IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP NO 154/98

BETWEEN	HOWARD FALCON SCOTT of Paihia, Dentist	
	First Plaintiff	
AND	PETA CONSULTANTS LIMITED an investment company having its registered office in Vancouver, Canada	
	Second Plaintiff	
AND	HUTCHINS & DICK LIMITED a valuation company having its registered office in New Plymouth	
	First Defendant	
AND	ALISTER MAXWELL DICK of New Plymouth, Registered Valuer	
	Second Defendant	

Hearing: 1-5 March 1999

Counsel: W Akel and SE Loveys for Plaintiffs
IDR Cameron for Defendants

Judgment: May 1999
25.

JUDGMENT OF BARAGWANATH J

Solicitors: *Simpson Grierson, Solicitors, DX CX 10092, Auckland for Plaintiffs*
Morrison Kent, Solicitors, DX CP 18001, Auckland for Defendants

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I. *Introduction and result*

The plaintiff mortgagees allege against the defendant valuers negligence and breach of s9 of the Fair Trading Act 1986, asserting that a valuation on the strength of which each agreed to lend was unreasonably high. The defendants contend that the valuation of what is a remote and uneconomic unit, in the southern King Country between Taumarunui and the coast, was properly valued on the evidence available on a rising market; that the figure placed upon it by the defendant was within a reasonable range; and that the loss later suffered by the plaintiffs at mortgagee sale at a lower figure was the result in a drop in the market, together with a discount by reason of the forced sale.

I have concluded that, on an application of the principles by which the law protects those relying upon professional advice, the plaintiffs have not established breach of duty by the defendants and accordingly the claims fail.

II. *Background*

In May 1995 a Mr VI Randall committed himself unconditionally to buy the subject property for $320,000. On 9 June 1995 the Second Defendant (Mr Dick) on behalf of the First Defendant (H&D) of which he is a director and shareholder, assessed the market value of the property at that date as $275,000 inclusive of improvements and of $2,000 for fixed chattels. (It is unnecessary to distinguish between the respective positions of Mr Dick and H&D). Armed with the valuation Mr Randall approached Mr David Barton of Park Avenue Mortgage Brokers (PAMB) to seek finance for his purchase. On 21 December H&D readdressed his valuation to the plaintiffs (Mr Scott and Peta) who were clients of PAMB. Relying upon it they lent Mr Randall sums of $105,000 on first mortgage (Mr Scott) and $47,000 on second mortgage (Peta) respectively, the security being the personal covenant of Mr Randall, the property, and (in the case of the second mortgage) the personal guarantee of Mr Barton. Mr Randall did not have the means to service the loans, which were at high interest rates. Both he and Mr Barton became bankrupt and at mortgagee sale the property realised insufficient to repay Mr Scott and nothing for Peta. The plaintiffs assert and the defendants deny that the valuation was made negligently and in breach of the Fair Trading Act, overstating the value of the property which the plaintiffs say they would never have

accepted as security had the valuation been prepared with reasonable care so as to disclose the property's true (and lower) value. They apply for leave to amend the statement of claim to allege further particulars of negligence and breach of the Fair Trading Act. The defendants resist the amendment and assert contributory negligence.

III. *The property*

The property comprises 101 hectares held in three titles of some 44, 55 and 4 hectares respectively. It is located on State Highway 40, the closest village being Ohura some 18 kilometres to the east, being 12 kilometres of metalled road and 6 of seal. Further east again is Taumarunui which is 72 kilometres away; New Plymouth is 120 kilometres distant via State Highways 40 and 3. A primary and a district high school are available at Ohura which provides a small range of services and facilities. There is no school bus. The defendants' valuation described the property's altitude as from 430 to 515 metres above seal level. Winter frosts can be severe and annual rainfall is about 2400 millimetres. The defendants described the resale potential in the immediate vicinity as below average relative to other parts of Taranaki and the King Country, mainly because of the relative isolation and harsh winter conditions.

IV. *The principles of law*

This decision turns upon the application of clear principles of law which must be kept in mind when considering the deep seated conflict of expert evidence.

The law of negligence requires an expert valuer, when forming and expressing an opinion which with the valuer's knowledge and consent is being relied upon by prospective lenders, to exercise reasonable care and skill. A plaintiff whose claim is in negligence must prove both conduct that is careless, and resulting loss.

Section 9 of the Fair Trading Act prohibits conduct that is misleading or deceptive. In a claim under s9 the plaintiff must prove such conduct; to secure relief (under s43) again the plaintiff must prove loss.

