IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-004384
[2012] NZHC 623

UNDER	Section 26 of the Land Valuation Proceedings Act 1948 and section 38(5) of the Ratings Valuation Act 1988
IN THE MATTER OF	an appeal against a decision of the Land Valuation Tribunal of Auckland dated 8 July 2011
AND	
IN THE MATTER OF	objections to the revaluation of the District Valuation Roll for Auckland Council (formerly Waitakere City Council)
BETWEEN	WESTPARK MARINA LIMITED, WESTPARK DEVELOPMENTS LIMITED, WESTPARK VILLAGE LIMITED, WESTPARK SHIP CHANDLERY LIMITED, WESTPARK MARINA OPERATORS LIMITED, WESTPARK MARINE ENGINEERS LIMITED Appellants
AND	AUCKLAND COUNCIL Respondent

Hearing: 7 and 8 December 2011

Counsel: M J Ruffin for Appellant
M Casey QC for Respondent

Judgment: 4 April 2012

RESERVED JUDGMENT OF ELLIS J AND P J MAHONEY

This judgment was delivered by me on 4 April 2012
at 9.30 am, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors: Kevin McDonald & Associates, Takapuna, Auckland
Auckland Council, Private Bag 92300, Auckland 1142
Counsel: M J Ruffin, PO Box 1662, Auckland 1140
M E Casey QC, PO Box 317, Auckland 1140

[1] This is an appeal from a decision of the Auckland Land Valuation Tribunal ("the Tribunal") dated 8 July 2011.[1] The appellants had objected to the assessment of the rateable value (determined as at September 2007) of twelve parcels of land that are leased by them from the Auckland Council (formerly Waitakere City Council). Although only lessees, the appellants are the ratepayers in relation to the land and therefore have a right of objection under s 33 of the Ratings Valuation Act 1998 ("the RVA").

[2] The rateable valuations now at issue were prepared by Quotable Value (NZ) Limited ("Quotable Value") pursuant to the RVA as part of the triennial revaluation of all properties in the former Waitakere City. The Waitakere City rating system at that time was based on the assessed land value component. There was no objection lodged to the assessed capital values.

[3] The assessed land values that were initially notified totalled $10,524,000. Following receipt of the appellants' initial objection these were reviewed, resulting in a revised combined value of $9,071,000. The appellants remained dissatisfied, however, and the matter was referred to the Tribunal.

Background

[4] The parcels of land concerned are situated on the Upper Waitemata Harbour at Hobsonville and collectively comprise what is known as the Westpark Marina development. The twelve Lots combined occupy 4.8885 hectares and are the subject of eleven separate leases to Westpark Marina Limited and its associated companies. Much of the land that comprises the Lots has been reclaimed from the harbour. The Tribunal described the Lots and the role that each played in the Westpark Marina Development as follows:[2]

> ... Lots 18 and 19 comprise the seawalls enclosing the harbour on the south and eastern sides (Lot 18) and the northern side (Lot 19). Lot 16 comprises the seawall on the western side of the development and is in part also used for carparking. It is contiguous to the main areas of reclamation to the west. To the immediate west and contiguous to Lot 16 are Lots 10 and 13 which

---

[1] *Westpark Marina Ltd & Others v Auckland Council* LVT Auckland LVP113/09-LVP125/09, 8 July 2011.

[2] At [5].

are sealed and used for parking. To the south of Lot 10 at the southern extremity of the development is Lot 2 which comprises a boat ramp and vehicular access thereto. No buildings are erected on any of the foregoing lots. Lot 8 to the extreme west of the development is also sealed and used for parking. Between that Lot and the carparking along the foreshore retained by Lot 16 are situated Lots 6, 7, 11, 12 and 20 all of which have been developed to varying degrees of site coverage with relatively light commercial and industrial buildings and sealed yards for access, parking and storage.

[5] The Marina Development has its origins in the Waitemata City Council (West Harbour) Empowering Act 1979 ("the Empowering Act"). The object of that Act is made clear in its long title which states that it is:

> An Act to vest in the Auckland Harbour Board certain land in the Waitemata Harbour and to authorise the Auckland Council to develop such land for the purpose of a boat harbour and to reclaim part of the land for that purpose and to operate a boat harbour thereon.

[6] Section 4 of the Act vests the land in the Auckland Harbour Board, and ss 5 and 6 enable reclamation by the Council. Section 8 permits the Board to transfer the fee simple of land to the Council for the purposes of a boat harbour and s 10 authorises the Council to develop and operate such a harbour. The term "boat harbour" is defined in s 2 of the Act as:

> ... a harbour or part of a harbour or an anchorage used for the purpose of constructing, fitting out, mooring, sheltering, or servicing boats; and includes any land or building used in conjunction therewith and, without limiting the general import of that term, includes—
>
> (a) Any slipway, launching ramp, dock, pier, marina pier, quay, wharf, jetty, landing place, hoist, hoist-well, bridge, float, pontoon, boat shed, boat repair facilities, boat yard, breakwater, wave screen, embankment, marine service station or fuelling pier or facility, facilities for the hire, sale or dry storage of boats and for the sale of marine equipment and accessories including ship's chandlery, or any other boating or aquatic structure, service, or amenity for the use and convenience of the boating public; and
>
> (b) Any shop, restaurant, car park, club premises, or facility or any other commercial or recreational amenity for the use and convenience of the general public as well as that of the boating public — and reference to a boat harbour shall be deemed to be reference to any part of any facility, structure, service, amenity, or use included in a boat harbour:

[7] Section 11 authorises the Council to permit other persons to develop and operate the boat harbour and s 12 authorises the licensing of the foreshore and

seabed (which may be subdivided by the Council by virtue of s 9). Section 13 permits the leasing of the reclaimed land for boat harbour purposes on such terms as the Council sees fit. Section 14 stipulates that the public have rights of access "to the whole of the land reclaimed" but not to any building on it (as defined) and that any lease granted over the land is to be "read and construed accordingly".

