IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

LIV 2007-463-998

UNDER	THE LAND VALUATION PROCEEDINGS ACT 1948
IN THE MATTER OF	THE DECISION OF THE WAIKATO NO.2 LAND VALUATION TRIBUNAL DATED 9 NOVEMBER 2007
BETWEEN	TE WHAITI NUI A TOI TRUST Appellant
AND	WHAKATANE DISTRICT COUNCIL Respondent

Hearing: 25 September 2008

Appearances: G J Dennett for appellant
D J Neutze for respondent

Judgment: 14 November 2008

JUDGMENT OF ALLAN J

In accordance with r 540(4) I direct that the Registrar endorse this judgment with the delivery time of 11.30 am on Friday 14 November 2008

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[1] This is an appeal against a decision of the Waikato No.2 Land Valuation Tribunal (the Tribunal) given on 9 November 2007. The appeal was out of time but I granted leave to appeal on 21 February 2008. The appeal raises a single issue: whether the Tribunal was correct to reject the evidence of the appellant's valuer, Mr Reynolds, concerning the proportion of the total value of the appellant's property to be attributed to the value of native trees.

[2] Counsel agree that it is appropriate for me to hear the case sitting alone.

Factual background

[3] The appeal relates to a property consisting of 1137.8 hectares of Maori freehold land, set apart as a Maori reservation for the purposes of the Te Ture Whenua Maori Act 1993. The property is situated on State Highway 38, approximately 10 km south of Murapara, and is zoned as Rural 2 under the respondent's district plan. It lies at altitudes varying between 310 and 680 metres above sea level. The property bounds the northern side of SH 38 over a length of 230m. Its eastern boundary is the Whirinaki River.

[4] The land itself was described by the Tribunal as:

> … broken rugged hill country, at times precipitous, with the majority of it covered in native bush.

[5] Surrounding properties include a mix of undeveloped land comprising native bush, national park, and exotic forestry.

[6] Rating valuations, conducted by the respondent in 1995, 1998 and 2001 respectively, each produced valuations of $170,000. There was no objection to any of those valuations. But a further valuation as at 1 September 2004 produced a figure of $365,000, more than twice that of the preceding three valuations.

[7] The appellant objected to that very significant increase. The objection was heard by the Tribunal on 20 November 2006. The Tribunal's decision of

9 November 2007 was not entirely adverse to the appellant. It ruled that the Council's assessment of $365,000 should be reduced to $330,000. In the course of reaching that conclusion the Tribunal ruled on several issues that are no longer in dispute between the parties.

[8] But the remaining matter in dispute is of some significance. Mr Dennett submits that, had the Tribunal followed what he argues is the proper approach in accordance with Mr Reynold's evidence, then the valuation would fall to $164,868. That is slightly less than the valuation to which the appellant had not objected at the time of the 1995, 1998 and 2001 valuations.

Appellate jurisdiction

[9] Any person affected by an order of the Tribunal may appeal to the High Court. The appeal is by way of rehearing. This Court may confirm, discharge or vary the order of the Tribunal, or refer it back to the Tribunal for further consideration. It may generally make such order as it considers just and equitable in the circumstances of the case: see generally s 26 Land Valuation Proceedings Act 1948.

[10] It follows that this Court must itself consider afresh the matters that were before the Tribunal, and which are the subject of the appeal: *Kent's Nurseries v Upper Hutt City Council* HC WN CIV 2005-485-1958 6 August 2007: *Chief Executive of Land Information New Zealand v Kane Carding Co Ltd* HC NAP CIV 2007-441-578 11 December 2007, *Austin, Nichols Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 (SC).

Relevant statutory provisions

[11] The valuation in issue in the present appeal was made for the purpose of the District Valuation Roll and in accordance with the Rating Valuations Act 1998 (the Act). Section 2 of the Act defines the terms "capital value" "improvements" "land" and "land value" as follows:

Capital value of land means, subject to sections 20 and 21, the sum that the owner's estate or interest in the land, if unencumbered by any mortgage or other charge, 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:

…

Improvements, in relation to any land, means all work done or material used at any time on or for the benefit of the land by the expenditure of capital or labour … so far as the effect of the work done or material used is to increase the value of the land and its benefit is not exhausted at the time of valuation; but does not include—

(a) Work done or material used … in—

(i) The provision of roads or streets, or in the provision of water, drainage or other amenities in connection with the subdivision of the land for building purposes:

(ii) The draining, excavation, filling, or reclamation of the land, or the making of retaining walls or other related works:

(iii) The grading or levelling of the land or the removal of rocks, stone, sand, or soil:

(iv) The removal or destruction of vegetation, or the effecting of any change in the nature or character of the vegetation:

(v) The alteration of soil fertility or of the structure of the soil:

(vi) The arresting or elimination of erosion or flooding:

(b) Except in the case of land owned or occupied by the Crown or by a statutory public body, work done or material used on or for the benefit of the land by the Crown or any statutory body except to the extent that it has been paid for by way of direct contribution:

Land means all land, tenements, and hereditaments, whether corporeal or incorporeal, in New Zealand, and all chattel or other interests in the land, and all trees growing or standing on the land:

…

Land value, in relation to any land, and subject to sections 20 and 21, means the sum that the owner's estate or interest in the land, if unencumbered by any mortgage or other charge, might be expected to realise at the time of valuation if—

(a) Offered for sale on such reasonable terms and conditions as a bona fide seller might be expected to impose; and

(b) No improvements had been made on the land:

[12] Of pivotal importance is s 20 of the Act, to which the definition of the phrase "capital value" is subject. Section 20 provides:

> **20 Value of trees and minerals**
>
> (1) The value of any trees is not to be included in any valuation under this Act unless the trees are fruit trees, nut trees, vines, berryfruit bushes, or live hedges.
>
> (2) The value of any fruit trees, nut trees, vines, berryfruit bushes, or live hedges is not to be taken into account in assessing the land value of any rating unit under this Act.
>
> (3) The value of any minerals is not to be included in any valuation under this Act unless the owner of, or ratepayer for (if different), the rating unit is receiving a benefit from the sale or use or working or extraction of those minerals.

[13] The Act requires the Valuer General to prepare a district valuation roll from which the valuation roll of each local authority is prepared. That valuation roll is in turn used for rating purposes. It is common ground that the combined effect of the definition of "land" in s 2 and the provisions of s 20 is to provide that trees are part of the land, but their value is not to be included in any valuation made under the Act for rating purposes: *Fletcher Challenge Forests Ltd v the Valuer-General* HC AK AP35/96 17 December 1996 at 6, affirmed on appeal: *Fletcher Challenge Forests Ltd v the Valuer-General*, CA119/97, 29 September 1997 at 2.

The Tribunal hearing

[14] Before the Tribunal, valuation evidence was given by Mr Reynolds for the appellant, and by Mr Power for the respondent. Mr Reynolds contended for a gross valuation of $400 per hectare; Mr Power favoured $575. The Tribunal selected $475. There is no challenge to that aspect of the decision.

[15] The Tribunal had also to consider the extent of deductions which ought to be allowed for multiple Maori ownership, for sites of special significance and for the designation of the property as a reserve: *Valuer-General v Mangatu Inc* [1997] 3 NZLR 641. The Tribunal decided that the total discount ought to be 39%. There is no challenge to that aspect of the decision either.

[16] The remaining issue concerned the valuation of the trees on the land. The trees (indigenous bush and forest), fell within the definition of the term "land" for the purposes of the Act, but were to be excluded from the value of the land for valuation purposes by virtue of s 20.

[17] The Tribunal dealt with the issue briefly. It said:

> [62] We come finally to the issue of the added value that the trees give to the land.
>
> [63] Mr Reynolds says at paragraph 11.8 of his evidence:
>
> > 11.8 It could be argued the added value the trees give to the land could be resolved by drawing comparisons with sales of land covered in scrub and gorse. I believe this proposition fails on two counts. Firstly, land covered in scrub and gorse is generally acquired for pastoral development, not the preservation of indigenous trees. … secondly, the Courts have directed that the existence of the trees cannot be ignored. To meet this requirement I have therefore concluded a valuer is left with no other alternative than to make a subjective judgment. I have concluded due to the land's locality and its other attributes, purchasers consider this to be of equal importance as the cover.
> >
> > 11.9 On the basis of purchaser motivation and having regard for the Court's directive [in the *Fletcher Challenge* case] I have applied a 50/50 apportionment of the estimated price paid for the land inclusive of trees.
>
> [64] Mr Reynolds further added that in his opinion, when the Department of Conservation purchased bush blocks, they purchased the blocks for the value of the bush and apportioned their purchase price 50/50 land and bush. There was no evidence presented in support of this proposition.
>
> [65] On objections, the burden of proof rests with the objector. (Section 38(2) of the Rating Valuations Act 1998).
>
> [66] As to that burden, Archer J, in *Valuer-General v Sullivan* (Land Valuation Court, Dunedin 1962, McVeagh and Babe p 459) said this:
>
> > It is always incumbent upon objectors however to establish by cogent evidence that a valuation appealed from is wrong. This in general calls for proof of the facts on which the valuation should be based, and for a proper valuation based upon proved facts and made in accordance with recognised principles of valuation.
>
> [67] We are left in this case where we must conclude that there is no cogent evidence before us as to the value to be ascribed to the trees. Indeed, neither valuer has made any attempt using conventional valuation tools or methodology to empirically arrive at a value for the trees. In that respect therefore, the objection fails.