In a claim for damages for negligence it is not the court's function to form an opinion as to the actual value of the land. (Cf the case, for example, of a District Court Judge sitting as a member of a Land Valuation Tribunal). Whether this Court would itself form the same or a different opinion as to value is a different question from whether carelessness has been established. In ***Bolitho v City and Hackney Health Authority*** [1998] AC 232 the House of Lords considered a case of alleged medical negligence. The plaintiff contended that a medical practitioner, who breached her professional duty by failing to attend on a sick child, was careless in a manner which had contributed to his death. Her evidence that had she done so she would not have intubated the child was accepted. The essential question was whether a failure to intubate was outside the zone of reasonable professional conduct. Five distinguished medical experts held that the answer was yes; three that it was no. The judge indicated that, without medical evidence, he would have thought that the risk of death as a result of failing to intubate was unacceptable. But the House of Lords held that he had acted properly in putting his layman's view aside. The judge was right to apply the following statement of principle by Lord Scarman in his dissenting speech in ***Maynard v Midlands Regional Health Authority*** [1984] 1 WLR 634, 639 adopted by the trial judge in ***Bolitho*** (see page 238):

> ... I have to say that judge's 'preference' for one body of distinguished professional opinion to another also professionally distinguished is not sufficient to establish negligence in a practitioner whose actions have received the seal of approval of those whose opinions, truthfully expressed, honestly held, were not preferred. If this was the real reason for the judge's finding, he erred in law even though elsewhere in his judgment he stated the law correctly. For in the realm of diagnosis and treatment negligence is not established by preferring one *respectable* body of professional opinion to another. Failure to exercise the ordinary skill of a doctor (in the appropriate speciality, if he be a specialist) is necessary.

Lord Browne-Wilkinson stated (***Bolitho*** page 243)

> It is only when a Judge can be satisfied that the body of expert opinion cannot be logically supported at all that such opinion will not provide the bench mark by reference to which the defendant's conduct falls to be assessed.

Having found (1) that a responsible body of expert opinion had rejected the option of intubation, and (2) that he could not reject that body of opinion as illogical, the judge

was right to refuse to substitute his own views for that of the reasonable experts with whom he would have preferred to disagree.

Such principles are regularly applied in England in valuation cases: ***Zubaida v Hargreaves*** []1995] EGLR 127; ***Merivale Moore plc v Strutt and Parker*** (CA 22 April 1999 *The Times* 5 May 1999).

Mr Akel, responding to my minute inviting comment on ***Bolitho*** and Professor Whipple's work (Part V below), submitted that the decision has no present relevance, because this is a case not of two different valuation methodologies, one or other adopted by members of two competing schools of thought, but of competing individual opinions.

I take the point of conceptual distinction but do not agree that it entails a practical difference. On the contrary, the reasons that lead a court to pause before rejecting a general technique supported by expert opinion must apply equally to judgments that a particular opinion is to be rejected as below an acceptable standard. It is implicit in the assertion by an accepted expert of an opinion that it is within a legitimate range. To challenge the opinion requires showing it is outside such range. There is analogy with the exercise in administrative law of challenging an executive decision on judicial review: only in some of the cases in which the Court is itself expert will it substitute its opinion for that of the decisionmaker (see ***Khawaja v Secretary of State for the Home Department*** [1984] AC 74); in others it will defer to a greater or lesser extent unless persuaded that the decision was unreasonable. The degree of deference will depend upon the extent to which it is justiciable. Compare ***Wellington City Council v Woolworths NZ Ltd (No 2)*** [1996] 2 NZLR 537 and ***Ports of Auckland Ltd v Auckland City Council*** [1999] 1 NZLR 601 at 606. In the present case a good deal of deference is required.

I have considered whether in New Zealand we should strike out in another direction; I am satisfied that we should not do so. The principles underlying these decisions are two fold. First, the truism that two polar opposite opinions may nevertheless both be "reasonable", in the sense that the law will not insist on one ahead of the other: see in another context the remarks in ***Secretary of State for Education and Science v Tameside Metropolitan Borough Council*** [1977] AC 1014. The second and related

principle is that of justiciability. Without the presence of an expert lay member or assessor the judge is not equipped by knowledge or experience to determine the merits of the competing opinions, unless there is some evident illogic which a judge is competent to discern and act upon. For a lay judge to presume to prefer one responsible and reasonable expert to another would substitute whim for adjudication by application of predictable principle. As ***Bolitho*** shows, it must be enough that the responsible and reasonable opinion exists; ***Maynard*** rightly stops the enquiry at that point: the law cannot resort to head counting. I am of the view that in applying the test of carelessness New Zealand should in this context follow England in adopting what has become known as the ***Bolam*** principle; ***Bolam v Friern Hospital Management Committee*** [1957] 1 WLR 582, 587 per McNair J:

> I myself would prefer to put it this way, that he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art ... Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view.

That is subject to the gloss that, if the practice is itself unreasonable, liability will follow. See ***Sulco Ltd v ES Redit & Co Ltd*** [1959] NZLR 45; 88 per Henry J, cited with approval by Richmond J in ***McLaren Maycroft Co v Fletcher Development Co Ltd*** [1973] 2 NZLR 100, 107-8:

> For myself, I would conclude, and do conclude, that there was no sufficient proof that the architect failed to exercise the amount of skill properly expected from skilful and experienced members of his profession. Since the Court must ultimately itself determine the question of negligence as a fact in all the circumstances of the case, I do not rest my finding on evidence as to the general practice of the profession alone. The Court may come to the conclusion that the standards deposed to by the witnesses do not reach the standard required by law – namely, a reasonable and prudent architect engaged on a work such as this.