[8] On this statutory basis the land was transferred to the Council and then leased to the appellants. For the purposes of the present appeal it is relevant to note certain aspects of the lease agreements. In particular, clause 10 of each of the leases provides that:

> The lessee will not use the said land other than for one or more of the purposes of shops, restaurants, car park, club premises or facilities, commercial or recreational amenities for the use and convenience of the general public as well as that of the boating public provided that the lessee shall make proper provision as approved by the lessor for the public and users of the marina adjoining the said land to have access to the said land.

[9] As well as this general restriction, some seven Lots are the subject of the following specific restrictive conditions:

(a) The lease for Lots 2 and 16 requires Lot 2 be used for the purposes of car parking, rigging/de-rigging area and public launching ramp and Lot 16 to be used for the purposes of foreshore pedestrian access. Both Lots are required to be held in common ownership with the holder of the seabed sub-licence.

(b) The lease for Lot 10 requires the lessee to make proper provision for the public and users of the marina adjoining Lot 10 to have access to Lot 10 for the purpose of car parking. This Lot is also required to be held in common ownership with the holder of the seabed sub-licence.

(c) The lease for Lot 13 requires the lessee to make proper provision for car and trailer parking.

(d) The leases for Lots 18 and 19 require the public and users of the marina to be given pedestrian access to the breakwater and requires

these Lots to be held in common ownership with the holder of the seabed sub-licence.

(e) The lease for Lot 20 requires the lessee to make proper provision for the public and users of marina to have access for the purposes of administration offices. This Lot is required to be in common ownership with the holder of the seabed sub-licence.

[10] Lastly, by way of background, it is relevant to note that the applicable resource management/zoning requirements are contained in the Marine Special Area ("MSA") section of Rule 11 of the Waitakere District Plan. The section includes a concept plan for the Marina, showing the four areas (A, B, C and D) to which different rules relate.

The evidence before the Tribunal and the Tribunal's decision

[11] The Tribunal's hearing took place on 15 and 16 December 2010. The Tribunal heard expert evidence from two Valuers. Mr Dean, who was called by the appellants, initially assessed the aggregate land values at $4,707,950. Mr Bristow, who was called by the Council, initially assessed the aggregate land values at $7,905,000.

[12] Prior to the hearing, however, the two Valuers reached agreement on the assessed land value for Lots 2, 16, 18 and 19. They also agreed on provisional valuations for the remaining eight lots (Lots 6, 7, 8, 10, 11, 12, 13 and 20).[3] The agreement was provisional because the valuations were conditional on the way in which the Tribunal resolved two outstanding areas of dispute, namely:

(a) Whether any further adjustments should be made to the valuation figures to take account of various restrictions contained in the leases that affect them; and

---

[3] Unfortunately, perhaps, there is no record of the precise basis upon which the provisional agreement was reached. It is impossible to be certain whether the two Valuers were "on the same page", in terms of any assumptions underlying the agreed valuations.

(b) Whether further adjustments should be made to reflect the weak ground conditions as a result of the land being reclaimed. It was agreed that those conditions would mean that, in the event that buildings of a heavier kind were to be built on the land, piling would be required.

[13] In relation to the first issue, the objectors contended that the restrictive provisions in the leases (and in the Empowering Act) meant that the provisional values should be reduced.[4] However neither Valuer took the leases or the Empowering Act expressly into account when arriving at their valuations. Mr Bristow was, indeed, explicit in that regard.[5]

[14] The Valuers did, however, both give careful attention to the restrictions on use arising from the resource management and zoning requirements. Because this assumes some importance later in this judgment, we set out the relevant portions of the valuation evidence at this point.

[15] Mr Dean's evidence contained a specific section in which he considered the terms of the Empowering Act. However he concluded that section by saying:

> 52 I could refer to the Empowering Act 1979 in even more detail, but what seems readily apparent from the foregoing is that the land at Westpark Marina was specifically reclaimed for the purposes of a boat harbour and functions associated with a boat harbour operation and not for other, unrelated purposes.
>
> 53 In those circumstances, it seems inevitable that significant parts of the land must continue to be used for the purposes of a boat harbour by statutory authority.

---

[4] This omission is problematic for the appellants. As Mr Casey QC submitted that omission might in itself suffice to dispose of this aspect of the appeal. As he said there is a double onus on the Marina interests arising by virtue of s 38(2) of the RVA and by virtue of the usual burden that must be shouldered by those who bring an appeal. As it transpires, however, a determination of the issues on the merits (which were argued fully before us) gives rise to the same result.

[5] At [21] of his first affidavit Mr Bristow said:

> Advice received for the purposes of this valuation is that the existing Ground Leases registered against the various allotments should be disregarded in assessing the land values. I have proceeded accordingly.

54 It is therefore consistent with that statutory background, that under the Concept Plan:

54.1 those lots contained in Area A are shown by and large on the Concept Plan as relating to specific uses relevant to a boat harbour and in particular parking, workshops, marine service area and a marina edge walkway (and acknowledgement of public access required under the Empowering Act 1979);

54.2 reference is also made to public access to the boat ramp.

[16] Mr Dean then goes on to consider the Valuation impact of these matters in the following way:

Impact on highest and best use

56 Relating the foregoing material to the particular rules of the Special Area provisions and also referring to the notations on the Concept Plan, I note that the only practical permitted activity as of right within Area A is any "Marina Activity" involving the construction or alteration of buildings.

57 All the other permitted activities on the Concept Plan in either Areas A or C are activities which can only be undertaken without the construction or alteration of buildings. While marina activities can be undertaken without buildings, residential activity, non-residential activity, retail sales generally speaking become irrelevant if there are no buildings associated with them. Public water transport facilities could be available without the use of buildings by way of landing people and having carparks to satisfy the needs of the travelling public on water transport. However, usually shelter would be required for such people as would jetty constructions and so on.

