Roll Value - Objection - multi-storeyed apartment building - Unit Titles - Method of valuation of land - Approach to be taken with strata interests - whether Departments methodology erroneous - Valuation of Land Act 1951 SS 2, 8; Unit Titles Act 1972 SS 2, 4.

IN THE LAND VALUATION TRIBUNAL HELD AT AUCKLAND LVP 435/91

IN THE MATTER OF AN OBJECTION UNDER S.19 OF THE VALUATION OF LAND ACT 1951

BETWEEN S L & A I SPEEDY
Objectors

AND VALUATION NEW ZEALAND
Respondent

Before the Auckland Land Valuation Tribunal
Chair: Judge B N Norris
Members: R M McGough Esq
P J Mahoney Esq
Hearing: 28.4. 1992
Decision: 21 December 1992
Appearances S L Speedy for S L and A I Speedy
M T Parker, Crown Law Office, Wellington for the respondent

DECISION OF THE TRIBUNAL

This objection relates to the 1990 Review of the Roll Value for the objectors' apartment situated in Windermere Apartments, corner the Promenade and Killarney Street, Takapuna. The operative date of the valuation is 1 October 1990 and it is:-

Land Valuation	$220,000
Improvements	$265,000
CV	$485,000

The objectors' concern is towards the land value and the issue for us is the determination of the principles to be followed when ascertaining the value where the land is a stratum interest under the Unit Titles Act 1972, and having established that principle, to consider the correctness or otherwise of the valuation appealed against in accordance with the provisions of the legislation.

In accordance with the Tribunal's invariable practice over a long period of time, and with the consent of the objectors, notwithstanding the burden of proof being on the objectors (s.20(8) Valuation of Land Act 1951) the respondent opened the proceedings by Mr Parker presenting written submissions and calling the evidence of Mr D E Everiss, Registered Valuer, who presented a valuation report with supporting data in seven appendices.

Mr S L Speedy acted as his and his wife's advocate and gave evidence on their behalf. He is a Registered Valuer, a graduate in commerce and urban property economics.

He is the published author of a number of texts in the area of land valuation and land economics published by Butterworths and the New Zealand Institute of Valuers. With his 35 years experience in the valuation profession, he is an acknowledged expert and an elder statesman of the profession in this country.

Respondent's Case:

The respondent says that the effect of a strata title where as in this case the building is a multi-storied apartment building, is to give legal ownership of air space. In carrying out the valuation the District Valuer has valued the land as including the air space which is represented on the title.

The objectors' other land interests include accessory units, which are situated at ground level, and a share of the common area, some of which are at ground level.

The objectors' estate in land is a mixture of physical land and air space. That entitlement is conferred by the flat's plan appended to Mr Everiss' evidence. And a Registered Valuer has certified the assessment of the unit entitlement on that plan in accordance with the Unit Titles Act 1972.

We are told by the respondent that there is no Roll Value for Windermere Apartment block itself. Each unit is valued separately so that the building gives rise to ten different entries in the Roll Value, one for each apartment for which a unit title is issued.

Apparently there is a composite entry for No 11 Killarney Street, which shows as the legal description Lot 1 DP 48402, together with the legal description of the various units as taken from the strata plan, and also shows a capital value which represents the total of the various separate valuations. Mr Parker, for the respondent, contends this is not a Roll Value under the Valuation of Land act 1951. He says it is simply a summation of various Roll Values done to satisfy the computer programme used by Valuation New Zealand, which requires each entry to show the land area. Further, no land area is shown on the entry of the stratum title and therefore for total purposes it is necessary to do a summation entry.

Finally, Mr Parker tells us that the entry has no legal or valuation significance. This position is not challenged by the objectors..

The objectors had objected to the valuations of the other nine units, but it is accepted that Mr and Mrs Speedy's objection is the only one to proceed. Mr Parker indicated that if the Tribunal finds that the Valuer General has followed the wrong principle, then it is likely that an adjustment will be made to the Roll Values for the other apartments.

The Tribunal would expect such action to follow, and if the principle is upheld but the valuation allowed for other reasons, then the other nine valuations would accordingly be reconsidered in the light of the decision that we reach.