[18] The issue on the present appeal is whether the Tribunal was correct to decide that because there was " … no cogent evidence before us as to the value to be ascribed to the trees …" it was proper to fix a valuation without making any deduction for their value.

Mr Te Amo's evidence

[19] Mr Te Amo is the chairman of the appellant Trust. He gave evidence before the Tribunal of the very strong historical and spiritual attachment of the Ngati Whare people to the property and to the Whirinaki Valley. There are at least two wahi tapu in the reserve, as well as battle sites and pa sites. The reserve land is the only part of the valley not subject to Crown and private ownership, or in the possession of the Crown under a 99 year lease.

[20] Mr Te Amo said there was no prospect of the lands being alienated by the trustees or the beneficial owners.

Mr Reynolds' evidence

[21] Mr Reynolds is a very experienced valuer, well versed in valuations of this type. He told the Tribunal that a two stage assessment was required. First it was necessary to make reference to comparable sales evidence in order to assess the value of the land, inclusive of native trees. Then, he said, in order to satisfy the requirements of s 20, the second stage required the value of the trees to be excluded. He further told the Tribunal that, contrary to ordinary valuation practice, the only practical approach that took into account the requirements of s 20 was to endeavour to quantify the added value the trees give the land, and to deduct it from the value assessed in stage one.

[22] Because the Tribunal decided that the appellant had produced no cogent evidence to support this aspect of its objection, it is necessary to set out in this judgment much of the evidence given on the point by Mr Reynolds to the Tribunal.

[23] In his brief of evidence he said:

> 11. Valuation methodology
>
> 11.1 In accordance with the requirements of the RVA and the directives of the Court, I have concluded a two staged assessment is required. Firstly, with reference to comparable sales evidence the value of the land inclusive of native trees must be undertaken. In order to satisfy the requirements of s 20 of the RVA the second stage requires the value of the trees must then be excluded. Contrary to accepted valuation practices, s 20 of the RVA invites a residue approach to be adopted.
>
> 11.2 With the passage of time areas of land covered in native trees have significantly declined. For this reason a sector of the real estate market recognises the landscape values of this diminishing resource. Those attracted to lands covered in indigenous trees include the Department of Conservation and those wishing to meet recreational needs. From my knowledge of the market, all of these purchasers place value on the existence of native trees for their recreational, landscape or conservation values. The question then arises how one quantifies the added value these attributes confer upon the land.
>
> 11.3 I have concluded the only practical methodology is to identify freehold comparable sales of lands clad in native trees. I have then identified and quantified the added value tangible assets give to the land and deduct this sum from the gross consideration. The residual sum then represents the amount paid for the land inclusive of native trees and other recreational attributes the land may possess.
>
> 11.4 The RVA requires the valuer to disregard the landscape or recreational value the trees give to the land. For this reason within my analysis I have quantified the added value the trees give to the land. The residue value represents the value of the land beneath the forest canopy.
>
> 11.5 I acknowledge the resultant calculations provide a residual land value as opposed to focusing on the added value the various components provide to the land. I believe this is in keeping with the requirements of the RVA.
>
> 11.6 A similar problem was addressed by the Dunedin Land Valuation Tribunal in 1999 when fixing the value of land exclusive of improvements pursuant to the Land Act 1948 (*W G Walker v The Commissioner of Crown Lands*). I have concluded certain similarities can be drawn between this decision and the requirements of the RVA. In essence, the Dunedin Land Valuation Tribunal acknowledged that due to the lack of comparable sales evidence "The Tribunal must therefore deduct the value of those improvements from the value of the land included in the lease. The resulting figure is the value of the land exclusive of improvements on the land as at the date for renewal of the lease". They also concluded that in so doing, the resultant residue land value must be reasonable and sensible. I conclude the directions of the Dunedin

Land Valuation Tribunal provide support and guidance for the methodology which I have adopted.