58 All other activities are not permitted as of right and have various different assessment criteria, numerous of which have discretion associated with them. The assessment criteria under Rule 11(a) to (f) include such things as:

58.1 The extent to which the scale of buildings creates adverse effects on neighbourhood character and amenity values, including views over the site to the harbour;

58.2 The extent to which activities and structures maintain and enhance the character and amenity of the Special Area;

58.3 The extent to which areas of open space and planting are used to offset the visual impact of additional building coverage;

58.4 The extent to which traffic generation creates adverse effects on the capacity of roads giving access to the site, the safety of road users, including cyclists and pedestrians and on neighbourhood character.

> 59 Additionally, there are design criteria under Rule 11(f)(vii) such that the design of buildings should maximise exposure to winter sun and under (f)(x) that "buildings are encouraged to be linked to allow the efficient use of sites".
>
> 60 Lastly, under assessment criteria 11(g), raises the spectrum of financial contributions where adverse effects arise which are more than minor.
>
> 61 Given the numerous subjective elements, it is difficult to predict exactly what could be built on any of these sites because of course the planning process has to be undertaken.
>
> 62 The only thing that can be said with confidence is that on Area A with respect to buildings, the only permitted activity as of right is that of marina activities.

[17] Later in his affidavit Mr Dean does contemplate the possibility of Lots 6, 7 and 8 being used other than for Marina purposes, but notes that historically the Council has used the leases and the Empowering Act effectively to prevent such use. Ultimately, however, Mr Dean does not appear to reduce the value of these 3 Lots on the basis of such restrictions. No doubt that is because of his conclusion that:

> 74 In the circumstances of Westpark Marina, in my opinion there is limited demand for commercial services on the subject land and that demand by and large is fulfilled by the development that has taken place on Lot 6, where the majority of retail and service facilities are located servicing the marina and/or the general public.

[18] In other words, Mr Dean appears to have been of the view that, notwithstanding the possibility of alternative uses for Lots 6, 7 and 8, their highest and best use remains that which is associated with the Marina Development.

[19] Mr Bristow began the relevant part of his analysis by saying:

> 5.1 To summarise the range of activities allowable within the Marina Special Area are tightly controlled by both the District Plan Rules and the Concept Plan.
>
> 5.2 Whereas the Rules potentially provide for a wider range of activities (particularly as Controlled) the Concept Plan is more representative of the actual development to date. As such, I consider it to be a firm basis against which the valuation of the individual parcels should proceed. To summarise I set out in the following Areas as defined within the Concept Plan and the actual or indicative uses:-

Area A	Activities
Lot 10 (part)	Marina Parking
Lot 11	Marine Service Area (assumed)
Lot 12	Marine Workshop
Lot 13	Marine Service Area
Lot 16 (part)	Marina Edge Walkway
Lot 20	Commercial
Area B	
Lot 7	Commercial, Residential & Parking
Lot 8	Commercial, Residential & Parking (assumed)
Area C	
Lot 6	Commercial
Lot 10 (part)	Marina Parking
Lot 16 (part)	Marina Edge Walkway

[20] Later, he said:

> 8.6 Having reviewed the matter, I am satisfied that the District Plan Rules, and in particular the Concept Plan provide support to the appropriate basis of valuation. Both Rule 11 and the Concept Plan recognise the specific desire to develop a comprehensive Marina facility, with specific lots set aside for specific end use(s).
>
> 8.7 A number of lots, such as part Lot 7 (public parking), Lot 2 (public boat ramp), Lot 10 (berthholders carparking), Lots 16, 18 and 19 (walkway and sea walls) provide critical infrastructure within the marina complex and are not independently saleable as such. Accordingly, I consider the land values to be applied against these areas needs to bear some resemblance, at least from a starting point, against the balance land, which is obviously enhanced by virtue of their existence.
>
> ...
>
> 9.25 Being zoned Marina Special Area, the potential range of activities is narrower than would be provided for under either a Community or Working zone. Further, the Rules provide for varying performance standards in respect of building coverage, building height, height to boundary and landscape treatment.
>
> 9.26 For the most part a negative adjustment is warranted.
>
> ...
>
> 10.1 I believe it is necessary to reflect the fact that this is a comprehensively planned Marina development as provided for in the District Plan Rules and Concept Plan, the latter having been endorsed by the Environment Court.
>
> 10.2 As such I consider it appropriate to apply a single land value across the three Areas identified on the Concept Plan, making site specific adjustments for those matters stated.

[21] In relation to the second (ground condition) issue, Mr Dean applied a significant discount on the otherwise agreed land values that, he said, took appropriate account of the ground conditions. In particular, he reduced the land values to reflect the qualitative difference between the land in question and "firm natural ground". The quantification of that difference by Mr Dean led to reductions in land value ranging between 24 per cent and 64.5 per cent.

[22] By contrast, Mr Bristow adopted a considerably lesser reduction of approximately 5 per cent. Although he acknowledged the "firm natural ground" benchmark, his reduction reflected site-specific engineering advice which confirmed that after 20 years of consolidation the sites were suitable for traditional light weight industrial buildings on slab foundations which would be typical of buildings used in a marina environment.

[23] The Tribunal essentially preferred Mr Bristow's, and therefore the Council's, position in relation to both issues. The Tribunal held that the appropriate land values for all twelve lots totalled $7,846,000.