The respondent relies on s.8 of the Valuation of Land Act 1951 and the definition of land in s.2 of that Act. Section 8 provides:-

"8. Preparation of District Valuation Roll—(1) A district valuation roll shall be prepared for each district by the Valuer General, and shall be in the prescribed form, and shall set forth in respect of each separate property the following particulars:

(a) The name of the owner of the land, and the nature of his estate or interest therein, together with the name of the beneficial owner in the case of land held in trust:

(b) The name of the occupier...:

(c) The situation, description, and area of the land:

(d) The nature and value of the improvements:

(e) The [land value] of the land:

(f) The capital value of the land:

[(ff) Where applicable, the special rateable value or the rates postponement value of the land:]

(g) Such other particulars as are prescribed.

(1A) An annual value valuation roll shall also be compiled by the Valuer for any district of a territorial authority where the annual value rating system is in force, and shall in a prescribed form contain for each separate property the following particulars:

(a) The name of the owner:
(b) The name of the occupier:
(c) The situation and description of the property:
(d) The annual value:
(e) Where applicable, the rates postponement value or the special rateable value, as the case may require:
(f) Such other particulars as may be prescribed.

[(2) For the purposes of this section any land that is capable of separate occupation may, if in the circumstances of the case it is reasonable to do so, be treated as separate property whether or not it is separately occupied."]

In terms of s.2 "land" is defined as follows:-

"'Land' means all land, tenements, and hereditaments, whether corporeal or incorporeal, in New Zealand, and all chattel or other interests therein, and all trees growing or standing thereon."

Land Value is defined as follows:-

"'Land Value', in relation to any land, means the sum which the owners 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."

Mr Parker then submits that it is clear from the definition and trite law, that land value relates not just to the physical land but also to the legal interest in land. He submits that the land value of a specific physical area of land will change depending upon the nature of the legal interest by valuation.

For example, whether it is an estate in fee simple or an estate in leasehold. He contends that it follows that where the legal interest in land represents the right to occupy or use air space then that interest can be valued as land.

As authority for that proposition he cites the Australian case *Resumed Properties Department v Sydney Municipal Council*, the Unit Titles Act 1972 and an extract from Mr S L Speedy's own publication "Property Investments". Mr Parker quoted from p. 72 of that work and we reproduce the passage:-

"Once ownership of useable space above ground was established it naturally followed that a person could build in space as part of a new building. The next logical step was the sale of air space independent of the surface ground.

The basic legal principles—relating to air space have emerged. The air space vertically above or below a parcel of land which is capable of development primarily belongs to the surface owner but a parcel of air space may be owned by a person other than the land surface owner. Although the air space lacks any physical form other than what is built within the defined area of volume of space it is nevertheless legally a tangible form of property. Air space can be thought of as land space as distinguished from land surface."

Insofar as the Unit Titles Act 1972 is concerned, it is the respondent's submission that that Act enables definition of that space (that is air space — independent of the surface ground), and further creates a legal estate in that air space and that once land is subdivided into units under the Unit Titles Act, then a stratum estate is created. Counsel points to the alternative method as being the cross-lease system whereby the unit owner held an equal share in the fee simple, together with the lessee's interest in the unit occupied by him.

Mr Parker quoted to us the provisions of s.4(2) of the Unit Titles Act, and that section confirms that on the deposit of a unit plan a stratum estate in freehold or leasehold as the case may be in the units in the common property to which the proprietor of the unit is entitled, and in all the units to which the proprietor is contingently interested, is created.

Counsel submits that the Unit Titles Act recognises the common law concept of land defined by horizontal boundaries, and expands on it by creating a system of subdivision which enables issue of a title to a stratum estate in a unit. counsel points to the definition of unit in s.2 of that Act:-

"'Unit'. In relation to any land means a part of the land consisting of space of any shape situated below on or above the surface of the land or partly in one such situation and partly in another or others all the dimensions of which are limited and that is designed for separate ownership."

Again by reference to s.4(1) of the Unit Titles Act Mr Parker submits that the word "unit" relates to an interest in land and not to a physical unit in the building.

By reference to the unit plan already mentioned Mr Parker contends that the objectors hold a stratum estate in freehold in the unit 4A in Windermere Apartments. The plan shows this unit is substantially above ground level.

The objectors in their submission have legal ownership of the space occupied by that unit and the right to occupy it to the exclusion of any other person including any owner of any other units in the building. The Unit Titles Act 1972 was passed as:-

"An Act to facilitate the subdivision of land into units that are to be owned by individual proprietors and common property that is to be owned by all the unit proprietors as tenants in common and to provide for the use and management of the units and common property."