This passage recognises that evidence as to the general practice of a profession affords a valuable test. If it be found that a professional man does not use the degree of skill and care which the majority of his profession would have brought to the same task, then that is strong evidence of negligence. In his judgment in the *Sulco Co Ltd* case, Henry J (at p 86) cites a passage from the judgment of Tindal CJ in *Chapman v*

> *Walton* (1833) 10 Bing 57; 131 ER 826 where the value of this type of evidence is fully recognised. At the same time, in the passage which I have cited from his judgment, Henry J makes it clear that the Court is not necessarily bound by such evidence for the Court must retain its own freedom to conclude that the general practice of a particular profession falls below the standard required by the law.

(The application of the ***Bolam*** principle in the special case of medical non disclosure considered in ***Smith v Auckland Hospital Board*** [1965] NZLR191, ***Reibl v Hughes*** (1980) 114 DLR (3d) 1 and ***Rogers v Whitaker*** (1992) 175 CLR 479 involves special considerations relating to human dignity which do not require consideration here. They are discussed in Lord Scarman's reasons for his dissent in ***Maynard v West Midlands*** at 876.

For similar reasons I am of the view that that test should apply also in allegations against professional advisers of breach of s9. While the test of "misleading" or "deceptive" is, like that of the tort of negligence, objective (***Goldsbro v Walker*** [1993] 1 NZLR 394), the judge cannot find such test to be satisfied unless able to reject the expert evidence that the opinion was justified. That takes the enquiry back to the two principles which underlie the ***Bolitho*** test.

V. *Approach*

It is for the plaintiffs to establish the probability both of negligence, or breach of the Fair Trading Act, and the quantum of loss said to result.

A report on the value of land is often sought by a prospective financier to provide information as to its worth as mortgage security. The valuer will provide an opinion as to the current market value which may be, but in this case was not, accompanied by advice as to the sum which is considered reasonable to advance on such security.

Conventionally, that valuation is performed on the basis of what a willing but not anxious buyer might reasonably expect to receive from a willing but not anxious seller. There are no real parties to the notional transaction; the concept of willing but not eager buyer and seller is a fictional test commonly expressing the valuer's conclusion of the property's value based upon an assessment of more or less analogous actual transactions

affecting other properties. The problem is to determine just how such other transactions are to be employed in the reasoning process.

In some cases, where there are frequent sales of closely comparable properties, the evidence of prior transactions will provide useful guidance, within a narrow range, as to the value. Again, in cases where the value is largely a function of the present value of discounted future cash flow the range may be narrow. An example sometimes used is that of a dairy farm the value of which depends very much on its likely production; although there is likely to be a difference between its value and that of another less valuable asset producing similar income, a fact that may reflect an element of optimism as to future increases in land values as well as the preference of some New Zealanders to live in a rural environment.

The present case however is of a property which all agree is not an economic unit, that is one capable under ordinary efficient management to pay outgoings and provide a reasonable return. While there was at the time of the valuation some scope for securing a return from the property, it was agreed that no buyer would on economic grounds alone as at 9 June 1995 pay a price within the range of any of the three figures advanced in evidence by the three valuers who gave evidence, namely:

Mr Findlay (for plaintiffs)	$193,000
Mr Hughes (for defendants)	$254,000
Mr Dick (second defendant)	$273,000 (nett)

The Findlay figure is 70% and the Hughes figure 75% of that of Mr Dick.

There was no substantial pattern of closely similar transactions available as a guide to Mr Dick at the time of his valuation, or to the independent experts Messrs Findlay for the plaintiffs and Mr Hughes for the defendants when performing what was necessarily a retrospective valuation as at the same date. Each valuer had therefore to do his best on the basis of what was available by way of more remote comparisons. In such a case application of the fictional test of value presents a more extensive range of legitimate opinion than in other cases.

Particular care is needed when there has been a general drop in property values after the event; and the ore when there has been a later forced sale.

Further, an expert valuer possesses the skill, attained after years of daily experience, of appraising the relative weight and significance of a wide range of disparate factors such as soil quality, size, shape, topography, location, carrying capacity, aesthetic quality and comparability with other data and their respective weighting, to form a professional judgment as to value. Mr Findlay put it well:

> A valuer is required to interpret the market and to make a judgment as to the value of any subject property. The valuer uses a wide range of information available being sales and a variety of sales analysis, knowledge of the market place which includes both vendors and purchasers' requirements and needs and is then required to put all that together to establish the value. A valuer cannot in any way take one particular formula do some simple multiplication and say that is the answer.

In such a case as the present a judge, having no more than the limited experience gained in a lawyer's practice, must exercise caution before concluding that a valuation is outside what may be a broad range within which a reasonable valuation would fall. See ***Singer and Friedlander Ltd v John D Wood and Co*** [1977] 2 EGLR 84 and ***Banque BruxellesLambert SA v Eagle Star Insurance Co Ltd*** [1997] AC 191. (It is unnecessary to enter the controversy as to the application of the latter decision to the assessment of damages: see remarks of Lord Cooke (dissenting) in ***Platform Home Loans Ltd v Oyston Shipways Ltd*** [1999] 2 WLR 518 at 523.)