[24] The two issues recorded at [13] above also formed the basis of the present appeal, which we approach on the basis that (as Mr Casey submitted) it is one to which the Supreme Court's dicta in *Austin, Nichols & Co Inc v Stichting Lodestar* at [4] and [5] applies.[6]

[25] Each of the two issues will be addressed in turn.[7]

Issue 1A: effect on valuation of the restrictive provisions in the leases

[26] The starting point in relation to the lease issue is the definition of "Land value" that is contained in s 2 of the RVA:

---

[6] *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103; [2008] 2 NZLR 141; (2008) 8 NZBLC 102,172.

[7] We include in the first issue both the issue of the effect of the restrictive provisions in the leases and the effect of the restrictions in the Empowering Act, notwithstanding that the issue as originally defined did not include any reference to the Act. While slightly different legal considerations apply in respect of each, both have led us to the same conclusion.

> 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 have been made on the land:

[27] Mr Casey QC submitted that this definition meant that it was the Council's interest in the land that was being valued, and that the existence and terms of any lease was therefore irrelevant to the valuation exercise.

[28] Given that the word "owner" is defined in the RVA to mean "the person whom, whether jointly or separately, is seized or possessed of any estate or interest in the land constituting a rating unit", that conclusion is not straightforward.[8] On its face, this definition of "owner" would encompass a person with a leasehold interest in the land.

[29] That said, however, this Court has previously held that, following the significant amendments that were made to the RVA in 2002, the broad definition of "owner" contained in it is no longer apt.[9] The present case seems further to underscore that conclusion. More particularly, prior to the 2002 amendments leasehold interests could be separately valued and rates apportioned between a leaseholder and the registered proprietor. That is no longer possible due to the abolition of the concept of "separate property" (which was a unit of occupation[10]) as the basis for rating valuations and the repeal of the Rating Powers Act 1988 (which provided for apportionment). We therefore accept that it is the registered proprietor's (Council's) interest in the land that is to be valued for rating purposes.

[30] This conclusion does not mean that the existence and terms of any lease over the land is irrelevant to the valuation of the Council's interest in the land. That is made clear by s 21, to which the s 2 definition of "land value" is expressly made subject. Section 21 is headed "Value of land subject to lease" and provides that:

---

[8] A "rating unit" is generally defined in s 5B(1) as "the land comprised in the certificate of title".
[9] *Franklin District Council v Cryer* [2011] 1 NZLR 529 (HC).
[10] *Rodney District Council v Attorney-General* [2002] UKPC 47, [2002] 3 NZLR 721.

> (1) For the purpose of determining under this Act the ... land value ... of a rating unit that is subject to a lease, -
>
> (a) Regard is to be had to the desirability for rating purposes of preserving uniformity with contemporaneous roll values of comparable parcels of land; and
>
> (b) Any lease provisions or circumstances particular to the property concerned that do not reflect the prevailing market conditions at the date of valuation are to be disregarded.
>
> (2) This section applies for the purposes of determining valuations for the purposes of this Act and the Local Government (Rating) Act 2002 only, and is not intended to alter the definitions of the terms "capital value" and "land value" in the case of valuations made other than for rating purposes under any other Act or document.

[31] The very existence of s 21, and the fact that the s 2 definition of "land value" is subject to it, implies that the existence and terms of a lease over land that is being valued for rating purposes may have an impact on that value.[11] However any such impact will be subject to the strictures contained in s 21 itself. For that reason, the appellants necessarily contended that s 21 did not apply to render the leases irrelevant in the present case. The meaning and application of s 21 therefore becomes a critical first stage of the inquiry.

[32] Although counsel were not able to enlighten us as to the origins of s 21 (which had no equivalent in the Valuation of Land Act 1951) it transpires that its history is instructive. Section 21 was included in the 1998 Act as a direct response to decisions of this Court and of the Tribunal in which it had been held that the existence and specific terms of a lease did affect the value of the land to which the lease pertained.[12]

---

[11] We do not consider that a lease can simply be disregarded as a "mortgage or other charge", otherwise there would be no need to make the definition subject to s 21. And prior to the enactment of s 21, this Court (in *Valuer-General v Radford Company Limited* – see below) held that those words did not encompass a lease.

[12] The Explanatory Note to the Rating Valuations Bill stated that

> The definitions of the terms "capital value" and "land value" are now subject to clause 21 of the Bill. That clause deals with valuations of land subject to leases and is intended to nullify the decisions of the High Court in *Valuer-General v Radford Company Limited* and the Wellington Land Tribunal in *Diffey and Diffey v Valuer-General*.

[33] *Valuer-General v Radford Company Limited* involved a property in central Wellington that was leased on "relatively generous terms" for a considerable term.[13] Despite the lessor being unable easily to evict the lessees and obtain vacant possession of the property for demolition, the parties agreed that the property should be valued as a development site (to its highest and best use).

[34] Grieg J noted that the presumption that a valuer should treat any buildings as removed when assessing land value without improvements could not be extended to mean that any lease over that property was also to be ignored. He said that the reference in the definition of "land value" to mortgages and other charges did not include a lease.[14] Then Greig J said:[15]

> A bona fide seller offering for sale his freehold estate subject to these leases will realise or expect to realise a sum, which takes into account the benefit or detriment of those leases. In my judgment, therefore, on a plain reading of the relevant definitions and sections the valuer must take into account the effect of the leases so far as they have any effect on the expected realisable sum. That seems to be consistent with the assumption that the land, though notionally vacant and without buildings, is not restored to its primitive or primeval state but is subject to all the existing chances which may affect its value at the date of valuation. Thus, as in *McKee's* case, the chance which the owner of the land may have of obtaining a consent to a particular use and likewise the opportunity to sell as a development site are all matters to be taken into account. A lease, though a private contractual arrangement and not an environmental factor applying unilaterally and without any contribution by the owner, is still a present feature or factor which needs to be taken into account.