11.7 From my knowledge of the market, purchasers are motivated to acquire this class of land for the landscape value the trees give to the land. I would further conclude, if it were not for the landscape value of the trees, these purchasers would not be drawn or attracted to this class of land. The question therefore arises, which portion of the sale price should be attributable to the underlying land and which portion to the trees?

11.8 It could be argued the added value the trees give to the land could be resolved by drawing comparisons with sales of land covered in scrub and gorse. I believe this proposition fails on two accounts. Firstly, land covered in scrub and gorse is generally acquired for pastoral development, not the preservation of indigenous trees. A good example being a 196 hectare block of land covered in scrub and gorse and situated within this general locality. In April 2004 it was acquired for $305,000 or $1,556 per hectare. This and other gorse and scrub blocks have been purchased for pastoral development. If the existence of the trees cannot be ignored then these sales cannot be taken as comparable evidence. Secondly, the Courts have directed that the existence of the trees cannot be ignored. To meet this requirement I have therefore concluded a valuer is left with no other alternative than to make a subjective judgment. I have concluded due to the land's locality and its other attributes, purchasers consider this to be of equal importance as the cover.

11.9 On the basis of purchaser motivation and having regard for the Court's directive I have applied a 50/50 apportionment of the estimated price paid for the land inclusive of trees.

11.10 A similar situation arose when the Court of Appeal reviewed the High Court's decision in *Tahaorakuri*. The Judges concluded "Simply because a factor relevant to a valuation cannot be quantified by evidence does not mean it should not be taken into account … It is a judgment which a valuer must bring to bear". (p 8).

[24] Mr Reynolds then referred to a number of North Island sales of comparable properties. In each case he estimated the value of native trees at 50% of the total consideration, taking into account, where appropriate, the possibility that the purchaser had factored into the purchase price the value of other intangible assets, such as the availability of recreational pursuits. In none of these cases was any evidence available of the actual allocation of any part of the purchase price to trees.

[25] Mr Reynolds was extensively questioned by members of the Tribunal. Again, it is necessary to set out substantial passages from the transcript of his evidence:

Q. So to summarise though, what you are saying because we haven't read through the calculations you made, is that you take the sale price and then you take that part of the land that is under native trees?

A. Yes.

Q. And then you apply your case 50% of that as being the value of the bare land?

A. Yes. I make a subjective apportionment between the value attributable to the land and to the cover or the trees.

Q. But in many cases that would be – purchasers could put a higher value on the value of the trees?

A. Yes they could have, but, and in talking to purchasers, they obviously don't apply the same mental calculation as we are required to. They buy the land and the trees, so from my experiences, it isn't helpful, although I have spoken to purchasers, how did they apportion it? They did not.

Q. Yes, they can't help you with the percentage, you have got to do it yourself.

A. Unfortunately.

And later:

Q. Mr Reynolds, just referring to p 10 paragraphs 11.8 and 11.9 where you have reached the subjective conclusion that there should be a 50/50 apportionment. I understand what you are saying when you say that you have not drawn comparisons with sales of land covered in scrub and gorse, because you go on to say that land covered in scrub and gorse is generally required for pasture or for development, not for preservation of indigenous trees. I understand that. What about sales of land where in accordance with good modern land conservation practice, parts of the land in steeper places and so on are being retired, wouldn't that provide some reasonable comparison?

A. Sir, I've got a pastoral property with a thousand hectares. Thirty or 40 of those hectares have been permanently retired from grazing and they are covered in willow which the owner is also allowed to mill, as long as he replants it. I think where that argument fails Sir, is that the motivation of the purchaser was for the pastoral benefits that land would give him, not the benefits accruing from lands permanently retired from grazing, and therefore, if I bought that property for two-three million dollars, and I went through a sales analysis to identify the added value the improvements gave to the land, and I satisfied myself what the land component of that transaction was, then the residue for that 30 odd hectares would be extremely small and it's a very very subjective analysis, because the purchaser wasn't motivated by that retired portion.

Q. Well let's take that one step further. I understand what you have said. Why not compare that 30 hectares of land to be retired with similar gorse, scrub covered land that an adjacent purchaser is buying to develop into farmland and average your two figures out?