During the hearing counsel on both sides and I sought to elicit from each valuer the path of logic along which he moved from the evidence of prior transactions to his opinion as to the value of the subject property. Each produced a list of other transactions which he said assisted his conclusion and showed the error of that of the other side. I will return to the evidence. What was however notable was that Mr Findlay for the plaintiffs exhibited considerable reluctance to spell out his process of logic; while, although each was presented with a patent flaw in what had been described as a major element of his process of reasoning, none of Mr Findlay, Mr Dick or Mr Hughes considered that his respective opinion should be altered in any way to make allowance for the error. (It is fair to record that Mr Findlay's error was in a set of figures prepared over a lunch

adjournment to meet the challenge that his process of reasoning was not transparent). Neither the good faith nor the experience of any of the experts was challenged; although Mr Dick was conceded to have the greatest experience of the particular area. I agree with Mr Cameron that the factor mentioned by McGechan J in ***Gosper and Olsson v Relicensing (NZ) Limited*** (CP225/96 Wellington Registry) at page 61 warrants consideration:

> The outsider can, of course, obtain the standard statutory information including recent sales...just like any other, but cannot hope to have the judgmental familiarity or alertness to potential local advantages vested in an experienced local.

Of course both Mr Findlay and Mr Hughes have had long experience that relates specifically to areas not far distant. All these are among the many factors that go to whether the ***Bolitho*** test of logic and reason has been met.

I had provisionally concluded that the methodology employed entailed to a high degree a value judgment based on personal experience of what factors were significant and how they should be weighed, rather than any process of logic readily evaluated by a lay judge in terms of ***Bolitho***, when I encountered Professor RTM Whipple's text *Property Valuation and Analysis* (Law Book Company 1995). I invited counsel's submissions on the following passage in that work at pages 258-260.

> METHODS FOR EFFECTING COMPARISONS
>
> Valuers use up to four methods in weighing comparisons between sold and subject properties in value estimation. These are :
>
> - review and intuition;
>
> [The other three methods -
>
> - construction of an adjustment grid;
> - quality point rating;
> - regression analysis -
>
> are irrelevant to the evidence in this case and do not fall for discussion.]
>
> ...
>
> REVIEW AND INTUITION

> This may be disposed of fairly quickly.
>
> In this approach, the valuer identifies sales of other properties regarded as comparable with the property to be valued. Features deemed relevant to the comparison are reviewed and evaluated. These will vary with the type of property and the amount of information that can be gathered.
>
> Allowances are made for time differences ... and other factors affecting the terms of sale. The various properties are then compared, feature by feature, with the subject property in a mental process that Rowland [*The Use of Comparable Sales for Market Valuations* (The Valuer No 31, No 5 February 1991 pages 332-6 and 366)] refers to as "ill-defined" and which sometimes ends with an estimate of value based upon the evidence of the comparable sales.
>
> The conclusion arrived at in this way may well be reasonable, resting no doubt on years of experience in the valuation of the kind of property concerned. It suffers however from a number of shortcomings:
>
> 1. ... this method of weighting the features of properties cannot be taught or otherwise communicated. One may therefore be at a loss to understand how this skill, central to value estimation, is acquired in the first place and communicated ... in a manner [that] convinces ... of the logical basis whereby the duty of care owed to [clients] has been discharged. Rowland observes:
>
> > 'Although it has become common to present sales evidence in valuation reports in Australia, it is rare for the way in which the sales have been employed in the process to be explicit.' (op cit, p 332).
>
> 2. ...
>
> 3. Because the steps leading to the valuation cannot be identified, the process cannot be replicated between valuers. Ten valuers using this process will likely produce different estimates of value which will be impossible to reconcile.
>
> ...
>
> ... this approach to weighing evidence cannot be recommended.
>
> This is not to downgrade the value of bringing wide experience to a valuation assignment because judgment certainly has a role to play. Nevertheless, judgment is best invoked following careful analysis so that the bridge over the chasm of the unknown is as short as possible. The mental acts of judgment and intuition are different in kind.
>
> A structured approach [of the kind the author proceeds to describe in his other methods] is not advocated ... purely for the sake of structure. It

> may not necessarily produce a more correct result - but it will better alert the valuer to possible errors in logic and proceed on and form the basis for a more credible communication ...

Whether or not it would have been possible in this case to employ any of Professor Whipple's other three methods does not arise.

Mr Cameron submitted it was not possible, describing the approach employed by Mr Hughes and by Mr Dick (at least in his evidence) as:

- the most comparable properties were included in the schedules
- these were inspected and fully analysed (improvements, land and effective land area compartmentalised)
- the schedules highlighted the variations
- a final conclusion was reached from the comparables as to where the subject property sat in regard to current market evidence
- in valuing rural properties of this type, where there are few if any comparable properties which can be used as a bench mark, a high degree of judgment and intuition were necessary and unavoidable
- reassurance could be achieved from sales immediately following the operative date

Mr Akel contended that in this case all of the first three of Professor Whipple's methods of valuation were undertaken in various forms, although Mr Dick placed much greater reliance on intuition:

> "[t]his is reinforced by his stress on sales that he knew and was involved in."

It may be observed that Mr Findlay's reference in his evidence in chief and Mr Dick's in the notes preceding his valuation to only the single Collins-Santer sale would suggest that their approach tends to fall more into Professor Whipple's first category than into any other. That is not to criticise either of them for failing to provide a better supported argument; the problem faced by all three experts is that of sparcity of evidence as to value of comparable properties.