[35] The Judge said that, although there appeared to be conflicting High Court authority on the relevance of leases for valuation purposes, he preferred the view of Archer J in *Findlay v Valuer-General*[16] to that of Tompkins J in *Valuer-General v Addington Raceway Ltd.*[17] On that basis, Greig J concluded that the value of the

[13] *Valuer-General v Radford Company Limited* [1993] 3 NZLR 721 (HC).
[14] At 728. The definition of "land value" under the Valuation of Land Act 1951 was materially identical to the definition in the RVA.
[15] At 729.
[16] *Findlay v Valuer-General* [1954] NZLR 76 (LVC). This was essentially an apportionment case where the critical issue (ie the effect of leases on land value) was ultimately moot because the tenancies in question were agreed not to constitute an interest in the relevant land.
[17] *Valuer-General v Addington Raceway Ltd* [1969] NZLR 327 (SC). Here the issue was whether the 80 year lease of the raceway land (which was owned by North Canterbury Hospital Board) affected the value of the land. Tompkins J held that it did not.

Wellington property was to be reduced by the cost of obtaining vacant possession in order to demolish the buildings so that development could take place. He said:[18]

> It is not a question of valuing the leases but valuing the fee simple and the effect of the lease on that having regard to the redevelopment purpose. In those circumstances the principle adopted that it was, in effect, the cost of obtaining surrender and freeing the land for redevelopment must be appropriate ...

[36] What is particularly notable about this analysis (with which we respectfully agree) is that the leases affected the value because:

(a) redevelopment was agreed to be the highest and best use of the land in question; and

(b) redevelopment could not occur without obtaining the surrender of the leases.

[37] *Diffey v Valuer-General* involved the value of land that was subject to a fixed long-term lease which secured to the lessor rent that was well in excess of market rates.[19] Although the Valuer-General accepted that the lease was not a charge within the s 2 definition of "land value",[20] he contended that the contracted rental should not be taken into account when valuing the land because it was out of line with the market.

[38] The Tribunal applied the High Court's decision in *Radford* and concluded that:[21]

> In those circumstances, it seems to us artificial for any valuer to look at valuing a leased property on the basis of what it should be earning in rent, rather than what it is receiving.
>
> We agree with Mr Taylor that in valuing the property, the Valuer should have taken into account the lease over the subject property.

---

[18] *Radford* at 736.
[19] *Diffey and Diffey v Valuer-General* Land Valuation Tribunal Wellington LVP 4/94, 8 May 1996.
[20] The definition in the 1998 Act largely replicates the 1951 definition.
[21] At 7.

[39] The Tribunal then used the investment approach to ascertain value, treating tenant quality, lease terms, lease conditions, rental income, market rent, operating expenses, and the capitalisation rate as relevant.

[40] Thus the decisions in *Radford* and *Diffey* offer a compelling explanation for the enactment of s 21 and, more specifically for:

(a) subsection (1)(a), which appears to be directly responsive to *Radford*; and

(b) subsection (1)(b), which appears to be directly responsive to *Diffey*.

Does s 21 prevent the Marina leases being taken into account?

[41] It is not disputed that s 21 must be considered in the present case because it concerns valuation for rating purposes (s 21(2)). So, as we have noted, the appellants were obliged to argue that the terms of s 21(1) did not apply to prevent the leases being taken into account in the valuation exercise. Essentially, Mr Ruffin contended that:

(a) In terms of s 21(1)(a), there were no parcels of land that were "comparable" to the Marina Lots and thus there was no need to preserve uniformity with contemporaneous roll values;

(b) In terms of s 21(1)(b), the absence of comparable parcels of land meant that there was no relevant "prevailing market conditions" against which their provisions were to be judged.

[42] The Tribunal rejected these arguments and held that s 21 meant that the leases could not be taken into account. The Tribunal said:

> [18] No evidence has been adduced to show as the objectors must contend, that apart from the restrictive conditions in the lease, the features of the lands concerned with this objection are of such a singular nature that the lands are not fairly comparable with any other lands, on the Waitakere City Roll. In fact the valuation evidence which has been put before us by both parties is to the contrary in the sense that both Mr Dean, and Mr Bristow in

> making their valuations, and in reaching the measure of agreement as to value that they have, have done so on the basis of reference to sales of other land for comparative purposes in the traditional way.
>
> [19] It must be the case that what is to be regarded as "comparable" in valuation terms, must in practice at times be a relatively elastic concept. Valuers strive to find sales of comparable parcels of land as a basis of valuation. In some cases sales of other land having truly similar characteristics to the land to be valued simply cannot be found, and adjustments to reflect the differences must be made in a principled way. There is no evidence here that the Valuers have found the task of establishing a value for the lots under consideration to be beyond the fetch of this traditional methodology.
>
> [20] The objectors' argument also implicitly depends upon the proposition that s 21(1)(a) and (b) are so linked that if the objectors' proposition as to uniqueness of the lands in question is established then the strictures of s 21(1)(b) may be disregarded. We are not persuaded that this is a correct interpretation of the legislation. Section 21(1) specifies two matters to be taken into consideration in establishing the capital value of land subject to a lease. While the policy consideration set out in s 21(1)(a) may be seen as a rationale for the clearly expressed direction in s 21(1)(b), we are not persuaded that the two subsections necessarily stand or fall together.

[43] But when s 21 is viewed in light of its history (which was not put before the Tribunal) we consider that the appellants are correct that s 21 does not require the leases to be ignored in the present case.

[44] As far as s 21(1)(a) is concerned, the Tribunal quite rightly noted that both Valuers compared the land upon which the Marina Development is situated with other industrial land in the area. But we do not agree that this leads to the conclusion that that industrial land constituted "comparable parcels of land" within the meaning of the section. Rather, sales of industrial land in the wider market were the best, if not only, market indicators available.