Mr Parker relies on *Elwood v Valuer General* (1989) 1 NZLR 884 (a Court of Appeal decision) and *Valuer General v Alfred Kohn Family Trust* (unreported decision, Greig J, Wellington, High Court, 10 December 1990).

In *Elwood* the Court of appeal held:

"(1) The influence of zoning on development under a Town Planning Scheme is relevant to land value for the purposes of the Valuation of Land Act 1951. The right to build two units on a section without subdividing it is a matter which affects land value rather than the value of the improvements. The system of cross-leasing effectively provides the benefits of a limited method of subdivision and should in principle be treated in the same way for valuation purposes as if it were a subdivision.

(2) In assessing the land value the Valuer General was obliged to ask what sum the appellant's estate might have been expected to realise if offered for sale the potential for cross-leasing having been realised. He was also obliged to contemplate the land as at the moment of valuation with the buildings notionally removed."

As the Valuer General had fulfilled those obligations and correctly valued the land the appeal was dismissed.

In the *Kohn* case, Greig J, sitting with an assessor, considered the valuation of a development known as Quay Point Development situated between Lambton Quay and The Terrace in the central business district of Wellington.

The land was divided into four lots, and the essential point for the Court's consideration was whether the value of each of the properties should be valued

separately, or whether the value of each of the properties should not exceed the sum which would have been realised had the land been sold as one entity.

The Court decided that the separate property should be identified and valued accordingly and held that though Lots 1 and 3 were separate properties, Lots 2 and 4 had to be treated as one property. Greig J described the properties at p 3 and 4 of the decision, and some of them are quite clearly air space properties. At p 6 Greig J says:-

"The crux of this appeal or what is pivotal to this appeal is the meaning and application of s.8 of the Act."

He then sets out s.8 in full and goes on at p.7 to say:-

"What we think is essential in the preparation of the District Roll is first of all to identify the separate properties. That phrase is not defined but it must be the case that separate occupation is one aspect of that. Subsection (2) necessarily implies that separate occupation and the capability of separate occupation are two of the ways in which the separate property can be identified. Other matters which the appellant submits, we think correctly, to be among the criteria for that identification includes separate ownership, different or distinct land tenure, separate land use and availability of separate titles. Once the property has been identified as being a separate property then it is to be valued and the particulars as described in s.8 are to be provided for each separate property. It is not, we think, appropriate to make a single valuation of separate properties which may be contiguous as if one joint site whether they have been previously amalgamated as one, or can be in some way treated as being unseparated by some common feature or connection. It is not appropriate to apportion a single value of two or more separate properties or to attempt to put a cap or maximum value because of the assumption or fiction of conjunction of the properties because of the past or the future."

The Objector's Case

Mr Speedy says that the essence of their objection is directed against the method adopted by the Valuer General of valuing the objectors' estate or interest in their medium rise unit title apartment. The consequences of the erroneous methodology for the objector is that their value is too high. The objectors agree that the site on which the Windermere Apartment block is situated contains an area of 1378 square metres, and that under the Local Authorities Ordinances the land may be subdivided into sections of an average area of 689 square metres, each of which would then be suitable for two units. In his written submission Mr Speedy says "The site currently has existing use rights for the ten residential units".

He further submits however, that the notional air space approach by the Valuer General is wrong in law and he says wrong in valuation principle "Because it is a fictional creation not based on tangible land that lacks a bona fide market mechanism".

Mr Speedy contends that the proper approach to the valuation of the objectors' "land value" is to disregard all the apartments of Windermere and other above ground improvements, and to value the objectors' estates and interests in the unit entitlement share in the value of the Windermere section, together with the added value, if any, of the existence of the unit title plan.

The objectors then say that the basis of their objection is;-

"Land value is a statutory creation of the Valuation of Land Act 1951 as amended in 1971 intended to be used for taxation purposes. Unimproved land on developed properties like Windermere is not a separate legal entity, it is basic property law that all improvements form a legal part of the land."

Then:-

"Likewise the very substantial improvements are economically integrated with the land. Physically there is only one real section. Each apartment has not only a title to the above ground improvements but to various other legal rights, estates and interests. No separate market can exist for the air space content of a unit title (if only because it cannot exist in isolation), only for the fully existing apartment (and associated common property and other legal interests)."

Mr Speedy then in his submission draws a contrast with cross-lease vacant sections that can exist without any building, and says that they do not necessarily form a basis for comparison.

He also says that it is necessary to analyse the Unit Titles Act 1972 to understand more precisely what owner's estate or interest falls to be valued as unimproved land.