A. Because, with due respect Sir, we are instructed that we cannot disregard the existence of the trees.

Q. Yes, I'm not suggesting you do. What I am saying is that I want to take you back to what you said in paragraph 11.8 and I have suggested an alternative scenario for possibly valuing similar land to what you are dealing with, where a portion of the land has been retired from farmland and you have given me the example of this 1000 hectare productive farm with 30 hectares of steep places that have been retired. Why don't you say those 30 hectares which will admittedly be the subject of an exercise in the valuer's judgment, compare that to the hectare rate you give to those 30 hectares, with the rate that you would apply to gorse and scrub covered land that is intended to be brought into productive farmland and average the two. The point being in each case, you are dealing with scrub gorse covered land admittedly for completely different purposes.

A. My response Sir is that when we go to the marketplace and look for market evidence, we have got to make sure we are comparing like with like, and in so doing, we must also be comparing the motives of the purchaser.

Q. Well we are aren't we?

A. No we are not, with due respect, we have got one sector of the market which I have identified who has a desire to acquire and own lands covered in indigenous vegetation for the purpose of protecting, not developing, protecting and enjoying the benefits that indigenous vegetation give to the land. The other class of purchaser wish to remove or destroy the vegetation in order to follow a different track, ie productive pastoral farming.

Q. In each case you are talking about the highest and best use though, aren't we, so they are not unfamiliar concepts to valuers?

A. I agree they are not unfamiliar concepts, but I think there is a disconnect in the argument in as much as when we examine the motives of the various classes of purchasers.

Q. Well isn't the problem this though? That when we are as we are here looking at remote country in the Urewera, we are not going to have a comparable sale next door, and as you have rightly done, you have compared sales far and wide over a span of years. Do you not think in the scenario that I have put to you, you might at least derive some limited benefit in the same way that some of the sales you have referred us to, will necessarily only provide you limited benefits for a whole raft of reasons?

A. I did go down that thought process and that was one of the reasons that I included the property at Galatea that I think I said it sold for

> $1,500.00 odd a hectare and one of the reasons that I went down that line of thought was to provide some fall back or verification as to whether the conclusions I was drawing were fair and reasonable and the reason that I concluded that that would not be helpful was because the motives of the purchasers were diametrically opposed. In other words, one valued the indigenous vegetation which we can't ignore and the other purchasers wished to remove the gorse and scrub for the purpose of pastoral (inaudible).

Mr Power's evidence

[26] Mr Power did not touch at all in his own evidence upon the effect of s 20 in this case. He simply assumed that the bush and forest on the property should be treated as part of the land for valuation purposes. The basis for that approach became apparent during his cross-examination of Mr Reynolds before the Tribunal. The following exchange occurred:

> Q. Mr Reynolds, would you agree that all previous case law that deals with the value of trees has referred to the millable value of the trees?
>
> A. No, I do not agree with that statement.
>
> Q. Are you aware of any case law that refers to the aesthetic value or landscape value of the trees?
>
> A. No I am not.
>
> Q. So with your interpretation of the Rating Valuation Act and particularly s 20 with relation to the value of trees, were you therefore suggesting under the Act, that any land with native timber on it, should be apportioned to determine a value of those trees as separate from the land?
>
> A. It's my reading that that is exactly what the Act requires and the subsequent case law has underscored that in upper case (sic) and also the High Court criticised the Valuation Department for not doing what they were required to do.
>
> Q. But all previous case law regarded that as being even millable or exotic timber, is that not correct?
>
> A. No. All the case law refers to the value of the trees. It says quite clearly, you cannot ignore the existence of the trees, only their value. It doesn't say 'millable', it says 'the trees'.
>
> Q. So to take it a step further, if you have a rural residential block, with a long driveway with native trees all the way down the drive that would add significant aesthetic value to the property, a four hectare block, would those trees therefore, you are saying, be assessed separately?

A. If a valuer came to the conclusion that the situation you described, that those trees had an aesthetic value, then I would have thought in accordance with the rules, the valuer undertaking the work for the territorial authority had no other option than to follow those rules.

Discussion

[27] The Tribunal expressly held (correctly in my view) that Mr Dennett was right to submit on behalf of the appellant that a valuer must, for present purposes, disregard the landscape, conservation and recreational value the trees give to the appellant's land. Mr Reynolds was therefore right to assess the value to be ascribed to the trees, and to exclude that figure from his final valuation. Correspondingly, Mr Power was wrong to exclude the value of the trees in his valuation on the ground that they had no millable value.