[45] In our view it is reasonable to conclude that the marina land is unique and we are not persuaded that further evidence was required in order for the Tribunal to reach that view. Both Valuers make it clear that they are comparing the Marina land to industrial land because that land was the *most* similar; there was nothing else with which to compare it. A person wishing to operate a marina in the Waitakere area could not do so on those other parcels of industrial land referred to by the Valuers. Moreover, the qualitative difference between the two types of land is further

reflected in the fact that both Valuers felt compelled to apply a substantial discount to the "comparable" industrial land values in order to value the Marina land.

[46] This view is, we believe, underscored by the fact that the policy concerns that underlie s 21(1)(a) do not seem to arise in this case. Because the Marina land is itself unique, a valuation that takes account of lease restrictions - which themselves are directly related to the unique (marina) features of the land - could not sensibly be regarded as out of step with the roll values of industrial land in the area that are not subject to similar leases. Put another way, the owner of one of the parcels of industrial land could not invoke a comparison with the rating value of the Marina land (regardless of whether the leases were taken into account in arriving at that value) in an attempt to argue that the valuation of the industrial land was inequitable. As well, paragraph (a) does not *require* uniformity, it simply stipulates that the desirability of uniformity is to be taken into account.

[47] Similarly, we consider that Mr Ruffin is correct about the inapplicability of s 21(1)(b). This is a quite different case from *Diffey*, which involved the valuation effect of an unusual lease in the context of a readily identifiable market involving other leases over similar (comparable) land. We do not think that such a "prevailing market" exists here. If it did, it would necessarily consist of other leases over other marina land. Even assuming the existence of such a market, we would have expected that the lease provisions here would in fact be reflective of it.

[48] We accordingly find for the appellants in relation to that aspect of the appeal that relates solely to the interpretation and application of s 21.

[49] Ultimately, however, we consider that s 21 is something of a red herring. Even if, as a matter of law, s 21 does not, in theory, prevent the rating valuation from taking into account the existence and terms of the leases, we do not consider that, in reality, the leases make a difference to the appropriate valuation of the Marina land for the reasons that follow.

What effect should the leases have on the rating valuation?

[50] As we have said, it is not in dispute that neither valuer took the leases separately into account when valuing the Marina land. The question therefore is whether it could have made a difference to their valuations had they done so.

[51] As we have also said, the starting point is that it is the Council's interest in the land that is being valued. It seems to us that the value of that interest might be affected by the leases if their terms or existence:

(a) made it particularly difficult for the Council to use or to sell the land; or

(b) in some other way constituted a meaningful restriction on the Council's title.

[52] As regards the leases, we consider that it is only the question of restraints on use that requires consideration. Any restrictions on alienability fall to be considered in the context of the Empowering Act, and we do that later, below. As for restrictions on title, Mr Ruffin did not appear to be suggesting that, in the event of a sale, the Council would only be able to transfer an interest in the land that was less than its own fee simple estate in the land.

[53] The difficulty for the appellants in relation to restrictions on use arising from the leases is that it has not been suggested by either valuer that the highest and best use of the land involves anything other than the operation of a Marina. Although it appears that Mr Dean toyed with the possibility of alternative uses in relation to Lots 6, 7 and 8 he did not, so far as we can tell, conclude that those possible uses were higher or better and ultimately they had no effect on his valuations.

[54] Once it is accepted that the highest and best use involves the operation of a marina, the restrictions contained in the leases must be seen as incidents of achieving that use. Moreover the restrictions would appear in fact to be necessary for that purpose. A comparison with *Radford* is instructive. In that case, the leases were

preventing the highest and best use of the land in question. In the present case, the leases have no such detrimental effect. Arguably, the leases here are *facilitating* the highest and best use.

[55] Even if that were not the case, the restrictions in the leases are directed at the same range of uses contemplated by the MSA designation. As the excerpts from the evidence we have set out at [15] - [20] above make clear, the Valuers expressly took into account the constraints on use prescribed in the relevant parts of the Waitakere District Plan. It cannot in our view be correct that those constraints should be taken into account twice merely because they happen also to be reflected or contained in the lease provisions.

Issue 1(B) - effect on valuation of the restrictions contained in Empowering Act

[56] To the extent that this aspect of the appeal relates to the restrictions on *use* contained in that Empowering Act, it is, we think, answered by the analysis above regarding the lease (restrictions) issue. That is because, if the restrictions on use contained in that Act are also concomitant with (and facilitative of) the highest and best (marina) use of the land, then:

(a) they can have no adverse effect on value; and

(b) they have already implicitly taken into account by Valuers when considering the strictures on use contained in the District Plan.

[57] As we have intimated above, however, there appears to be another aspect to the appellants' argument in relation to the Empowering Act. That is that the Act also imposes restrictions on alienability that negatively affect value. In making that argument, Mr Ruffin relied on the decision in *Valuer-General v Mangatu Inc* where the Court of Appeal held that the statutory restrictions on the alienation of the land arising by virtue of the provisions of Te Ture Whenua Maori Act 1993 had an effect on the value of the land.[22]

[22] *Valuer-General v Mangatu Inc* [1997] 3 NZLR 641 (CA).

[58] Mr Ruffin endeavoured to bolster his analogy with *Mangatu* by reference to the recent decision of MacKenzie J in *Jones v Waitakere City Council* which relates to the sale of two of the lots in the Westpark Marina development in 1998.[23] We were advised that those two lots were not required for Marina purposes.