For the reasons given by Mr Findlay it may be doubted how relevant are the use of "gross" and "effective" land areas in the case of the present uneconomic property and its comparators. But on his approach the result is simply that the exercise becomes even more problematical and the zone of legitimate difference of expert opinion beyond the ability of the Court to assess by logical means increases.

For the reasons contained in this part, as well as the ***Bolitho*** reasons discussed in Part IV, I must exercise particular care in attempting to determine whether Mr Dick's figure is proved to have exceeded the upper limit of the legitimate range of expert opinion.

VI. *The plaintiffs' challenge and the application to amend*

The Plaintiffs' pleading put in issue as to liability only the value stated in the Defendants' valuation. No issue arose as to advice concerning the risk that the borrower would be unable to maintain payments.

At 4.15 p.m. on Day 5, following the conclusion of the evidence, Mr Akel sought to add the following further particular of negligence and breach of the Fair Trading Act:

> g. Failing to give a mortgage recommendation or advise the plaintiffs of adverse or negative factors that would affect the grant or advance of mortgage finance.

Mr Cameron opposed the application on the ground that had the point been raised earlier there would have been further evidence and cross examination upon it. I reserved my decision to allow consideration of the point after reviewing the evidence. I now uphold the objection and disallow the application. Both the plaintiffs could and would in my view have been likely to have been cross examined as to the significance to them of the point. Part of the basis for such particulars was present, in the form of the Institute of Valuers' Practice Standard 2 *The Valuation of Residential Properties for Mortgage Purposes* paragraphs 3.2 and 4.2 contained in the Supplementary Bundle and the Brief of Evidence in Reply of Mr Findlay paragraphs 26-7, and some cross examination from Mr Cameron (pages 66-7). His questions were however explicable as going to support Mr Findlay's credibility generally rather than as directed to a specific plea that had not

been advanced. Mr Cameron's clients should not be penalised for his decision not to explore an issue that had not been raised, against the possibility that it would be. Any other conclusion would stand the principles of pleading on their head.

VII. *The challenges to defendants' report*

The report of 9 June 1995 described the property in some detail. Since the plaintiffs' pleaded challenge is confined to an attack upon reasonableness of the valuation figure of $275,000 (including chattels) it is to detail the parts of the report which do not bear upon that challenge. The plaintiffs contended :

1. That the approach to the valuation exercise was fundamentally flawed and as a result its conclusions were outside a reasonable range.

They asserted that

(a) the defendants performed a technical comparative analysis, failing to stand back and appraise where in reality its value was in relation to other sales;

(b) the report gave too greater emphasis to the area of the property;

(c) the report failed properly to analyse the Collins to Santer sale which was closest in location, size and land type, and used wrong base figures even though correct figures were readily available;

(d) the defendants erred in using a "template" developed in 1982 in relation to elements of lifestyle, forestry and stock unit capacity, without analysing properly or at all whether such factors remained valid in 1995;

2. That the evidence established no demand for lifestyle properties or uneconomic units at Waitaanga exceeding a price of $200,000 (or 10% above that figure).

3. That there was no demand for amalgamation with adjoining properties.

4. That there was no or limited demand for forestry blocks.

5. That the assessment of carrying capacity of 10 stock units per hectare was excessive.

6. That taking all factors together, overall the valuation was unreasonably high.

Against these the defendants advanced the contention

7. That there was an overall trend of rise in the market, at least in relation to the component of store grazing.

I consider each of these, in a somewhat different order.

VIII. *Rise and fall in the general market*

The Capital Value for the subject property fixed at Government Valuation had been $195,000 in September 1993. Mr Dick's report referred to the state of the market in the following terms which is consistent with the evidence:

> **State of the Market**
>
> The various categories of rural property have moved at variance to each in regard to sale prices over the past two years. The dairying sector has seen unprecedented increases in prices more particularly up until mid 1994 but over recent months increased interest rates and a "dampening" of enthusiasm (which pervaded this sector previously has resulted in a decrease in sales volumes in 1995.
>
> Hard hill country in the east and north east of the Taranaki land district and the south-western portion of the King Country have shown some lift in property prices over the past 18 months. Despite the fact that beef prices (in particular) are depressed, the influence of strong demand for forestry development and the "flow on" effect from increased prices in the dairying sector have impacted on this category. ...

Since the Randall purchase at $320,000 in May 1995 was grossly inflated, it is difficult without evidence as to its significance in the programming of the computer which produced the September 1996 GV figure of $230,000 to gauge the importance of the

latter in relation to a June 1995 valuation and a September 1997 mortgagee sale. But it is plain that the general market rose significantly after the September 1993 Government valuation and dropped sharply after the defendants' June 1995 valuation.