[28] Yet the Tribunal has rejected Mr Reynolds' approach, because it considered that his evidence was "insufficiently cogent" to justify a finding on the issue in the appellant's favour. The Tribunal ruled against the appellant because it considered that neither valuer:

> … has made any attempt using conventional valuation tools or methodology to empirically arrive at a value for the trees.

[29] The Tribunal therefore made no adjustment in respect of the value of the trees on the property. The result is that the assessment departs from the approach required by s 20, which expressly provides that the value of trees is not to be included in any valuation under the Act. While there is little available comparable sales evidence, the Tribunal was not in my opinion justified in ignoring a clear statutory direction on the ground that the available evidence is insufficiently cogent.

[30] The problem facing the Tribunal was not unlike that considered by the Court of Appeal in *Fletcher Challenge Forests Limited*. There, the Court was concerned with the state of the evidence as to the strength of the forestry market. There was general evidence that the market was weaker than that for pastoral land, but no reliable market evidence. The High Court had held that the market for forestry land in the central North Island was not notably depressed, but accepted that significant

potential purchasers had been drawn away from purchasing freehold land in the central North Island area, by reason of the availability of Crown Forest Licences. The High Court nevertheless declined to recognise the weaker state of the market. It said:

> Those factors must have had an effect on the Central North Island but the evidence does not quantify that.

[31] Tipping J, writing for the Court of Appeal, held that approach to have been erroneous. He said:

> In our view, there are two difficulties with the approach of the Tribunal and the Court to this topic which Mr Parker's submissions failed to overcome. The first point is that the Tribunal appears to be saying that while there was some weakness in the forestry market, it was necessary for evidence to quantify it before it could be taken into account. That impression is reinforced by the Tribunal's reference to market conditions being an intangible factor. Simply because a factor relevant to a valuation cannot be quantified by evidence does not mean it should not be taken into account. The weakness or otherwise of the market must be a factor bearing on the price likely to be asked and paid for the subject matter. Assessing the impact of such a factor is a matter of judgment rather than calculation. It is a judgment which a valuer must bring to bear. The fact that any allowance to be made for the state of the market cannot be defined or justified by formula, calculation, or other convenient touchstone, does not make the factor any the less real. An informed judgment is what is required.

[32] In my view the guidance offered in this passage is of application in this case. The fact that a relevant matter (the value of the trees) cannot be quantified by reference to conventional valuation methodology does not mean that it should not be taken into account. But that is the view to which the Tribunal came. It correctly noted that the burden of proof rested with the objector. That much is clear from s 38(2) of the Act. But the only evidence before the Tribunal in respect of the value of the trees came from Mr Reynolds. Mr Power had (wrongly) assumed that s 20 dealt only with millable timber and therefore did not address the issue at all. Mr Neutze suggested that I should draw the inference that Mr Power took the view that the trees on the property were of no, or little, monetary value and so made no adjustment. That inference is simply unavailable in the light of the exchange between Mr Power and Mr Reynolds during the hearing. It is clear that Mr Power made no adjustment because he thought that s 20 applied only to millable timber.

[33] The tenor of the Tribunal's cross-examination of Mr Reynolds suggests that it was troubled by the absence of reliable data upon which to rely for a credible assessment based on comparable sales. Mr Reynolds was taxed at length about the possibility of evidence being adduced of sales of properties incorporating both pastoral and retired land. It is clear that Judge McGuire, who undertook the questioning of Mr Reynolds on this topic, was looking for the comfort of a degree of conventional valuation analysis. But as Mr Reynolds pointed out, there is very little utility in such an approach, because the motivation of a purchaser of such land is quite different from that of a purchaser who is seeking bush covered land for aesthetic or recreational purposes. For a buyer who wishes to develop the property, the retired land will add little to overall value, but for the purchaser who is focused on recreational or aesthetic objectives, the existence of the trees is the most important, or at least one of the most important, reasons for that purchaser's interest.

[34] While the Tribunal's concern is understandable, it is to be noted that in the course of questioning, the Judge accepted that the value to be placed upon retired land of little interest to a purchaser of pastoral land, would come down to the exercise of a valuer's judgment, and he agreed that such evidence would " … necessarily only provide you limited benefits for a whole raft of reasons".