[59] The plaintiffs in *Jones* claimed (inter alia) that the sale of the lots by the Council was ultra vires the Empowering Act and in breach of trust. MacKenzie J's judgment relates to an application by the Council to strike out the claims, which he declined. In doing so, he simply said:[24]

> [22] I deal next with the question of whether the causes of action can be said to be untenable, to the extent that there is no reasonably arguable cause of action disclosed. The plaintiffs' contention that all of the reclaimed land transferred to it pursuant to s 8 of the Act was required to be held for the purpose of a boat harbour, and that its sale by the Council was ultra vires, cannot be dismissed as untenable. It follows that the pleading seeking judicial review of the relevant decisions or actions of the Council in connection with the sale cannot be said to disclose no reasonably arguable cause of action. As far as the pleading against the Council alleging breach of trust is concerned, that is so closely connected with the proposition that the sale of Lots 3 and 4 by the Council was ultra vires that that cause of action should not be struck out as not reasonably arguable.

[60] MacKenzie J went on to express reservations about the merits of the breach of trust claim and we understood from Mr Ruffin that this aspect of the claim may now have been modified or dropped. In any event, MacKenzie J's reservations did not appear to extend to the *vires* claim.

[61] For his part, Mr Casey submitted (as he did before MacKenzie J) that, although the land was reclaimed for the purpose of supporting the marina (via the boat harbour purpose), there is no requirement that the Council hold the land forever and exclusively for that purpose. For example, s 17 of the Act says that nothing in the Act is to be construed as limiting the application of (inter alia) the Local Government Act 1974. That Act conferred extensive powers of sale of land held by a Council (s 230). Its successor, the Local Government Act 2002, also does not

[23] *Jones v Waitakere City Council* HC Auckland CIV 2010-404-002338, 29 October 2010.
[24] At [22].

prohibit the sale of such land and there is High Court authority to support that proposition.[25]

[62] It would, we think, be wrong for us to express a view on the merits of the claim that is presently squarely before this Court in the *Jones* proceedings. We heard no real argument on the issue and, by virtue of the analysis that follows, there is ultimately no need for us to consider it. That is because the answer, in any event, lies in a consideration of *Mangatu* and other similar decisions.

[63] The subtleties of the decision in *Mangatu* can perhaps best be understood by considering other cases in which similar arguments have been raised. These both pre-date and post-date the *Mangatu* decision itself. In particular we refer to:

(a) *Thomas v Valuer-General* in which the Court held that restrictions on the alienability of land held under the Native Townships Act 1910 (namely that land was alienable only with the consent of the Governor-General) did not affect the value of the land.[26] The Court of Appeal in *Mangatu* distinguished *Thomas* on the grounds that the restrictions on alienation were less stringent in that case and (more significantly) that, once alienation was authorised, a purchaser would obtain an ordinary (unrestricted) freehold title to the land;

(b) *Valuer-General v Trustees of the Christchurch Racecourse* in which the Court held that the significant restrictions on both alienation and use imposed by the Christchurch Racecourse Reserves Act 1878 and the Reserves Act 1977 warranted a reduction in land value.[27] As in *Radford*, however, it is notable that the central restriction (namely the requirement that a significant portion of the land be used for a racecourse) was inconsistent with the highest and best use of the land;

[25] *Auckland City Council v Greig* HC Auckland CP969/87, 30 July 1987.
[26] *Thomas v Valuer-General* [1918] NZLR 164 (SC).
[27] *Valuer-General v Trustees of the Christchurch Racecourse* HC Christchurch AP 343/92, 13 September 1994.

(c) *Carter Holt Harvey Forest Ltd v Valuer-General* in which the Court held that the strictures created by the Crown Forest Assets Act 1989 meant that some reduction in the value of the Crown's interest in the land was appropriate.[28] In that respect the Court said:[29]

> Obviously when the CFA Act was passed, there was no intention on the part of the Crown (or Parliament) to diminish the value of the Crown's forestry land But to satisfy the requirements of the Maori interests with whom the Crown had been in negotiation before the CFA Act was passed, it was necessary for the Crown to accept some limitations on the way in which Crown forestry assets should be held and managed. To the extent that these restrictions adversely affect the value of the owner's estate or interest in the land in issue in this case, they must be recognised in the valuation.

Then, after considering the statutory regime, the Court concluded:[30]

> Given the impossibility of sale by the Crown as at September 1993, the issue of land value must be treated as depending on a notional sale to a purchaser who would accept a position identical to that of the Crown. The position must be treated as including the risk of expropriation for full value. For reasons just expressed we see that risk as diminishing (but not to a large extent) the value of the land from the point of view of the Crown. But the CFL tenure system imposes some rigidities in the way in which Crown forestry land is held. Since the hypothetical sale we must consider would involve the purchaser accepting the other limitations implicit in the CFL regime, the impact of those restrictions on value must now be assessed.

[64] The critical distinction between the types of case referred to at [63](a) and (b) above was expressly noted by Chapman J in his judgment in the *Thomas* case. He said:[31]

> The case of a rifle range or a public racecourse is quite different. The owner of a racecourse which can only be used or let for that purpose and for grazing when not in use for racing is not a case where the owner has full enjoyment of the land. The land might be of very great value, say, as a market-garden, while yielding but little revenue to the body owning it

[28] *Carter Holt Harvey Forest Ltd v Valuer General* HC Christchurch AP 7/98, 27 November 1998. The Court declined to make any adjustments due to the existence and terms of the Crown forestry licences themselves on the basis that the case was different from *Radford* because the licences were not interests in land.

[29] At 28.

[30] At 30.

[31] At 172.

> because it could not be used as a market-garden. A Native owner has full use of the land, and on his death it passes to his successor, who has the same full use of it. If he alienates it after the removal of restrictions his purchaser has an unrestricted freehold. That, I think, differentiates this case from the cases when there is no such unrestricted right to use the land.