Mr Findlay acknowledged (page 62) a general increase in sale prices of economic units from the time of the September 1993 valuation figures, although he considered that one exceptional case was possibly one of the properties most comparable to the subject property. And according to Mr Findlay's Schedule (p 19) derived from MAF reports, the values of store grazing farms increased from an index of 1273 at December 1992, 1528 at December 1993, and 1913 at December 1994. Each index reflects a previous year's activity. No witness attempted any precise correlation between the index and the Government (or other) value. The index has particular importance for assessing economic units (2000 stock units per annum is regarded as marginally economic and 3500 to 4000 as likely to be required to support a family (page 44). It was common ground that the subject property had a limited earning capacity (of some 750 stock units per annum) and its classification as uneconomic, and as a "lifestyle" block (a concept to which I return), limits the relevance of the index. But by way of general approach, while there had been the recent increase in interest rates and "dampening" of enthusiasm described to which Mr Dick's report drew attention, a valuer at June 1995 would have seen a general pattern of increase in value, which I consider to be of some relevance in relation at least to the revenue producing component of the subject property. More generally Mr Findlay referred to the knock on effect on the value of inferior land of increased demand for superior land (page 40). The market did not peak until May 1996; that fact became evident rather later.

It was plain in 1997 prior to the mortgagee sale on 16 September that the general market had fallen distinctly; a nearby property dropping from its September 1993 Government valuation by over 2/3rds at sale in early April 1997 (page 64). Its percentage fall from the peak of the market would have been rather greater. Another property sold in May 1996 lost over 24% when resold in February 1998; another shed nearly 49% in terms of its September 1993 and October 1998 Government valuations.

In terms of the index an economic unit bought at the subject property's Government valuation of $195,000 in September 1993 might perhaps have been expected to increase

to $293,000 by 1995; and then have dropped sharply when subjected to forced sale in September 1997.

But the plaintiffs' point is that this was not an economic unit; while there may have been some increase to June 1995 in the values of uneconomic or "lifestyle" blocks it is essential in valuation to compare like with like, and to examine the market and specific comparators of that type.

IX. *Error and over value of the land component in the sale of the neighbouring Santer property and the overall significance of that transaction*

The comparator which received the greatest attention in evidence was a property of 52.2 ha, with an effective area of 40 ha, which in August 1994 was bought by a Mr Santer at a price of $170,000. Its Government valuation at September 1993 had been $145,000. This property is directly opposite the subject property and was regarded by all valuers as of particular importance. Mr Dick stated at page 10 of his valuation of 9 June 1995 :

> Our analysis in support of the market value of the subject has included similar type parcels in eastern Taranaki and south-western King Country. We are aware of several properties in the immediate district which are on the open market at present but the only transaction which has recently occurred locally involves 52 hectares immediately across the Waitaanga Road (Collins/Santer) which sold in August 1994 for $170,000.

In a contemporary note he recorded this as the only actual sale of note. It stated

> Sales
>
> Highway 40 /Waitaanga Road opp[osite] subject
>
> Collins/Derek 128 acres for $170,000
> Santer Since sold 30 acres bareland for $37,000.

Mr Dick's original brief Schedule C analysed the transaction as entailing a land sale price of $160,000 (÷40 = $4210 per effective hectare), this calculated by deduction from the actual sale price of $170,000 of $10,000 for improvements. By contrast he fixed the value of the subject land at $1,937 per effective hectare, viewing it as relatively inferior (p 120). In giving evidence he acknowledged that the improvements figure should be $50,000, which entailed reduction of the Santer land price to $120,000 or $3,158 per

effective hectare. Mr Akel put to him Ex 6 which, applied to the subject property, showed a reduction of his assessment by no less than $84,160 (page 117). He nevertheless declined to accept any abatement in his assessment of the value of the subject land despite what was a 23-25% decrease according to the Santer arithmetic (pages 95, 118).

Mr Hughes had originally employed a different methodology from that used by Messrs Findlay and Dick, using "land without buildings" which would include such items as roads and fencing, rather than "land without improvements", which would not. He had employed the same figure of $10,000 for "land without buildings". He too declined to alter his assessment of the subject property when the correct improvements figure was acknowledged.

For his part, as I have noted, Mr Findlay experienced difficulty in describing specifically just how he walked the intellectual path from the Santer "per effective hectare" and notional lifestyle figures to its application to the subject property (eg pages 56, 73-4, 78, 89). And faced with an arithmetical error in his analysis of the Santer transaction prepared, as I have noted in the course of his evidence, he also declined to modify his opinion (pages 86-7). In relating the Santer price to the subject property's valuation he had made allowance for the easier contour of the former (p83), giving an initial figure of $1375 per effective hectare for Santer and $1000 for the subject property. Cross-examined he recognised that he had wrongly deducted the 12 ha of the Santer property that had been on-sold; with that corrected the Santer figure rose to $1527 per effective ha which would, arithmetically, result in an increase to $122160 for the effective ha component of the subject property. Adding $65,000 for improvements a figure of $187,000 would result, plus any allowance for "lifestyle". Challenged to increase his original $193,000 valuation to make allowance for the error he said "I'm well satisfied [of] my assessment ... irrespective of any analysis and values gymnastics that might be entered into" (p88).