[35] As the Tribunal noted, the difficulty is that "… we are here looking at remote country in the Urewera, we are not going to have a comparable sale next door…" and so comparable sales evidence will be sparse and even where available, will be of limited assistance because the proportion of the purchase price likely to have been paid by a notional purchaser for the trees alone is not capable of precise arithmetical assessment.

[36] Mr Neutze suggested that Mr Reynolds ought to have gathered evidence from those within the small group of available notional purchasers. An example might be the Department of Conservation. Mr Neutze argued that there ought to have been evidence from the Department as to the price it might have paid for the subject land, and of the portion of the purchase price it may have ascribed to the trees.

[37] Whether the Department could be persuaded to give such evidence is problematic, but even if it did, the result would be wholly artificial in my view. There would also be a danger that evidence from a notional purchaser (who on Mr Te Amo's evidence would never become an actual purchaser) might assume undue prominence.

[38] The difficulty here is simply that, by reason of the isolated situation of this property, and its relatively unique character, little or no evidence of comparable sales will be available. That was recognised by Judge McGuire in the course of his questions during the hearing. Nevertheless, there is obvious substance in Mr Reynolds' assessment that a notional purchaser buying for recreational or aesthetic reasons, would pay substantially less for the land without its forest canopy.

[39] Another example of the need to depart from "conventional valuation tools or methodology" is provided by a case to which Mr Reynolds referred in his evidence: *Walker v Commissioner of Crown Lands* (1992) LVC 959. In that case the issue for the Tribunal was how to fix the value of land exclusive of improvements for the purposes of fixing leasehold farm rentals under the Land Act 1948. There was a paucity of comparable sales evidence. As to that the Tribunal said:

> It is also clear that with the passage of time and the continued improvement of rural land, the 'comparable' sales approach disappears further into the mists of unreality.

Later, it said:

> Clearly, it would be inequitable to rely upon sales which are not fairly comparable …

And later again:

> At the end of the day, it is then proper for the valuer to exercise his judgment and skill, his sense of the market and all of the factors that influence it. It may be that the final judgment is not susceptible to any precise analysis, but it is none the worse for that. Certainly, in our view, it is better than attempting to fit that judgment into the procrustean bed of recent sales or values which are not in fact comparable.

[40] The more recent observations of Tipping J in *Fletcher Challenge Forests* are to the same effect.

[41] If comparable sales evidence having some applicability to the case before the Tribunal is not available, it is not open to the Tribunal to decide the case against the party carrying the burden of proof simply because no conventional valuation tool or methodology can be employed. The Tribunal must instead consider the valuation evidence adduced, including that based upon informed judgment rather than calculation, and make its decision in the light of that evidence.

[42] The Tribunal omitted to identify the type of evidence upon which it might have been prepared to rely, but it may be a proper inference that it considered the absence of comparable sales evidence to have been fatal to the appellant, given the tenor of Judge McGuire's cross-examination of Mr Reynolds, discussed above. But of course, the absence of a "convenient touchstone" does not deprive the appellant's case of validity, as is emphasised by Tipping J in the *Fletcher Challenge Forests* case.

[43] Unless the Tribunal came to the view on the evidence that the trees were of insignificant or no monetary value (which it did not), then it was obliged to take the provisions of s 20 into account. In deciding not to do so it reached an erroneous conclusion. The assessment of a possible valuation of the trees was unusually difficult, as the available comparable sales evidence was very limited and indeed of only marginal help at best. However, that did not justify the Tribunal ignoring a matter that it was obliged to take into account, and on which it had evidence from a valuer who had exercised his judgment and made an assessment. It is no answer to characterise Mr Reynolds' 50% allocation as mere "guesswork" as Mr Neutze did in argument. Mr Reynolds extensively reviewed a range of earlier sales; his assessment was therefore an "informed" one, although calling for a significant degree of subjective judgment. He was also entitled to draw on his extensive experience in valuation work of this type.

[44] Neither is it sufficient for the respondent to assert that the burden of proof has not been met in circumstances where its own valuer has failed to provide the assistance to which the Tribunal was entitled, by reason of his misunderstanding of the requirements of s 20.

Result

[45] For the reasons set out above, the appeal is allowed. The objection is remitted to the Tribunal for reconsideration in the light of this judgment.

[46] The appellant is entitled to costs. Counsel may file memoranda if they are unable to agree.

C J Allan J