[65] Proceeding therefore on the orthodox basis of a notional (2007) sale of the fee simple in the Marina land by a willing but not anxious seller to the hypothetically willing but not anxious buyer, we proceed on the assumption that such a purchaser would be subject to the restrictions in the Empowering Act. In other words, like the Council, the purchaser would be obliged to use the land for Marina purposes. But while that may be a constraint, it is one that is consistent with the highest and best use of the land. In our view, the cases referred to above make it clear that the Empowering Act cannot have a material effect on land value in the absence of:

(a) any suggestion that, because of the operation Empowering Act, something less than the Council's own fee simple title could be sold; or

(b) any tension between that highest and best use, and the statutory constraints on use.[32]

Issue 2: effect on valuation of comparison of Marina land with firm natural ground

[66] There is no dispute that the land in question is reclaimed land and, even following some years of compacting and consolidation, it cannot properly be viewed as equivalent to "firm natural ground". It is also not in dispute that:

(a) in the event that anyone wished to erect heavy commercial or industrial buildings on the land, piling would be required;

(b) the same type and weight of building would not require piles if the land constituted "firm natural ground"; and

---

[32] Even if we are wrong in this there remains the point to which we have previously referred, namely that there was in any event no evidence before the Tribunal or before us about what impact on value the Empowering Act might have.

(c) there is an extra cost involved in piling.

[67] What is in dispute, however, is whether the land values should be reduced to take account of the theoretical piling cost.

[68] Mr Dean's valuation for the appellants proceeded on the basis that such an adjustment should be made. Thus he assessed and took into account the real and actual costs of building on the lots with further substantial adjustments to recognise the need for specific piled foundations to increase the load-bearing capacity of the land, presumably to support heavy commercial or industrial buildings.

[69] Mr Bristow's valuation proceeded on a different basis, namely that:

(a) the highest and best use of land was for marina purposes;

(b) it was therefore highly unlikely that buildings requiring piling (by virtue of the weight) would ever be constructed on the Lots in question; and

(c) the types of buildings most likely to be built on the Lots would require only cheaper, floating raft, foundations.

[70] On that analysis, he concluded that any adjustment made to the land value on account of the cost of future construction was necessarily limited.

[71] Having reviewed the relevant evidence, we agree with the Tribunal that (as at September 2007) the ground conditions pertaining to the majority of the sites were suitable for standard structures built on raft foundations. The evidence presented indicates that the settlement and consolidation of the Westpark Marina sites were sufficiently advanced by 2007 to support commercial and light industrial buildings without piling. We also accept Dr Fendall's opinion that there would be very few buildings which would require a designed floor load in excess of five kiloPascals ("kPa"). We therefore consider that piled foundations would not be required to the extent suggested by the appellants.

[72] As we have said throughout this judgment, it seems clear that the highest and best use of the lots in question is as part of the Marina development.[33] It follows that any further cost of bringing the land to that use is appropriately taken into account in the valuation exercise. But it seems to us that in making further substantial adjustments Mr Dean is seeking to value the land by some even higher (entirely hypothetical) benchmark. It may well be appropriate to make comparisons between the Marina land and "firm natural ground" as part of a valuation methodology and, indeed, Mr Bristow did so. But it is a different thing entirely to require that the final valuation contain further adjustments for the cost differential between building on the Marina land and building on firm natural ground when the reality is that such building is most unlikely to ever occur.

[73] It follows that we prefer Mr Bristow's approach of adjusting the agreed land values to take into account the likelihood of additional costs to be incurred to develop the sites consistent with their best use. In most circumstances, that would necessitate raft foundations, possibly with some additional reinforcing. Conversely, we are not persuaded that deductions of the magnitude made by Mr Dean are warranted, for the reasons we have given.

[74] As at the valuation date, the only question therefore was what reduction, if any, was required to recognise any market perception that the land may have been worth less because any buildings on it would require raft foundations and (possibly) some additional reinforcing. The appellants presented no evidence to establish the quantum of adjustment required on that basis and the Tribunal was therefore not only entitled, but obliged, to adopt the evidence of Mr Bristow.

Conclusion

[75] In summary, we consider that:

(a) in principle, s 21 of the RVA does not operate to prevent the leases being taken into account for rating valuation purposes; but

[33] To the extent Mr Dean's evidence takes issue with this (and this is far from clear) we consider that the Tribunal was entitled to prefer the evidence of Mr Bristow, as do we.

(b) the restrictions contained in the leases do not (as a matter of fact) require an adjustment that adversely affects the value of the Council's interest in the land because the restrictions in the leases:

(i) are consistent with (and facilitative of) the highest and best use of the land; and

(ii) have been taken into account by the Valuers when considering the impact of the relevant MSA provisions in the District Plan;

(c) in principle, any restrictions contained in the Empowering Act that adversely affect the value of the Council's interest in the land are to be taken into account in the valuation exercise; but

(d) the restrictions contained in the Empowering Act do not (as a matter of fact) require an adjustment that adversely affects the value of the Council's interest in the land because the restrictions -

(i) would not, in the event of a (hypothetical) sale, result in the transfer of a lesser interest in the land than that possessed by the Council; and

(ii) are consistent with (and facilitative of) the highest and best use of the land; and

(iii) have in any event been taken into account by the Valuers when considering the impact of the relevant MSA provisions in the District Plan;

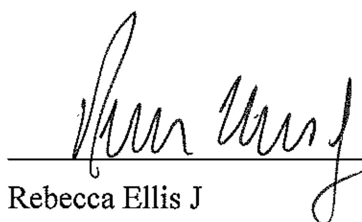
(e) the assessment of the appropriate reduction in land value as a result of ground conditions must proceed on the assumption that the land will continue to be put to its highest and best (Marina) use;

(f) that highest and best use would not be likely to involve the construction of buildings on the land that have a designed floor load

in excess of 5kPa. Buildings with a designed floor load of less than 5kPa would not require piling or the additional cost associated with that; and

(g) no further reduction to the land value is accordingly warranted on the basis of ground conditions.

[76] The appeal is dismissed accordingly. The Council is entitled to costs on a 2B basis.



Rebecca Ellis J

P J Mahoney, Lay member