The evidence on both sides in relation to this transaction was material to my conclusion that each valuer, while honestly seeking to provide a logical explanation to the Court of why his intellectual path was right and the opposing version wrong, was having difficulty in doing so at a level of logic which could be tested in terms of ***Bolitho***. That

is by no means surprising; it is quite impossible to articulate in the limited time available in the witness box the multiplicity of factors that a valuer takes into account and to which he gives variable weighting in forming his assessment of value: I have recorded in Part V Mr Findlay's excellent exposition of the point. The difficulty of the present case is that the comparators are so remote as to give no clearly articulable guide.

There is a certain attraction in the plaintiffs' syllogism "Collins-Santer was centre stage; it was relied on to justify a particular value for the subject property on a certain per effective hectare basis; that basis was erroneous and correction of the error requires a lower per hectare value for the subject property; and so Messrs Dick and Hughes are wrong and Mr Findlay is right." Mr Akel's cross examination employing his Ex 6 made the point powerfully. Its conclusion was that, corrected to allow improvements $50,000 instead of $10,000, the Dick and Hughes analysis of Santer yielded $2299 per ha and $3158 per effective ha (rather than the original $3065 and $4210 of Mr Dick's Ex C). If those corrected figures are transposed to the subject property and abated for the 23% (indeed perhaps 30% or more: p120) allowance for the comparative lesser quality of the subject property the resulting figures are some $236,000 (or less) for the Dick and $225,135 (or less) for the Hughes methodologies, which are markedly closer to the Findlay $193,500 (and closer still to an increased Findlay figure to reflect his error) than the actual Dick and Hughes valuations. I have given careful consideration to whether the result shows up in the defendants' assessment the very kind of error of logic that justifies judicial intervention.

But I am satisfied that the apparent logic does not justify such conclusion. That is for several reasons :

(1) There is no magic in the Collins-Santer transaction; it is not a fixed point which may be used as datum for commencing an exercise of logic. Mr Randall made a great mistake; without a more detailed analysis of the Collins-Santer transaction, it is impossible to say how informed the parties to it were. They must however have been even less informed than the present valuers, lacking any kind of reasonably close guide. Of course uninformed transactions play their own part in establishing a market. But here it is impossible to articulate what the market is for, over and above the inadequate economic element. There

was no evidence of a real demand for such property at a high price for bush walking or shooting: see Part X. To treat the Collins-Santer episode as decisive by itself would be placing more weight upon it than it could fairly bear. That is not to reject it as insignificant. The use made of it by all three valuers points to its relevance. But relevance is not decisiveness; it is a factor and no more.

(2) The lack of an assessable reasoning path, as distinct from an exercise in judgment, in moving from that transaction to a value for the subject property.

(3) The relevance of the general pattern in the valuers' minds of other transactions, albeit more remote in distance, type and kind.

The proper course is to note the point and return to it as part of the whole case.

X. *The significance of the area of the subject land and its use for "lifestyle" purposes*

Mr Findlay developed an argument that the defendants' valuation was too high, placing excessive weight on its area when the block was uneconomic and its value above what it would return in income (as by lease to a neighbour or running stock on it) must in significant part be what he called "lifestyle", which bore no relation to mere size.

I take "lifestyle" to be the component added for aesthetic reasons, such as enjoyment of a bush view, or fondness for a retreat remote from urban areas.

There is force in Mr Findlay's view. Undoubtedly there are some who enjoy such aspects; views are highly prized; there is more to life than income. I agree that there is no direct or arithmetic relationship between area and value of a lifestyle block. But this was not a property of aesthetic significance.

The real position in my view is that, as stated in Mr Dick's 9 June 1995 valuation:

> Resale potential in the immediate vicinity is below average relative to other parts of Taranaki and the King Country due mainly to the relative isolation and harsh winter conditions which prevail.

What tends to be overlooked is that the conventional single figure valuation lends an apparent air of precision to a process that often is not and in the present case could not be precise. For a lifestyle property to have below average resale potential because of relative isolation and harsh winter conditions suggests that the market is likely to be sparse; the property being uneconomic there could be no assurance of keen interest at a forced sale.

Mr Akel contended that there was no evidence of demand for lifestyle blocks at Waitaanga exceeding a price of $200,000 and that Messrs Dick and Hughes erred as a matter of fact in seeking to justify their June 1995 figures of $273,000 and $254,000 for a property with a September 1993 Government valuation of $195,000; while Mr Findlay's $193,000 accorded with the evidence.

There would be force in the point if one limited the evidence to Waitaanga. But to do so would be unreal; prospective purchasers would be interested in the sum of the characteristics of a property (including those of location relating to soil type, remoteness, altitude, exposure to weather) rather than its precise position. At Nihoniho, which is somewhat to the east of the subject property, a hundred ha property with slightly superior soil type and a Government valuation in September 1993 of only $5000 more than the subject property sold in October 1994 for $290,000. And in Matiere a seventy seven ha property with the same Government valuation - $195,000 - sold in August 1995 for $233,500. As a matter of mathematics a layman might be inclined to see the former as suggesting that Mr Dick's assessment of the subject property was conservative relative to its earlier Government valuation, and the latter that it was excessive. But it is necessary to recall that a lay opinion is beside the point unless the result is irrational.