He acknowledges the situation under s.4 of the Unit Titles Act which on deposit of the unit plan creates the stratum estate for each unit that is comprised on the plan. He develops an argument around s.2 of the Valuation of Land Act and s.4 of the Unit Titles Act and he cites in support *Toohey's Limited v Valuer General* (1925) AC 439 an Australian case cited with approval in *Valuer General v General Plastics NZ Limited* LVCB 295 and (1951) NZLR 857 and *Tetzner v Colonial Sugar Refining Company Limited*, which is also cited in the *General Plastics* case. On the basis of the principles of *Tetzner* and *Toohey* it is Mr Speedy's submission that the whole of the Windermere improvements must be regarded and not just the individual proprietor's apartment.

He says that it follows that the Valuer General's notional section in the sky that is based on the assumed existence of other proprietor's improvements remain in existence is then without any physical or legal foundation, and he submits that the correct approach is to assume that the whole of the above ground improvements had not been made but that the unit title and plan does exist albeit of limited value without the improvements.

He says that the highest undeveloped land value would be as a section with the potential of subdivision into two sections each capable of two units as of right, or as existing use for ten units for a lower value end of the market.

He looks at *Valuer General v Elwood* in a different way to the respondent, and he considers that the general statement concepts of principle in the *Elwood* case apply to cross-leases and not to unit titles. Insofar as the *Kohn* case he submits that Greig J recognised that the nature of the separate market for each separate property, and he considers that the points of special relevance to his objection are as follows:-

(a) The proportionate share of the land value does not set a cap.
(b) A sum should be added for the existence of a deposited plan for each separate property.
(c) Strata development in the eyes of the market generally are inferior and prices paid generally reflect this.
(d) Unit titles are inferior to fee simple titles and somewhat akin to leasehold title.
(e) Risk and development for unit titles are higher.
(f) A small fee simple lot on its own will command a better price.

(g) And lastly, it is necessary for the objector to show that the Valuer General's valuation was wrong.

Insofar as the legal principles are concerned we are of the view that the Valuer-General is correct and as in the words of Greig J, once the property has been identified as being a separate property, then it is to be valued and the particulars as described in s.8 are to be provided for each separate property.

In defining the legal principles to be applied, the Tribunal has then considered the valuation approach as adopted by the objector and by the respondent, Valuation New Zealand.

We agree with both Mr Speedy and Mr Everiss, that the valuation of the stratum interest in a multi-unit development enjoying existing use rights, is difficult and indeed very subjective.

In instances such as this, valuers are often required to operate in a "hypothetical vacuum" where there is no directly comparable evidence.

In essence, the approaches adopted and conclusions reached by the two valuer witnesses are summarised as follows:-

(i) The Tribunal is not satisfied that the objectors' reliance upon the "Superview" property at 241 Hurstmere Road, is a valid comparison. In this instance, Valuation New Zealand had apparently not chosen to assess the individual interests in that property held under cross-lease title, but rather assessed a roll value for the total site. Further, no evidence was produced by the objectors to justify or support the 20% allowance they adopted in adjusting the assessed total land value from single ownership to multi-unit ownership for comparison with Windermere Apartments.

(ii) The objectors' alternative approach, of assessing the land value as a residual value commencing with the agreed capital value, is not accepted as being appropriate in this situation. Indeed, the approach as such is not consistent with the requirements of s.2 of the Valuation of Land Act 1951.

(iii) The valuation methodology adopted by Mr Everiss on behalf of Valuation New Zealand stated: "My approach for valuing the land within the apartment block is fundamentally the same as valuing a block of separate property units on the ground..." is in essence the appropriate starting point for a valuation of this type.

(iv) By making reference to vacant land sales, Mr Everiss then arrived at a land value of $200,000 for what he considered to be a conventional land unit value for a ground level site. This figure was not contested by the objectors.

(v) By application of further subjective and significant adjustments, Mr Everiss then arrived at a land value applicable to unit 4A of $220,000. Again, the adjustments adopted by the respondent's valuer were not contested.

(vi) Mr Everiss then endeavoured to arrive at a land value by analysis of improved sales. Whilst this is at best a secondary approach and may be appropriate in a market or location where there is insufficient actual sales evidence available, the primary method of approach is preferred based on the evidence available in this case.

In the circumstances, bearing in mind the burden of proof being on the objector, we are of the unanimous view that this has not been clearly established by the objectors and therefore we have no alternative other than to dismiss the objection.