is predominantly steep hill land in bush and is remotely located up the Akatarawa Valley. Very substantial adjustments would be required to utilise this as a comparable."

The others he claimed were more appropriate comparisons had not been put to Mr Allison before the Tribunal, and Mr Kent's claims were not supported by any valuation evidence. We therefore decided to ask for Mr Allison's views on these additional properties to see if there was any substance in Mr Kent's claims and to give Mr Kent and Ms Hansen the opportunity to ask him questions directed to this.

We summarise Mr Allison's response as follows:

1. Totara Park Enterprises 15230/2002

2. Totara Park Enterprises 15230/1500

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3. MacAlister and Martyn 15190/07202

They are all in the same location, the first two are zoned industrial. They are large blocks of land, very stony, with stockpiles of boulders, much gorse, and generally rough condition. They are located on the fringe of the City and in fact are quite unuseable for their zoned use. Nobody wants to go there industrially.

The third is a long narrow strip with no road frontage, part flat part hillside, and formerly designated motorway. It is traversed by power pylons.

None of the three is therefore an appropriate or useful comparison with the appellant's property.

4. Fletcher Residential 15230/2000

This comprises various areas decreasing as sections have been sold. This is residential development in Totara Park. The blocks contain developed sections and undeveloped block land. They do not compare with the appellant's land, because obtaining an average value per hectare ignores a multitude of components.

5. Montgomery Industrial Park 15210/357

(This property was considered by Mr Kent to be the best comparison).

It is a single block which used to be in the main north entrance to the City (before the Western by-pass motorway). It is zoned for special purposes for commercial developments of various sorts, but none has thus far taken place. The most recent suggestion is for a resthome or retirement village. It has no use as a comparison.

6. Wellington Plant Wholesalers 15190/29556

This is very peaty land at the end of Katherine Mansfield Drive. It is doubtful if it would stand use as a commercial growing area for horticulture because of the high water table, but as a standing area for plants and produce it works quite well. Not much possibility for passing sales. It is well down the list of comparable properties.

Mr Allison did not consider any of the properties affected his valuation under s25A. In the absence of any valuation to the contrary, we must accept Mr Allison's assessments as they appear to us to conform to the standards summarised by the Tribunal, and which we ourselves adopt. The appeal against the rates postponement values accordingly also fails.

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The existing use values

The land has for many years been used by the Kent family as a nursery. Mr Allison considers its existing use is a mixture of plant display activity (2200m^2), growing activity (2000m^2), residential activity (two dwellings) (600m^2), and unused vacant residential (3623m^2). On this basis he valued the land value of the whole property as at 1992 at $455,660 or $54 per square metre, which compared with two other comparable nursery properties at $54 and $56 per square metre. This compares with the land value determined under s2 of $450,000, and so pursuant to s25E(3) no special rateable value for 1992 was to be fixed. For the 1995 year however Mr Allison concluded that the value of the existing use value of the land had fallen to $400,000 (or $47.5 per square metre) and so was less than the land value which stayed the same at $450,000.

Here, too, Mr Kent made submissions without supporting valuation evidence that the existing use values should be substantially lower. He produced a schedule of calculations based on a value of all the improvements on the land. He ascribed a replacement value, deducted 25%, and claimed a depreciated value of $214,899.89, to which he added his own assessment of the land value of $11,116.00 to give a capital value of $226,010.

In our view the value of improvements is to be calculated in accordance with the definition already quoted, the added value which the improvements give

to the land. Land value and capital value must be assessed first, and the value of improvements is the difference. Plainly, there is room for adjustments between land value and value of improvements to take into account differing opinions. However, a depreciated cost value will seldom equate with the figure arrived at by the correct approach. Nor do we consider Mr Kent's proposed land value to be remotely realistic.

Again we do not consider Mr Kent to have shown any error in approach or result in Mr Allison's valuations. This aspect of the appeal too will be dismissed.

The backdating of RPV to 31 March 1988

Mr Kent filed on 18 August 1988 his application to have the RPV fixed in respect of the period commencing 1985, but it was not the subject of the Valuer-General's decision until 16 August 1989. As a matter of law therefore, by applying s25G of the 1951 Act, the RPV applied from 31 March 1989. If the Valuer-General had made his decision before the end of the 1988/89 rating year, it would have operated from 31 March 1988. To this extent the delays by the Valuer-General have operated unfairly against the appellants. However, as we explained, we can do nothing to assist them and in any event, the matter is res judicata, following the decision of McGechan J in *Kent v Valuer-General*

(Wellington Registry, CP57/90, 27 July 1993). This appeal must therefore also be dismissed.

Conclusion

Each of the appeals must accordingly be dismissed. Mr Kent has laboured mightily in the preparation of his evidence and submissions. In this field however he would have benefitted very much from the advice of an independent valuer.

We are not inclined to award costs against the appellants. If however counsel for the respondent wishes to apply, she can file a memorandum. A copy is to be served on Mr Kent, who can file a memorandum in reply within 21 days. We will then make our decision.

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Ellis J.

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Wild J.

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I.W. Lyall