It was said for the plaintiffs that there are problems with using data from sales too far from Waitaanga. Nihoniho is near to Matiere which was said to have certain advantages over Waitaanga, being on the main road with a school and some employment opportunity and, in Mr Findlay's words (page 39)"almost considered to be civilisation"; he regarded Waitaanga (page 41) as "very isolated". But the exercise of comparing and contrasting localities is very much one of valuation expertise; the locations are

relatively close; Mr Findlay acknowledged that in an area where there are very few truly comparable sales local experience was all the more important; and I am not persuaded that there is irrationality in the defendants' opinion that there is a broad comparability among them.

More generally, the ratio between sale price and prior 1993 Government valuation of the 13 transactions analysed by Mr Hughes ranged between .98 and 1.84, with a median of 1.28 - 1.38. Mr Dick's comparable figure was 1.4; Mr Hughes' 1.3; and Mr Findlay's .99. Whether or not that evidence can be said to confirm the defence approach it does not suggest they acted irrationally.

Overall, there was enough evidence of interest, as evidenced by the Collins-Santer at some $3,000 per effective ha, for it to be irresponsible for a valuer to discount too much the prospect of someone who might be attracted by the mix of elements presented by the subject property.

There was a marked difference in approach between the plaintiffs' and defendants' valuers. Mr Findlay regarded the carrying capacity of the subject property as "one of the minor factors involved in an uneconomic property" (p59) so that he was "firmly of the opinion that the income stream part of the purchase [price] on both the Santer and the [subject] property are almost irrelevant" (p72). He gave substantial weight to the "lifestyle" element which he accepted to be an aesthetic element: the subjective delight in ownership (p78). He considered there to be no adequate evidence in the present case to demonstrate a greater lifestyle figure than $15,000 and attributed that figure as "lifestyle" to each of the Santer property and the subject property (Ex 4; pages 76-7). He considered that size has very little relevance to lifestyle value, just as a big painting is not necessarily worth more than a small one (pp79; 80).

Mr Dick by contrast considered that there "should be no plusage or recognition of a lifestyle component ... to apply this [lifestyle] methodology to a property at Waitaanga or anywhere away from a metropolitan area or a settlement of some substance is a farce, I cannot accept the principle and the principle is flawed" (p121).

Mr Hughes accepted that in all sales there is an aesthetic or lifestyle component. He initially suggested in this case a figure of 75% economic and 25% lifestyle (p148). After reflection over the morning adjournment he gave specific figures. He considered the lifestyle component for the Santer property to be no more than $2000; his opinion was that only one of the 13 properties in his list of comparators should receive a greater life style allowance: that was a figure of $5000 for a property with an elevated site (p150). He expressed the view that Mr Findlay had very much overstated the non-economic value.

I believe the reason for these very different assessments of the economic and non economic components is that there is no specific evidence of how buyers in fact take them into account in making what becomes the successful offer. So while it is easy enough to separate the two in theory, the exercise gives no real help in evaluating whether one of other of the experts' approaches is logically flawed.

XII. *Comparative sales and application of Bolitho test*

Of the 13 comparative sales used by Mr Findlay in his evidence only one occurred before June 1995, so as to have been available to Mr Dick. I consider the others essentially irrelevant to the allegation of negligence, which depends on what would or should have been known by a skilled valuer acting reasonably in the light of knowledge available at the time of the report. The only gloss is that later sales may shed retrospective light on the actual value of the property at about the time of the valuation: if they show that the valuation was within a reasonable range they are of assistance in disproving causative loss - even if the valuation was performed carelessly.

Perhaps some weight can be placed by a valuer on discussions with intending vendors and their representatives prior to sale, but such information must be of quite limited help even to the expert; it provides no help in challenging a valuation before a judge who must apply the ***Bolitho*** test.

I have examined the schedules prepared by the various valuers and reflected on whether they can be said to throw up any pattern that would indicate illogic in the defendants'

valuation. I have already mentioned the ratio between sale prices and prior 1993 Government valuation of the 13 transactions analysed by Mr Hughes.

I have reflected on the competing evidence and submissions about the utility of the subject land for forestry; plainly it is not of the best kind for the purpose, but equally there is demand in the area, if not from the major growers.

In the end I am not persuaded that there is such pattern as establishes a range from which the defendants' figure differs so as to satisfy the ***Bolitho*** test.

XIII. *Conclusion*

It follows that the plaintiffs' claims fail. The lesson of this case may be to emphasise that the valuer's task is an exercise in judgment, which can be no more precise than the evidence available permits. That fact is well understood by the valuation profession, who in the Practice Standards of the New Zealand Institute of Valuers advise in relation to the valuation of residential properties for mortgage purposes

> 4.2 Where no mortgage recommendation is required by a lender the valuation report should specifically record the basis of the valuer's instructions and should contain a statement that, at the client's request, no mortgage recommendation is made.

A similar statement might warrant inclusion in the Standards relating to the valuation of rural properties.

The crunch may have come earlier had Mr Dick not been asked to withhold a recommendation as to the sum which could reasonably have been lent on the property by way of security. One would have expected a heavy discount to reflect the elements of risk in the event of a fall in the market and a forced sale; the valuers suggested a 50% figure. But what would have happened in that event, which did not occur, is not now in issue.

Costs are reserved; memoranda may be filed by the defendants within 14 days and the plaintiffs within a further 14 days.